UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DUHRING RESOURCE COMPANY, a Pennsylvania Corporation *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant.*	)	Civil Action No. 15-289 ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This case is another chapter in the long-running and intermittently unhappy relationship between private subsurface oil, gas, and mineral rights owners in the Allegheny National Forest ("ANF"), and the Forest Service, which manages the Government-owned surface estate. Plaintiff Duhring Resource Company brings the present action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1), alleging seven counts of "unreasonable interference with enjoyment of servitude; trespass" against Defendant United States of America. Plaintiff alleges that from approximately mid-July 2007 through November 2008, Defendant, acting by and through officials and employees of the Forest Service and as the surface owner of certain parcels in the ANF, unreasonably prevented Plaintiff from accessing, and, therefore, developing, its corresponding subsurface oil, gas, and mineral ("OGM") resources. Plaintiff additionally alleges that in August 2007, Defendant struck and damaged one of Plaintiff's natural gas pipelines.[1]

[1] Asserting virtually the same facts as those alleged here, Plaintiff, in 2007, brought claims against Defendant (and others) for Quiet Title, and claims under the Administrative Procedures Act and the Little Tucker Act, 28 U.S.C. 1346(a)(2). *Duhring Resource Co. v. U.S. Forest Service*, No. 1:07-cv-314 (W.D. Pa. filed Nov. 2, 2007). The Little Tucker Act provides for damages, not to exceed $10,000, against the United States "in cases not sounding in tort." 28 U.S.C. 1346(a)(2).

Defendant has moved to dismiss Plaintiff's Complaint, arguing that Plaintiff has failed to allege claims for which a private person could be liable for tort damages under Pennsylvania law. Doc. 36. Additionally, or alternatively, Defendant argues that Plaintiff's claims are barred by any one of four exceptions to the FTCA. Thus, Defendant contends, the FTCA's general waiver of immunity does not extend to Plaintiff's claims, the Court lacks subject matter jurisdiction, and Plaintiff's claims must be dismissed. Plaintiff opposes the motion. Having reviewed the parties' briefs together with all relevant materials, the Court grants Defendant's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Duhring is an oil and gas drilling company that is organized and exists under the laws of Pennsylvania. Compl. ¶ 1. Between May 2004 and March 2007, Plaintiff acquired by assignment the OGM rights associated with four parcels—known as Lots 7, 8, and 9, and Warrant 3672—in the ANF. *Id*. ¶ ¶ 8-11. The surface estate of each of these parcels is owned by Defendant United States, and is managed by the Forest Service, an agency within the United States Department of Agriculture. *Id*. ¶ 12.

By way of background, the Forest Service and OGM drillers operate their split estates in the ANF pursuant to the framework established in *United States v. Minard Run*, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. 1980) ("*Minard Run I*"). Compl. ¶ 18; *see also Minard Run Oil Co. v. U.S. Forest Service*, 670 F.3d 236, 243-45 (3d Cir. 2011) ("*Minard Run III*") (summarizing state and federal treatment of mineral rights in the ANF and explaining the *Minard Run I* framework) (citing *Minard Run Oil Co. v. U.S. Forest Service*, 2009 WL 4937785, *8-9 (W.D. Pa. Dec. 15, 2009) ("*Minard Run II*")). In *Minard Run I*, the Court reiterated the long-standing "rule" in Pennsylvania that the owner of a subsurface estate has the "unquestioned right" to go upon the surface estate, "'without any expressed words of grant,'" to "'occupy so much of the surface…as might be

necessary to operate his [subsurface] estate, and to remove product thereof.'" 1980 U.S. Dist. LEXIS 9570 at *13 (quoting *Chartiers v. Mellon*, 152 Pa 286 (1893)). However, "the parties must exercise due regard for the rights of the other." *Id*. "Due regard" to the Forest Service, *Minard Run I* found, required OGM rights owners planning to conduct drilling operations to provide the Forest Service with certain information "no less than 60 days in advance" of drilling.[2] *Id*. at *13-22.

This 60-day notice procedure was incorporated into the Forest Service's 1984 ANF Handbook, and it became the custom and practice among OGM rights holders and the Forest Service. Compl. ¶ 18; *Minard Run III*, 670 F.3d at 244. After receiving a completed drilling proposal, the parties "would [] negotiate the details of drilling operations, such as the location of wells or access roads, so as to prevent any unnecessary surface use. At the end of this process, the [Forest] Service would issue a Notice to Proceed (NTP) to the mineral rights owner, which acknowledged receipt of notice from the mineral rights owner and memorialized any agreements between the parties regarding drilling operations." *Minard Run III*, 670 F.3d at 244; Compl. ¶ 18. The 60-day notice procedure became federal law in 1992 with the passage of the Energy Policy Act of 1992, 30 U.S.C. § 226(o). Compl. ¶ 19.[3]

[2] Specifically, *Minard Run I* held, "[i]n order to properly avoid unnecessary impairment of surface resources incident to contemplated mineral operations," prospective drillers must provide the following information to the Forest Service no fewer than 60 days before commencing drilling operations: (1) a designated field representative; (2) a map detailing the dimensions of the planned improvements, including well sites, roads, and pipeline access; (3) a plan of operations, including a schedule for construction and drilling; (4) an erosion and sedimentation control plan for the proposed timber clearings; and (5) proof of ownership of the minerals. *Id*. at *20. *Minard Run I* found that 60 days would afford the Forest Service a "reasonable" timeframe within which to "market its own merchantable timber" that would be cleared by the proposed drilling. *Id*. at *22.

