

IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

BLUE EAGLE LAND, LLC, et al.,

PETITIONERS,

V.

CIVIL ACTION NO: 08-CAP-171

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

RESPONDENTS.

ORDER

On the 15th day of May, 2009, came the petitioners, by Nicholas Preservati, their attorney, and came the West Virginia Surface Owners Rights Organization (hereinafter referred to as WVSORO) by David B. McMahan, its attorney, pursuant to WVSORO's Motion to Intervene. After reviewing the file in this matter, including WVSORO's Motion to Intervene, the Petitioner's response to the Motion to Intervene and after considering the oral arguments of the parties herein, the Court hereby **GRANTS** WVSORO's Motion to Intervene.

This matter is the result of a Writ of Prohibition filed before the Supreme Court of Appeals of West Virginia. In *State ex. rel. Blue Eagle Land, LLC v. West Virginia Oil and Gas Conservation Commission*, 222 W.Va. 342, 664 S.E. 2d 683 (2008), the Supreme Court granted a Writ of Prohibition as moulded and dismissed the case from the Supreme Court's docket with leave for the petitioners to file an appeal of the West Virginia Oil & Gas Conservation Commission's Order (hereinafter referred to as Commission) to the Circuit Court within thirty (30) days.

On June 26, 2008, petitioners filed a timely appeal from the Commission's Order in the Circuit Court of McDowell County. Although not a party in the Supreme Court case, WVSORO filed an appeal in the Circuit Court of Kanawha County, which appeal has been transferred to the Circuit Court of McDowell County. WVSORO appeared *amicus curiae* in the Supreme Court.

WVSORO filed a Motion to Intervene in the instant case, which said Motion was objected to by the petitioners. Respondents were provided notice of the hearing on the Motion to Intervene and chose not to appear.

Petitioners initially filed a Writ of Prohibition directly with the Supreme Court objecting to certain orders issued by the Commission regulating the drilling of "deep" wells for oil and gas. Petitioners invoked the Supreme Court's original jurisdiction claiming that the Commission did not have jurisdiction to issue orders relating to these proposed wells. Petitioners claim that the wells are "shallow" wells and are regulated by the Shallow Well Gas Review Board and not the Commission. The Supreme Court found that they did not have a factual record to properly evaluate the matters and based upon the limited record, the Court could not say that the Commission's exercise of its jurisdiction was clearly erroneous. The Court further said that petitioners had a remedy other than prohibition because the Commission's orders are appealable to the Circuit Court. In footnote one (1) of its opinion, the Court acknowledge the *amicus curiae* brief of the West Virginia Surface Owners Rights Association and provided that if the case was appealed that the Association should be given an opportunity to assert its interest and views.

WVSORO is an organization, whose members are in at least fifty (50) counties. A majority of their members own surface only. Its concern is the proximity of well sites, the number of well sites, access roads to these sites, ground water, soil erosion and stream sedimentation. Approximately 30-40% of WVSORO members also own an interest in the minerals located beneath the surface of their land.

Petitioners object to the intervention by WVSORO because it did not intervene during the initial hearings. Petitioners also believe that because WVSORO did not intervene during the

Commission hearings that its intervention is untimely. Petitioners further claim that WVSORO is adequately protected because petitioners are surface owners that have the same concern about access roads, ground water, soil erosion and stream sedimentation. Petitioners also believe that the Commission, which is a named party in this case, will protect the interest of WVSORO. Although petitioner object to the intervention by WVSORO, petitioners do not object to WVSORO filing an *amicus curiae* brief.

Although WVSORO did not intervene during the Commission hearings, their attorney, Mr. McMahon, participated in the hearings to a limited extent by conducting some cross examination. WVSORO also acknowledges that they are limited to the existing evidence developed during the hearings and that the Court is to consider this appeal upon the existing record.

Intervention is controlled by Rule 24 of the West Virginia Rules of Civil Procedure and in accordance with the guidelines established in State of WV, ex rel. Bobby J. Ball, et al., v. Cummings, et al., 208 W.Va. 393; 540 S.E.2d. 917 (1999).

