



No. 11-1157

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES MARTIN, IN HIS OFFICIAL CAPACITY AS DIRECTOR,
OFFICE OF OIL AND GAS, WEST VIRGINIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION;

and

EQT PRODUCTION COMPANY,

Petitioners/Respondents Below,

vs.:

Docket No. 11-1157

MATTHEW L. HAMBLET,

Respondent/Petitioner Below,

and

WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION,

Respondent/Intervenor on Appeal.

FINAL BRIEF
OF RESPONDENT/INTERVENOR
WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION

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I. SUMMARY OF ARGUMENT

This brief is filed pursuant to the Court's order allowing the Intervenor/Respondent West Virginia Surface Owners' Rights Organization (hereinafter "WVSORO") to respond to the Amicus Curiae brief of the West Virginia Oil and Natural Gas Association ("WVONGA"). The Independent Oil and Gas Association ("IOGA") has also filed an Amicus Curiae brief; and this brief will respond to that brief also although the IOGA brief was not filed with the motion, as is required by the rule and presumed by this Court's order, and was instead filed on December 21, 2011, when EQT and the State's reply briefs were due. The points raised in those amicus briefs were intertwined with and supported by points made in the reply briefs of the State and EQT in response to the Intervenor/Respondent WVSORO's initial brief stressing the right to a pre-decisional hearing; and this brief will include replies to the supporting points made in those briefs of the State and EQT. This being a brief in the nature of a reply brief, the substance of the arguments will only be summarized in the headings of the sections as set out in the Table of Contents.

II. ARGUMENT

A. Surface owners retain a sufficient interest to be entitled to the constitutional due process protections of a pre-decisional evidentiary hearing and right to appeal of the State's action to issue, condition or deny a permit to drill an oil or gas well even though some of the rights to the use of their surface now belong to the mineral owner.

The two amicus briefs as well as the briefs of EQT and the State take the position that surface owners should have no right to a hearing upon, or an appeal from, the State's issuing, conditioning or denial of a permit to drill an oil or gas well because the State has no authority to determine or enforce the common law relationship between the mineral owner and the surface owner arising out of the severance of the estates. WVSORO agrees that the State has no

authority for that purpose. If the driller's permit application proposed a well access road that bisects a future home lot into two unusably small parcels instead of going around the edge, and if the driller's proposed well pad and impoundment site are in the surface owner's best quality, flattest meadow or another future home site instead of overgrown acreage next to it, the State can and will do nothing about it. The code is very clear. The driller's permit can only be denied or conditioned by the State permitting process,

[I]f the director determines that:

- (1) The proposed well work will constitute a hazard to the safety of persons; or
- (2) The plan for soil erosion and sediment control is not adequate or effective; or
- (3) Damage would occur to publicly owned lands or resources; or
- (4) The proposed well work fails to protect fresh water sources or supplies.

W.Va. Code §22-6-11.

The surface owner can comment on the permit. W.Va. Code 22-6-10(a). And that code section says that the surface owner can even comment "as to the location" of the well work -- but that is just a tease. As quoted just above, the drillers chosen locations for the road and well pad could only be moved by the State if the driller's proposed locations caused a safety problem, a soil erosion or sediment control problem, a fresh water source or supply problem, or would damage publicly owned lands.¹ No matter how clearly the driller's choice of proposed locations

¹The amicus brief of IOGA at page 21 asserts that, "[t]he 'deprivation' of a surface owner's property rights, if there is any, would be temporary. The well in question would be drilled, gas produced and the permit released." This is wrong in several ways. The permit in question is to drill the well and not produce the well, so the "permit" is released and the well continues to produce. And gas wells produce for decades if not generations, and the well site and access road are there for all of that time. Further, lax bonding and plugging enforcement results in 13,000 unplugged oil and gas wells in West Virginia in addition to the 55,000 active wells cited by IOGA at page 23 of its brief.

would be more than a reasonable use of the surface owner's estate when balanced against the surface owner's future uses and so on, the permit will be issued by the State. To oversimplify somewhat, the State's process is about how the well sites and access roads are constructed and how gas wells are drilled, and not about the surface owners' additional interest in where they are constructed and drilled.

However, as stated in the Amicus brief of WVONGA, "Under Chapter 22 of the Code, the D.E.P. was given the right to *comprehensively regulate numerous* aspects of drilling, reclamation, water usage, production and plugging of wells . . . [Emphasis added]." WVONGA Amicus Curiae Brief, p. 5. These "how" issues, and not just the driller's choice of locations, have a serious risk of erroneous determination and have a major effect on the property rights of the surface owners.

