

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

BLUE EAGLE LAND ,LLC, et al.

Petitioners,

v.

Case No: 08-CAP-171

WEST VIRGINIA OIL AND GAS
CONSERVATION COMMISSION,
CHESAPEAKE APPALACHIA, LLC,
EASTERN AMERICAN ENERGY CORPORATION, and
PETROEDGE RESOURCES (WV), LLC,

Respondents,

v.

WEST VIRGINIA SURFACE OWNER’S RIGHTS ORGANIZATION,

Proposed Interveners.

**MOTION OF
WEST VIRGINIA SURFACE OWNERS RIGHTS ORGANIZATION
TO INTERVENE**

Comes now the Surface Owner’s Rights Organization, by counsel, by this motion and the accompanying proposed “Intervener’s Answer to Petition for Appeal and Cross-Petition for Appeal” setting forth the claims and defenses for which intervention is sought, and moves to intervene in this matter and says:

RULES APPLICABLE

1. Rule 81(a)(1) of the Rules of Civil Procedure for Trial Courts of Record provides that the Rules of Civil Procedure apply to this case because this case is a review of a decision of an administrative agency.

2. Rule 24(a)(2) of the Rules of Civil Procedure provides that “anyone” shall be permitted to intervene of right in an action, “[W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

3. Rule 24(b)(2) provides that intervention is permissive when an applicant’s claim or defense and the main action have a question of law or fact in common.

4. Rule 1 provides that the Rules, “[S]hall be construed and administered to secure the just, speedy, and inexpensive determination of every action”.

5. “Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because intervention serves the judicial system’s interest in resolving all related controversies in a single action.” *Stern v. Chemtall Inc.*, 2005, 617 S.E.2d 876 at 884, 217 W.Va. 329 citing *Ball infra*.

UNDERLYING ISSUE

6. At issue in this case is whether statutory forced well spacing and royalty sharing for statutory “deep wells” (confusingly called “pooling and unitization” in the statutes) applies at all to Marcellus Shale gas wells drilled on an astonishing 427,000 acres in 5 counties if the wells are drilled using certain modern techniques; and if that well spacing statute does apply to all of those wells, the issue becomes the distance that these gas wells have to be spaced from each other and from mineral boundary lines.

7. The outcome of this case will also affect additional proceedings before the Commission affecting lands in 21 additional West Virginia counties that are awaiting the outcome of this action. See below.

8. If forced well spacing for statutory “deep wells” does not apply to all such Marcellus Shale wells, then these wells can be drilled as closely together as any driller wants (and the Rule of Capture applies and the driller can drill as close to mineral boundaries as the driller wants and drain neighbors without sharing the royalties) – all unless there is a coal seam underlying the tract where the well is going to be drilled and the owner or lessee of that tract has either recorded a declaration pursuant to W.Va. Code §22-6-36 or his filed maps with the office of coal miner health, safety and training. Even then, it is only the owner of the coal of the tract where the gas well is actually being drilled that can object to the spacing, not the owner of coal or gas on a neighboring tract that will be drained by the rule of capture.

9. If gas wells are spaced too closely together, less total gas is produced from the formation. This and the drilling of the extra wells results in:

- a. Resources being left in the ground and wasted.
- b. Royalty owners getting less royalties.
- c. Investors in oil and gas drilling getting paid less.
- d. Consumers paying more for gas, if you subscribe to the economic theory that all costs are eventually passed on to the consumer.
- e. More wells being drilled through the water tables with the incumbent risks of polluting the water table.
- f. More well sites and access roads fragmenting forests and risking other environmental harm.
- g. And finally, more surface owners having more access roads and well sites bulldozed on and occupying their land.

STANDARD FOR INTERVENTION

10. “West Virginia Rule of Civil Procedure 24(a)(2) allows intervention of right in an action if an applicant meets four conditions: (1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant must show that

the interest will not be adequately represented by existing parties.” Syllabus Point 2, *Ball v. Cummings*, 540 S.E.2d 917 (W.Va. 1999).

(1) Timeliness

11. In this case the record from the administrative proceeding below has not even been received by the Circuit Court. The delays to date were to see if the Legislature would moot the suit. The intervention the West Virginia Surface Owner’s Rights Organization will not cause any delay.