[3] Between approximately 1981 and 2008, the Forest Service processed 90-95 percent of the drilling proposals it received within 60 days. *Minard Run II*, 2009 WL 4937785, *8-9. "Delays beyond the 60 days were rare and generally were the product of ongoing and amicable negotiations between the Forest Service and private mineral owners." *Minard Run Oil Co. v. U.S. Forest Service*, 2012 WL 994641, *6 (W.D. Pa. Mar. 23, 2012) ("*Minard Run IV*").

The following are Plaintiff's allegations, which, in the context of a Rule 12(b)(1) facial challenge to the Court's subject matter jurisdiction, the Court must accept as true. *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1997). From approximately mid-July 2007 through November 2008, Defendant failed to issue NTPs within the 60-day timeframe for all of Plaintiff's parcels. Compl. ¶ ¶ 24-38. Specifically, as to Lot 7, Defendant did not issue an NTP until approximately one and one half months past the 60-day period, *id*. ¶ ¶ 24-25; as to Lot 8, Defendant did not issue an NTP until approximately five months past the 60-day period, *id*. ¶ ¶ 26-29, 36-38; as to Lot 9, Defendant did not issue an NTP until approximately four and one half months days past the 60-day period, *id*. ¶ 30; and as to Warrant 3672, Defendant did not issue an NTP until approximately nine months past the 60-day period, *id*. ¶ ¶ 32, 36-38. According to Plaintiff, on multiple occasions when past each of the parcel's 60-day notice period, Forest Service officials told Plaintiff's employees that they "could not commence OGM development activities" until the Forest Service issued an NTP. *Id*. ¶ 23. Further, Plaintiff alleges that Forest Services employees repeatedly "threatened" arrest and criminal prosecution if Plaintiff "commenced use of the surface estate in the absence of the issuance of an NTP or used the surface estate in violation of NTP provisions after [it] had been issued." *Id*. Additionally, for three days in February 2008, the Forest Service "physically block[ed]" Plaintiff from accessing its wells on Lots 7, 8, and 9. *Id*. ¶ 39.

Plaintiff brought the instant FTCA suit on December 3, 2015.[4] Compl. Plaintiff, in Counts 1 and 3-7, alleges that the Forest Service acted tortiously when it unreasonably delayed Plaintiff's ability to access its subsurface estates and exercise its OGM rights. Plaintiff further maintains that

[4] There is no dispute that Plaintiff, having filed an unanswered administrative tort claim with the Forest Service in 2009, complied with the FTCA's exhaustion requirement set forth in 28 U.S.C. § 2675. Def's. Mot. to Withdraw First Mot. to Dismiss, Doc. 31. Nor is there any contention that Plaintiff's claims are untimely.

Defendant's actions violated various federal acts and policies, and that Defendant so acted in an intentional effort to discourage the development of OGM resources in the ANF. As relief, Plaintiff seeks damages in excess of eight and one half million dollars for lost profits. In Count 2, Plaintiff alleges that in August 2007, the Forest Service struck one of Plaintiff's pipelines used to transport OGM resources from Lots 8 and 9, damaging the pipeline and causing Plaintiff to lose natural gas.

II. LEGAL STANDARDS

A. Rule 12(b)(1) Motion to Dismiss Standard

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may attack the complaint on its face or it may attack the existence of jurisdiction in fact. *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1997). Here, Defendant makes a facial attack. Doc. 36 at 5. In considering a Rule 12(b)(1) facial attack, courts must accept as true the complaint's allegations, and examine only those allegations contained in the complaint and the documents referenced therein, in the light most favorable to the plaintiff. *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000).

B. The FTCA Framework

The United States, as a sovereign, cannot be sued unless it consents to be sued. *Merando v. United States*, 517 F.3d 160, 164 (2008) (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The FTCA is a "partial abrogation" of that immunity, conferring jurisdiction upon a district court to hear allegations of tortious conduct by Government employees. *Gotha United States*, 115 F.3d 176, 179 (3d Cir. 1997). For a claim to be actionable under FTCA, it must be made: (1) against the United States, (2) for money damages, (3) for injury or loss of property, or personal injury or death, (4) caused by the negligent or wrongful act or omission of any employee of the Government (5) while acting within the scope of his office or employment, (6) under

circumstances where the United States, if a private person, would be liable to the claimaint in accordance with state tort law where the act or omission occurred. *FDIC v. Meyer*, 510 U.S. 471, 477 (1994) (citing 28 U.S.C. § 1346(b)(1)) (internal alternations omitted). The plaintiff bears the burden of demonstrating that its claims meet all of § 1346(b)(1)'s six elements. *Id.*; *Merando*, 517 F.3d at 164. Even where a plaintiff meets this burden, its claims may nevertheless be barred by one of the Act's many exceptions. *CNA v. United States*, 535 F.3d 132, 138 (3d Cir. 2008), *as amended* (Sept. 29, 2008); 28 U.S.C. § 2680. The Government bears burden of proving the applicability of any FTCA exception. *Merando*, 517 F.3d at 164. Where any of § 1346(b)(1)'s elements have not been met—and/or where an FTCA exception applies—the Government has not waived its immunity, and a court does not have subject matter jurisdiction to consider Plaintiff's claims under the FTCA. *CNA*, 535 F.3d at 149. Waivers of immunity "must be strictly construed in favor of the United States." *Ardestani v. INS*, 502 U.S. 129, 137 (1991).

III. THE COURT LACKS SUBJECT MATTER JURISDICTION

Defendant's primary contention is that Plaintiff's claims are barred by the FTCA's discretionary function exception, due care exception, and/or interference with contract rights exception. Doc. 36 at 6-24. Only after lengthy discussion does Defendant additionally argue that Plaintiff has failed to allege claims for which a private person would be liable in accordance with Pennsylvania tort law, as required by element six of § 1346(b)(1). *See id*. at 24-28. Although the parties spend a great deal of time discussing Defendant's asserted FTCA exceptions, the Court finds that this case should be disposed of on Plaintiff's failure to make out element six of § 1346(b)(1). *See, e.g.*, *FDIC*, 510 U.S. at 477; *Merando*, 517 F.3d at 164.

