IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

SIERRA CLUB, INC., a California,
non-profit corporation,
Plaintiff,

vs. CA No. 2: 00 CV 10

ALLEGHENY WOOD PRODUCTS, INC.,
a West Virginia corporation; its agent,
COLUMBIA HELICOPTERS, INC.,
an Oregon corporation, and the
UNITED STATES FOREST SERVICE,
an agency of the United States,
Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. Introductory Statement

Pursuant to Rule 65, F.R.Civ.P., Plaintiff, the Sierra Club, Inc., by Counsel, respectfully requests that this Court grant interim relief in the form of a preliminary injunction:

(a) enjoining Allegheny Wood Products, Inc. and its agent, Columbia Helicopters, Inc., from conducting overflights of the Monongahela National Forest by helicopters which transport logs suspended by cables,

(b) enjoining any enforcement of the January 25, 2000 order of the Forest Supervisor purporting to close the areas of the Monongahela National Forest affected by overflights by Allegheny Wood Products, Inc., and its agent, Columbia Helicopters, Inc.

In support of this motion, the Sierra Club, Inc. directs the Court's attention to the following points and authorities:

II. Controlling Authorities

This Court requires no primer on the grounds for issuance of a preliminary injunction. Rule 65, F.R.Civ.P., authorizes the issuance of a preliminary injunction, upon notice to the adverse parties. The U. S. Court of Appeals for the Fourth Circuit has endorsed the now familiar four-part criteria for issuance of a preliminary injunction:

(a) plaintiff's likelihood of success in underlying dispute between the parties;

(b) whether plaintiff will suffer irreparable injury if interim relief is denied;

(c) injury to defendant if injunction is issued; and

(d) the public interest.

North Carolina State Ports Authority v. Dart Containerline Co. Ltd., 592 F.2d 749 (4 Cir. 1979).

III. Summary of Argument and Relevant Facts

A. Identity of Parties

The Sierra Club, Inc. (hereafter "Sierra Club") is a California, non-profit corporation formed in 1892 "to explore, enjoy, and rendure accessible the mountain regions of the Pacific Coast; to publish authentic information concerning them," and "to enlist the support and cooperation of the people and government in preserving the forests and other natural features of the Sierra Nevada." Today, in the State of West Virginia, the Sierra Club organizes programs for the year-round use and enjoyment of natural resources, including winter sports, such as hiking and cross-country skiing in the Monongahela National Forest, Blackwater Falls State Park and in the Blackwater River Canyon.

The United States Forest Service (hereafter "Forest Service") is charged with the planning and management of all activities within the forest lands of the United States committed by law to its custody. This responsibility is guided by a Land and Resource Management Plan (herein "the Forest Management Plan") and the development and execution of programs consistent with that plan.

Allegheny Wood Products, Inc. (hereafter "AWP") is a West Virginia, for-profit corporation with its principal place of business in the City of Petersburg, West Virginia. AWP is engaged in the "quality appalachian hardwood lumber" business and on February 18, 1997 acquired legal title to a 2,800 acre tract of land located in Tucker County, West Virginia in a transaction with West Virginia Power Transmission Company, a subsidiary of Allegheny Energy System, Inc. The various lands deeded to AWP in 1997 had been owned by West Virginia Power Transmission Company since 1930 and earlier.

Columbia Helicopters, Inc. (Columbia) is an Oregon corporation engaged in the heavy-load rotorcraft operation business. Columbia has been engaged by AWP to transport cut logs from 350 acres of AWP's land referred to as the North Tract. Columbia is transporting the logs from the North Tract to two distinct locations – one to the West which is located totally on private land near Hendricks, West Virginia. The transportation of cut logs from the North Tract to the Hendricks location is not the subject of this motion.