It is true that, unless otherwise specifically provided in the deed, the mineral owner has the right to reasonable use² of the surface in order to explore for and produce the minerals – so long as the surface use was broadly within the contemplation of the parties (See Section G of this brief). But the severance does not deprive the surface owner of all interests in the surface. The fact that the mineral owner has the right to reasonable use, means that the mineral owner *only* has the right to reasonable use. Any interest in the property that would be affected by use beyond that which is reasonable by the mineral owner still belongs to the surface owner! The State's brief says, "Surface owners are missing a few 'sticks' of the anecdotal 'bundle' of property

²Note that it is unclear whether this Court's test to balance the reasonably necessary rights of the mineral and surface interests is "fairly necessary", "due regard" or "accommodation". See Smith, *Disturbing Surface Rights: What Does 'Reasonably Necessary' Mean in West Virginia?*, 85 W.Va. Law Review 817 (). That question has not been raised by any party in the instant case and WVSORO urges the Court not to address it in the decision in the instant case.

rights. And the sticks that are missing are the ones that would invoke due process if the surface owners still had them in their possession.” Surface owners are indeed missing a few sticks, but they still have lots of sticks left, and they are important sticks. They are more than sufficient private interests to give rise to due process rights to a hearing on, and appeal of, the State’s decision to issue, condition or deny a permit to place a well pad and access road, and drill a gas well into and under, the surface owner’s land as set out in WVSORO’s initial brief as Intervenor/Respondent. And this Court should so hold.

B. Surface owners have a sufficient interest to be entitled to the constitutional due process protections of a pre-decisional evidentiary hearing and right to appeal because the state action in issuing, conditioning or denying a permit designed to protect the State’s environment and therefore the State’s citizens so directly affects their individual private interests.

Even if surface owners had no common law surface use private ownership interests left and were completely prostrate to the whims of the driller, surface owners have environmental interests. It is after all the state Department of Environmental Protection that is issuing the permit. The very first of the Legislature’s findings in the statute establishing the Department of Environmental Protection states that the government, “[H]as a duty to provide and maintain a healthful environment for our citizens”. W. Va. Code §22-1-1-(a)(1). Citizens are citizens whether they own property interests in land or not. The Department of Environmental Protection’s duties that are the subject of the instant case are whether to deny or condition the permit if, among other things, "(1) The proposed well work will constitute a hazard to the safety of persons; or (2) The plan for soil erosion and sediment control is not adequate or effective; . . . or (4) The proposed well work fails to protect fresh water sources or supplies." W.Va. Code §22-6-11.

These are matters that are to protect citizens generally. If the plan for soil erosion and sediment control is not adequate or effective, top soil will erode and become the sediment that fills up the streams with harm to the environment of the stream. And a sediment-filled stream is less able to carry away water during heavy rains resulting in or exacerbating flooding. But where does that sediment come from? It comes from the surface owner lands! It can come from roads that are too steep to make it possible to prevent erosion because the State inspector erroneously waived the maximum steepness requirement of the Soil Erosion and Sediment Control Manual. And sometimes the sediment does not even make it to the stream, it just fills in the surface owner's field below. A well pad that the state permit does not require to be properly designed or reclaimed does the same thing.

Similarly a state permit that does not require proper or deep enough layers of casing and cementing of the gas well bore hole through ground water "fails to . . . protect fresh water sources or supplies". Contamination in ground water will, over time, spread over large distances and harm the water wells and springs belonging to many citizen surface owners who rely heavily on them in rural West Virginia. And the surface owners of the lands where the gas wells are actually drilled through the water aquifer are the most immediately and seriously affected. An erroneous decision by the State on the requirements for the casing and cementing of the bore hole to require can harm the health of the surface owner where the well is drilled. This is surely enough interest to require due process hearing and appeals -- even if the surface user was only a renter. And the monetary value of a rural home site or land will be seriously decreased if suddenly it has no un-contaminated groundwater for a water well.

These are environmental concerns of citizens the D.E.P. is supposed to be protecting through the permit process. And the surface owner where the gas well is located is the most concerned and directly affected citizen – enough to have a hearing and appeal of the issuance, conditioning or denial of the permit.

It may also be common law unreasonable use of the surface for the driller to propose and cause these environmental “how” problems. But that overlap does not erase the surface owner's interest in the State permitting process as the most affected citizen. The State does not have to get involved in the “how” questions, but if it does, it is state action directly affecting the private interests of surface owners.