A. § 1346(b)(1)'s element six as applied to Plaintiff's "unreasonable interference with enjoyment of servitude; trespass" claims in Counts 1, 3-7[5]

Defendant, in its motion, asserts that Pennsylvania law defines trespass as "an unprivileged, intentional intrusion upon land in possession of another." Doc. 36 at 24 (quoting *Graham Oil Co v. BP Oil Co*., 885 F. Supp. 716, 725 (W.D. Pa. 1994) (citing *Kopka Bell Tel. Co*., 91 A.2d 232, 235 (1952)). Plaintiff, Defendant maintains, has not alleged that the Forest Service intentionally intruded upon any of its subsurface estates. *Id*. Thus, Defendant argues, Plaintiff cannot "sustain a cause of action on such grounds." Doc. 36 at 25. Further, Defendant maintains, to the extent that Plaintiff asserts "unreasonable interference with enjoyment of servitude" as a separate cause of action, such claims are barred because Pennsylvania law does not recognize this cause of action. Doc. 36 at 25. Even if "unreasonable interference with enjoyment of servitude" is a recognized claim, Defendant maintains, it is actionable only where the claimant seeks equitable or injunctive relief, not monetary damages. *Id*. (citing *Belden & Blake Corp. v. Dept. of Conservation and Natural Resources*, 969 A.2d 528, 530 (Pa. 2009)). Thus, Defendant argues, Plaintiff has not satisfied the sixth element of § 1346(b)(1), and its claims do not fall within the scope of the Government's general waiver of immunity under the FTCA. *See id*. at 24-28. Plaintiff, in response, does not define (or even mention) either alleged cause of action. *See* Doc. 44 at 37-39. Instead, Plaintiff contends that the Court "need look no further than *Chartiers*, *Belden & Blake*, or *Minard Run II*" to recognize that its claims are cognizable. *Id*. at 37. The Court examines each case in turn, before determining whether Plaintiff has met its burden of demonstrating that the alleged

[5] All seven counts in Plaintiff's Complaint are titled "unreasonable interference with enjoyment of servitude; trespass." Compl. However, in Count 2, Plaintiff alleges that the Forest Service struck Plaintiff's pipeline used to transport OGM resources from Lots 8 and 9, damaging the pipeline and causing Plaintiff to lose natural gas. Compl. ¶ 50. Viewing the allegations in the light most favorable to Plaintiff, the Court finds that Count 2 is more appropriately brought as a claim for property damage. *See, e.g.*, *Fitzpatrick v. Branoff*, 470 A.2d 521 (Pa. 1983). The Court addresses the parties' arguments as to Count 2 in Section B, *infra*.

conduct amounts to negligent or wrongful acts or omissions for which a private individual would be held liable under Pennsylvania tort law. *See FDIC*, 510 U.S. at 477 (citing 28 U.S.C. § 1346(b)(1)).

In *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (1893), a subsurface coal owner sought to enjoin the surface owner and/or his lessees from drilling through the coal estate in order to reach the oil and gas located beneath the coal. *Id*. at 597. Oil and gas had been discovered in Allegheny shortly before the filing of *Chartiers*; and the surface owner leased the oil and gas reserves beneath Plaintiff's coal to Defendants, and Defendants began to drill through Plaintiff's coal. *Id*. Plaintiff filed a bill seeking to enjoin Defendants from further drilling wells that Defendants had already begun drilling, and from drilling any new wells that would pass through the coal. *Id*. In its bill, Plaintiff averred that Defendants "had no right whatever to drill the wells,"[6] and argued that Defendant's drilling would expose the coal mine to gas leaks, thereby depreciating—if not wholly destroying—the value of the coal, and rendering coal mining too dangerous. *Id*. The lower court refused to grant an injunction as against any existing wells and as against any future wells that would pass through only a lower strata of coal. *Id*. The lower court granted an injunction, however, as to any wells not already drilled that would pass through the upper strata of Plaintiff's coal. *Id*. The lower court further ordered that Defendants obtain a court-approved insurance policy for Plaintiff for any future damages caused by Defendants "putting down and operating any wells now in process of drilling." *Id*. Unsatisfied with the scope of the injunction granted, Plaintiff appealed.

The Pennsylvania Supreme Court found that the lower court based its reasoning on the

[6] Plaintiff, in its bill, asserted that its deed to the coal estate conveyed not only the coal but also the associated mining rights and privileges, including the right to drill or otherwise open the surface estate to access the coal, and the right of ingress and egress for the purposes of drilling. *Id*. Conversely, Plaintiff asserted, the grantor-surface owner did not reserve for himself a "right, privilege, or easement" in the coal, nor any right of way through the coal from the surface to obtain any substance below. *Id*. The *Chartiers* Court thought it likely that at the time of the coal grant, the grantor was unaware that there might be another, valuable substance beneath the coal. *Id*.

ground that the oil and gas lessee had an easement by necessity through the estates above. *Id*. at 598. The Supreme Court declined to adopt this reasoning. *Id*. at 599. Instead, the Court held that "[w]hile the right of the surface owner to reach in some way his underlying strata is conceded," applying the doctrine of easement by necessity in such cases "involves too many questions affecting the rights of property, and of injury to the underlying strata to be settled by the judiciary." *Id*. Thus, the Supreme Court left it to the legislature to define the nature of this easement. *Id*. Nevertheless, the Court found that as against a surface owner, a subsurface owner "would have the right, without any express words of grant for that purpose, to go upon the surface to open a way" to access his estate, "and to occupy so much of the surface…as might be necessary to operate his estate and to remove the product thereof." *Id*. at 598. "This is a right," the Supreme Court held, "to be exercised with due regard to the owner of the surface, and its exercise will be restrained, within proper limits, by a court of equity if this becomes necessary." *Id*. Though the Supreme Court did "not fully sustain" the lower court's reasoning in granting the limited injunction, it declined to alter the terms of the injunction because Plaintiff "has not yet sustained any irreparable injury" from Defendant's wells, "and [Plaintiff] may never do so." *Id*. at 599.

