

**U.S. District Court
Western District of Pennsylvania (Erie)
CIVIL DOCKET FOR CASE #: 1:08-cv-00162-SJM**

PENNSYLVANIA OIL & GAS ASSOCIATION et al v.
UNITED STATES FOREST SERVICE et al
Assigned to: Sean J. McLaughlin
Cause: 42:4321 Review of Agency Action-Environment

Date Filed: 05/27/2008
Jury Demand: None
Nature of Suit: 893 Environmental
Matters
Jurisdiction: U.S. Government
Defendant

Plaintiff

**PENNSYLVANIA OIL & GAS
ASSOCIATION**
*A PENNSYLVANIA NON-PROFIT
CORPORATION*

represented by **Matthew L. Wolford**
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Plaintiff

ALLEGHENY FOREST ALLIANCE
*A PENNSYLVANIA NON-PROFIT
CORPORATIOIN*

represented by **Matthew L. Wolford**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

J. Michael Klise
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ATTORNEY TO BE NOTICED

V.

Defendant

**UNITED STATES FOREST
SERVICE**
AN AGENCY OF THE UNITED

*STATES DEPARTMENT OF
AGRICULTURE*

Defendant

JOEL HOLTROP
*DEPUTY CHIEF FOR THE
NATIONAL FOREST SYSTEM*

Defendant

KENT CONNAUGHTON
*REGIONAL FORESTER OF THE
EASTERN REGION OF THE FOREST
SERVICE*

Date Filed	#	Docket Text
05/27/2008	<u>1</u>	COMPLAINT against all defendants (Filing fee \$ 350 receipt number 0315903846), filed by PENNSYLVANIA OIL & GAS ASSOCIATION, ALLEGHENY FOREST ALLIANCE. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit) (sdp) (Entered: 05/27/2008)
05/27/2008		Summons Issued as to UNITED STATES FOREST SERVICE, JOEL HOLTROP, KENT CONNAUGHTON BY JD. (sdp) (Entered: 05/27/2008)
05/28/2008	<u>2</u>	NOTICE that instant civil action has been designated for placement into the United States District Court's Alternative Dispute Resolution program. Parties are directed to fully complete the required 26(f) report, which includes the stipulation of selecting an ADR process. Counsel for plaintiff (or in the case of a removal action, counsel for removing defendant) shall make service of the notice on all parties. (nk) (Entered: 05/28/2008)
06/05/2008	<u>3</u>	NOTICE of Appearance by J. Michael Klise on behalf of PENNSYLVANIA OIL & GAS ASSOCIATION, ALLEGHENY FOREST ALLIANCE (Klise, J.) (Entered: 06/05/2008)

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

PENNSYLVANIA OIL AND GAS)
ASSOCIATION, a Pennsylvania non-profit)
corporation; and)
ALLEGHENY FOREST ALLIANCE, a)
Pennsylvania non-profit corporation;)
)
Plaintiffs)

vs.)

CIVIL ACTION NO. _____)

UNITED STATES FOREST SERVICE, an)
Agency of the United States Department of)
Agriculture;)
JOEL HOLTROP, Deputy Chief for the)
National Forest System; and)
KENT CONNAUGHTON, Regional Forester)
of the Eastern Region of the Forest Service;)
)
Defendants.)

COMPLAINT

Plaintiffs Pennsylvania Oil and Gas Association and Allegheny Forest Alliance file this Complaint against defendants United States Forest Service, an agency of the U.S. Department of Agriculture; Joel Holtrop, Deputy Chief for the National Forest System; and Kent Connaughton, Regional Forester of the Eastern Region of the U.S. Forest Service (collectively "Forest Service Defendants"). This legal action seeks declaratory judgment and injunctive relief concerning actions of the Forest Service Defendants in approving a revised Land and Resource Management Plan for the Allegheny National Forest in violation of the National Environmental Policy Act of 1970, 42 U.S.C. §4321, *et seq.* ("NEPA"), the National Forest Management Act of 1976

("NFMA"), 16 U.S.C. §1600, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §551, *et seq.* ("APA").

Parties

1. Plaintiff Pennsylvania Oil and Gas Association ("POGAM") is a Pennsylvania non-profit corporation with its principal place of business at 240 North Third Street, Harrisburg, Pennsylvania 17108. POGAM is a trade association of the Commonwealth of Pennsylvania's independent oil and gas producers, and promotes the general welfare of Pennsylvania's crude oil and natural gas exploration and production industry. POGAM and its members are committed to the economical and environmentally responsible development, production, and use of Pennsylvania's crude oil and natural gas resources.

2. Plaintiff Allegheny Forest Alliance ("AFA") is a Pennsylvania non-profit corporation with its principal place of business at 22 Greeves Street, Kane, Warren County, Pennsylvania 16735. AFA is a coalition of public school districts, municipalities, and businesses with interests tied to the Allegheny National Forest ("ANF"). AFA promotes and supports sustainable development within the ANF, including sustainable forestry, environmental stewardship, and multiple-use management of the ANF.

3. Defendant United States Forest Service ("USFS") is an agency of the U.S. Department of Agriculture ("USDA") organized by the USDA under the laws of the United States of America, with a national office located at the Auditors Building, 1400 Independence Avenue, SW, Washington, District of Columbia 20250. Defendant USFS is a citizen of the District of Columbia.

4. Defendant Joel Holtrop is an adult individual and the Deputy Chief for the National Forest System, with an office located at Room 3NW, Yates Federal Building, 201 14th Street, SW, Washington, District of Columbia 20250. Defendant Holtrop held the position of Deputy Chief for the National Forest System at all times material to the causes of action asserted in this Complaint.

5. Defendant Kent Connaughton is an adult individual and the Regional Forester of the Eastern Region of the USFS, which position he assumed in January 2008, with an office located at 626 East Wisconsin Avenue, Milwaukee, Milwaukee County, Wisconsin 53202. Defendant Connaughton has not held the position of Regional Forester of the Eastern Region at all times material to the causes of action asserted in this Complaint. He is named in his own right as the current Regional Forester of the Eastern Region, and as successor to Randy Moore, former Regional Forester of the Eastern Region, in accordance with FED.R.CIV.P. 25(d).