B. Nature of the Sierra Club's Legal Injury

This motion is concerned with the transportation of logs from AWP's North Tract to the North, across a 2,054 acre portion of the Monongahela National Forest known as Opportunity Area 13.009, in order to deliver the cut logs to a landing site on private land further North of Opportunity Area 13.009. While transiting airspace over the Monongahela National Forest, Columbia suspends the cut logs by cable from heavy-lift helicopters. The transportation of logs by suspended cables under helicopters is inherently dangerous to persons and property below the helicopter.

At this time, the Sierra Club does not contend that AWP's agent, Columbia's personnel and aircraft are not properly licensed and certified, or that applicable statutes and regulations of the F.A.A pertaining to those personnel and aircraft are not being complied with in full. However, the helicopter operations conducted for AWP by Columbia consist of the airborne transportation of cut logs suspended by cables. These operations present an inherent risks to persons and property in Opportunity Area 13.009, and those risks have resulted in the closure of the Forest.

The immediate injury caused by the transportation of logs, whether by AWP or its agent, Columbia, is the inherent danger which led to the Forest Supervisor's closure of the Monongahela National Forest. That closure was intended, on its face to protect Forest users, such as the Sierra Club, its members and the public, injury in the event of an accidental release of a log over the

Forest. However, the closure of the Forest for timbering from private lands outside the Forest was not an option available to the Forest Supervisor.

The Forest Supervisor could have, and under law should only have, filed a complaint pursuant to 14 C.F.R. § 13.1(a) with the Federal Aviation Administration to obtain an immediate cease and desist order under 14 C.F.R. § 13.20 (b) barring the flights over the Forest. That action, and that action only, would have been consistent with the Congressional mandate applicable to management of the National Forests, i.e., the requirements in 16 U.S.C. § 475 that the Forest be managed for purposes within the Forest, and in 16 U.S.C. § 528 that recreational purposes be given priority with timbering and other purposes.

Moreover, AWP could have arranged, and can still arrange, to have all cut logs transported to its landing site in Hendricks, West Virginia -- to the West of the North Tract -- and avoid overflights of Opportunity Area 13.009 in its entirety. This option permits the Forest to remain open, and the Sierra Club, its members and the public to enjoy all the benefits of the Forest, which benefits are explicitly given priority by law over AWP's timbering activities on private land outside the Forest.

In short, the immediate, tangible injury to the Sierra Club, its members and the public caused by the overflights is the fact that the Forest Supervisor issued the January 25, 2000 order closing the Forest. The fact that the January 25, 2000 order recognized the hazard to property and persons is a stipulation on the Forest Supervisor's part that the flights, in the absence of a valid closure order, would constitute a violation of applicable F.A.A. regulations.

As matters stand, the January 25, 2000 closure order immediately excludes the Sierra Club, its members and the public from winter cross-country skiing and hiking which has been expressly recognized in the 1986 Forest Management Plan which governs the use of the Monongahela

National Forest, and is recognized in the Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528. Violation of the January 25, 2000 order will subject the Sierra Club, its members and the public to fine and imprisonment. The opportunity to ski or hike in the winter of 2000 is temporal; once the time for it has past there is no means of recreating that opportunity.

By contrast, AWP can continue its logging activities and merely shift the location of its transportation activities to another route which does not transit lands dedicated to public recreation. That will not injure AWP in any respect whatsoever. Its investment in time, energy, personnel and material can still be gainfully employed; they just need a new flight path. To the extent that the shift of the transportation route reduces the amount of timber that might be removed at this time, that timber can be removed at a later time. Deferral of the timber removal to a later date, even as much as a year later, is not an unreasonable burden for AWP to incur. *Lost* profits is not the issue here. At best AWP can only show *deferred* profits, and that is not a cognizable injury in the context of this motion.