In *Belden & Blake Corp. v. Dept. of Conservation and Natural Resources*, 969 A.2d 528, 530 (Pa. 2009), Plaintiff Belden & Blake owned or leased OGM estates in a State park in which the Commonwealth owned the Park's surface. 969 A.2d at 561. Belden & Blake notified the Commonwealth that it was in the "preliminary stages" of developing gas wells on its parcels, and simultaneously submitted its permit application and other documentation required by the Pennsylvania Oil and Gas Act ("POGA"). *Id*. In response, the Department of Conservation and Natural Resources ("DCNR") "sought to impose a 'coordination agreement' on Belden & Blake before allowing it access to the parcels." *Id*. The terms of the coordination agreement included

Belden & Blake posting a performance bond, and paying "stumpage fees" equivalent to double the fair market value of the timber to be removed. *Id*. Belden & Blake filed for declaratory and equitable relief, and sought to enjoin DCNR from "further interference with its rights, alleging DCNR refused it access by imposing unlawful bonds, fees, and an unnecessary right-of-way (as it already had an easement)." *Id*. at 561. DCNR did not contest that Belden & Blake had "the right to enter the surface property to access" its subsurface estate. *Id*. at 566. Instead, DCNR argued that its obligation to conserve and maintain State parks pursuant to the Pennsylvania Constitution and State environmental acts authorized it to condition surface use. *Id*. at 561, 565. In upholding the partial grant of summary judgment for Belden & Blake, the Supreme Court of Pennsylvania held that "[a] subsurface owner's rights cannot be diminished because the surface comes to be owned by the government, or any party with statutory obligations, regardless of their salutary nature." *Id*. at 567. "A 'regular' surface owner cannot unilaterally impose extra conditions on the subsurface owner beyond those that are reasonable." *Id*. When DCNR and the subsurface owner cannot agree "on the reasonableness of conditions sought, DCNR must seek redress in the appropriate judicial forum; it is not the obligation of the subsurface owner to do so." *Id*.

In *Minard Run II*, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009), Pennsylvania oil and gas companies sought to enjoin the Forest Service's implementation of a settlement agreement reached between the Forest Service, the Forest Service Employees for Environmental Ethics, and the Sierra Club. In the Agreement, the Forest Service promised to apply the National Environmental Policy Act ("NEPA") to its future analysis of drilling proposals for split estates in the ANF. *Id*. at *1. As a result, the Forest Service suspended issuing any new NTPs until the completion of a multi-year, forest-wide environmental impact study. *Id*. at *1, *11-15. Plaintiffs alleged that the Agreement and its implementation were contrary to law and procedurally deficient under the Administrative

Procedures Act ("APA"). *Id*. at *1. Defendants moved to dismiss, arguing that Plaintiffs lacked standing, and that the Agreement and its implementation did not constitute a "final agency action" as required for judicial review under the APA. *Id*. at *22 (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882 (1990); 5 U.S.C. § 704). The court in *Minard Run II* disagreed with Defendants, finding that the Agreement's implementation constituted a "fundamental 'sea change' in the manner in which the Forest Service had previously interacted with oil and gas drillers in the ANF for almost 30 years[,] by requiring it to engage in a lengthy NEPA review process that had not previously been applied." *Id*. Thus, the court held that the Agreement's implementation constituted final agency action for the purposes of the APA and was, therefore, reviewable. *Id*. In further holding that the Agreement was contrary to law, *Minard Run II* found that:

> The Forest Service does not possess the regulatory authority that it asserts relative to the processing of oil and gas drilling proposals. Consequently, its involvement in the approval process does not constitute a major federal action requiring NEPA compliance. The Weeks Act [of 1911, which established funding and procedures for acquiring privately-held property interests that later became the ANF, and which proscribed that reserved mineral rights were subject to federal control only to the extent set forth in the rules and regulations of the written deeds][7] has never been abrogated, [and] Pennsylvania common law relative to split-estates, as well as almost thirty years of cooperative interaction consistent with the dictates of *Minard Run* [*I*], circumscribe the Forest Service's authority in this area. While the Forest Service's authority is limited, it can nevertheless effectively exercise its obligation to prevent undue degradation to the surface estate through the interactive model delineated in *Minard Run* [*I*]. In addition, it retains all of the rights of a servient estate holder under Pennsylvania law, including the right to seek appropriate judicial intervention where necessary to protect its interests.

Id. at *31. Accordingly, *Minard Run II* preliminarily enjoined the Forest Service from "requiring

[7] Pursuant to the Weeks Act, estates in the ANF are either reserved or outstanding. *Id*. at *3. Reserved estates were created when the fee owner transferred the surface estate to the Government but retained the subsurface mineral estate. *Id*. Outstanding estates were created when the surface owner and the mineral estate were severed at some point before the surface estate was transferred to the Government. *Id*. at *4. Prior to the events surrounding the Settlement Agreement, the Forest Service took the position that reserved mineral rights were subject only to the rules and regulations "in effect at the time of the mineral reservation [that] were incorporated as part of the deed by which the United States acquired the surface." *Id*. at *7 (quoting the 1990 Forest Service Manual, Ch. 2830). As to outstanding mineral estates, the Forest Service acknowledged that it "does not have the authority to deny the exercise of a mineral reservation or outstanding mineral rights." *Id*. (quoting the 1990 Forest Service Manual, Ch. 2830).

the preparation of a NEPA document as a precondition to the exercise of private oil and gas rights in the ANF," and from enforcing a forest-wide drilling ban. *Id*. at *34. *Minard Run II* further ordered that the Forest Service return to processing drilling proposals "consistent with the procedures set forth in" *Minard Run I*. *Id*.