The surface owner may also have a right to get a temporary restraining order based on common law unreasonable use. That assumes the surface owner would have enough time and money to hire a lawyer and get a temporary restraining order and post a bond the driller will demand for the potential lost profits. But that does not diminish the fact that the State has undertaken to regulate the environment aspects of oil and gas well drilling to protect its citizens, and the State's action in doing so affects the surface owner in a way and to a degree that requires the due process protections of a hearing and appeal. ³

³EQT asserts on Page 2 of its brief in reply to Intervenor/Respondent WVSORO's first brief that this case is a blatant attempt to advance its failed legislative agenda through the judiciary. That is incorrect. No bills drafted by WVSORO for introduction in the Legislature in the last four years requested a hearing on the issuance, conditioning or denial of a driller's permit. Such a hearing is something that would happen only after the driller had already had the plat for its proposed well location surveyed, had its reclamation plan created, had its casing and cementing plan prepared etc., and included all of that in its application for a “well work” permit upon which the surface owners now seek a hearing and appeal. Surface owners believe they have better chance of having drillers move well sites and access roads if they can negotiate with the drillers before the drillers go to the expense of preparing all of those plats and plans for the permit application. So instead WVSORO drafted bills that have included provisions to require

C. The State's action in issuing or failing to condition a permit can have a direct effect on surface owners' private litigation over reasonable use of the surface.

As noted quickly in WVSORO's initial brief, Syllabus Point 9, of *In re Flood Litigation*, 607 S.E.2d 863, 216 W.Va. 534 (2004) states, "Compliance of a [mineral] landowner in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations may be evidence in any cause of action issuing against the landowner for negligence or unreasonable use of the landowner's land if the injury complained of was the sort the regulations were intended to prevent. . ." While the State action on the permit would not give rise to a presumption in favor of the driller, evidence of the State's decisions is powerful evidence before a jury. This is another way in which the erroneous decision made in the State's issuance, conditioning or denial of a permit has a direct effect on the private property rights of surface owners. The surface owner should have due process rights in a decision that is admissible in a civil action by the surface owner based on the surface owner's common law cause of action.

the driller to approach the surface owner before starting to prepare the permit application. We wanted the drillers to have incentives to negotiate the reasonable use issues of whether to put the access road and well pad on future home sites and the most valuable pastures etc. earlier – before the permit application process even begins. The bills WVSORO has drafted have included provisions to require pre-permit application mediation of location etc. issues, or the posting of an extra bond if the driller and surface owner cannot sign a surface use agreement, etc. That is very different than WVSORO's position in the instant case that they have constitutional due process in the State decisions on environmental/permit application issues. Most importantly, the appeal of state action on the permit can only be on grounds that are generally environmental "how" issues: whether "(1) The proposed well work will constitute a hazard to the safety of persons; or (2) The plan for soil erosion and sediment control is not adequate or effective; or (3) Damage would occur to publicly owned lands or resources; or (4) The proposed well work fails to protect fresh water sources or supplies." W.Va. Code §22-6-11.

D. The fact that surface owners might have a private cause of action in court does not diminish surface owners' interest in having a hearing on, and appeal from, the State's decision to issue or condition a permit, but may instead help establish the surface owner's right.

The briefs of WVONGA, IOGA, EQT and the State all take the position that surface owners should have no right to a hearing or appeal of the issuance, conditioning or denial by the State of a permit to the driller's permit because of the mineral severance that leaves surface owners only the option to file their own law suits in a civil court. The same was true in *Snyder v. Callaghan*, 168 W.Va. 265, 284 S.E.2d 241(W.V.1981) and that did not deter this Court from granting the citizens the right to a hearing in the *Snyder* case. *Snyder* specifically noted, "The obstruction or diversion of the natural watercourse or the introduction into it of sediment, sludge, refuse or other materials which corrupt the quality of the water by upper riparian owners or users constitutes an infringement of the lower riparian owner's property right, which may be enjoined or give rise to a cause of action for damages." *Snyder* at p. 246 (citations omitted).⁴ It would seem from that language that the reverse might well be true. It is the fact that the surface owner has that common law right that in fact gives the surface owner the property interest that *Snyder* relied upon to give the citizens in *Snyder* the private interest necessary for the due process rights ordered.

And WVSORO agrees with Hamblet at page 20 of his initial brief that the availability of injunctive relief and common law remedies for damage cannot alter the constitutional analysis.