C. The Monongahela National Forest

The Monongahela National Forest (hereafter "the Forest") is part of the 191 million acres of land owned by the United States that has been entrusted to the U. S. Forest Service, an agency of the United States Department of Agriculture, for management. The Monongahela National Forest was created by the “Weeks Law” of 1911, which was passed in response to devastating floods and fires in the watersheds of the Allegheny and Monongahela Rivers at the turn of the century. The first lands for the Forest were acquired in 1915; it grew rapidly during the Depression era. By 1985 the Monongahela National Forest consisted of roughly 857,000 acres in the eastern highlands of the state, or approximately 6% of the land area of the State of West Virginia.

The scenic and recreational values of the Monongahela National Forest attract in excess of 1,000,000 visitors yearly. Recreational activities within the Forest, and recognized in the 1986 Forest Management Plan, include camping, hiking, hunting, fishing, nature study, swimming, whitewater canoeing, rock climbing and, in winter months, cross-country skiing.

D. AWP's Timbering Activities in the Blackwater River Canyon

The land to which AWP acquired legal title 3 years ago consists of the core of what is commonly referred to as the Blackwater River Canyon. The Blackwater River Canyon is located on both the North and South side of the Blackwater River, and is itself bounded on both its Northern and Southern borders by elements of the Monongahela National Forest. On or about January 10, 2000, AWP commenced timbering activities within what it describes as the North Tract, an area consisting of 350 acres of the 2,800 acre Blackwater Canyon. The North Tract is on the North side of the Blackwater River and is adjacent to the southern border of a portion of the Monongahela National Forest.

E. AWP's Illegal Overflights of Monongahela National Forest

At some point in time, Charles L. Myers, the Forest Supervisor of the Monongahela National Forest, heard that AWP planned to transport cut timber by cables suspended from helicopters from the North Tract to two different landing sites. One of the landing sites is located on a portion of the 2,800 tract AWP acquired legal title to in 1997 and is both south and west of the timbering area. The second landing area is located on State Rt. 219 to the north of the portion of the Monongahela National Forest which borders AWP's North Tract. In order to reach the Rt. 219 landing area, AWP must fly over a portion of the Monongahela National Forest designated as Opportunity Area 13.009.

Opportunity Area 13.009 over which AWP is now conducting overflights includes 2,054 acres of National Forest and is immediately adjacent to the Blackwater Falls State Park. Opportunity Area 13.009 includes four very highly developed recreational trails in the Monongahela National Forest. Indeed, the border between AWP North Tract and the Monongahela National Forest consists of a former CSX rail right-of-way, which has been has been declared eligible for incorporation into the National Rail Trail System. The Rail Trail extends from Thomas to Hendricks, a distance of 11 miles, and is frequently used in winter months for cross-country skiing.

F. The Forest Supervisor's January 25, 2000 Closure Order Is Unprecedented

AWP never sought or obtained any permit from the Forest Service for the overflights it is conducting. To be sure, AWP never even advised the Monongahela National Forest Supervisor that the over flights would occur. Instead, the Forest Supervisor learned of the overflights by word of mouth and called AWP officials to confirm their intentions.

AWP, in communications which were never reduced to any writing now in possession of the Monongahela National Forest, initially advised the Forest Supervisor that the overflights would occur from February 1, 2000 through March 18, 2000. The Forest Service, without any public notice or participation, immediately drafted a order closing the Forest for the February 1, 2000 to March 18, 2000 period. Thereafter, on January 24, 2000, Mark Sturgill, an employee of AWP, confirmed in writing that AWP anticipated "using helicopters to remove logs between the period of February 1 through March 31, 2000." Exhibit E. The Forest Service, again without public notice or participation, immediately amended its closure order to conform to the new dates on which AWP told the Forest Service they would be conducting overflights.

On January 25, 2000 issued Order No. 21-49 (Exhibit A) which from January 31, 2000 through March 31, 2000, during the hours from 0600 on Monday through midnight Saturday, closed designated portions of the forest areas and trails to individuals and vehicles. A Press Release issued incident to the January 25, 2000 closure order stated that the Forest Service did not close the Forest on Sundays because AWP "told us they will not fly on Sunday." Exhibit C.