(2) Applicant’s Interest

12. The West Virginia Surface Owner’s Rights Organization (“WVSORO”), formerly an unincorporated association, is now West Virginia Citizen Action Group d.b.a West Virginia Surface Owner’s Rights Organization, an application for trade name having been filed with and approved by the Secretary of State on June 18, 2008.

13. The organization has hundreds of SORO members, in at least 50 counties, 20 other states and 2 other countries.

14. The majority of WVSORO’s members own only the surface.

- a. They will be affected by whether and how close together gas well sites will be spaced – and therefore how many well sites and access roads will be bulldozed. Attached for Judicial notice as Exhibit #1 is an ariel photograph of most, but not all, of a vertical Marcellus Shale well site drilled in 2008 in Upshur County that shows the impact on the surface owner of such a well site.

b. They will also be affected by the increased risk to ground water, soil erosion and stream sedimentation, and other environmental risks if extra, unnecessary wells are drilled around them.

c. Those who are consumers of natural gas may also be affected.

15. Thirty to forty percent of WVSORO members also own some interest in the minerals under their surface.

a. They would be affected if these wells could be drilled on neighboring mineral owners just across their mineral boundary lines under the Rule of Capture in order to drain the gas out from underneath them, and

b. They will be affected if wells on their property for which they receive royalties produce less gas because extra, unnecessary, wasteful wells are drilled near them and reduce the production from the gas wells on their land.

c. Those who are consumers of natural gas may also be affected.

16. To the extent notions of “standing” are included in this analysis, it is clear from West Virginia Supreme Court case law that WVSORO has standing. In *Snyder v. Callaghan*, 284 S.E.2d 241, (W.Va. 1981) the Upper West Fork River Watershed Association sued in order to get a hearing on a State action necessary to build the Stonewall Jackson Dam. The members of that organization owned land downstream from the proposed dam. The Supreme Court said the organization had standing. In the present case thousands of Marcellus Shale gas wells will be drilled directly on the surface land

owned by the WVSORO members themselves – not just upstream from them. WVSORO meets all the tests of *Snyder*.

(3) Need for Protection of Applicant's Interests.

17. The third consideration in determining whether to allow an intervener is whether the “disposition of the action [without the applicant] may as a practical matter impair or impede the applicant’s ability to protect that interest[.]” *Ball, supra*.

18. In the *Ball* case the Department of Environmental Protection had brought an action against a municipal waste water treatment plant for discharging pollutants in violation of its “NPDES” permit. The discharge was into a stream that ran across the Ball’s property. The Balls wanted to intervene.

19. Justice Maynard wrote for the Court saying, “Therefore we hold that in determining whether a proposed intervener of right under West Virginia Rule of Civil Procedure 24(a)(2) is so situated that the disposition of the action may impair or impede his or her ability to protect that interest, courts must first determine whether the proposed intervener *may be practically* disadvantaged by the disposition of the action [Emphasis supplied.],” and weigh that against the interests of the other parties in conducting and concluding their action without undue complication and delay, plus “the general interest of the public in the efficient resolution of legal actions.”. *Ball* at S.E.2d p. 925.

20. For WVSORO members living upon the 489,000 acres directly affected by Commission orders already before this Court:

- a. Intervening in this action may be the only way to advocate for the Commission's authority to set spacing for the Marcellus Shale wells in question.
- b. This may be the only chance to argue that the "arbitrary" 1000 foot spacing puts wells too close together.
- c. Without protection from the Commission's field rules, they would have to bring an injunction action as a class or as individuals using a claim that 1000 foot spacing is more than is "fairly necessary" use of their surface – a claim that is far short of well-established law.
- d. WVSORO's Cross-Petition seeks relief that the Petitioners do not. WVSORO seeks a declaration that the Commission does have jurisdiction over these wells and that 1500 foot temporary and permanent spacing should be ordered in the alternative to 3000 foot or 1000 foot spacing.

21. There are 5 more proceedings pending below that are being held in abeyance until this appeal is decided. Those proceedings cover massive acreage in the more northern counties of Barbour, Braxton, Calhoun, Clay, Fayette, Gilmer, Harrison, Jackson, Kanawha, Lewis, Marion, Marshall, Monongalia, Nicholas, Preston, Randolph, Roane, Taylor, Upshur, Webster, and Wetzel.

22. Proceedings filed with the Commission are required to identify the topographic quadrants in which the acreage to be ruled upon is located. Attached is

Exhibit #2 which is a map of West Virginia showing the topographic quadrants which were listed in the proceedings before this Court and still awaiting the Commission's decision.

