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

DUHRING RESOURCE COMPANY, Plaintiff	:	CIVIL ACTION NO. 07-314
	:	Judge McLaughlin
and	:	
	:	Electronically Filed
PENNSYLVANIA OIL AND GAS, Plaintiff-Intervenor	:	
v.	:	
THE FOREST SERVICE, RANDY MOORE, KATHLEEN M. MORSE, ROBERT T. FALLON, ANTHONY V. SCARDINA, ROBERT A. STOVALL, KENT P. CONNAUGHTON, LEANNE M. MARTEN, ROBERT GYDUS, JASON J. HABERBERGER and PHILIP MICKLE, Defendants	:	
and	:	
ALLEGHENY DEFENSE PROJECT, Defendant-Intervenor	:	

DEFENDANT-INTERVENOR'S COMBINED REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Defendant-Intervenor, Allegheny Defense Project ("ADP"), hereby files this Combined Reply to Plaintiff Duhring Resources' ("Duhring") and Pennsylvania Oil and Gas Association's ("POGAM") opposition to ADP's Motion to Dismiss. Because Duhring joined POGAM's brief in opposition specific to ADP's motion to dismiss, this reply responds to POGAM's brief, but also applies to Duhring's brief in opposition where those issues overlap.

Introduction

POGAM's Brief in Opposition to ADP's Motion to Dismiss contains numerous inaccuracies that must be addressed. First, POGAM erroneously claims that ADP stated that Plaintiffs' APA claims must be dismissed because they seek relief for "unspecified actions." Next, POGAM incorrectly claims that ADP did not point to any statutes or regulations that require exhaustion of administrative remedies. Finally, POGAM claims erroneously that the regulations cited in ADP's Brief in Support of Motion to Dismiss are not applicable. The fact is, ADP quite specifically stated the reasons that Plaintiffs' complaint should be dismissed – Forest Service regulations require exhaustion of all administrative remedies and Plaintiffs' failed to exhaust those administrative remedies by not administratively appealing the Forest Service's Notices to Proceed. Absent such appeals, federal law and clear Third Circuit precedent bars this Court from considering Plaintiffs' claims in any way.

ADP specified actions requiring exhaustion – the issuance of the Notices to Proceed

When defending its claims under the Administrative Procedure Act, which only provides for judicial review of discrete, final agency actions (*See* 5 USC Sec. 704), POGAM claims that, "ADP contends that all six APA claims (Counts I, III, IV, V, VI, and VII) must be dismissed because they seek relief for 'unspecified actions.' ADP Br. at 8." POGAM Opp. Br. at 13. ADP never stated that these claims must be dismissed because they seek relief for "unspecified actions." In fact, the phrase "unspecified actions" does not even appear in ADP's Brief In Support Of Motion To Dismiss. Rather, ADP specifically stated that the "Plaintiff acknowledges that it is indeed the Notice to Proceed that is the source for nearly all of its claims." ADP Br. at 8. The issuances of the Notices to Proceed, identified in Plaintiffs' allegations (POGAM

Compl. At ¶ 57; Duhring 2nd Amended Compl. At ¶ 56), are the specific Forest Service actions from which Plaintiffs' are seeking relief. POGAM even admits this in its opposition brief. POGAM Opp. Br. at 12 ("[t]he agency action manifesting this unlawful conduct was made known to Duhring through several Notices to Proceed – written documents purporting to authorize Duhring to proceed with the development of its mineral estates, albeit subject to several significant restrictions."); POGAM Opp. Br. at 14 ("…the various Notices to Proceed contain the statement of the agency actions of which POGAM now complains."); POGAM Opp. Br. at 16 ("Here, in contrast, Duhring and POGAM have identified discrete final agency actions, precisely as ADP admits."). As will be explained in further detail below, if Plaintiffs are complaining about specific, discrete, Forest Service decisions, and Plaintiffs insist that they are in order to state claims under the APA, then federal law and Third Circuit precedent required that they first submit administrative appeals of those Forest Service decisions. Plaintiffs' complete failure to do so is an absolute bar to judicial review of any of plaintiffs' claims that are based on those supposedly illegal or improper Forest Service decisions.

Exhaustion of all administrative remedies is legally required

POGAM's argument that exhaustion is not a pleading requirement and that it is an affirmative defense in which the defendant bears the burden of pleading and proof is simply wrong. (*See* POGAM Opp. Br. at 18.) POGAM ignores the fact that both ADP and the Forest Service are challenging this Court's subject matter jurisdiction in fact under FRCP 12(b)(1). Therefore, no presumption of truthfulness attaches to Plaintiffs' allegations. *Mortenson v. First Federal Savings and Loan Administration*, 549 F.2d 884, 891 (3rd Cir. 1977). The burden of

establishing jurisdiction lies with the Plaintiff, *Id*., and Plaintiffs have completely failed to sustain that burden.