Three years after this preliminary injunction was issued, Plaintiffs in *Minard Run II* brought a motion for contempt, submitting to the court records purporting to show that the Forest Service was not processing NTPs within the 60-day timeframe. 2012 WL 994641, *3 (W.D. Pa. Mar. 23, 2012). In finding that Plaintiffs had not met their burden of demonstrating by clear and convincing evidence that the Forest Service was, in fact, failing to process NTPs within the 60 days contemplated by *Minard Run I*,[8] the court noted:

> We have previously cautioned that forbearance on the part of the mineral owners beyond the initial 60-day period, while not legally required, may be practically advisable in order to exercise appropriate 'due regard' for the Forest Service's estate. We also stress, however, that the Forest Service's processing of drilling proposals consistent with the *Minard Run* [*I*] paradigm and our directive in *Minard Run II* should not be viewed by the Forest Service as merely an aspirational goal. It is required. Unreasonable delay by the Forest Service beyond the 60–day period increases the likelihood that mineral owners will simply choose, as would be their right, to commence drilling activities prior to the completion of the interactive process. As a result, in the absence of filing its own lawsuit, the Forest Service could lose its ability, with respect to any given well package, to supply meaningful input concerning issues it considers important to preserving the integrity of its servient estate. As has always been the case, the successful resolution of drilling-related disputes on an informal basis and the avoidance of future litigation depend entirely on the good faith and cooperative efforts of both parties.

2012 WL 994641, at *7 (W.D. Pa. Mar. 23, 2012).

Before determining whether Plaintiff, in its Complaint and in relying upon these cases, has

[8] In its Order, the *Minard Run II* Court held that the 60-day "clock" does not begin "until all of the information required by *Minard Run I* has been supplied" by the OGM owner. *Id*. at *6. In its response to the motion and during the evidentiary hearing, the Forest Service provided the Court with "some credible evidence" that mineral owners had submitted initially-incomplete proposals, but nevertheless maintained that that date of submission started the 60-day clock. Id. Thus, the Court found evidence that "the mineral owners have, in various particulars, contributed to the delay in the issuance of NTPs." *Id*.

met its burden of demonstrating that a private individual would be held liable for money damages under Pennsylvania tort law—and, therefore, that Defendant has waived its immunity under the FTCA—the Court must identify the challenged conduct. *See S.R.P. ex rel. Abbunabba v. United States*, 676 F.3d 329, 332 (3d Cir. 2012).[9] Plaintiff, in its Complaint, seeks damages for lost profits resulting from the following allegedly wrongful conduct committed by the Forest Service: (1) failure to issue NTPs within the 60-day timeframe, and, therefore, failure to acknowledge Plaintiff's right to timely conduct drilling operations pursuant to POGA; (2) failure to timely remove timber from Lot 7; (3) refusing to provide reasonably-priced invoices for the sale of timber on Lot 8 and Warrant 3672, refusing to timely remove this timber, and to compensate Plaintiff for its removal of this timber; (4) refusing to permit Plaintiff to mine or use stone below the surface of Warrant 3672; (5) repeatedly threatening arrest and prosecution should Plaintiff remove any of the timber itself or otherwise begin drilling operations before the Forest Service issued an NTP; (6) blocking Plaintiff for one day from being able to travel on a well access road to Lots 8 and 9; and (7) physically blocking Plaintiff from accessing Plaintiff's wells on Lots 7, 8, and 9, and informing Plaintiff that it was doing so because Plaintiff had not yet paid road use fees. Thus, Plaintiff alleges that the Forest Service unreasonably delayed access to Plaintiff's OGM estate; and, as a result, Plaintiff lost profits.

The Court finds that none of the cases on which Plaintiff relies demonstrate that Pennsylvania recognizes a cause of action for money damages sounding in tort where a surface owner delays access to—but does not destroy (or even damage)—a subsurface OGM estate.

[9] Plaintiff's briefing is not a model of clarity with regard to the precise nature of Plaintiff's claims. *Compare, e.g.*, Compl. ¶ ¶ 8-48 *with id*. ¶ ¶ 57-61 (apparently alleging in Counts 4 and 5 the damages associated with certain wrongful conduct alleged in Count 1 as to Lot 8 and Warrant 3672, respectively); *compare id*. ¶ ¶ 8-48 *with id*. ¶ ¶ 62-65 (apparently alleging in Count 6 damages for conduct that occurred on the first of three days of continuous, wrongful conduct alleged in Count 1); *compare* ¶ ¶ 8-48 *with id*. ¶ ¶ 66-70 (apparently seeking in Count 7 additional damages associated with the wrongful conduct alleged in Count 1 as to Lot 9); *see also* Pl's. Opp., Doc. 44 at 37-39 (arguing that Plaintiff has a cognizable claim without naming or defining what that claim is).