Subject Matter Jurisdiction

6. This Court has subject matter jurisdiction over the claims asserted in this Complaint pursuant to the Federal Question Act, 28 U.S.C. §1331, as the claims arise under the laws of the United States and the United States Constitution. The Court also has original jurisdiction to compel employees of the United States or an agency thereof to perform duties pursuant to 28 U.S.C. §1361, and may issue declaratory and injunctive relief pursuant to 28 U.S.C. §§2201 and 2202. Section 702 of the Administrative Procedure Act (“APA”), 5 U.S.C. §702, constitutes a waiver of sovereign immunity with respect to these claims because they seek relief other than money damages and assert that a federal agency and employees thereof acted and/or failed to act in an official capacity or under color of legal authority; and Section 703 of the

APA, 5 U.S.C. §703, permits such an action to be brought against the United States, the agency by its official title, or the appropriate officer.

7. The actions of the Defendants challenged in this Complaint are final actions for the purpose of judicial review. All available agency appeal procedures have been exhausted, and there are no further means to appeal the challenged actions within the agency or its procedures. The final actions taken by the Defendants are arbitrary and capricious, abuses of discretion, and contrary to law, and have caused injury to the Plaintiffs. As such, there is a controversy between the parties, the controversy is ripe for judicial review, and the Plaintiffs have standing to bring the instant lawsuit.

Venue

8. Venue lies in this judicial district pursuant to 28 U.S.C. §1391(e) in that Defendant USFS is an agency of the United States; Defendants Holtrop and Connaughton are employees of the USFS who at all times relevant to the subject matter of this action acted under color of legal authority as employees of the USFS; a substantial part of the events or omissions giving rise to this action occurred in this judicial district; and all of the real property that is the subject of this action is located in this judicial district.

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

Background

10. This lawsuit arises as a result of a conflict between Defendant USFS as surface owner and manager of lands comprising the ANF, and Plaintiff POGAM whose members include

owners of oil, gas, and mineral (“OGM”) estates within the ANF, and Plaintiff AFA whose members includes public school districts, municipalities, and businesses that rely upon the appropriate and lawful management of the ANF.

OGM-related conflict

11. OGM estates in the ANF and other national forests are of two general types under the Weeks Law of March 1, 1911, the General Exchange Act of March 20, 1922, applicable regulations of the Secretary of Agriculture, and the laws of the Commonwealth of Pennsylvania: “Reserved” and “Outstanding.” A Reserved OGM estate refers to OGM rights retained by a grantor in a deed conveying the surface estate to the United States. An Outstanding OGM estate refers to OGM rights owned by a party other than the grantor when the surface estate was conveyed to the United States. OGM rights arising under Reserved OGM estates and Outstanding OGM estates are collectively referred to as “OGM rights” throughout this Complaint.

12. Defendant USFS is the owner of the surface estate of the ANF, which is servient to OGM rights under Pennsylvania law. As such, the USFS has only limited rights with respect to development of dominant OGM rights within the ANF. As acknowledged in Section 2830.1 of the Forest Service Manual, the “Forest Service does not have the authority to deny the exercise of a mineral reservation or outstanding mineral right.” In this regard, this Court previously held that, with respect to Outstanding OGM rights in the ANF, the USFS should receive 60 days advance notice of planned oil and gas development to allow consultations and accommodations before reasonable use of the surface estate commences. *United States v. Minard Run Oil Co.*, Civil Action No. 80-129, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. 1980).

13. In accordance with *Minard Run, supra*, a 1992 Federal statute provides that where the United States “does not have an interest in oil and gas deposits” in the “Allegheny National Forest,” prescribed “reasonable advance notice be furnished to the Secretary of Agriculture at least 60 days prior to the commencement of surface disturbing activities” including “well sites and road and pipeline accesses.” Energy Policy Act of 1992, Pub. L. No. 102-482, §2508(a), 106 Stat. 3108-09 (1992) (codified in 30 U.S.C. §226(o)). In that 1992 Act, Congress tracked the language of *Minard Run*, and conspicuously did not provide the USFS with regulatory approval authority over oil and gas development activities within the ANF.

14. Plaintiff POGAM’s members include corporations, individuals, and other business entities that own OGM rights within the ANF. As such, POGAM’s members have direct, vested real property interests in such OGM rights. POGAM’s members also have direct, vested economic interests in their OGM rights within the ANF. POGAM’s members are injured with respect to their real property and economic interests by actions undertaken by Defendant USFS and its officers and employees that restrict, limit, interfere with, or otherwise adversely affect privately held OGM rights within the ANF.

15. As the owners of OGM rights within the ANF, POGAM’s members have dominant easement rights for the use of the servient surface estate, giving POGAM’s members the right under the laws of Pennsylvania and the United States to the reasonable use of the surface estate to develop their OGM resources. As such, POGAM’s members are injured with respect to their real property and economic interests by actions undertaken by Defendant USFS and its officers and employees that restrict, limit, interfere with, or otherwise adversely affect easement rights appurtenant to OGM rights within the ANF.

Timber-related conflict

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

Elk County

Highland Township
Jones Township
Millstone Township
Ridgway Township
Spring Creek Township

Warren County

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

Forest County

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

McKean County

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

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 USFS 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.

17. Central to AFA's mission is promotion of sustainable development within the ANF, including advancement of public interests in maintaining an adequate, stable, and sustaining supply of forest goods and services. AFA promotes and supports sustainable forestry, environmental stewardship, and multiple-use management of the ANF.