⁴This quotation from *Snyder* also establishes that EQT is wrong in its brief when it says "This makes clear that the certification granted a right to the upper riparian user that did not exist prior to the certification." EQT brief in reply to Intervenor/WVSORO's initial brief, page 9. The citizens groups riparian rights existed before the statutory process.

Post deprivation remedies are generally irrelevant in analyzing the constitutional sufficiency of State procedure. *Clark v. Kansas City, Missouri School Dist.*, 375 F.3d, 702(8th Cir., 2004).

E. The process giving rise to the *Turley* decision was very different so it is inapplicable, and the arguments for which it is cited are flawed.

The respondents cite to the case of *Turley v Flag-Redfern Oil Co.*, 782 P.2d 130 (Okla. 1989) in support of their argument that West Virginia surface owners do not have a constitutionally-based due process right to a predecisional hearing on, and an appeal of, a decision of the State permitting the construction of an access road and well site, and the drilling of an oil or gas well.

Turley, however, is entirely inapposite to the instant case. Notably, *Dulaney v Oklahoma State Dept. of Health*, 868P.2d 676 (Okla. 1993), cited by WVSORO in its initial brief, held that even neighboring surface owners *do* have a right to a predecisional hearing on permits.

Importantly, the *Turley* case is only about Oklahoma's statutory the well spacing, pooling and unitization process. This process assures that wells are not drilled too closely together, so that reservoir pressure is not exhausted too quickly resulting in less total gas production from the reservoir. "Excessive drilling is wasteful, both in terms of the cost of drilling unnecessary wells (economic waste) and in terms of unnecessary and undesirable dissipation of native reservoir energy resulting in loss of otherwise producible hydrocarbons (physical waste)." Howard R. Williams & Charles J. Meyers, *Oil and Gas Law*, Matthew Bender, "Pooling and Unitization" §905.1(1). The well spacing, pooling and unitization process also deals with the flip side of that issue. If the wells are not drilled far enough apart, they can leave spaces in between that contain hydrocarbons, but the in-between spaces with the hydrocarbons are too small to justify the drilling of another well to get them out, leaving them "wasted" in the ground.

Another function of this spacing, pooling and unitization process occurs if more than one lessee/driller has leases for some the acreage that will be drained by the well or wells in the "unit". Which driller gets to be the one to actually drill the well and make the profit from being the driller, a profit in addition to that for just being the lessee/producer? If all of the involved drillers cannot agree, the State process decides who gets to actually drill and later operate the well. See for example W.Va. Code 22C-9-7(b)(3) for statutory "deep" wells in West Virginia.

Additionally, the spacing, pooling and unitization process divides up the royalties among the lessors/mineral owners if the "unit" contains more than one mineral tract. This is to prevent the "Rule of Capture" from giving all of the royalties from all of the gas produced from one well to the mineral owner upon whose mineral tract in the unit the gas well happens to be located; and it is the process is to provide for some royalty payment to a neighboring mineral owner whose tract is being drained by that well so as to prevent the neighbor from drilling an "offset" well to get the gas out first (see the discussion of unnecessary wells earlier in this section).

Turley itself said, in describing the process at stake in its decision, "It has long been recognized that the state, in the exercise of its police powers, may control the density of drilling to prevent waste and to protect correlative rights." *Turley* at 135 (Citations omitted).

Regulatory decisions regarding the spacing/pooling/unitization process start with the porosity and permeability of the underground, hydrocarbon bearing geologic formation owned by the lessor/mineral interest owners and leased by the lessee/drillers.

The important point is that none of the decisions being made by the Oklahoma commission in *Turley* dealt with surface owners' interests anything like those decisions that the State makes in the instant case in its process for issuing permits for the actual drilling of the wells

... the issues that are at stake in the instant case of Mr. Hamblet. *Turley* was not about road slopes, placement or number of waterbars and/or broad-based dips. Similarly, *Turley* was not about what casing and cementing practices should be required to protect groundwater from contamination. That is what the instant case is about—the surface owner interest in those issues is undeniable and overwhelming.

The *Turley* opinion has language that would lend credence to surface owners arguments in the instant case. "To render a party aggrieved by the decision [to have a right to a hearing], its adverse effect must be direct, substantial, and immediate rather than contingent on some possible remote consequence or a mere possibility of an unknown future eventuality." *Turley* at page 135 (Citations omitted.)

