IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

BLUE EAGLE LAND, LLC, et al.

Petitioners, and

WEST VIRGINIA SURFACE OWNER'S RIGHTS ORGANIZATION,

Intervener/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.

ANSWERING BRIEF OF INTERVENER/PETITIONER WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION

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Introduction.

In the narrowest sense, this proceeding is to decide whether certain wells drilled to the Marcellus Shale formation are statutory "deep wells" or statutory "shallow wells".

It is only about *certain wells* to the Marcellus Shale, because it only applies to a well if the driller[1] intends to extend the vertical well bore more than twenty feet into the Onondaga formation, the formation which underlies the Marcellus Shale in most places in West Virginia.

The Petitioners argue that these wells are statutory shallow wells. If the Petitioners prevail that these certain wells are statutory shallow wells, there will be at many consequences.

First, if the Petitioners prevail that these certain wells are statutory shallow wells, then these wells cannot be drilled – at all. This is because "[I]n drilling a shallow well, the operator may penetrate into the 'Onondaga Group' to a reasonable depth, not in excess of twenty feet . . ." W.Va. Code §22-6-1(g) and (r); W.Va. Code §22C-8-2(8) and (21); and §22C-9-2 (a)(11) and (12). If that is how far the statute says the driller may drill a shallow well, he may not drill it any further. It must be noted that some drillers could choose to drill the wells using older technology or by running half the "tools" they use to locate and analyze the production formation two times instead of running them together in one long cluster;

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[1]The term "operator" or "well operator" is the term of art defined by the statute. W.Va. Code §22-6-1(w). However there are also "*coal* operators" in the statutes. W.Va. Code §22A-2-75. And many times gas wells are sold by the "operators" who drilled them to others who just produce them who are also technically "operators" under the statutes. So this brief will use the narrower, more descriptive, and less confusing term "driller" for the entity wishing to drill a gas well. The term "operator" will still appear in the quoted West Virginia Code sections.

though it is unclear that all of them think that is workable economically or wise geologically. It is also possible that operators could choose to drill these wells with the newest drilling technology – horizontally. Horizontal drilling may turn out to be the best for almost everyone.[2]

Second, the wells would not be subject to the jurisdiction of the Oil and Gas Conservation Commission (the "Commission") for forced well spacing[3] or special field rules at all, and these wells especially should be. One would gather from reading the Petitioners' initial brief that all these wells would be subject to forced well spacing by the Shallow Gas Well Review Board if they are not subject to forced well spacing by the Commission. But this is not the case. Only the coal seam owner can file an objection that sets in motion the actions of the Shallow Gas Well Review Board. W.Va. Code § 22-6-17. And only the coal seam owner

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[2]Horizontal drilling uses one vertical well, or one cluster of vertical wells all on one well site, to drill down to the Marcellus Shale and then out up to 4000 feet horizontally. The horizontal legs usually run from southeast to northwest, or the reverse direction, to cross perpendicularly the naturally occurring cracks in the formation and utilize those cracks to promote drainage of gas to the well bore. The one horizontal well, or cluster of horizontally drilled wells, takes the place of several times that number of vertical wells to drain the same area. So the penetrations of coal seams are greatly diminished, as is the number of wells sites and access roads on surface owners. Not enough is known about this technology for this Court to take judicial notice of anything more about horizontal drilling than is set out above. But horizontal drilling may end up being the best solution to all of these problems!