23. For the WVSORO members in those more northern counties, a decision made in this case that the wells in question are statutory "shallow wells" may, indeed will, as a practical matter impair or impede their ability to protect their interests.

- a. The Commission will follow that authority, and dismiss the field rule spacing proceedings below applicable to their areas.
- b. It would be impractical if not impossible for surface owners to get a court to require drillers in their areas to ask the Commission for Field Rules or for the surface owners to require the Commission to order spacing.
- c. And in the meantime there would be no spacing and the Rule of Capture, a rule of law originally conceived for foxes and deer in England in the Middle Ages, would prevail.

24. For the WVSORO members in those more northern counties, if this Court rules that the wells in question in this proceeding indeed are statutory "deep wells" subject to forced pooling and unitization, but only orders 1000 foot spacing in *this* proceeding, then the Commission would be hard pressed to order different spacing for the pending proceedings covering the northern part of the State.

25. Permitting WVSORO to intervene would not add undue complication or delay. The only prejudice that the existing parties would suffer would be if WVSORO would persuade the Court that the positions of the other parties is Petitioners is wrong, and that is not grounds to deny intervention. The more information and insight the Court is presented with the better the Court's decision making process will be.

26. Justice Maynard's requirement for the court to consider the "general interest of the public in the efficient resolution of this legal action" may be the argument that most heavily points to allowing intervention. See the next subheading.

(4) WVSORO's Interests Will Not Otherwise Be Adequately Represented.

27. The parties with an interest in the outcome of this appeal are:

- a. Gas drillers.
- b. Coal owners and operators.
- c. Gas well operators.
- d. Mineral owners receiving royalties.
- e. Mineral owners without leases or drilled wells.
- f. Investors in oil and gas drilling.
- g. Surface owners.
- h. The public generally regarding environmental issues.
- i. Consumers of natural gas.

28. The private parties already represented in this proceeding fall under a., b, and some of c.

29. The Commission also represents the interest of mineral owners, but has to balance their interests against the oil and gas and coal parties.

30. The interests of surface owners, the public generally regarding the environment, and consumers of natural gas will not be represented if WVSORO is not permitted to intervene.

31. Without the Intervener, this proceeding will be heard as a dispute between coal and some oil and gas drillers and operators on one side, and other oil and gas operators on the other side – and the Commission will be in the middle. This may be the most important oil and gas “play” in the history of West Virginia. The many surface owners, investors and other members of the public who will suffer the collateral damage from the results of this decision should be allowed to intervene.

AMICUS IS NOT APPLICABLE, OR ENOUGH

32. In forcing the parties back to Circuit Court, the Supreme Court said in Footnote 1, “If the instant case is re-filed as an appeal, the West Virginia Surface Owners’ Rights Association [sic] should be given an opportunity to assert its interests and views.”

33. In other Circuit Court filings some of the other parties have taken the position that WVSORO should be limited to Amicus Curiae status in Circuit Court because

elsewhere the Supreme Court granted leave only for the “petitioners” to file an appeal in the Circuit Court.

34. But this is a motion to intervene pursuant to Circuit Court rules in the “petitioner’s” appeal as authorized by the literal wording of the Supreme Court’s opinion.

35. The Supreme Court’s footnote and the circumstances of this case should lead this Court to a less literal reading of the language the Supreme Court used to force this proceeding back to Circuit Court, as argued in pleadings in the case WVSORO filed in Kanawha County Circuit Court that is also now before this Court. There Petitioner’s at once claim that the publication notice they got was constitutionally infirm, while at the same time complain if all of WVSORO’s i’s were not dotted and t’s not crossed on the record.

36. WVSORO can find no provision for Amicus Curiae status in Circuit Courts.

37. Our Supreme Court rules only allow Amicus Curiae to participate in oral argument “for extraordinary reasons” R.A.P. 19, denying intervention may call WVSORO’s oral argument into question.

38. Most significantly, if WVSORO is only Amicus Curiae below, and if this court decides against WVSORO’s interest, the right of WVSORO to appeal to the Supreme Court of Appeals will be seriously questioned.

39. All interested parties are best served by a speedy definitive determination resolving all related controversies in a single action decision in which all parties participate.

40. A copy of the WVSORO's pleading setting for the claims and defenses for which intervention is sought accompanies this motion (it is primarily a further polishing of the appeal WVSORO filed in Kanawha County).

