

### **Attachment 3: Issues mooted by appeal decision.**

The following contentions have been rendered moot as a result of the decision to suspend use of design criteria as it pertains to private Oil and Gas Development (OGD) until public comment is provided. Therefore, these contentions will not be responded to.

Appellants contend the Allegheny National Forest (ANF) has disregarded legal precedent, regulatory authority and Forest Service (FS) regulation. The ANF must specify the precise authority being claimed (RLRMP, p. 90) and clarify the distinction for administration of private OGD relied upon (Pennsylvania Coal Co. v. Mahon and Lucas v. South Carolina Coastal Council). Appellants want a declaration [that] “rebuttable presumption” is...intended to preempt the Pennsylvania (PA) Alternative Uses Doctrine described in Gillespie v. American Zinc and Chemical Company 247 PA 222 (1915) (NOA #0006, pp. 2-3, 9-11(includes [##]<sup>1</sup> & [\*\*\*]<sup>2</sup>);NOA #0009, pp. 2-6, 9-10; NOA #0010 pp. 14-15, 25-26 (includes [\*\*\*]; NOA #0012, pp. 2-3, 9-11; NOA #0013 pp. 6-8; NOA #0014, pp. 2-3, 9-11).

Another appellant contends that although PA- Department of Environmental Protection (DEP) is the permitting authority and regulates the details of OGD operations...the FS under its regulatory authority found in the "special uses" regulations and under its right as a surface owner....must grant approval before private action is taken. They believe this is a legal precondition equivalent to a permit. Appellant contends that the FS legally can and must do more to regulate surface rights (NOA #0007, pp. 32-33, 39-40).

Appellant contends that Minard Run does not address the full range of the FS’s regulatory power over OGD. Further, appellant contends that Duncan Energy Co. v. United States Forest Service, 50 F.3d at 590-91 would pre-empt state law seeking to impose limits on the federal sovereign's authority to adequately protect the federal surface resources (NOA #0007, pp. 33-37).

Appellants contend the ANF does not acknowledge the privately-owned mineral estate as dominant nor recognize 1980 United States v. Minard Run Oil Company as the standard for development of private OGD on the ANF. Minard Run held that private OGM operators are entitled to reasonable use of the surface determined in accordance with applicable state law before required to yield use of the surface. It did not authorize the ANF to summarily make that determination in the context of reserved or outstanding OGM estates (NOA #0006 pp. 7, 9 (includes [##] & [\*\*\*]); #0009 pp. 3-4, 7-9; #0010 pp. 11, 13-14(includes [\*\*\*]); #0012 pp. 7-9; #0013 pp.6-7, 17; #0014 pp.7-9).

Appellant contends that the National Environmental Policy Act (NEPA) is triggered when reviewing private OGD operating plans to insure that proposed development is

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<sup>1</sup> [##] = Appeal #0006 (POGAM) incorporates 64 non-unique appeals (#0019-#0083).

<sup>2</sup> [\*\*\*] = #0017 (Mead Township & Kane Area School District) incorporate all portions of POGAM (#0006) and Arthur J. Stewart (#0010) by reference in addition to their specific appeal points relative to oil and gas.

consistent with the Revised Plan and that the ANF should prepare, at minimum, an environmental assessment (EA) (NOA #0007 pp 37-42, 46).

Appellant contends the Revised Plan must contain monitoring and evaluation requirements that will provide a basis for a periodic determination and evaluation of the effects of management practices. FS has clearly not established a standard to report or monitor oil spills, plugged wells, potential leaking from improperly plugged oil wells, or monitor the "approximately 0.3 acres" cleared for each well pad and one acre cleared for roads. There must be monitoring of road and well construction, in order to determine that OGD are building the roads and wells according to forest standards (NOA #0007, pp. 55-58, 68, 79).

Appellants contend that regulating and mitigating increased OGD should have been THE MAJOR ISSUE for plan revision. Therefore none of the alternatives were shaped to analyze a different approach to OGD. The Revised Plan documents should be withdrawn and the FS should prepare a supplemental DEIS and new proposed Revised Plan that thoroughly and adequately addresses OGD on the ANF (NOA #0007, pp. 29-32, 51-54, 61-67 & 81; NOA #0013, p. 14).