18. AFA's members have a direct, vested interest in appropriate and lawful management of the ANF in that they are directly affected by USFS management plans and decisions concerning the ANF. For example, by statute, AFA's public school district and municipal members receive a 25% share of all receipts generated through timber sales within the ANF. 16 U.S.C. §500. The rationale for this compensation is the recognition by Congress of the heavy financial burden placed upon public school districts and municipalities when large areas of tax-exempt property are established within their geographic regions. As a result of the 25% compensation arrangement, when the USFS manages the ANF in manner that results in more or less timber harvesting, this increases or decreases (respectively) operating revenues for AFA's public school districts and municipalities. Accordingly, AFA members are injured by actions undertaken by Defendant USFS and its officers and employees that restrict, limit, interfere with,

or otherwise adversely affect timbering within the ANF. When timber harvesting is curtailed or suspended by the USFS, member public school districts and municipal entities are severely impaired in their ability to fund schools, maintain roads, and carry out other legally-mandated duties; and member businesses can lose substantial amounts of revenue, jeopardizing their long-term existence and forcing them to lay off or terminate employees whose jobs and livelihoods depend upon timber harvesting in the ANF.

Management of the ANF

19. As required by the NFMA, management of the ANF by the USFS is governed by a Land and Resource Management Plan ("Forest Plan"). 16 U.S.C. §1604. The Forest Plan for the ANF under the NFMA was originally approved in 1986 ("1986 Forest Plan") and was amended numerous times since.

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

record of decision (“ROD”). 42 U.S.C. §4332(2)(C); and 40 C.F.R. §1502.9, §1502.19, Part 1503, and §1505.2.

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

22. The USFS provided an opportunity for public comment on the Draft Revised Forest Plan and DEIS, and the Plaintiffs and some of their individual members submitted comments.

23. In March 2007, Defendant USFS issued a final Land and Resource Management Plan (“2007 Revised Forest Plan”) for the ANF, along with an accompanying Final Environmental Impact Statement (“FEIS”) and Record of Decision (“ROD”). The 2007 Revised Forest Plan, FEIS, and ROD are incorporated herein by reference. The ROD, dated February 2, 2007, was issued by Randy Moore, then Regional Forester of the Eastern Region of the USFS (and Defendant Connaughton’s predecessor).

24. As noted repeatedly in the 2007 Revised Forest Plan and FEIS (as well as in the Draft Revised Forest Plan and DEIS), approximately 93% of the subsurface OGM rights in the ANF are privately held. With this in mind, the FEIS attempted to predict environmental

consequences related to oil and gas activities within the ANF over the next decade. *See generally, e.g.*, FEIS, at Appendix F. To address predicted environmental consequences (primarily road construction and surface occupation, not environmental hazards), the 2007 Revised Forest Plan included a number of measures to restrict OGM development, including but not limited to: a) guidelines in Part 4 (Management Area Direction) of the Plan, which require mitigation measures as a precondition to the exercise of legal rights by private owners of OGM interests; b) requirements to reduce impacts on the environmental resource objectives of specific designated Management Areas (such as gating roads, vegetative screening of facilities, and wildlife habitat enhancement projects); c) establishment of design criteria to regulate oil and gas activities (including such measures as tripling the area of the Allegheny River riparian corridor, creating protection zones around wetlands, protecting “vernal pools” and creating protection zones around them, regulating surface runoff from roads and trails by adding new “direction,” “improving” standards and guidelines applicable to oil and gas development, and creating “rebuttable presumptions” for operational standards in favor of the USFS as surface owner. *See*, ROD, at pp. ROD-29 and ROD-34. According to the Regional Forester, these new provisions of the 2007 Revised Forest Plan were designed to make “energy minerals... available in an environmentally sensitive manner...” while establishing a framework for “restoring, enhancing, or maintaining ecological conditions that will improve ecosystem resiliency, sustain biological diversity, and aid in conserving and recovering federally-listed threatened and endangered species and other species with viability concern.” ROD, at p. ROD-16.

25. Many of the above-referenced measures in the 2007 Revised Forest Plan to

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

26. As a result of the adverse consequences to the Plaintiffs' members posed by the 2007 Revised Forest Plan, the Plaintiffs and certain of their individual members timely appealed the Plan on a number of grounds. The USFS appeal record is incorporated herein by reference.

27. On February 15, 2008, Defendant Holtrop issued an unusual appeal decision for the Forest Service Chief on the 2007 Revised Forest Plan and FEIS ("Appeals Decision"). A true and accurate copy of the Appeals Decision is attached hereto as Exhibit A and incorporated herein by reference. More specifically, the Appeals Decision finds (at pp. 3-5) that the FEIS upon which the 2007 Revised Forest Plan was based does not comply with NEPA in at least three material respects:

- a) In Instruction No. 1, Defendant Holtrop found that "the public was not provided the opportunity to comment on substantial changes made to the design criteria as it [sic] applies to private oil and gas development (OGD). ...These changes occurred between the Draft Environmental Impact Statement (DEIS) and the FEIS. This does not fully comply with 40 CFR. 1502.9(c)(1)." Appeals Decision, at p. 3. To address this violation of NEPA, Defendant Holtrop instructed Defendant Connaughton "to provide the public the opportunity to comment on these changes in accordance with FSH 1909.15, Chapter 18.2." *Id.* "Until that time, applying the use of the Revised Plan design criteria specific to OGD is suspended. During that time...I expect you to follow the site specific authority in the 1986 ANF Plan to administer private OGD." *Id.*
- b) In Instruction No. 2, Defendant Holtrop stated that "the regulations at 40 CFR 1502.22 require the use of complete information," and "the Allegheny NF's outline of the process of management of private oil and gas development under the 'Description of Surface Oil, Gas, and Mineral Activity' (FEIS

Appendix F, p. F-5) does not clearly describe private, state and federal responsibilities and authorities.” *Id.* “In fact, there are inconsistencies throughout the record in regard to managing the private oil and gas development process”... and “Clearly, the description of this process is essential to the decision particularly as the FEIS and Revised Plan rely upon Appendix F throughout the documents.” *Id.*, at pp. 4-5. To address this violation of NEPA, Defendant Holtrop instructed Defendant Connaughton to “incorporate language in the ROD, Revised Plan, and FEIS to clarify Allegheny NF’s authority to manage oil and gas activities.” *Id.*, at p. 4.

c) In Instruction No. 3, Defendant Holtrop found “that the disclosure of cumulative effects of OGD on Allegheny NF air quality as well as impacts to regional air quality does not fully comply with NEPA regulations at 40 CFR parts 1502.16 and 1508.7.” To address this violation of NEPA, Defendant Holtrop instructed Defendant Connaughton to “more fully document the cumulative effects of OGD on air quality” and to “follow the agency policy for consideration of new information to determine any subsequent actions that may be necessary.”