Areas and trails of the Forest closed by the Order No. 21-49 are depicted on Exhibit B and include:

(a) the northern side of the Blackwater Railroad grade between the existing exit gates at Hendricks (western end) and Thomas (eastern end);

(b) Trail #116 - the so-called "Boundary Trail";

(c) Forest Road 18 - the so-called "Canyon Rim Road";

(d) Trail #142 - the so-called "Limerock Trail" east of Big Run; and

(e) all National Forest Land in the Black Fork Mountain area east of Big Run.

As noted above, this closure area encompasses all of the 2,054 acres of National Forest land within Opportunity Area 13.009.

G. Public Use of the Affected Areas of the Monongahela National Forest

As recently as January 14, 2000, the Sierra Club, its members and the public used the Blackwater Railroad grade for a previously planned hike. The January 14, 2000 use of the Rail Trail was communicated to both AWP and the U. S. Forest Service by a letter from counsel for the Sierra Club to Duke McDaniels, an attorney for AWP. The January 14, 2000 letter was in response to a letter from counsel for AWP unilaterally purporting to close the Rail Trail, one-half of which is titled in AWP, and threatening arrest and criminal prosecution of any trespasser. Exhibit F. The Sierra Club, as its January 14, 2000 letter noted, "respected" AWP's right to control the southern

half of the Rail Trail (which it owns) and "asserted its own" right to occupy and use the northern half of the Rail Trail (which is owned by the United States). Exhibit G.

But for the issuance of Order No. 21-49 on January 25, 2000, without prior notice or publication, the Sierra Club, its members and the public would have used the affected areas of the Forest for cross-country skiing and hiking between February 1, 2000 and March 31, 2000.

IV. The Sierra Club Is Likely To Succeed on the Merits Of Its Claims Against AWP

A. AWP's Over Flights of the Monongahela National Forest Violate FAA Regulations

In 49 U.S.C. § 40101, the U. S. Congress declared the airspace of the United States, as defined by regulations of the Federal Aeronautical Administration, 14 C.F.R. Chapter I, Subchapter E -- AIRSPACE, PART 71, to be in the public domain and open to public transit.

However, all such transit is expressly made subject to such F.A.A. regulations, and those regulations consistently provide that flights, whether by fixed-wing aircraft or helicopters ("rotorcraft" in F.A.A. parlance) must be conducted in a manner which does not present a threat to the safety of persons or property on the ground below. In this regard, F.A.A. regulations encompass a broad range of craft and pilot certifications, and operating requirements for personnel, aircraft and airport facilities.

Among these F.A.A. regulations are those at 14 C.F.R. Chapter I, Subchapter F, Part 91, which set out minimum safe altitudes generally. Those general altitude regulations provide in their entirety as follows:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> (d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

14 C.F.R. § 91.119 (emphases added).

The Monongahela National Forest is governed by subsection (a) - emergency landings anywhere, subsection (c) - "other than congested areas", and subsection (d) - helicopter flights generally. The Sierra Club does not contend that the Forest is a congested area covered by subsection (b).

In addition to the foregoing general altitude rules, separate rules are provided by the F.A.A. for so-called "Rotorcraft External-Load Operations," i.e., helicopters which carry heavy loads outside of the aircraft, the precise kind of helicopter flights These regulations, codified at 14 C.F.R. Part 133, provide that:

> Notwithstanding the provisions of part 91 of this chapter, and except as provided in § 133.45(d)[pertaining to densely populated areas], the holder of a Rotorcraft External-Load Operator Certificate may conduct external-load operations, including approaches, departures, and load positioning maneuvers necessary for the operation, below 500 feet above the surface and closer than 500 feet to persons, vessels, vehicles, and structures, if the operations are conducted without creating a hazard to persons or property on the surface.