The cases that POGAM cites in support of their affirmative defense argument, *Williams v. Runyon*, 130 F.3d 568 (3rd Cir. 1997) and *Bowden v. U.S.*, 106 F.3d 433, are inapposite to this case. Both *Williams* and *Bowden* dealt with Title VII actions pursuant to the Civil Rights Act of 1991. In *Williams*, the court clearly stated that "[i]n Title VII actions, failure to exhaust administrative remedies is an affirmative defense in the nature of the statute of limitations." *Id*. at 573. In *Bowden*, the court stated after detailing the scheme of the Equal Employment Opportunity Commission's regulations implementing the Civil Rights Act that, "[b]ecause untimely exhaustion of administrative remedies is an affirmative defense, the defendant bears the burden of pleading and proving it. *Id*. at 437. Neither the Civil Rights Act, nor its implementing regulations, is at issue here.

What is at issue here are the federal statute and regulations that require the exhaustion of administrative remedies regarding Forest Service "decisions". *See* 36 CFR Sec. 251.101 and 7 USC Sec. 6912. Those provisions make such an appeal an absolute prerequisite to bringing any action against the Forest Service or its employees regarding such "decisions". It is beyond dispute that the allegedly "economically-burdensome provisions imposed by the notices to proceed issued by the Forest Service[,]" Duhring Second Amended Complaint. ¶ 56; POGAM Complaint. ¶ 57, are what underlies plaintiffs' claims in this proceeding. Pleading some of those claims as Quiet Title or *Bivens* claims does not change that fact. Moreover, such creative pleading does not erase the fact that neither Duhring nor POGAM raised their concerns with the Forest Service in the context of an administrative appeal as required by the statute, 7 USC Sec.

6912(e), Forest Service regulations, 36 CFR Part 251, and case law specific to the Forest Service's exhaustion requirements.

In *Kleissler v. United States Forest Service*, the Third Circuit noted:

> The U.S.D.A. Reorganization Act of 1994, section 212(e) provides that "a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against (1) the Secretary; (2) the Department; or (3) an agency, office, officer, or employee of the Department." 7 U.S.C. § 6912(e).

183 F.3d 196, 201 (3rd Cir. 1999). According to the court in *Kleissler*, "[i]t is axiomatic that we cannot review issues that have not been passed on by the agency…whose action is being reviewed." *Id*. at 200 (internal quotes omitted). The applicable regulations for this court to consider are found at 36 CFR Part 251, subpart C. These regulations mirror the appeal regulations found at 36 CFR Part 215 that the court relied on in *Kleissler* in that both appeal regulations explicitly state that "any filing for Federal judicial review" is both "premature and inappropriate" unless the plaintiff has first sought to resolve the dispute by invoking and exhausting the procedures of the appropriate subpart. (*See*, 36 CFR §§ 215.21, 251.101; *see also, Western Radio Services v. United States Forest Service*, 2008 U.S. Dist. Lexis 11203, *16 (D. Or. February 12, 2008)). Because Plaintiffs' claims hinge on the Forest Service's issuing the supposedly illegal or unreasonable Notices to Proceed and Plaintiffs' did not administratively appeal those Notices to Proceed, they are precluded from seeking relief from this Court.

Forest Service regulations clearly establish an appeal procedure that Plaintiffs' could have used to raise their concerns about the allegedly "economically-burdensome provisions imposed by the notices to proceed issued by the Forest Service[.]":

> The rules of this subpart govern appeal of written decisions of Forest Service line officers related to issuance, denial, or administration of the following written instruments to occupy and use National Forest System lands, *including but not limited to*:

> (6) Permits and agreements regarding mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinder, clay and other similar materials) under 36 CFR 228, subpart C.
>
> (7) Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR part 251, subpart A.
>
> (11) Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.

36 CFR § 251.82(a) (emphasis added)

Plaintiffs are not exempt from the administrative appeal requirements

POGAM tries to deflect attention away from this fatal flaw in their causes of action in a multitude of ways. First, POGAM claims that "[n]either the Forest Service nor ADP points to any statute or regulation that requires exhaustion *of the claims raised by POGAM and Duhring*." POGAM Opp. Br. at 18. (emphasis in original) POGAM cites *Darby v. Cisneros*, 509 U.S. 137 (1993) to unconvincingly assert that because it believes there is no regulatory structure for appealing the Notices to Proceed and the various provisions contained within those Notices, further exhaustion was not required. POGAM Opp. Br. at 18. POGAM completely misses the point, though, that it is not "exhaustion of the claims" but rather exhaustion of administrative remedies relative to the specific Forest Service actions of issuing the Notices to Proceed that is required. Plaintiffs' had to raise its claims with the Forest Service in an administrative appeal to fulfill the exhaustion requirement. Plaintiffs', however, did not and as a result, this court lacks the power to consider these claims now.