28. Although the Appeals Decision plainly acknowledged several NEPA violations and the need for a more comprehensive EIS, Defendant Holtrop nonetheless affirmed the noncompliant 2007 Revised Forest Plan and FEIS.

29. As a result of Instruction No. 3, above, Defendant USFS recently withdrew approval of timber sales from the South Branch Kinzua Creek area of the ANF, which will have a direct adverse economic impact on Plaintiff AFA. Moreover, upon information and belief, Defendant USFS is reportedly considering whether to disapprove or delay all timbering requests until Instruction No. 3 is complied with.

Count I
The Appeals Decision is an arbitrary and unlawful action
under NEPA, NFMA, and APA

30. Paragraphs 1-29 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

31. The Appeals Decision is a final agency action ripe for judicial review, and the Plaintiffs have exhausted applicable administrative appeals. 36 C.F.R. §§217.16(e) and 217.18 (1999). *See also*, Appeals Decision, at p. 6 (“This decision is the final administrative determination of the Department of Agriculture....”)

32. USFS regulations require that the “appeal decision must be consistent with applicable law, regulations, and orders.” 36 C.F.R. §217.16(c) (1999). However, the Appeals Decision violates this rule as it inconsistent with applicable law, regulations, and orders in the ways described below.

33. Most fundamentally, the Appeals Decision violates NEPA authorities by purporting to approve a final decision before obtaining all the necessary information and public comments that NEPA requires before an agency can select an alternative in a ROD. Instead, the Appeals Decision (at p. 3) unlawfully prejudices by “affirm[ing] the decision to select Alternative ‘C modified’ from the FEIS and approv[ing] the Allegheny NF Revised Plan,” even though the Appeals Decision found multiple NEPA violations that are fundamental to the underlying decision to approve the 2007 Revised Forest Plan. The Appeals Decision sends a clear signal that, if ANF officials simply carry out a paper exercise of allowing public comment on oil and gas matters in a supplemental EIS, this will be the end of the matter. That is contrary to law. The Forest Service’s own NEPA Handbook, referenced in the Appeals Decision as “FSH 1909.15, Chapter 18.2” requires that, “[a]fter completion of the final supplement or final EIS, issue a new record of decision.”

34. NEPA regulations require a fresh agency decision in a ROD after consideration of public comments on a draft supplemental EIS and after a final EIS supplement is prepared. 40

C.F.R. §§1502.9(c)(4), 1503.1, 1503.4, and 1505.2. It is unlawful for Defendant USFS to have made a final decision before considering the required supplemental NEPA analysis and public comment thereon. *Idaho Sporting Congress v. Metcalf*, 222 F.3d 562, 567-68 (9th Cir. 2000); *Metcalf v. Daley*, 214 F.3d 1135, 1143-46 (9th Cir. 2000). Instead, USFS must freshly “reconsider” which alternative forest plan to adopt after considering the supplemental information and public comment. *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988). The fundamental distortion of NEPA in the Appeals Decision – affirming a final decision before all relevant impact information has been described and considered and before obtaining all public comment – creates the type of current injury that warrants judicial review at this time. *See, Trustees v. Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986). *See also, Robertson v. Methow Valley Citizens Council, et al.*, 490 U.S. 332 (1989) (the primary purpose of preparing an EIS in conjunction with a “major Federal action” is to require the implementing agency to take a “hard look” at potential environmental consequences before acting). As the Court observed in *Methow Valley*, the requirement that a federal agency prepare an EIS serves NEPA’s “action-forcing” purpose in two important respects: a) it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; and b) it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision. *Id.*, at 369. By affirming the decision to approve the 2007 Revised Forest Plan without all the necessary information and public comment, the Appeals Decision failed to require the “hard look” before acting as mandated by NEPA.

35. At the same time the Appeals Decision focused on public comment violations under NEPA, it ignored violations of similar requirements for meaningful public comment on the Draft Revised Forest Plan under the NFMA and implementing regulations. Just as “the public was not provided the opportunity to comment on substantial changes” between the DEIS and the FEIS, the public was denied the ability to comment on the significant substantive requirements appearing for the first time in the final 2007 Revised Forest Plan. Appeals Decision, at p. 3. For example, the Appeals Decision admitted that the “application of all forest-wide standards to private OGD was a material change from the Preliminary Land and Resource Management Plan (LRMP). Further, the design criteria specific to private OGD in Section 2800 was changed” in the 2007 Revised Forest Plan. *Id.* Thus, the USFS did not provide the level of public comment required by 16 U.S.C. §§1604(d) and (f)(4), §1612; and 36 C.F.R. Part 216 and §§219.6, 219.10, and 219.12 (1999), before the agency could lawfully adopt the 2007 Revised Forest Plan. Accordingly, the Appeal Decision’s ratification of the Plan was unlawful. Further, the Appeals Decision was arbitrary and contrary to law by failing to recognize these NFMA deficiencies and failing to provide for the supplemental public comment period required by NFMA authorities. This is especially true with respect to local government stakeholders (including AFA members), who were not invited to participate in the planning process until years after the initial effort began.

36. If the USFS neutrally and objectively considers the upcoming public comments, the agency may well conclude that it lacks the requisite legal authority – under the deeds, incorporated regulations, property law principles, and pertinent laws – to impose design criteria and other elements of the 2007 Revised Forest Plan on the dominant OGM estates. For example,

when Congress enacted 30 U.S.C. §226(o) in 1992, it rejected the option of granting USFS the power to regulate the dominant mineral estate to prevent or minimize environmental impacts, instead legislating in a fashion that respects private property rights and State regulatory authority over private oil and gas development. 106 Stat. 3108-09 (1992); H.R. Rep. No. 102-474, pt. 8, at 42, 88, 137-38 (1992); *see* Par. 13, above. As the Appeals Decision (at p. 4) found, the 2007 Revised Forest Plan does not accurately “[d]istinguish[] between reserved and outstanding rights and how management of these two distinct private mineral estates may vary depending upon language in individual deeds and/or the USDA Secretary’s rules and regulations,” and this must be addressed by “incorporat[ing accurate] language in the . . . Revised Plan” (and, we would add, after considering the public comment that NFMA and NEPA require on such a central issue).