14 C.F.R. §133.33(e) (emphases added).

Additional exceptions to the general altitude requirements of Part 91 are recited at 14 C.F.R. § 137.49 governing "Operations over other than congested areas." However, those exceptions continue to require that operations be conducted without hazard to persons or property.

> Notwithstanding part 91 of this chapter, during the actual dispensing operation, including approaches, departures, and turnarounds reasonably necessary for the operation, an aircraft may be operated over other than congested areas below 500 feet above the surface and closer than 500 feet to persons, vessels, vehicles, and structures, if the operations are conducted without creating a hazard to persons or property on the surface.

14 C.F.R. § 137.49. (emphasis added).

B. The Forest Supervisor Concluded That Overflights Were A Hazard To Persons and Property

The Forest Supervisor determined in the January 25, 2000 closure order that the overflights were a hazard to persons and property within the Forest. Exhibit D is an unsigned and undated document released to the Sierra Club pursuant to a Freedom of Information Act (FOIA) request for all documents pertaining to the January 25, 2000 closure order. This document bears a line of text at the top followed by a colon with six subparts following. The heading appears to be:

"Proposed Forest Supervisor's closure order for area adjacent to Blackwater Canyon:"

A subpart within the text of Exhibit D entitled "Reason for closure:" states as follows:

> [N]eighboring landowner Allegheny Wood Products will be flying loads of logs with a helicopter from their land to the south and east of the closure are[a] to a point north of the Forest Service boundary. The area will be closed to the public to ensure safety in the advent$_{sic}$ of a load of logs breaking loose from the helicopter.

Exhibit D (emphasis added).

Similarly, in a press release dated January 21, 2000, released to the Sierra Club as part of the Forest Service's FOIA production, the Forest Service states:

> In helicopter logging the logs are cabled together as they are lifted from the felling site to a landing where they are loaded on trucks. The felling site in this case is on land owned by Allegheny Wood Products on the north side of Blackwater Canyon between the Blackwater River and the railroad grade. Part of the logs will be flown entirely over land owned by the company. Part, however, will be flown over National Forest to a landing on private land north of the Canyon. While it is rare for logs to break loose as they are being transported," said Goodrich, we don't take chances with visitor safety."

Exhibit C (emphasis added).

Citing 16 U.S.C. § 551 and 36 C.F.R. §261.50 (a) and (b) and the special closure provisions of 36 C.F.R. § 261.53 (e), the Forest Supervisor closed the Forest in the areas described above because of the hazard the helicopters posed to human life and excluded all vehicles under 36 CFR § 261.54 (a).

The Forest Supervisor has not charged AWP or Columbia any fee, nor has either private defendant paid any consideration to the Forest Service or the United States in exchange for the right to fly over the Forest. And the Forest Service has not conditioned the overflights on any terms or provisions which preserve the recreational uses to which the Sierra Club its members and the public would put the Forest, nor has the Forest Service's gratuitous acquiescence in the overflights guaranteed public access to the Forest.

Although the Forest Supervisor has disclaimed knowledge of any authority to halt A.W.P.'s flights, Federal Aviation Agency (F.A.A.) regulations at 14 C.F.R. Part 13 provide a detailed scheme for the filing of a complaint and the issuance of an immediate cease and desist order with respect to any action in violation of F.A.A. regulations or applicable statutes. The opportunity to stop A.W.P.'s overflights was readily available to the Forest Supervisor. Given the Congressional mandate that he focus exclusively on the territorial limits of the Forest and its legitimate users, that option was the only lawful option available to the Supervisor.

C. An Implied Private Right Of Action Exists For Enforcement of FAA Safety Regulations

In *Cort v. Ash*, 422 U.S. 66, 45 L.Ed.2d 26, 95 S.Ct. 2080 (1975), the U. S. Supreme Court stated the questions to be addressed in determining whether a private cause of action should be implied in the absence of an explicit statutory provision for citizen suits. Those questions were as follows: (1) Is the plaintiff on of the class for whose especial benefit the statute was enacted; (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) Is a private cause of action consistent with the underlying purposes of the legislative scheme, and (4) Is the cause of action one traditionally relegated to state law so that it would inappropriate to infer a cause of action based solely on federal law.