In *Turley* the Oklahoma commission's decision at stake was only about spacing/pooling/unitization -- if the wells were drilled. It could be that none of the additional wells to be allowed under the new commission order that was in question in *Turley* will ever be drilled. And if the wells were drilled, the permit process that decides the environmental issues of how these wells are drilled will be of paramount importance to the surface owner – the effect would be "direct, substantial, and immediate" – and a hearing would be appropriate, under *Snyder* and *Dulaney*.

It should also be noted that the *Turley* case refers to the surface owner's right to seek damages under the Oklahoma Surface Damages Act . 52 O.S.Supp. 1982 §52-318.2 through .9. The Petitioners have referred to that. But that is no different from arguing that the fact that surface owners might have a remedy in court for unreasonable use should eliminate their due process rights to hearing and appeal. This argument was rebutted in Section D of this brief above

pointing out the citizens had a civil court remedy in *Snyder* too, but this Court gave them the right to a pre-decisional hearing.

Even if good damages legislation was a justifiable consideration for reducing constitutional due process procedures, West Virginia's damages legislation pales by comparison to Oklahoma's. An Oklahoma driller has to post a \$25,000 bond to cover damages -- *before* entering the surface owner's land. *Id.* at §318.4. West Virginia has no surface damage bond -- *at all*. And *before* moving heavy equipment onto the surface, an Oklahoma driller has to not only give a notice of his intentions (*Id.* at §318.3) he has to either negotiate an agreement with the surface owner or file a proceeding in court to appoint appraisers for damages (*Id.* at §318.5). In West Virginia the driller can sneak onto the surface owner's land and survey the well site and road and only give the surface owner notice of his plans at the time he files his permit (W.Va. Code §22-6-9(a)(1)) (except under recent legislation the surface owner will get notice 10 days before the permit application is filed (W.Va. Code §22-6A-16(b) and (c)(2011)) for certain horizontally drilled wells and there is a notice before the surveyor entered the land). In West Virginia it is the surface owner who has to initiate the damages claim process and not until after drilling is completed, and the driller files a notice that it is commencing reclamation. W.Va. Code §22-7-5 (and now §22-6B-5(2011)). And as important as any of the above, in Oklahoma, damages under the statute do not appear to be limited, as in West Virginia, to the current "actual use," value rather than market value. W.Va. Code §22-7-3. (Or now the same thing, the "market value of the actual use" for certain horizontal wells (W.Va. Code §22-6B-3(a)(5)(2011).)

Finally it is of course a decision based on the facts in Oklahoma, and Oklahoma is a very different place. Topography and land use is different there. The surface owner in *Turley* appears

to have owned the surface of an entire “section”, which is a square mile of about 640 acres. The ownership of such sections would likely be for ranching. The smaller tracts owned by surface owners in West Virginia are more often used as residences and small farms – frequently to supplement other livelihood by West Virginians who particularly value their ownership of their land among their mountains.

For the foregoing reasons, the *Turley decision* does not support the Defendants’ arguments in the instant case

F. *Snyder* does require an evidentiary hearing that is to occur before the final decision made by the agency.

In its initial brief, WVSORO noted that *Snyder* held that constitutional due process required that the downstream riparian owners were entitled to a “pre-decisional” hearing on the agency action. The State’s reply brief calls this interpretation “false”. James Martin and Office of Oil and Gas, West Virginia Department of Environmental Protections’s Reply Brief to Intervenor/Respondent’s Response Brief, at Page 7. The State appears to take the position that the citizens’ group in *Snyder* was only entitled to a hearing after the certificate was issued, which would constitute more of an appeal than a pre-decisional hearing. The State’s disagreement is based on a portion of the hearing rule in the *Snyder* case that the State quoted in its brief. That portion reads, “[M]ay request a hearing within 30 days of the Department’s issuance of the proposed certification. [Emphasis supplied]” *Id.*

WVSORO submits that the emphasis in the quotation supplied by the State in its brief is on the wrong word! WVSORO would emphasize a different word. “[M]ay request a hearing within 30 days of the Department’s issuance of the proposed certification. [Emphasis added]”. WVSORO’s point is that the Department of Natural Resources process set out in the rule was to

issue a proposed certification. Then if someone requested an evidentiary hearing before the agency, an evidentiary “administrative hearing” would be held by the agency before the final agency certification was issued.

The State’s confusion on the convoluted process involved in *Snyder* is understandable, but a careful reading of the facts recited in *Snyder* bears out WVSORO’s position, and the last paragraph of the decision makes it unmistakable.