Belden & Blake, *Chartiers*, and *Minard Run II* involved only the grant or denial of injunctive and/or declaratory relief.[10] As applied to the instant case, *Belden & Blake* and *Chartiers* establish that: the Government, as surface owner, enjoys exactly the same rights and privileges as does any private surface owner, and, therefore, that it will be enjoined from imposing any unreasonable conditions on surface use; and that a subsurface owner has the right to go upon the surface to open a way by which to access and remove subsurface resources, but, in doing so, he must show due regard to the surface estate. Similarly, *Minard Run II* is relevant only to provide context: in the ANF, the respective rights of the estate owners require that, consistent with *Minard Run I*, OGM owners submit drilling proposals no fewer than 60 days in advance of drilling in order to enable the Forest Service to market its merchantable timber; and that during 2007 and 2008, the Forest Service departed from its long-established compliance with the *Minard Run I* procedures. Thus, these cases do not recognize what Plaintiff has styled as the tort of "unreasonable interference with enjoyment of servitude," nor do they provide authority for recovering money damages.

Indeed, in categorizing Defendant's allegedly wrongful conduct, Plaintiff swivels from asserting the amorphous "unreasonable interference with enjoyment of servitude," to the established, narrow causes of action of trespass, nuisance, and interference with easement. *Comapre* Compl. ¶ ¶ 8-48, 53-70 (alleging counts of "unreasonable interference with enjoyment of servitude; trespass") *with* Pl's. Opp., Doc. 44 at 38 (noting that "in *Washcak v. Moffat*, 109 A.2d 310, 315 (Pa. 1954), the Pennsylvania Supreme Court adopted the Restatement (First) of Torts § 822 for non-trespassory invasions of another's interest in the private use and enjoyment of land," suggesting that Plaintiff is asserting nuisance claims) *and id*. at 37 (noting that "[f]rom the earliest

[10] In its complaint, Plaintiff in *Belden & Blake* additionally alleged that DCNR's "impairment of private property rights" constituted a taking without just compensation. 969 A.2d 528, 572 n.3. The lower court, however, granted summary judgment in favor of the Commonwealth, which Belden & Blake did not appeal. *See id*. Thus, only the counts for declaratory and equitable relief were before the Supreme Court. *Id*.

days, easements over real property have been a prolific source of litigation," suggesting that Plaintiff asserting interference with easement claims) (quoting *Minard Run I*, at *12).

As for Plaintiff's trespass claims, they cannot succeed. Plaintiff does not allege that the Forest Service entered or intruded upon its land, or that it caused another person or thing to do so; thus, Plaintiff has not stated a claim for trespass. *See Liberty Place Retail Assoc., L.P. v. Israelite School of Universal Practical Knowledge*, 102 A.3d 501, 506 (Pa. 2014) (citing Restatement (Second) of Torts § 158 (1965)).

Similarly, any asserted nuisance claims must fail. Plaintiff does not allege that the Forest Service used its own property in a way that materially annoyed, inconvenienced, or otherwise hurt Plaintiff or Plaintiff's subsurface resources; thus, Plaintiff has not stated a claim for nuisance. *See Waschak*, 109 A.2d at 314 (citing *Kramer v. Pittsburgh Coal Co.*, 19 A.2d 362, 363 (Pa. 1941)).

Plaintiff comes closest to stating cognizable claims for interference with easement. "An easement, once acquired, may not be restricted unreasonably by the possessor of the land subject to the easement." *Palmer v. Soloe*, 601 A.2d 1250, 1252 (Pa. Super. 1992). In considering whether a servient landowner has unreasonably interfered with an easement, the first step is to define the scope and nature of the easement. *See, e.g.*, *id.*; *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Super. 1997). Here, Plaintiff fails to do so. *See* Compl. ¶ 13 ("as the owner of the rights to develop the OGM resources in the Parcels, [Plaintiff] had an easement for the use of the surface estate that is dominant to the surface estate"); *Cf. Chartiers*, 25 A. at 599 (declining to adopt the lower court's finding that subsurface owner had an easement by necessity through the estates above). Regardless of the nature of the easement, however, a servient landowner "may not take actions that 'completely deny' use of the easement." *Palmer*, 601 A.2d at 1250 (quoting *Taylor v. Heffner*, 58 A.2d 450, 454 (Pa. 1948). Defendant, in its motion, asserts that the typical interference with

easement case involves a servient landowner physically relocating or otherwise erecting a barrier to an easement, and argues that "threats" of arrest and criminal prosecution cannot constitute unreasonable interference. *See* Doc. 36 at 25-28 (citing *Coxe v. Hazelton City Authority*, 207 A.2d 827 (Pa. 1965); *Cochran Coal Co. v. Municipal Management Co.*, 110 A.2d 345 (Pa. 1955)). While Defendant's categorization of a typical interference with easement case is correct, the Court does not find a meaningful distinction between erecting a physical barrier and the Government's threatening arrest and prosecution—both effectively serve as a complete denial of access to one's land. *See Palmer*, 601 A.2d at 1250. Further, in at least Count 3, Plaintiff alleges that the Forest Service physically blocked Plaintiff from accessing Lots 8 and 9. Compl. ¶ 54.

However, in Pennsylvania, "the general rule of law [is] that economic losses may not be recovered in tort absent any physical injury or property damage." *Gen. Pub. Utilities v. Glass Kitchens of Lancaster, Inc.*, 542 A.2d 567, 570 (Pa. 1988); *see also Spivack v. Berks Ridge Corp.*, 402 Pa. Super. 73, 78 (1991) ("economic losses may not be recovered in tort (negligence) absent physical injury or property damage"); *Aikens v. Baltimore & Ohio R.R. Co.*, 348 Pa. Super. 17, 22 (1985) ("no cause of action exists for negligence that causes only economic loss"); *Matakitis v. Woodmansee*, 667 A.2d 228, 233 (Pa. Super. 1995) (in interference with easement case, "the measure of damages for injury to real property is the cost of repairs where that injury is reparable unless such cost is equal to or exceeds the value of the injured property[, and,] where the injury to the property is permanent, the measure of the damages becomes the decrease in the fair market value of the property") (internal quotation omitted). Here, Plaintiff does not allege any damage to its OGM resources, let alone that any damage was caused by the Forest Service.