37. The Appeals Decision unlawfully and arbitrarily “affirm[s] the decision to select Alternative ‘C modified’ from the FEIS and approve[s] the Allegheny NF Revised Plan” before considering the information to be developed on whether the burdensome and restrictive OGM regulatory program contained in the Plan is lawful. When the USFS requests comments on the legal authority issues, Plaintiffs intend to file comments demonstrating that the agency, as owner of the servient surface estate, lacks legal authority to require design criteria and other elements related to oil and gas development in the 2007 Revised Forest Plan, so the USFS must select another forest plan alternative as a matter of law. The Appeals Decision unlawfully and arbitrarily prejudices those comments by substantively approving the legal sufficiency of the FEIS and the 2007 Revised Forest Plan, subject only to procedural gesture of receiving additional public comment.

38. The Appeals Decision concludes that the FEIS “meets the requirements of applicable Federal law” even though the Decision describes at least three material violations of four NEPA rules (*i.e.*, 40 C.F.R. §§1502.9(c), 1502.22, 1502.16, and 1508.7). This violates NEPA and is unlawful and arbitrary action under the APA.

39. Plaintiffs’ administrative appeals focused on how the decisions in the 2007 Revised Forest Plan and ROD to further regulate dominant private oil and gas interests *substantively* violate applicable law. The Appeals Decision fails to address those substantive issues, and addresses only procedural NEPA issues. Yet, the Appeals Decision inconsistently purports to substantively “affirm the decision to select Alternative ‘C modified’ from the FEIS and approve the Allegheny NF Revised Plan.” This is also unlawful and arbitrary action under the APA.

40. The rationale that the Appeals Decision employs to avoid issues “regarding legal and regulatory authorities and responsibilities relating to the rights of oil and gas development” is that the substantive issues are “moot” due to the decision on “Item 1.” Appeals Decision at p. 2, *see id.* at Attachment 3. This rationale is arbitrary because Item 1 suggests that the USFS can adopt its intrusive new restrictive OGM program by merely offering a meaningless *post-factum* public comment period, without the USFS having to face the hard issue of whether it actually has the requisite legal authority. However, an “appeal decision must be consistent with applicable law” (36 C.F.R. §217.16(c)), and the restrictive OGM regulatory program in the approved 2007 Revised Forest Plan is not consistent with controlling law.

41. Because the Appeals Decision, 2007 Revised Forest Plan, and FEIS violate NEPA, NFMA, and regulatory authorities, this Court should grant relief consistent with the

directive of the APA that those actions which are arbitrary and contrary to law “shall” be “h[e]ld unlawful and set aside.” 5 U.S.C. §706.

WHEREFORE, for all of the foregoing reasons, the Plaintiffs respectfully request this Honorable Court to: a) declare that the Appeals Decision, 2007 Revised Forest Plan, and FEIS violate NEPA, NFMA, and related regulatory authorities; b) vacate the decision of the Regional Forester to approve the 2007 Revised Forest Plan, thereby returning management of the ANF to the 1986 Forest Plan; and c) remand the matter to Defendant USFS with instructions to the Forest Service Defendants to fulfill necessary public comment requirements in accordance with NEPA, NFMA, and related regulatory authorities before making a final decision on a selected alternative.

In the alternative, and at the very least, the Court should direct that: a) no portion of the 2007 Revised Forest Plan can be applied to the Plaintiffs’ detriment until the deficiencies are cured; b) the Forest Service Defendants must allow meaningful public comment in the areas of deficiency by providing an opportunity for comment on a draft supplemental EIS and draft supplemental forest plan revision; and (3) the Forest Service Defendants must inform the public that the agency will make a fresh new decision on the content of the 2007 Revised Forest Plan after reviewing the new information and public comment.

Count II

Approving the 2007 Revised Forest Plan without first resolving the NEPA violations identified in Instruction No. 1 of the Appeals Decision was unlawful and arbitrary

42. Paragraphs 1-41 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

43. The regulations governing whether or not an EIS must be prepared for a “major Federal action” under NEPA are found at 40 C.F.R. Part 1502. Part 1502 also sets forth various requirements for an EIS, such as requirements for implementation (Section 1502.2), properly defining a proposal (Section 1502.4), timing (Section 1502.5), and a number of other issues.

44. As noted above, Defendant Holtrop expressly found in Instruction No. 1 of the Appeals Decision that “...the public was not provided the opportunity to comment on substantial changes made to the design criteria as it [sic] applies to private oil and gas development (OGD).”

Instruction No. 1 continued as follows:

“...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. This does not fully comply with 40 CFR 1502.9(c)(1). 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, applying the use of the Revised Plan design criteria specific to private OGD is suspended....”

45. As revealed by Instruction No. 1, Defendant USFS admittedly failed to obtain public comment on certain design criteria and the application of all forest-wide standards to private oil and gas developers. According to Defendant Holtrop, the USFS also failed to comply 40 C.F.R. Section 1502.9(c)(1).

46. Obtaining public comment on design criteria and the application of all forest-wide standards to private oil and gas developers was required to be part of the EIS process mandated by NEPA. By failing to obtain public comment on these critical issues, Defendant USFS violated NEPA by failing to guarantee “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.” *Methow Valley, supra*, at 369.

47. Public comment required as part of an EIS under NEPA must be timely obtained *before* a final agency decision is made. Otherwise, the agency fails to consider factors necessary to reach an informed decision. Moreover, this type of NEPA violation cannot be cured after a decision becomes final (as proposed in Instruction No. 1) because such an approach undermines a fundamental purpose of NEPA, to wit, that the agency take an informed “hard look” before making its decision.

48. The *post-factum* public comment approach of Instruction No. 1 also violates 40 C.F.R. §1502.22(a), which provides that complete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and, unless the cost of obtaining the information is exorbitant, *shall* be included in the EIS.

