

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA SURFACE OWNERS'
RIGHTS ORGANIZATION,

Petitioner,

v.

Action No.: 08-AA-85

WEST VIRGINIA OIL & GAS
CONSERVATION COMMISSION, et al.,

Respondents.

RESPONDENTS' MOTION TO DISMISS

COME NOW some of the Respondents¹, by counsel Nicholas S. Preservati and Joseph L. Jenkins, of Preservati Law Offices, PLLC, and hereby moves this Honorable Court to dismiss Petitioner's appeal as Petitioner lacks standing.

INTRODUCTION

Petitioner lacks standing because it was not a party to the underlying proceedings before the West Virginia Oil & Gas Conservation Commission ("Commission") and Petitioner was not a party in *State ex rel. Blue Eagle Land, LLC v. West Virginia Oil & Gas Conservation Commission*, 2008 W.Va. LEXIS 37 (May 27, 2008). Furthermore, *Blue Eagle* did not grant Petitioner a right of appeal. As such, having no standing, nor a right to appeal, Petitioner's appeal should be dismissed. Finally, Respondents filed an appeal in McDowell County, 08-C-171-M, whereby Petitioner will have adequate opportunity to present their interests and views in the McDowell county case as was contemplated by *Blue Eagle*. Therefore, dismissal of this action will not prejudice Petitioner.

¹ Blue Eagle Land, LLC, Coalquest Development, LLC, Consolidation Coal Company, Horse Creek Land and Mining Company, National Council of Coal Lessors, Inc., Penn Virginia Operating Company, LLC, Pocahontas Land Corporation, West Virginia Coal Association, WPP LLC, and Wolf Run Mining Company (hereinafter collectively referred to as "Respondents").

8/20/08

ARGUMENT

Three hearings were held before the Commission and five hearings were postponed pending the resolution of Respondents' writ of prohibition in *Blue Eagle*. Petitioner was not a party to those proceedings, but did participate by being present and submitting comments. The same occurred in *Blue Eagle*; Petitioner was granted leave to file a brief with the court as *amicus curiae*, but was not made a party to the proceedings. Having not been a party to the proceedings, Petitioner lacks standing under the Administrative Procedures Act, *W.Va. Code* § 29A-1-1, et seq. *Cf. Carte v. Cline*, 200 W.Va. 162, 488 S.E.2d 437 (1997) (holding that a police officer is a party to a license revocation hearing and therefore has standing to appeal the decision).

Additionally, Petitioner's reliance on *Blue Eagle* is misplaced. *Blue Eagle* granted Respondents, who filed the writ of prohibition at issue in *Blue Eagle*, the right to appeal the Commission's orders. "[W]e grant the writ of prohibition as moulded, and direct that the instant case be dismissed from this Court's docket, with leave for the **petitioners [Respondents here]** to file an appeal of the Commission's orders in circuit court within thirty days of the issuance of the mandate in the instant case." *Blue Eagle*, 2008 W.Va. LEXIS 37, *9 (emphasis added). *Blue Eagle* did not grant Petitioner the right to appeal in its holding.

Petitioner argues that a footnote in *Blue Eagle* subverted traditional notions of standing and granted a non-party and *amicus curiae* party status. This is dubious and a clear misstatement of *Blue Eagle's* footnote. The pertinent part of the footnote states: "**If the instant case is re-filed as an appeal**, the West Virginia Surface Owner's Rights Association should be given an opportunity to assert its interests and views." *Blue Eagle*, 2008 W.Va. LEXIS 37, *9 (emphasis added). "If the instant case is re-filed as an appeal" acts as a condition precedent to Petitioner being able to assert its interests and views. Therefore, an appeal must be filed *before* Petitioner

has an opportunity to be heard. *Blue Eagle* essentially ensured Petitioner could act as *amicus curiae* in any appeal filed with the circuit court. It did not give Petitioner the right to file an appeal of its own accord. If that was the intent, *Blue Eagle* simply would have stated as such; instead, *Blue Eagle* stated Respondents had that right.

CONCLUSION

It is unfathomable to discern any way Petitioner is entitled to appeal a decision in which it was not a party. Traditional notions of standing and *W.Va. Code* §29A-1-1, et seq. require Petitioner be a party. Furthermore, *Blue Eagle* did not, under any circumstances, grant Petitioner the right to appeal a decision it was not a party to. *Blue Eagle* granted Respondents' writ as moulded and gave Respondents' the right to appeal. Since Petitioner lacks standing to appeal the Commission's orders and *Blue Eagle* did not grant it a right to appeal, this appeal should be dismissed.

Respectfully submitted,

RESPONDENTS,
By Counsel,


Nicholas S. Preservati (W.Va. Bar #8050)

Joseph L. Jenkins (W.Va. Bar #9680)

Preservati Law Offices, PLLC

Post Office Box 1431

Charleston, West Virginia 25325

304.346.1431

304.346.1744 *facsimile*

Counsel for Respondents

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA SURFACE OWNERS'
RIGHTS ORGANIZATION,

Petitioner,

v.

Action No.: 08-AA-85

WEST VIRGINIA OIL & GAS
CONSERVATION COMMISSION, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Joseph L. Jenkins, do hereby certify that I have served a true and exact copy of the foregoing **Respondent's Motion to Dismiss**, upon all parties by U.S. mail on the 20th day of August, 2008, addressed as follows:

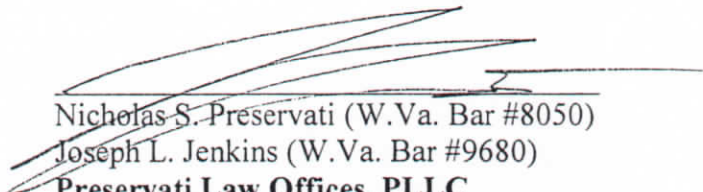
David B. McMahon, Esquire
1624 Kenwood Road
Charleston, WV 25314

Christie S. Utt, Esquire
WV Office of the Attorney General
Capitol Complex, Bldg. 1, Room E-26
Charleston, WV 25305

Timothy Miller, Esquire
Robinson & McElwee, PLLC
Post Office Box 1791
Charleston, West Virginia 25326

Suzanne Trowbridge, Esquire
Goodwin & Goodwin LLP
Post Office Box 2107
Charleston, West Virginia 25328

Kenneth E. Tawney, Esquire
Jackson Kelly PLLC
1600 Laidley Tower
500 Lee Street
Charleston, West Virginia 25322



Nicholas S. Preservati (W.Va. Bar #8050)

Joseph L. Jenkins (W.Va. Bar #9680)

Preservati Law Offices, PLLC

Post Office Box 1431

Charleston, West Virginia 25325

304.346.1431

304.346.1744 *facsimile*

Counsel for Respondents