Appellant contends other management areas suffer from lack of mandatory standards and guidelines that provide an enforcement mechanism. This mandatory language is implicitly required by the planning regulations; and ... for filing objections to the location of wells, especially in areas most in need of protections such as wilderness, WSAs, RNAs, sensitive areas from road construction and reconstruction activities, even-aged management, and/or activities associated with oil and gas exploration and production (NOA #0007, pp. 32, 54-60, 105 & 179).

Appellant is not satisfied with the small change in the "standards and guidelines" for oil, gas and mineral (OGM) operators listed in the ROD, [Revised]Plan, Transportation System "Standards and Guidelines", p. 96 (NOA #0007, p. 154).

Appellants contend the ANF is attempting to pre-empt PA's authority and regulation by declaring that OGD should not occur within the zones or riparian corridors; or through the creation of a system of design standards and procedures. Appellants want a declaration that portions of the Forest Plan defining "Riparian Corridors" and "Wetlands, including Springs, Seeps, and Vernal Pools" contained in the Design Criteria of the [Revised] Forest Plan are stricken and that they will be replaced with rules consistent with PA State Law (NOA #0006, pp.6 & 11 (includes [##] & [\*\*\*])); NOA #0009, p. 10; NOA #0010, pp. 25-26 (includes [\*\*\*]);NOA #0012, pp. 6 &11; NOA #0013, pp. 5, 17-18; NOA #0014, pp. 6 & 11; NOA #0015, p.10).

Appellants object to directing OGD road surfacing to be done only with stone obtained from pits designated by FS. This "standard" is illegal and unauthorized as it reduces the mineral owner's common law rights of ingress and egress by denying use of surface resources reasonably necessary to access and develop the OGM estate (#0010 p. 19, #0013 p.11 (includes [\*\*\*])). Further, appellants object to requirement that certain types

of vehicles utilized by the oil and gas owner be subject to written authorization of the ANF. #0010 pp. 20 -21(includes [\*\*\*]); #0013 p.12).

Appellants contend a standard needs to be added outlining specific timeframes for the ANF to process operating plans to protect private OGM owners from unwarranted delays by the FS (NOA #0006, pp. 4, 10 (includes [##] and [\*\*\*]); NOA #0009, pp. 4, 9-10; NOA #0012, pp. 4, 10; NOA #0014, pp. 4, 10).

Appellants variously contend the ANF has no jurisdiction to impose guidelines on outstanding OGM owners. Design criteria is illegal and must be stricken and replaced with applicable PA law and actual practice (e.g. OGD should not occur within “riparian corridors”, and “wetlands, springs, seeps and vernal pools”; standards for stabilization of disturbed areas and road construction related to private OGD, etc.). Further, appellants contend that “rules” in the ROD and Section 2800 constitute an unlawful attempt to preempt PA law and circumvent FS policy. This constitutes a regulatory taking of private OGM rights (NOA #0006, pp. 1-11 (includes [##] and [\*\*\*]); NOA #0009, pp. 4, 6-10; NOA #0010, pp. 13 (includes [\*\*\*]), 17-18, 20-26, 29-30 (includes [##] and [\*\*\*]); NOA #0012, pp. 6, 9-11; NOA #0013, pp. 5-6, 9-11, 13-14, 17-21; NOA #0014 pp. 1-4; NOA #0015, p. 10; NOA #0017, p.5).

Appellants variously contend the Revised Plan is not consistent with the FSM 2832 and is therefore invalid for the administration of outstanding mineral rights. Appellants want confirmation that FSM 2832 continues to be the governing policy (NOA #0006, pp. 6-7, 9 (includes [##] & [\*\*\*]), NOA #0009, pp. 5-6 & 8, NOA #0010, p. 19; NOA #0012, pp. 6-7, 9; NOA #0013 p.11; NOA #0014, pp. 6-7, 9; NOA #0017, p. 5).

Appellants object to the tenth paragraph which obliges the oil and gas operator to resolve issues related to “threatened and endangered” species (NOA #0010, p. 19; #0013, pp.10-11).

Appellant contends that the 1911 Rules and Regulations make it clear that a forest officer must approve the location of roads built to access reserved mineral rights, and that this approval is an action that triggers NEPA (NOA #0007, pp. 41- 46).

Appellants want language from 1986 Plan included into the Revised Plan, specifically “The FS will protect the rights of the federal government, respect private mineral rights ...” (NOA #0006, p.9 (includes [##] & [\*\*\*]); NOA #0009, p.9; NOA #0010, p.14 (includes [\*\*\*]); NOA #0012, p.9; NOA #0013, pp. 6, 23; NOA #0014, p.9).