First the State did, “[N]otice by publication of [the State’s] intention to make a decision on the Stonewall certification request and solicited comments and information on the impact of the construction activity on water quality.” *Snyder* at p. 244.

In response, “UWFRWA submitted comments and information on the environmental effects of the proposed construction and suggested control measures. UWFRWA also protested the inadequacy of the comment period and of the regulations and requested both a public hearing and an evidentiary hearing on the issues involved.” *Id.*

Then the State, “After consideration of the comments received . . . resissued the proposed state certification, to become final in thirty days unless appealed pursuant to the provisions of the Department’s temporary emergency regulations [Emphasis Added].” *Id.* The word “appealed” is what is confusing, but it is evident from the further recital of the process and quotation of the regulation that the appeal in question was actually the evidentiary hearing.

After the State, “[N]otified the UWFRWA that its request for a public hearing had been denied and responded to its comments,” the UWFRWA, “filed an administrative appeal from the issuance of the proposed water quality certification with the Department pursuant to §6.06 of the Department’s regulations., [Emphasis Added]”

The *Snyder* decision then immediately quotes the regulation for the administrative “appeal”. “Section 6.06 provides in material part: ‘Any person entitled to a hearing because of an infringement upon an interest protected by the State Constitution Article 3, Section 10 may request a hearing within 30 days of the Department’s issuance of the proposed certification. [Emphasis added]” *Id.* (Citation omitted.)

The State notified UWFRWA that its request for a hearing had been denied because the State did not believe that “[T]he property interests they claimed in their petition for appeal were not so directly affected by the issuance of the water quality certification as to entitle them to a hearing under article 3, section 10 of the state constitution or [therefore] under the Department’s regulations.”

UWFRWA then joined the issue by filing a mandamus in the Supreme Court. The Supreme Court heard the case and made a ruling which makes clear that the citizens were entitled a “pre-final-decision”, if you will, hearing before the agency.

The final paragraph of *Snyder* makes it most clear that the unanimous Court ordered a pre-decisional hearing. “Accordingly we conclude that the petitioners are entitled to the relief prayed for and a writ of mandamus will issue to compel the respondent, the Director of the Department of Natural Resources, to hold a hearing pursuant to section 6.06 of the Department’s *Regulations for Procedures Governing the Director’s Certification of §404m and 10 Permits* in accordance with the principles enunciated in this opinion. [Emphasis added]” *Id.* at p. 253.

EQT’s brief in reply to WVSORO’s initial brief argues that this Court should defer to the Legislature in determining the constitutional question. But “Where the unconstitutionality of an

act is clear, no amount of legislative interpretation of a constitutional provision is to be considered by a court in ascertaining its meaning.” 4C M.J., Constitutional law, §12. This is not a case where the Legislature stated its intent in findings that are the basis for its enactment. See Section G of this brief. The issue here is not really the unconstitutionality of a statute, but the constitutional demand for a provision that does not exist in statute. The final determination of constitutionality is the province of this Court.⁵

So *Snyder* did hold, as this Court should in the instant case, that the citizens had a right to a due process evidentiary hearing before the final agency decision – a pre-final-decision hearing, if you will.

G. The lack of a right to a hearing on, and appeal of, the State’s granting or conditioning of a permit is not compensated for by any other statutory provisions.

WVSORO has already pointed out in Section E of this brief that the existence of the Oil and Gas Production Damage Compensation Act, W.Va. Code §22-7-1 through 8, is not enough to supplant constitutional due process rights to a predecisional hearing and appeal.

WVONGA goes an erroneous step further by saying that this act of the Legislature, “provided protection unavailable at common law”. WVONGA Amicus Brief at p. 10. That is only true if you consider half the relevant common law – the holding that the mineral owner may do what is reasonably necessary to the surface to extract their minerals. The other half is that the

⁵Reference by both IOGA in its Amicus brief (page 7) and EQT in its reply to Intervenor/Respondent WVSORO’s initial brief (page 5) to what does not appear in the recently rammed through Marcellus Shale legislation is quite a stretch for establishing legislative history. And it is mistaken. The only hearing that ever appeared in that bill was a public hearing, not the administrative hearing to which the individual surface owner should be entitled. The damage compensation changes of the recent legislation are designed primarily to affect this court’s consideration of further WVSORO test cases, and the other benefits are hardly worth having while the most important things were left out.

use of the surface has to be “in the contemplation of parties”. The line of cases on this common law principle starts with or before *West Virginia – Pittsburgh Coal v. Strong*, 42 S.E.2d 46, 129 W.Va. 832 (W.Va. 1947) relating to strip mining coal, to the commonly cited *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 165 W.Va. 10 (W.Va., 1980) regarding power lines, to *Kell v. Appalachian Power Co.* 289 S.E.2d 450, 170 W.Va. 14 (W.Va., 1982) regarding aerial broadcast spraying of herbicides on power line rights of way.