PRAYER

WHEREFORE, the West Virginia Surface Owner's Rights Organization prays that this Court:

- A. Permit the West Virginia Surface Owners Rights Organization to intervene as a matter of right or permissively,
- B. Grant such other and further relief as the Court may deem just and proper.

West Virginia Surface Owner Rights Organization.
Respondent,
By Counsel

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Exhibit #1

7.5 Minute Topo Map Status for West Virginia

December 2003

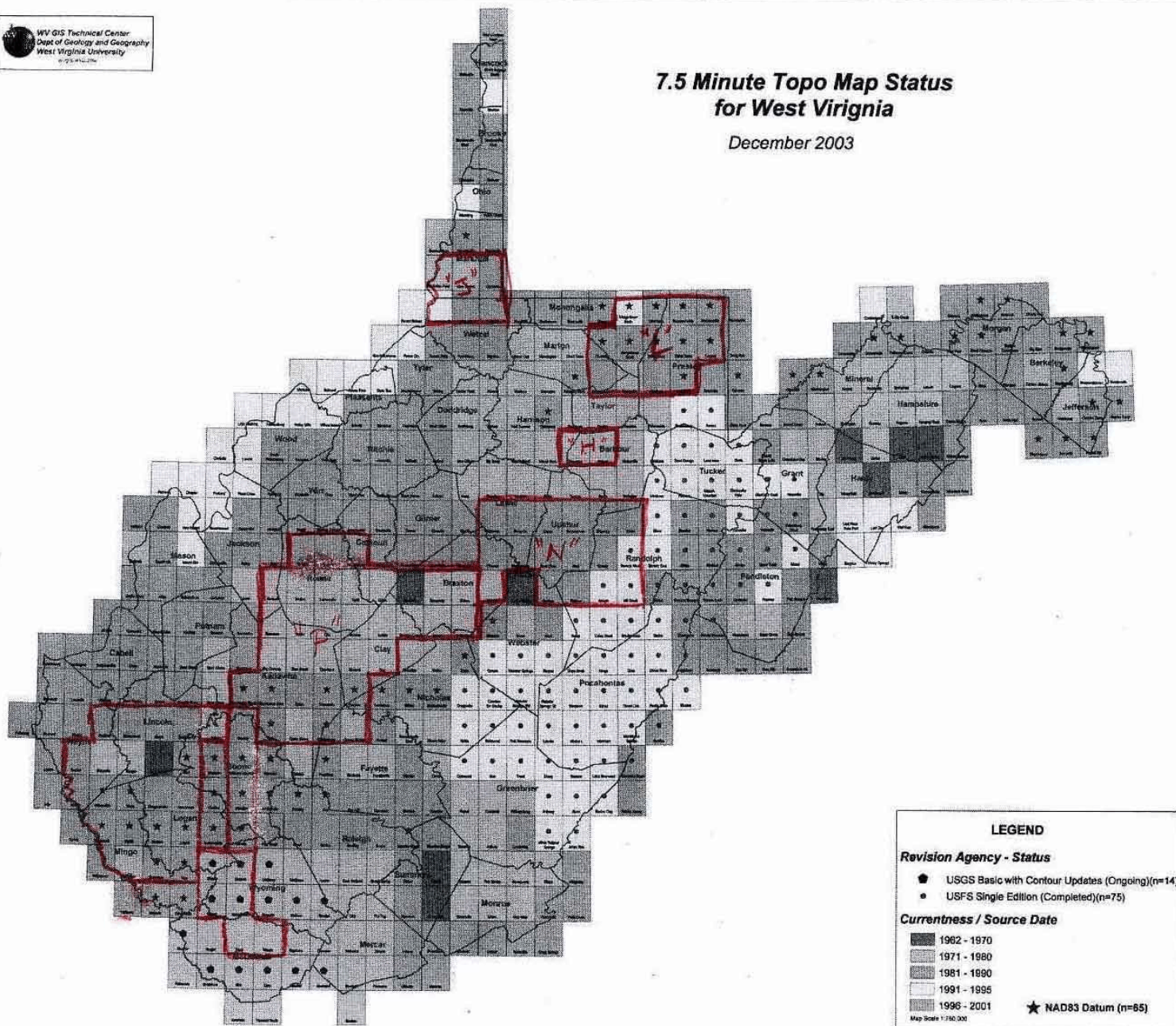


Exhibit #2