49. The *post-factum* public comment approach of Instruction No. 1 also deprived the Plaintiffs, their members, and the general public of due process of law.

50. As a result of the above-referenced NEPA violations, the Regional Forester’s decision to approve the 2007 Revised Forest Plan was unlawful and arbitrary.

WHEREFORE, for all of the foregoing reasons, the Plaintiffs respectfully request this Honorable Court to: a) declare that the failure of Defendant USFS to obtain and consider public comment on design criteria and the application of forest-wide standards to private oil and gas developers before approving the 2007 Revised Forest Plan constituted violations of NEPA; b) vacate the decision of the Regional Forester to approve the 2007 Revised Forest Plan, thereby returning management of the ANF to the 1986 Forest Plan; and c) remand the matter to Defendant USFS with instructions to the Forest Service Defendants to fulfill necessary public

comment requirements in accordance with NEPA before making a final decision on a selected alternative.

Count III

Approving the 2007 Revised Forest Plan without first resolving the NEPA violations identified in Instruction No. 2 of the Appeals Decision was unlawful and arbitrary

51. Paragraphs 1-50 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

52. As noted in Paragraph 24, above, the 2007 Revised Forest Plan included a number of measures, such as mitigation requirements and design criteria, to restrict OGM development in the ANF. This change from the 1986 Forest Plan will adversely affect oil and gas developers by requiring significant expenditures of additional resources, and will interfere with the conduct of business and result in inconvenience, delay, and consequential harm.

53. Requiring affirmative measures as a condition of the lawful exercise of OGM rights goes beyond managing the surface estate and this Court's decision in *Minard Run, supra*, and instead involves an attempted exercise of regulatory authority as sovereign, contrary Congressional limitations expressed in 30 U.S.C. §226(o). To address this issue, the Plaintiffs and certain of their members challenged during the appeal process whether Defendant USFS possesses the requisite legal authority to exercise regulatory control over oil and gas activities (as opposed to managing the surface as the surface owner) within the ANF. *See*, Instruction No. 2, at p. 4.

54. As a result of the above-referenced challenges to Defendant USFS' legal authority to regulate oil and gas activities within the ANF, Defendant Holtrop concluded in Instruction No. 2 of the Appeals Decision that the Regional Forester's decision to approve the 2007 Revised

Forest Plan failed to comport with 40 C.F.R. §1502.22 because the ROD, the 2007 Revised Forest Plan, and the FEIS all failed to adequately address the issue. Accordingly, Defendant USFS was instructed to amend the ROD, the Revised Plan, and FEIS by: a) “identifying the roles and responsibilities of the Forest Service, State (sic) of Pennsylvania and the private oil and gas operator for the purpose of protection of the surface resources from oil and gas development”; b) “distinguishing between reserved and outstanding rights and how the management of these two distinct private mineral estates may vary depending upon the language in individual deeds and/or the USDA Secretary’s rules and regulations”; and c) “reviewing and clarifying, where appropriate, the process identified in FEIS Appendix F (p. F-5).” Appeals Decision, at p. 4.

55. Instruction No. 2 continued as follows:

“...The regulations at 40 CFR 1502.22 require the use of complete information. The Allegheny NF’s outline of the process of management of private oil and gas development... does not clearly describe private, state and federal responsibilities and authorities. In fact, there are inconsistencies throughout the record in regard to managing the private oil and gas development process... Clearly, the description of this process is essential to the decision particularly as the FEIS and Revised Plan rely upon Appendix F throughout the decision.”

56. Although Defendant Holtrop characterized the above-referenced NEPA violation in terms of a failure to provide complete information, the Plaintiffs maintain that the right of Defendant USFS to manage resources within the ANF derives from, and is limited to, its status as the surface owner. *See, e.g., Minard Run*. As such, Defendant USFS lacks the requisite legal authority to “manage” the ANF by regulating oil and gas activities.

57. As Defendant Holtrop correctly noted, addressing the issue of the USFS’ challenged legal authority as part of the NEPA process “is essential to the decision.” Appeals Decision, at p. 5. This is because the restrictive measures applicable to oil and gas activities that

are central to the FEIS selected alternative cannot be implemented if the USFS lacks the requisite legal authority.

58. By failing to adequately address the fundamental "legal authority" issue before approving the 2007 Revised Management Plan, Defendant USFS failed to comply with NEPA's fundamental purpose that the agency make an informed decision, thereby violating NEPA.

WHEREFORE, for all of the foregoing reasons, the Plaintiffs respectfully request this Honorable Court to: a) declare that the failure of Defendant USFS to adequately address and explain its legal authority to establish in the 2007 Revised Forest Plan regulatory standards for oil and gas development and impose such standards on private oil and gas developers, which was done without public comment, constituted violations of NEPA; b) vacate the decision of the Regional Forester to approve the 2007 Revised Forest Plan, thereby returning management of the ANF to the 1986 Forest Plan; and c) remand the matter to Defendant USFS with instructions to the Forest Service Defendants to: i) provide a clear description of the legal authority of Defendant USFS to manage the ANF in the manner proposed; ii) provide a clear description of the anticipated process of management as directed by Defendant Holtrop, and iii) thereafter, fulfill necessary public comment requirements under NEPA before making a final decision on a selected alternative.

In the alternative, inasmuch as the question of Defendant USFS' legal authority to regulate oil and gas development within the ANF is a pure question of law, the Plaintiffs request that this Honorable Court establish a briefing schedule for the Court to rule on this issue prior to remand.

Count IV

Approving the 2007 Revised Forest Plan without first resolving the NEPA violations identified in Instruction No. 3 of the Appeals Decision was unlawful and arbitrary

59. Paragraphs 1-58 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

60. As noted above, Defendant Holtrop expressly found in Instruction No. 3 of the Appeals Decision that "...the disclosure of cumulative effects of OGD on Allegheny NF air quality as well as impacts to the regional air quality does not fully comply with NEPA regulations at 40 CFR parts 1502.16 and 1508.7." Instruction No. 3 continued as follows:

"...Therefore, I instruct you to more fully document the cumulative effects of OGD on air quality. I further instruct you to follow the agency policy for consideration of new information to determine any subsequent actions that may be necessary."