[3]WVSORO will refer to the process at issue below as "well spacing and royalty sharing", or "well spacing" for short. As explained in the Introduction to WVSORO's initial brief, many people call the process out of which this appeal arises "pooling and unitization," or just "pooling" or "unitization" etc. Those terms are used, although in different word forms, in the statute. Confusingly, the statute defines a "pool" as an "underground accumulation of . . . gas . . ." (W.Va. Code §22C-9-2(9)), but then later refers to the division of costs of drilling a well as "pooling" (W.Va. Code §22C-9-7(b)). There is statutory authority for this in that W.Va. Code §22C-9-4(f)(1) states that the primary purpose of the Commission's actions is to "Regulate *well spacing*. [Emphasis added.]" WVSORO thinks this term is more descriptive than other terms, and that other terms for this process are confusing.

directly under a proposed shallow gas well site can do so. *Ibid.* Indeed, only coal seam owners who are currently mining or who have recorded "declarations" in the County record room get notice of the proposed new shallow well.[4] So unlike statutory deep wells, neighboring oil and gas owners who are about to be drained by these Marcellus Shale wells will be subject to the Rule of Capture and will not be able to force well spacing and royalty sharing.

This means that the result of this suit is more than a quarrel between coal owners and drillers over which board or commission can force wells spacing on the wells the coal owners care about. The results of this action determine whether most of these wells, most of which coal owners do not care about, will be subject to well spacing at all. The rest of the State, including most everything east of I-79 would be subject to the Rule of Capture. And therein, for surface owners and most other West Virginians, plus the environment, lies the rub.

This brief will first, as background and to delineate the issue, explain the archaic Rule of Capture and the enormous problems that would cause if the Petitionersprevail on this issue that will apply to most of these wells, instead of statutory forced well spacing,. The brief will explain the positions all of the parties are in. It will argue that in this complex field the Court should adopt the position of the administrative agency below. It will then answer several points of the initial brief of the Petitioners. It will argue that these wells are not both

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[4]"[C]opies of the plat shall be forwarded by registered or certified mail to each and every coal operator operating said coal seams beneath said tract of land, who has mapped the same and filed such maps with the office of miners' health, safety and training in accordance with chapter twenty-two-a of this code and the coal seam owner of record and lessee of record, if any, if said owner or lessee has recorded the declaration provided in section thirty-six of this article, and if said owner or lessee is not yet operating said coal seams beneath said tract of land." W.Va. Code §22-6-12(a). See also W.Va. Code §22-6-36.

completed and drilled above the top of the Onondaga because they are drilled below the top of the Onondaga. It will also argue that what does occur in the Onondaga is indeed part of "completion". It will argue that the notice issue raised is not relevant to whether these wells are statutory deep wells subject to forced pooling and unitization. And this brief will conclude that the West Virginia Supreme Court was right when it stated in the precursor to this action that, "Under the applicable statutory language, it cannot be said, from the limited record before this Court [the same record now before the Circuit Court], that the Commission's exercise of its jurisdiction is clearly erroneous." *State ex rel. Blue Eagle Land, LLC v. West Virginia Oil and Gas Conservation Commission,* 664 S.E.2d 683, at 686 (W.Va. 2008) .

The Rule of Capture.

The underlying problem leading to this case is the Dark Ages common law "Rule of Capture" that applies in West Virginia to the drilling of gas (and oil) wells. *See, Boggess v. Milam*, 127 W.Va. 654, 34 S.E. 2d 267 (1943).

Under the Rule of Capture a gas well can be drilled on the very edge of a mineral owner's tract. The outside edges of pools of gas pay no respect to the boundary lines between mineral owners. Even though it is known with certainty that this first gas well will drain gas from the gas bearing strata of the neighboring mineral owner's tract, all of the gas that comes out of the initial well belongs to the mineral owner where the well is located (and his lessee/driller/operator).

Not only is this legalized thievery, it results in less total gas being produced. This is true because the neighboring mineral owner, in order to prevent the first mineral owner from

legally stealing his gas, will (if the economics are good enough[5]) put down an "off set" well on his side of the boundary to try to get the same gas out first.[6] There are now two wells, when one well would have been enough to get the gas out of the reservoir.

Those two wells will more quickly diminish the reservoir pressure that drives the gas out of the rock and up to the surface. The result is that the two wells together will produce less total gas than the one well alone would have produced!