Syllabus Points 2, 4, 5 and 6 in Ball v. Cummings, supra, are as follows:

- (2) 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.
- (4) To justify intervention of right under West Virginia Rule of Civil Procedure 24(a)(2), the interest claimed by the proposed intervenor must be direct and substantial. A direct interest is one of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the

judgment to be rendered between the original parties. A substantial interest is one that is one that is capable of definition, protect able under some law, and specific to the intervener. In determining the adequacy of the interest in a motion to intervene of right, courts should also give due regard to the efficient conduct of the litigation.

- (5) 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. Courts must then weigh the degree of practical disadvantage against the interests of the plaintiff and defendant in conducting and concluding their action without undue complication and delay, and the general interest of the public in the efficient resolution of legal actions.
- (6) In order to demonstrate inadequate representation under West Virginia Rule of Civil Procedure 24(a)(2), a private person seeking to intervene of right in a legal action in which a government agency represents the public interest generally must assert some specialized or private interest justifying intervention.

Concerning timeliness, this Court is guided by Pioneer Co. v. Hutchinson, 159 W.Va. 276, 220 S.E.2d 894 (1975), overruled on other grounds, State ex rel. E.D.S. Fed. Corp. v. Ginsberg, 163 W.Va. 647, 259 S.E.2d 618 (1979), which states as follows:

“While Rule 24 of the West Virginia Rules of Civil Procedure provides for the intervention of parties upon a timely application, the timeliness of any intervention is a matter of discretion with the trial court.”

Also, this Court believes that it should take notice of Rule 22 of the West Virginia Rules of Appellant Procedure to the Supreme Court, which states:

“Upon timely application, anyone shall be permitted to intervene in an original jurisdiction proceeding pending in this Court or in a case pending before this Court on a direct appeal from an administrative agency, but only when (1) a statute of this State confers an unconditional right to intervene; or

(2) the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by judgment in the action. Intervention may be permitted in other cases in the discretion of the Supreme Court."

First, this Court finds that the Motion to Intervene is timely filed. Petitioner's interpretation of timeliness is too restrictive. Petitioners would lead this Court to believe that the WVSORO's Motion to Intervene is untimely because they did not move to intervene during the Commission hearings. Also, petitioners would like this Court to find that the Motion to Intervene is untimely because WVSORO did not move to intervene when petitioners file their Petition for a Writ of Prohibition in the Supreme Court. This is too restrictive.

Petitioners argument is inconsistent. Petitioners acknowledge that WVSORO could have intervened when petitioners invoked the Supreme Court original jurisdiction during the filing of the Writ of Prohibition, which was after the Commission hearings. If it were not too late for WVSORO to intervene before the Supreme Court, then it would not be too late to intervene solely because WVSORO did not intervene during the hearing before the Commission.

In its written opinion, the Supreme Court allowed petitioners 30 days to file an appeal to the Circuit Court. The Supreme Court also extended the rights of WVSORO. There is little doubt that either petitioners or respondents will appeal to the Supreme Court this Court's final decision relating to petitioners' appeal. When this Court's decision is appealed, WVSORO could file a timely Motion to Intervene before the Supreme Court. It would be absurd to think that WVSORO could file a timely Motion to Intervene from this Court's decision, but not be allowed to file a timely Motion to Intervene prior to this Court's ruling.

Petitioners further acknowledge that the parties to this action have delayed proceeding in the appeal in order to provide the West Virginia Legislature an opportunity to address the questions in this appeal. However, the Legislature chose not to address these issues. Therefore, any delay in filing this motion has not prejudiced any party.

Petitioner's argument against timeliness is inconsistent with Rule 22(2) of the West Virginia Supreme Court of Appeals, which allows an applicant to intervene by representing that the applicant's interest will not be adequately represented by the existing parties and that the applicant is or may be bound by the judgment of the action. Rule 22 further allows the Supreme Court to permit intervention in the discretion of the Supreme Court. Therefore, this Court finds that the application is timely filed.