61. As noted in Par. 29, above, Instruction No. 3 resulted in Defendant USFS recently withdrawing approval of timber sales from the South Branch Kinzua Creek area of the ANF, and the USFS is reportedly considering whether to disapprove or delay all timbering requests until Instruction No. 3 is complied with. As a result, Instruction No. 3 may effectively place timbering requests in "limbo" status to the detriment and hardship of public schools and municipalities that rely upon timbering revenues.

62. Defendant Holtrop incorrectly concluded that a NEPA violation occurred with respect to the air quality issue raised in Instruction No. 3. This is because, if Defendant USFS had considered and correctly evaluated its lack of requisite legal authority to regulate and restrict oil and gas activities (*see* Count III, above), it would have determined that it also lacks the ability to affect cumulative air quality impacts of oil and gas development by selecting a particular

alternative. The selection of a particular alternative in the final EIS will not result in any change of cumulative air quality impact because oil and gas development will be common to all of the alternatives. In other words, because the USFS lacks the legal authority to restrict oil and gas development by selecting and implementing a particular alternative, documenting the alleged cumulative impacts of various alternatives is moot. *See, e.g.*, FEIS, at 3-58 (effects of administrative vehicle use, visitor vehicle use, and snowmobile use of various alternatives not considered by USFS because effects common to all alternatives). In short, because the USFS lacks the legal authority to restrict private oil and gas activities through regulation of such activities within the ANF, Instruction No. 3 is based on a unlawful false premise and is fatally flawed.

63. Even without the benefit of having properly evaluated the “legal authority” issue, Defendant USFS correctly determined that oil and gas development is common to all the alternatives proposed in the FEIS. *See, e.g.*, FEIS, at p. 3-163 (“Oil and gas development is assumed to be constant across the alternatives evaluated...”). *See also, e.g.*, FEIS at pp. 3-271 and 3-272 (under the heading “Effects common to all alternatives”). Accordingly, singling out oil and gas development for stricter scrutiny of cumulative air quality effects while not similarly requiring additional consideration of other effects common to all the alternatives (such as administrative vehicle use, visitor vehicle use, and snowmobile use) is plainly arbitrary and capricious, and creates due process and equal protection infirmities.

64. As noted above, the USFS did not consider the effects of administrative vehicle use, visitor vehicle use, and snowmobile use of the various alternatives in the FEIS because, according to the USFS, the effects of these uses are common to all the proposed alternatives.

However, the implementation of a particular FEIS alternative will undoubtedly result in the need for more or less administrative staff, and will also affect the number and type of visitors likely to use the ANF for recreational purposes such as camping, boating, snowmobiling, and other activities that affect air quality. A change in the number and type of visitors, standing alone, will affect air quality in the form of road use, boat use, campfires, emissions due to distances traveled, emissions due to change of use patterns (such as hiking versus motorized recreation), nearby airport use, etc. For example, alternatives providing for more development and road construction will attract visitors interested in motorized recreation (which create more emissions), while alternatives providing for less development and road construction will attract visitors interested in non-motorized pursuits. This was not accounted for. Moreover, air quality effects will not only occur within the ANF, but will occur off-site as well – *see, e.g.*, FEIS, at p. 3-55 – and will occur both directly and indirectly – *see, e.g., Methow Valley, supra*, at 339-342, and 40 C.F.R. §§1502.16 and 1508.8 (NEPA regulations providing for evaluation of both direct and indirect effects and their significance).

65. Unlike private oil and gas development, over which the USFS lacks requisite legal authority to restrict, other activities that affect air quality and *are* reasonably likely to be affected by the selection of an FEIS alternative were not considered by the USFS. If, as Defendant Holtrop concluded, additional study of cumulative air quality impacts is needed, all of the reasonably likely resultant impacts of the various alternatives – not just oil and gas activities – must be considered.

WHEREFORE, for all of the foregoing reasons, the Plaintiffs respectfully request this Honorable Court to declare that Instruction No. 3 of the Appeals Decision is arbitrary, capricious,

unlawful, and not required under NEPA, and vacate Instruction No. 3 accordingly.

Alternatively, in the event the Court is persuaded that consideration of projected cumulative air quality effects of projected oil and gas development is deemed to be relevant to the selection of an FEIS alternative, then the Plaintiffs respectfully request the Court to:

a) declare that the approval of the 2007 Revised Forest Plan without considering all reasonably likely projected cumulative air quality effects violated NEPA; b) vacate the decision of the Regional Forester to approve the 2007 Revised Forest Plan, thereby returning management of the ANF to the 1986 Forest Plan; and c) remand the matter to Defendant USFS with instructions to the Forest Service Defendants to consider the reasonably likely cumulative impacts of *all* emissions sources not previously considered – including administrative vehicle use, visitor vehicle use, snowmobile use, campfires, boat use, road use within the ANF and surrounding area by truck and automobile traffic, nearby airport use, etc. – before making a final decision on a selected alternative.

Count V

Approving the 2007 Revised Forest Plan without first performing an adequate analysis of social and economic impacts was unlawful and arbitrary

66. Paragraphs 1-65 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

67. As noted above, the selected alternative of the 2007 Revised Forest Plan includes provisions for a number of measures to restrict OGM development. As such, a thorough analysis of the economic and social effects comparing the various alternatives should have been included in both the DEIS and FEIS.

68. The FEIS included an “economic analysis” of oil and gas development in the

ANF. However, the narrow analysis was limited to considering the average cost of well drilling and anticipated production income. *See*, FEIS, Appendix F, at pp. F-11 - F-12. Consistent with the adverse portrayal of oil and gas development throughout the FEIS, the economic analysis failed to adequately account for or consider the positive contribution of oil and gas activities to regional economies. This, even though the FEIS acknowledged that oil and gas development is currently estimated to account for over 1,300 jobs in the ANF region, and that increased oil and gas development will result in the creation of new jobs. FEIS, at p. 3-418.