This latter participle, that the severed mineral interest can only do what is contemplated by the parties at the time of the severance or lease, is what the damage act relied upon, a protection very much available at common law. The Act’s purpose section stated the Act’s purpose section, “that no person severing their oil and gas from their surface land and no person leasing their oil and gas with the right to explore for and develop the same could reasonably have known nor could it have been reasonably contemplated that rotary drilling operations imposed a greater burden on the surface than the cable tool drilling method heretofore employed in this state [before certain stated years for which the act creates presumptions]”. The Act was just provided an arbitration procedure that a surface owner could use to enforce those rights instead of having to sue in Circuit Court.

At page 5 of its reply brief in response to Intervenor/Respondent WVSORO’s brief the State cited Justice Albright's concurrence to Lovejoy for the proposition that leaving surface owners with only a right to comment on a permit application was a Legislative balancing when juxtaposed with other statutory enactments.

First of all, the concurrence was “to express certain observations” about an issue. More importantly, the issue was the surface owners' statutorily enacted right to consent to deep well locations (W.Va. Code §22C-9-7(b)(4) in the deep well “conservation”

[spacing/pooling/unitization] statute. And that consent was principally juxtaposed against other enactments, "which address the issue of oil and gas conservation [spacing/pooling and unitization] that are set forth in article 9, chapter 22C of or state code." *Lovejoy* concurrence at p. 250. These are the same issues as *Turley*, discussed *infra*. The concurrence addressed the constitutionality of that consent provision (W.Va. Code §22C-9-7(b)(4)) while noting that the issue "was not fully briefed". *Id.* at 251. This was the issue that was the complement of the issue that the majority did not reach when it declared that Mr. Lovejoy had not exhausted his administrative remedies because Lovejoy should have filed an appeal of the permit decision. It was in regard to the question of constitutionality of the deep well consent provision that the concurrence referred to the Oil and Gas Damage Compensation Act of 1983. No mention was made of the trade off/balancing between the damage compensation act or any of those statutes with what rights surface owners have, or should have, or should not have during the process for permitting the "how" of surface disturbance for access roads or well pads and down-hole casing and cementing of the well bore.

And before assuming that the Legislature balances the interest of surface owners with those of the oil and gas industry, one should read the legislative findings for the Oil and Gas Conservation Commission article about which Justice Albright was writing and to which the Amicus brief of IOGA refers on page 5. W. Va. Code §22C-9-1 through 16. The public policy and findings are to safeguard and protect the rights of operators and royalty owners (W. Va. Code §22c-9-1(4)) and "foster, encourage and promote exploration" of oil and gas resources' (W. Va. Code §22C-9-1(1)). One searches in vain for protections of surface owners or the environment. The surface owner consent provision the constitutionality of which Justice Albright questions is

not enforced by DEP and is thrown into question by the Justice's concurrence. Similarly the Shallow Gas Well Review Board article that protects coal interests from oil or gas wells drilled too close together and sees to the safety of coal miners is to "safeguard, protect and enforce the correlative rights of gas operators and royalty owners. . ." (W. Va. Code §22C-8-1(3)) and again "Foster, encourage and promote the fullest practical exploration, development, production, recovery and utilization of this state's coal and gas," where coal and oil and gas formations overlap (W. Va. Code §22C-8-1(2)). Nothing for surface owners there either.

WVSORO believes that the concurrence was dicta, was admittedly only observations, did not come after briefing of the issues by concerned parties, was not on the issue before the Court in *Lovejoy*, and most importantly was not on the issue before this Court on whether due process requires a pre-decisional hearing for surface owners on the granting of well work permits.

H. The procedural posture of the instant case is appropriate and fair, and it is desirable for this Court to decide the question whether due process requires that surface owners have access to predecisional hearings relating to the State's issuance, conditioning or denial of a permit to construct a road and well pad, and drill an oil and gas well on a surface owners' land.