Secondly, this Court must determine that WVSORO has an interest relating to the property or transaction which is the subject of this appeal. WVSORO is made up of surface owners located in at least 50 counties in West Virginia, of which 30-40% have a mineral interest underneath their surface. In their response, petitioners argue that WVSORO's interests are adequately protected by petitioners, including Pocahontas Land Corporation, because petitioners are also concerned about the increased number of well sites causing (1) more access roads to be bulldozed on the surface; (2) ground water contamination; (3) soil erosion; and (4) stream sedimentation. By claiming that petitioners adequately protect WVSORO's interest, petitioner's acknowledge that WVSORO has an interest relating to this appeal.

Next, this Court finds that if there is a need for protection of applicant's interest. WVSORO members living within the 4989 acres are directly affected by the Commission's Orders, which are on appeal, are already before this Court. Therefore, intervention may be the only way to advocate

for the Commission's authority to set spacing for the wells in question. This may be the only chance they have to argue that the 1000 foot spacing puts wells too close together.

Also, WVSORO's petition seeks relief that petitioners do not seek. WVSORO seeks a declaration that the Commission has jurisdiction over these wells and that 1500 foot temporary and permanent spacing should be ordered in the alternative to 3000 foot and 1000 foot spacing. Futhermore, there are at least five proceedings pending before the Commission that are being held in abeyance until this Court appeal is decided.

Therefore, this Court finds that disposition of this action may impair or impede WVSORO's ability to protect the interest of its members and will be practically disadvantaged by the disposition of this case.

Finally, this Court finds that WVSORO's interest will not be otherwise adequately represented. The parties in this case are peculiarly situated. WVSORO and petitioners disagree as to whether or not the Commission has jurisdiction over these wells. However, should this Court find that the Commission has jurisdiction, then petitioners and WVSORO will, more or less, be in agreement as to spacing. Chesapeake Appalachia, LLC and WVSORO are in agreement that the Commission has jurisdiction over these wells, but are in disagreement as to spacing. Although some parties agree with WVSORO on one issue or another, it appears that none of the parties agree with WVSORO on all issues. Although settlement of this appeal is unlikely, during oral arguments, petitioners acknowledged that they could settle their disputes with respondents. If so, that would leave WVSORO without protection.

For the reasons set forth herein, this Court does hereby **GRANT** WVSORO's Motion to Intervene and further **GRANTS** WVSORO leave to file its appropriate pleadings.

The Clerk of this Court is hereby directed to send a copy of this Order to Nicholas S. Preservati, Esq., attorney for petitioners, Preservati Law Offices, PLLC., 300 Capitol Street, Suite 1018, P.O. Box 1431, Charleston, WV 25325; E. Forrest Jones, Esq., attorney for petitioners, Jones and Associates, PLLC, P.O. Box 1989, Charleston, WV 25327; Timothy Miller, Esq., attorney for Chesapeake Appalachia, Robinson & McElwee, PLLC, P.O. Box 1791, Charleston, WV 25326; Susan C. Wittemeier, Esq., attorney for Eastern American Energy Corporation, Goodwin & Goodwin LLP., P.O. Box 2107, Charleston, WV 25328; Kenneth E. Tawney, Esq., attorney for PetroEdge Resources (WV), LLC, Jackson and Kelly PLLC., 1600 Laidley Tower, 500 Lee Street, Charleston, WV 25322; David McMahon, Esq., attorney for West Virginia Surface Owner Rights Organization, 1624 Kenwood Road, Charleston, WV 25314 and to Christie S. Utt, Esq., Deputy Attorney General, attorney for West Virginia Oil and Gas Conservation Commission, WV Office of the Attorney General, Capitol Complex, Bldg. 1 Room E-26, Charleston, WV 25305.

ENTER this 2nd day of June, 2009.



RUDOLPH J. MURENSKY, II
JUDGE