Applying the criteria of *Cort*, the Supreme Court has declined to find an implied private right of action in the Securities and Exchange Act, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 61 L.Ed.2d 82, 99 S.Ct. 2479 (1979), but upheld the existence of an implied private right of action under the Commodities Exchange Act, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 72 L.Ed.2d 182, 102 S.Ct. 1825 (1982).

However, for purposes of this motion, the decision of the Second Circuit, before *Cort*, found an implied private cause of action for violations of the Federal Aviation Act of 1958 and the regulations promulgated thereunder. In *Town of East Haven v. Eastern Airlines, Inc.*, 282 F. Supp. 507 (D. Ct. 1968), the United States District Court for the District of Connecticut, citing then controlling precedent of the Second Circuit, *Fitzgerald v. Pan Amercian World Airways*, 229 F.2d 499 (2 Cir. 1956), held that "a violation of the provisions of the Federal Aviation Act or the regulation or rules issued pursuant thereto may give rise to a private federal right of action maintainable by those injured by the violation."

Similarly, in *Dipierri v. F.A.A.*, 671 F.2d 54 (1 Cir. 1982), the First Circuit, while not explicitly finding an implied right of action for a citizen suit for violation of F.A.A. regulations, did uphold, for purposes of a Rule 12(b)(6) dismissal motion, a citizen suit against the F.A.A. under the Administrative Procedure Act for a claim that F.A.A. regulations created a hazard to the plaintiff's safety which might violate the provisions of the Federal Aviation Act, 49 U.S.C. § 1348 (c), now repealed. No decision of the Fourth Circuit has addressed the existence of an implied private cause of action under the Federal Aviation Act.

Application of the *Cort* criteria to this case strongly suggests that an implied cause of action for violation of the safety provisions of the F.A.A. regulations should be found. Plainly, recreational users of a National Forest, like pedestrians anywhere, are among the class of persons to be protected by 14 C.F.R. § 91.119 which prohibits flying in a manner which poses a hazard to persons or property on the ground. Allowing a citizen to sue to enforce such regulations is totally consistent with the purpose of the regulations and the regulatory scheme. There is no persuasive evidence of an intent either to create or not to create a private right of action in the legislative history of the Federal Aviation Act. Moreover, resolution of the question in federal court will not intrude in an area normally reserved to the states; to the contrary the issue of aircraft safety has been held to have implicitly preempted state regulation. *Command Helicopters, Inc. v. City of Chicago*, 691 F.Supp. 1148 (N.D. Ill.).

The case for an implied private cause of action to enforce F.A.A. regulations is certainly as compelling as the case for implied federal preemption of air safety made in *Command Helicopters*. And in the absence of implied preemption, 16 U.S.C. § 480 would make AWP's overflights subject to W. V. Code § 29-2A-12 which prohibits flights by any aircraft: (a) below 1,000 feet over public gathering anywhere, or (b) in disregard of the rights and safety of others.

V. The Sierra Club Is Likely To Prevail in Its Cause of Action Against Forest Service

A. The Forest Supervisor May Not Subordinate Statutorily Mandated Uses ***Within*** The Forest To Private Uses ***Outside*** The Forest

The January 25, 2000 closure order issued by Forest Supervisor Charles L. Myers violated the provisions of 16 U.S.C. §475 which create a mandatory, exclusive duty to manage the lands and resources in order to protect and improve only the "***forest within the boundaries"*** (emphasis added). 16 U.S.C. § 475, entitled "[p]urposes for which national forests may be established and administered," provides:

> All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. ***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; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

16 U.S.C. § 475 (emphasis added).

The territorially exclusive focus of § 475 was in no way diluted by the expansion of the uses of the national forest system to include multiple uses, in addition to forestry, effectuated by the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215. That statute, codified at 16 U.S.C. § 528, provides that:

> It is the policy of the Congress that ***the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes***. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which

> the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. ***Nothing herein shall be construed*** so as to affect the use or administration of the mineral resources of national forest lands or ***to affect the use or administration of Federal lands not within national forests***.