69. As noted above, AFA's public school district and municipal members receive a 25% share of all receipts generated through timber sales within the ANF. 16 U.S.C. §500. As a result, AFA members are directly injured by actions undertaken by Defendant USFS and its officers and employees that restrict, limit, interfere with, or otherwise adversely affect timbering within the ANF. Member public school districts and municipal entities are severely impaired in their ability to fund schools, maintain roads, and carry out other legally-mandated duties; and member businesses can lose substantial amounts of revenue, jeopardizing their long-term existence and forcing them to lay off or terminate employees whose jobs and livelihoods depend upon timber harvesting in the ANF.

70. Despite the importance of oil and gas development to regional economies, the economic analysis in the FEIS failed to compare anticipated adverse economic consequences to oil and gas developers and regional economies caused by restricted OGM development of the various alternatives. Similarly, despite the reliance by public school districts and municipalities on revenue generated by timber harvesting, the economic analysis in the FEIS failed to compare anticipated adverse economic consequences to public school districts, municipalities, and related

consequences to regional economies caused by timber yields of the various alternatives.

71. As provided in 40 C.F.R. §1502.23, a cost-benefit analysis is intended to address the requirement of Section 102(2)(B) of NEPA, 42 U.S.C. §4332(2)(B). In addition, under 40 C.F.R. §1508.14, when an EIS “is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.” Although NEPA does not require a formal and mathematically precise cost-benefit analysis of alternatives, where, as here, a selected alternative will plainly result in measureable adverse socio-economic consequences to public schools, municipalities, a significant private industry, and regional economies, the EIS should fully and objectively describe the adverse economic and social consequences of the various alternatives and the perceived trade-off in environmental benefits.

72. Because the FEIS failed to provide a meaningful socio-economic analysis of the impacts of the various alternatives with respect to the oil and gas activities and timber harvesting within the ANF, it was fatally defective and violated NEPA.

WHEREFORE, for all of the foregoing reasons, the Plaintiffs respectfully request this Honorable Court to: a) declare that the economic and social effects analysis in the FEIS was deficient under NEPA; b) declare that the Regional Forester’s decision to approve the 2007 Revised Forest Plan was therefore violative of NEPA; c) vacate the decision to approve the 2007 Revised Forest Plan, thereby returning management of the ANF to the 1986 Forest Plan; and d) remand the matter to Defendant USFS with instructions to the Forest Service Defendants to revise the EIS to include an adequate analysis of the economic and social consequences of the various alternatives on the oil and gas industry, affected public school districts and

municipalities, and regional economies caused by the various alternatives, and receive public comment on this analysis, before making a final decision on a selected alternative.

Count VI
Including legally binding standards in the 2007 Revised Forest Plan
without undergoing rulemaking violated the APA

73. Paragraphs 1-72 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

74. As discussed above, the 2007 Revised Forest Plan created a number of new substantive requirements applicable to oil and gas activities within the ANF. According to the Plan, design criteria are comprised of “standards and guidelines,” and constitute requirements for future activities. 2007 Revised Forest Plan, at p. 1. Exceptions to guidelines may occur, but compliance is generally expected. *Id.*, at p. 2. However, the newly established standards contained in the Plan “shall be complied within all applicable situations, unless a Forest Plan amendment has been specifically prepared to exempt a project.” *Id.*

75. The newly established standards contained in the 2007 Revised Forest Plan create substantive requirements for oil and gas developers and are plainly intended to be applied as legally binding norms. As such, they constitute *de facto* regulations and should have been promulgated pursuant to the APA. *See, e.g., State of Louisiana, ex rel. Guste v. United States*, 656 F. Supp. 1310, *affirmed* 832 F.2d 935, *rehearing denied*, 836 F.2d 1346, *cert. denied*, 485 U.S. 1033 (conditions in memorandum respecting well drilling permits and well spacing requirements in a buffer zone were designed to implement, interpret or prescribe law or policy and to impose specific obligations on private interests in mandatory terms, and adoption of terms therefore constituted rulemaking under the APA).

76. Section 553 of the APA, 5 U.S.C. §553, provides that notice of proposed rulemaking shall be published in the *Federal Register*, unless persons subject thereto are personally served or have actual notice. 5 U.S.C. §553(b). The notice must include a statement of the time, place, and nature of public rulemaking proceedings, a reference to the legal authority under which the rule is being proposed, and a description of the substance of the proposed rule. *Id.* The purpose of the rulemaking requirement is to give interested persons an opportunity to participate through submission of written data, views, and/or argument. 5 U.S.C. §553(c). Interested persons are then afforded the right to petition for the issuance, amendment, or repeal of the rule. 5 U.S.C. §553(e). These fundamental due process guarantees provide an opportunity for affected parties to understand the government's perceived need to promulgate a regulation, to evaluate whether the agency promulgating the regulation has the legal authority to do so, and to seek redress for unfair, arbitrary, capricious, or unauthorized rules. For this reason, the notice and comment procedure of the APA is a nondiscretionary duty with respect to substantive rules.

77. Although the 2007 Revised Forest Plan established legally binding standards applicable to private oil and gas developers, Defendant USFS failed to follow lawful rulemaking procedures because its primary mission was planning, not rulemaking. Nonetheless, by establishing substantive rules, the 2007 Revised Forest Plan created *de facto* regulations that were required to undergo rulemaking in accordance with the APA. Because they did not undergo lawful rulemaking, they are invalid and should be removed from the Plan.

WHEREFORE, for all of the foregoing reasons, the Plaintiffs respectfully request this Honorable Court to: a) declare that the inclusion of legally binding standards in the 2007 Revised Forest Plan violated the APA; b) vacate the decision to approve the 2007 Revised Forest Plan,

thereby returning management of the ANF to the 1986 Forest Plan; and c) remand the matter to Defendant USFS with instructions to the Forest Service Defendants to amend the 2007 Revised Forest Plan by removing all legally binding standards that have not undergone rulemaking in accordance with the APA.

As an alternative form of relief, the Plaintiffs request this Honorable Court to declare that the provisions and standards of the 2007 Revised Forest Plan are not legally binding as a matter of law and cannot be applied by Defendant USFS as such.

Respectfully submitted,

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