POGAM is also incorrect in its implication that the provisions ADP cited in the motion to dismiss only "apply to *written decisions* addressing permits and special-use authorizations and that the Notices to Proceed are not a "written decision" simply because the phrase "Notice to

Proceed" is not mentioned in the Forest Service's regulations. POGAM Opp. Br. at 21-22. This is hardly persuasive. The Notice to Proceed is, in fact, a "written decision[] of Forest Service line officers related to issuance, denial, or administration of [] written instruments to occupy and use National Forest System lands[.]" 36 CFR § 251.82(a). "Written decision" is simply a descriptive term used in the regulation to encompass a variety of specific decisions that are covered by the regulations. That description, and the examples of such written decisions listed in the regulation (36 CFR sec. 251.82(a)), clearly include the Notices to Proceed at issue here.

ADP's brief in support of its motion to dismiss set forth specific facts indicating that Plaintiffs' had not submitted administrative appeals of the Forest Service decisions at issue. *See* ADP Brief at 3. Rather than deny those facts plaintiffs' response essentially admits that they did not submit administrative appeals and only argues that as a matter of law such appeals were unnecessary. Plaintiffs in fact had legally mandatory administrative appeals procedures available to them and they simply chose not to submit such appeals and instead filed this lawsuit without having exhausted their administrative remedies. Under such circumstances, Plaintiffs' clearly have failed to meet their burden under FRCP 12(b)(1) and this Court has no jurisdiction to consider Plaintiffs' claims.

Plaintiffs claims must be dismissed even if failure to exhaust were an affirmative defense

In an abundance of caution and to remove any possible doubt that Plaintiffs' in fact have failed to exhaust their administrative remedies regarding the Forest Service decisions at issue, ADP submits the attached declaration of Ryan Talbott, which simply confirms the facts set out in ADP's brief in support of their motion to dismiss. Compare Talbott Decl., ¶¶ 1-2, with ADP Brief at 3. Under FRCP 12(d) this Court can, if it deems it necessary, consider this declaration

and convert ADP's motion to dismiss into a motion for summary judgment. Although Plaintiffs have essentially admitted that they did not file any administrative appeal, the Court could then give Plaintiffs one last opportunity to offer evidence regarding any administrative appeal that they might have submitted. When Plaintiffs fail to do so, the court can then dismiss Plaintiffs' claims under FRCP 56 because undisputed facts show that Plaintiffs failed to exhaust mandatory administrative remedies. Of course ADP does not believe that such procedures are necessary because Plaintiffs' response to ADP motion to dismiss does not dispute that Plaintiffs in fact failed to submit administrative appeals and that failure is, as a matter of law, fatal to this Court's jurisdiction to hear Plaintiffs' claims.

Conclusion

POGAM and Duhring have the burden of establishing, before this Court can consider the substance of their claims in any way, when and how they raised their concerns about the Forest Service's Notices to Proceed in proper administrative appeals under the clearly applicable Forest Service regulations. In such appeals the Plaintiffs could have attempted to explain why the Forest Service's conditions were so unreasonable and why the Forest Service supposedly had no legal right to impose such conditions. Indeed the latter explanation would have been especially interesting in light of the well-established precedent allowing the federal agencies responsible for protecting federal property to impose reasonable regulations on nearby or adjacent private property in order to protect that federal property. *See,* e.g., *Minnesota v. Block,* 660 F.2d 1240, 1248-49 (8th Cir. 1981), citing and quoting, *Kleppe v. New Mexico,* 426 US 529, 539-543 91976) and *Camfield v. US,* 176 US 518 (1897) (Federal regulation under the Property Clause can effect private lands not under federal control if necessary to protect public lands); accord, *Duncan*

Energy v USFS, 50 F.3d 584, 589 (8th Cir. 1995). Rather than explain and justify their position initially in a proper administrative appeal, Plaintiffs instead went directly to this Court. That is not allowed under binding statutes, regulations and case law, and Plaintiffs' claims must therefore be dismissed.

Respectfully submitted,

QUINN, BUSECK, LEEMHUIS, TOOHEY & KROTO, INC.

By *S/ Paul F. Burroughs*

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2008, I electronically filed Defendant-Intervenor's Combined Reply to Plaintiffs' Opposition to Motion to Dismiss with the Clerk of Courts using the CM/ECF system, who will send electronic notification of such filing to counsel of record for the other parties to this action:

Plaintiff Duhring Resource Company:	James T. Marnen, Esq.
Plaintiff-Intervenor Pennsylvania Oil and Gas:	J. Michael Klise, Esq. Matthew L. Wolford, Esq. R. Timothy McCrum, Esq.

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S/ Paul F. Burroughs
Paul F. Burroughs