16 U.S.C. § 528 (emphases added).

Far from altering the focus of the management of national forests, § 528 explicitly reinforced § 475 territorially exclusive limits. Indeed, § 528 underscored that narrow territorial focus by explicitly providing that not even other non-forest Federal lands were to be affected by the provisions of § 528. 16 U.S.C. § 528 also had the long recognized purpose of raising uses of the forest for purposes other than the harvesting of timber to positions of parity with timber production. Those elevated purposes include the specific purpose - recreation - which the Sierra Club seeks to vindicate in this action.

Documents released by the Service pursuant to the Freedom of Information Act reveal that the drafters of Order No. 21-49 were aware of the order's unprecedented character as a closure based on matters occurring on private property wholly *without* the forest. The authors cite no authority or precedent for such a departure from the territorial limits of the national forest or the restrictions of 16 U.S.C. § 475. Under the subheading of "Consistency," the author of an unsigned FOIA-produced document by the Service states:

> "[T]he Forest Service has previously closed National Forest system lands during similar helicopter logging operations on public lands. ***This would be the first such closure of Monongahela Nation Forest lands due to private operations*** but the safety concerns are the same."

Exhibit D (emphasis added).

The Forest Supervisor's gratuitous easement to AWP also violates 16 U.S.C. § 521d's requirements for consideration and public access.

B. The Closure Order is Reviewable Under 5 U.S.C. § 702 As Action Beyond Agency Authority.

The January 25, 2000 closure order is reviewable by this Court under 5 U.S.C. § 702 which provides in pertinent part as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5. U.S.C. § 702.

The January 25, 2000 closure order is final for purposes of 5 U.S.C. § 704 because it was effective immediately upon issuance. The provision in the text of the January 25, 2000 order for an exemption under 36 C.F.R. §261.50(e) for various persons has no application to the Sierra Club, its members or the members of the public whose recreational uses are foreclosed by the January 25, 2000 closure order. Violation of the order will subject a violator to fine and imprisonment.

Plainly, the January 25, 2000 was intended to have, and in fact did have, the immediate effect of terminating all use of the affected areas of the Forest for recreational purposes while AWP conducted overflights by helicopters from which massive logs are suspended by cable.

VI. The Public's Loss Of Temporal Recreational Opportunities is Irreparable

This Court cannot back up the clock. Once the months of February and March 2000 are gone, they cannot be retrieved. The temporal recreational opportunities lost by the closure to the Forest during that period cannot later be reconstructed, nor can their loss be adequately compensated by monetary damages.

VII. The Adverse Impact of Limiting Defendants To Their Hendricks Landing Site is Minimal

AWP has, and is presently using, a second landing site at Hendricks, West Virginia for the unloading of cut timber transported from the North Tract. There is no reason why that landing site cannot be used for all cut timber from the North Tract. To the extent that any opportunity to cut timber is deferred until the following winter of 2001, that is a minimal inconvenience. It is not a loss of profits but rather a deferral of profits, and as such cannot offset the temporal opportunities lost by the Sierra Club, its members and the public as a result of the closure of the Forest.

VIII. Conclusion

In light of the foregoing matters, the Sierra Club respectfully requests that this Court enter an order preliminarily enjoining further flights over Opportunity Area 13.099 and the other affected areas of the Monongahela National Forest, and enjoining enforcement of the January 25, 2000 order of the Forest Supervisor purporting to close areas of the Forest affected by AWP's overflights.

SIERRA CLUB, INC.

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