The Petitioner EQT objects to WVSORO's request that this Court reformulate the certified question to encompass the issue of surface owners' procedural due process right to a pre-decisional hearing on a permit applications for the construction of well pads and access roads and the drilling of oil or gas wells on surface owners' land.

As WVSORO noted in its initial brief, even on simple direct appeals, "[I]n the exercise of its power to do so, an appellate court will consider questions not raised or reserved in the trial court when it appears necessary to do so in order to meet the ends of justice or to prevent the invasion or denial of essential rights." 1B M.J., Appeal and Error, §104. This is the rule when

“fundamental” rights are at stake, even if an error is unassigned⁶ See *Medical Center Hospitals v Terzis, M.D.* 367 S.E.2d 728 (Va., 1988) (Virginia Supreme Court of Appeals considers an additional issue not asserted below for guidance of the trial court upon remand.)

In *Kincaid v. Mangum*, 432 S.E.2d 74, at 82, 189 W.Va. 404, (W.Va., 1993), this Court noted that scholars have pointed out the importance of the deciding court’s discretion to reformulate certified questions.

Regardless of the clarity of the record, facts, and issues certified, the answering court must have the power to reformulate the questions posed. Although the court should not answer questions unrelated to the case at hand, the answering court should have the same freedom to analyze the factual circumstances that it would have if the entire case were before the court. Indeed, the ability of the answering court to reshape or add to the issues is necessary to further the goals of certification. The answering court may be best situated to frame the question for precedential value and to control the development of its laws. If state courts take offense at a poorly framed question, they may miss a genuine opportunity to settle state law on a particular point.

John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 Vand. L. Rev. 411, 426 (1988) (footnote omitted).

The instant case falls squarely within these principles. Essential rights and interests of surface owners are at stake. The right to a pre-decisional hearing on a permit application is intimately related -- as a matter of law -- to the right to an appeal. The facts are the same – and the record includes an actual permit that was granted, with a host of flaws, ignored issues, and

⁶“However characterized, all courts when confronted with a situation involving the fundamental personal rights of an individual, have considered assigned errors, if meritorious and prejudicial, as jurisdictional, or have noticed them as ‘plain error’. In either event, the rule is fashioned and applied to meet the end of justice or to prevent the invasion of or denial of fundamental rights.” 1B M.J., Appeal and Error, §103.

violations of the DEP's own regulations that could have been, and should have been, the subject of a predecisional hearing.

Moreover, the Constitutional analysis is the same. And there is no "surprise" to the petitioners here. Constitutional due process was raised before the Circuit Court (App.114) and the right to a hearing was raised in Respondent Hamblet's brief filed with this Court *before* WVSORO was granted the right to intervene. Finally it cannot be said that there is any lack of briefing on the issue in the instant case.

The relief requested is very important. More delay means that more and more citizens will have their interests affected by the State's action without an effective, constitutionally sufficient process that will avert avoid erroneous determinations such as those made in the permit in the instant case.

Also, the permit application is part of the record. Any supposed "missing facts" as alleged by the Petitioners in fact argues for WVSORO's position -- because such "facts" are not in the record--and will never be--precisely because there is no right to a hearing!

The simple fact is that surface owners need the right to a hearing now. Requiring another surface owner to bring a new separate mandamus petition is highly inefficient for WVSORO and the State, as well as for the oil and gas industry. Every week of delay means more surface owners are been denied their constitutional due process and having bad decisions made for the construction of well sites and access roads on their land, and the drilling of oil and gas wells through the groundwater under their land. The instant case is ideal for addressing this issue via a reformulated certified question

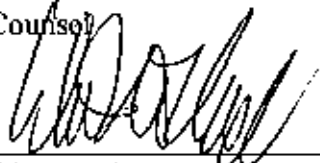
III. CONCLUSION

This Court should augment the question presented to read, "Does an owner of surface land upon which an oil or gas well will be drilled, with associated frac'ing and surface disturbance, have the rights under the due process clause of the West Virginia Constitution to an administrative predecisional hearing upon, and to the right to appeal to circuit court from, the actions of the Office of Oil and Gas of the West Virginia Department of Environmental Protection in determining whether to issue, condition or deny a well work permit for the drilling and associated frac'ing of, and surface disturbance for, an oil or gas well?"

And the answer to that question should be "Yes".

Respectfully Submitted
WEST VIRGINIA SURFACE OWNERS' RIGHTS
ORGANIZATION

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rdth day of December, 2012, true and accurate copies of the foregoing was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all parties to this proceeding as follows:

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