Plaintiff's supplied cases do not suggest a departure from the economic loss doctrine. In other words, Plaintiff's cases do not demonstrate that in Pennsylvania, a tort claim is cognizable

where a surface owner has delayed access to, but has not damaged, a subsurface estate. In fact, *Chartiers* suggests that any surface owner liability would be conditioned on a defendant having actually drilled into plaintiff's estate, damaging—if not destroying entirely—the subsurface resources. 25 A. 597, 599 (Pa. 1893) (leaving in place the lower court's refusal to enjoin Defendant as against any existing wells and any future wells that would pass through only the lower strata of Plaintiff's coal because Plaintiff had not "sustained any irreparable injury," and suggesting that if Plaintiff later suffered such injury, it "has its remedy at law"); *see also Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558, 565 (Pa. 1982) (noting that *Chartiers* "leaves the reader with certain definite impressions: [t]he *drilling* of any well constitutes interference[; and i]f the parties fail to agree on a suitable [well] location," they can seek such a determination in a court of equity) (emphasis added).

In the absence of allegations of property damage, and in seeking damages for lost profits, Plaintiff seeks damages that sound, if at all, in contract and not in tort.[11] *See, e.g., Allegheny Enterprises, Inc. v. J-W Operating Co.*, 2014 WL 866478, *9-10 (M.D. Pa. Mar. 5, 2014) ("predict[ing] that the Pennsylvania Supreme Court would hold that an oil and gas lessee must compensate the owner of an above-located coal estate for otherwise useful coal" that was rendered unrecoverable as a result of defendant's drilling, and ultimately awarding such damages based upon the terms of parties' contracts). In an FTCA action, "[t]he United States shall be liable," if at all, "in the same manner and to the same extent as a private individual under like circumstances" in accordance with state tort law. 28 U.S.C. § 2674; *Molzof v. United States*, 502 U.S. 301, 305

[11] In Plaintiff's 2007 suit against Defendant (and others), Judge Lancaster noted that the Forest Service "acknowledge[d] that both of [Plaintiff's] Little Tucker Act counts could be based upon the Constitutional Takings Clause…[W]ithout any statement as to the ultimate merit of such a claim," Judge Lancaster continued, "this would be an alternative basis on which to allow [Plaintiff's] Little Tucker Act claims to move past the motion to dismiss stage." *Duhring Resource Co. v. U.S. Forest Service*, No. 1:07-cv-314, Doc. 109 at 22 (W.D. Pa. filed Nov. 2, 2007).

(1992). Plaintiff has not demonstrated that a private individual would be liable for the claims alleged pursuant to Pennsylvania tort law. Accordingly, Plaintiff has not met its burden of demonstrating that Defendant has waived its sovereign immunity pursuant to § 1346(b)(1), and, therefore, the Court lacks subject matter jurisdiction to consider Plaintiff's claims under the FTCA. *See FDIC*, 510 U.S. at 477 (citing 28 U.S.C. § 1346(b)(1)); *see also In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 362 (3d Cir. 2001), *as amended* (Oct. 10, 2001) ("[A] government's waiver of its sovereign immunity must be narrowly construed."); *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1021 (3d Cir. 1997) ("A waiver of immunity must be unequivocally expressed and is construed strictly in favor of the sovereign."). Thus, Counts 1 and 3-7 are dismissed.

Having found that Plaintiff did not meet its burden of demonstrating that its claims in Counts 1 and 3-7 fall within the FTCA's general waiver of immunity, the Court need not address Defendant's arguments that these claims are barred by the FTCA's discretionary function exception, due care exception, and interference with contract rights exception. Doc. 36 at 6-24.[12]

B. The FTCA's contractor exclusion as applied to Plaintiff's claim

In Count 2, Plaintiff alleges that in August 2007, the Forest Service, while making repairs to a road it maintains and that Plaintiff uses to transport OGM resources from Lots 8 and 9, repeatedly struck one of Plaintiff's pipelines, resulting in damage to the pipeline and a loss of natural gas. Compl. ¶ 50. Plaintiff further alleges that on September 5, 2007, it "requested reimbursement" from the Forest Service for the costs it incurred repairing its pipeline, and that the

[12] The Court further notes that given the parties extensive briefing on the issue, both apparently consider the instant case to be a part of the nearly 10 cases surrounding the *Minard Run II* jurisprudence. *See, e.g.*, Pl's. Opp., Doc. 44 at 1-2, 4-10; Def's. Mot., Doc. 36 at 18-30. For the reasons stated above, however, the Court finds this case materially different from those cases. In the earlier cases, all of which are now closed, plaintiffs sought injunctive and/or declaratory relief under the Administrative Procedures Act and various environmental acts following the Forest Service's proposed 2007 Forest Plan, and the 2008 Settlement Agreement, both of which applied NEPA to the processing of drilling proposals. *See* Doc. 44 at 1 (citing cases).