Appellant contends that the FS has failed to authoritatively state that rock pits can no longer be used by OGD in the [Revised] Plan (NOA #0007, pp. 66-67).

Appellants contend the oil and gas owner has no legal obligation to collaborate with the ANF in the initial construction of the Erosion and Sedimentation Control Plan (NOA #0010, p.18 (includes [\*\*\*]); NOA #0013, p.10).

Appellants contend the ANF must present its position on which party has the burden of proof and describe the process for establishing the reasonableness of the use of the surface estate (NOA #0006 p. 9 (includes [##] & [\*\*\*]); NOA #0009 p. 9; NOA #0012 p. 9; NOA #0014 p. 9).

Appellants contend the ANF is conducting unlawful administrative authority that violates both State and Federal law by requiring the OGD to prove its proposed activity is “necessary” in relationship to “operations standards” [design criteria] (NOA #0006 pp. 2-3 (includes [##] & [\*\*\*]); NOA #0009 p. 3; NOA #0012 p. 3; NOA #0013 pp. 5-21; NOA #0014 p. 3).

Appellants contend the sentence is the first paragraph of Section 2800 (RLRMP, p. 90) does not establish “rebuttable presumptions” or authorize the FS to determine what private OGD activities are permitted on the federal surface (NOA #0006 pp. 3 & 10 (includes [##] & [\*\*\*]); NOA #0009 pp. 2-6; NOA #0010 p. 14 (includes [\*\*\*]); NOA #0012 pp. 3 & 10; NOA #0013 pp. 6 & 8; NOA #0014 p. 3).

Appellants contend the ANF does not acknowledge the primacy of existing private mineral rights by including provisions in the Revised Plan that impair the exercise of rights in accordance with applicable law (NOA #0006 p. 8 (includes [##] & [\*\*\*]); NOA #0012 p. 8; NOA #0013 pp. 6; NOA #0014 p. 8).

Appellants contend the ANF is undertaking unauthorized rulemaking. The characterization in the ROD of private OGD as “interference” with surface resources violates NFMA, as does land acquisition enabling legislations. Appellants want the ROD (p. 29) to declare “rebuttable presumption” is void for vagueness (NOA #0006 pp. 3 & 10 (includes [##] & [\*\*\*]); NOA #0009 pp. 2-9; NOA #0010 p. 14 (includes [\*\*\*]); NOA #0012 pp. 3 & 10; NOA #0013 pp. 6 & 8; NOA #0014 pp. 3 & 10).

Appellants contend the ANF must differentiate between Federal and private OGM activities in the Revised Plan (p.90) recognizing that private OGM activities cannot be restricted in the same manner as Federal activities. Specifically what precise authority is being claimed/declared by the FS in the first paragraph (NOA #0006 p. 11 (includes [##] & [\*\*\*]); NOA #0009 p. 10; NOA #0010 pp. 27-28 (includes [\*\*\*]); NOA #0012 p. 11)?

Appellants contend that in the case of outstanding mineral estates, negotiation with the FS is not a pre-condition to determine where surface disturbing activities will or may be located (NOA #0006 p. 11 (includes [##] & [\*\*\*]); NOA #0009 p. 10; NOA #0010 pp. 25-26 (includes [\*\*\*]); NOA #0012 p.11; NOA #0014 p. 11).

Appellant contends the FS admits that it identified 62,719 more riparian acres within the ANF than it did in the 1986 Plan. This is an enormous difference that was not communicated to the public. Therefore, the FEIS and Revised Plan must be supplemented and the ANF must consider and establish mandatory standards and guidelines that protect these sensitive areas from road construction and reconstruction activities, even-aged management, and/or activities associated with oil and gas exploration and production. See 36 C.F.R. § 219.29(a) (1); 40 C.F.R. § 1502.14” (NOA #0007, p. 179).

Appellant contends that the ANF should have addressed the impacts of oil and gas operations to the snowmobile system and scenery along the trails (NOA #0011, pp. 6 to 7; and NOA #0018, pages 6 to 7).

Appellant contends the Revised Plan is inconsistent with National Energy Policy and fails to account for the economic and other negative impacts the Revised Plan will have as a result of its attempted energy provisions (NOA#0013, pp. 22-23).