Forest Service "refused." *Id*. ¶ 51. Defendant, in its motion, maintains that the September 5, 2007 "request" to which Plaintiff refers is a letter authored by Plaintiff that "acknowledges that the damage was caused by a [Government] contractor." Doc. 36 at 29 (citing Stewart Letter, Def. Ex. E, Doc. 36-5).[13] The FTCA, Defendant asserts, contains a "contractor exclusion," which "makes clear that the United States cannot be held liable for the tortious conduct of contractors or employees of contractors." *Id*. at 28 (citing 28 U.S.C. § 2671; *Logue v. United States*, 412 U.S. 521, 528 (1973); *Norman v. United States*, 111 F.3d 356, 357 (3d Cir. 1997)). Thus, Defendant argues, Count 2 must be dismiss for lack of subject matter jurisdiction. Doc. 36 at 28-29. Plaintiff, in its opposition, concedes the existence of a contractor exclusion under the FTCA, but contends that Defendant's argument is impermissibly "fact-based." *See* Doc. 44 at 40. In considering a facial challenge to the Court's subject matter jurisdiction, Plaintiff asserts, the Court must accept as true Plaintiff's allegations; and Plaintiff alleged that the conduct at issue was caused by "the actions of [Forest Service] officials and/or employees." *Id*. at 40 (quoting Compl. ¶ 50). Further, Plaintiff asserts, a contractor can be considered a Government employee for the purposes of the FTCA where certain conditions are met. *Id*. at 39 (citing *Norman*, 111 F.3d at 357). Unlike in *Norman*, Plaintiff asserts, Defendant here has not produced any evidence to demonstrate that the contractor to which Plaintiff referred in its letter should *not* be considered an employee for the purposes of the FTCA. *Id*. at 40. Thus, Plaintiff argues, only after discovery should the Court consider dismissing Count 2. *Id*. at 40. Defendant, in response, asserts that under § 1346(b)(1), it is the plaintiff—and not the defendant—who bears the burden of demonstrating that the damage alleged was caused by a Government employee and not a contractor. Def's. Reply, Doc. 47 at 14-

[13] In its letter, Plaintiff informed the Forest Service that Plaintiff "was invited to attend a meeting…with *your contractor* Steve Dyne concerning work the Forest Service had *contracted* Mr. Dyne to perform on Forest Roads 148 and 162…[and] Mr. Dyne struck several pipelines during the court of the road improvement work." Doc. 36 at 29 (quoting 36-5 at 2) (emphasis and alterations in Def's. Motion).

15 (citing *Baer v. United States*, 722 F.3d 168 (3d Cir. 2013)). By incorporating into its Complaint its September 5, 2007 letter, Defendant maintains, Plaintiff has "made a party admission that the person who caused the damage was a contractor." *Id*. at 15. Though Defendant's motion is a facial challenge, Defendant contends, Plaintiff did not plead that the referenced "contractor's performance was controlled to such an extent that he is an employee of the Government for purposes of the FTCA." *Id*. Thus, Defendant argues, Plaintiff has failed to meet its burden under § 1346(b)(1). *Id*.

"[I]t is well understood that the government's activities are not performed exclusively by the government's employees and that independent contractors and subcontractors conduct a broad array of functions on the government's behalf." *Norman v. United States*, 111 F.3d 356, 358 (3d Cir. 1997) (quoting *Berkman v. United States*, 957 F.2d 108 (4th Cir. 1992)). Section § 2671 of the FTCA provides that for the purposes of liability under § 1346(b)(1), "[e]mployee of the government" does not include any contractor with the United States. *Norman*, 111 F.3d at 357 (noting that the FTCA contains "an independent-contractor exemption"). "By expressly waiving immunity for the tortious conduct of [Government] employees and only [Government] employees, the FTCA requires a more focused approach that requires the courts to determine the relationship to the United States of the actor who negligence might be imputed to the government under state law." *Berkman*, 957 F.2d at 112-113.

While it appears that the Third Circuit has yet to address the issue,[14] the Fourth and Fifth Circuits hold that for the purposes of the FTCA, it is the plaintiff who bears the burden of

[14] Defendant, in its Reply, relies upon *Baer v. United States*, 722 F.3d 168 (3d Cir. 2013) for its argument. *Baer*, however, involved only the FTCA's discretionary function exception, and, citing *Merando*, 517 F.3d at 164, noted that plaintiff "bears the burden of demonstrating that [its] claims fall within the scope of the FTCA's waiver of government immunity," while the government "has the burden of proving the applicability of the discretionary function exception." *Id*. at 172.

establishing that the alleged tortfeasor should be considered a government employee and not an independent contractor for the purposes of the FTCA. *See, e.g.*, *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (under the contractor exception, "plaintiff bears the burden of persuasion if subject matter jurisdiction is challenged under Rule 12(b)(1)"); *Mocklin v. Orleans Levee Dist.*, 690 F. Supp. 527, 529 (E.D. La. 1988), aff'd, 877 F.2d 427 (5th Cir. 1989) (plaintiff bears "the burden of proving that the allegedly negligent contractor was an employee of the Government, not an independent contractor"); *see also The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 Fordham L. Rev. 2859, 2934 (1999) (citing cases and noting that "[m]ost courts have held that the plaintiff bears the burden of proving that a party is an agent or employee of the government" for the purposes of the contractor exception). Further, Plaintiff, in its Complaint, specifically references a letter in which it refers to the alleged tortfeasor as the Forest Service's "contractor," without additionally alleging that this contractor was controlled and supervised by Defendant such that he should be considered an employee for the purposes of the FTCA. *See Norman*, 111 F.3d at 357 (3d Cir. 1997). Neither has Plaintiff requested jurisdictional discovery. *See* Doc. 44 at 39-40. Accordingly, Count 2 is dismissed.

IV. Conclusion

Having evaluated each of Plaintiff's claims under the Federal Tort Claims Act, the Court ORDERS as follows:

(1) The Court lacks subject matter jurisdiction to consider Plaintiff's claims alleged in Counts 1 and 3 through 7 of the Complaint. These claims are hereby DISMISSED;

(2) The Court lacks subject matter jurisdiction to consider Plaintiff's claims alleged in Count 2 of the Complaint. This claim is hereby DISMISSED;

(3) Defendant's Motion to Dismiss [36] is GRANTED;

(4) This case is closed;

(5) The clerk shall send copies of this Order to the parties.

Dated this 14th day of December, 2017.

Barbara Jacobs Rothstein
U.S. District Court Judge