"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. & Charles J. Meyers, *Oil and Gas Law*, Matthew Bender, "Pooling and Unitization" §905.1(1).

The result of extra, unnecessary wells recovering less total gas is that less total gas is produced. Less gas produced means less gas sold, which means less income for all. The mineral owner gets less royalty than he or she would have otherwise. The driller/operator's investors who helped pay to drill the well get profits out of the other income from the well, so they get less return on their investment. If the driller/operator keeps "an interest in the well"

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[5]If the first well has already drained too much of the existing gas or if the first well was not all that good of a producer in the first place, it would not pay for the second well to be drilled just across the mineral tract boundary. The well might be moved off a little, but still not the geologically justifiable distance. Or it could not be drilled at all, and the legal thievery of the first well would be complete.

[6]In fact there is an implied covenant in an oil and gas lease that requires the lessee driller to drill offset wells to protect the lessor/mineral owner from having his gas drained by wells drilled on neighboring tracts. See, Robert Tucker Donley, *The Law of Coal, Oil and Gas, in West Virginia and Virginia*, §96.

he or she will also get less. (Many less than scrupulous drillers/operators do not care about total production because they made their profit "on the push" – drilling the wells – from the investors and keep little or no interest in future income from the well. Others may have less concern future pay off because they are more focused on the cash flow at drilling time, or just do not like forced well spacing out of a philosophy of not want anyone, particularly the government, telling them what to do.) If credence is given to the economic theory that production costs are always passed on to the consumer, then consumers will pay more for their gas.

In addition to these bad, purely economic results from the Rule of Capture, there are other costs. There will clearly be twice the risk of environmental harm to the water aquifers as the extra, unnecessary well is drilled. And surface owners will clearly have twice as many wells drilled on them as are necessary. In the case of these new Marcellus Shale wells the surface use is enormous. See Exhibit #1 attached, an aerial photograph taken in Upshur County in 2008 of a typical Marcellus Shale gas well site including the extra impoundment for the huge slickwater frac job (but not including another impoundment to catch the returned frac water that is out of the frame).[7]

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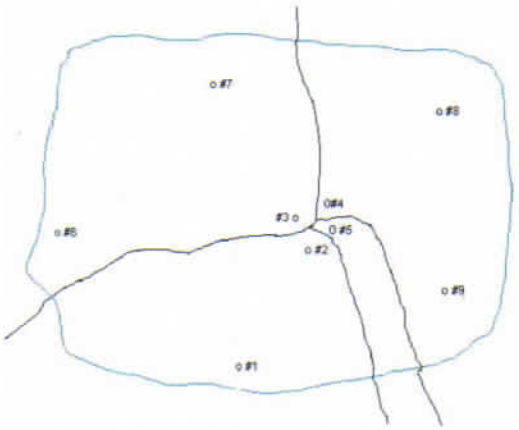
[7]A slide show that includes illustrations of scenarios caused by the Rule of Capture that



The Rule of Capture evolved in the Middle Ages in England when the primary natural resource was venison, and the game animal was a fox. A deer or fox would be born on one Lord's land, feed on a second lord's land, and be killed on a third Lord's land. Law suits ensued to determine which lord was entitled to the fox or the venison or what share of the venison. English courts opted for a bright line rule. They ruled that the deer and the fox belonged to the lord who "captured" the deer. "Ferra Naturae" the courts call it. "**Ferra naturae**...Of a wild nature or disposition. Animals which are by nature wild are so designated, by way of distinction from such as are naturally tame, the latter being called "domitae naturae." *Black's Law Dictionary*. *See*, *Acton v. Blundell*, 12 M&W 324, 152 E. R. 1223 (Ex. 1843).

The Rule of Capture was adopted for gas wells in this country when it was thought that oil and ran in underground rivers[8] and gas was a valueless byproduct[9].

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result in unnecessary wells getting out less gas (but which are scenarios that have more wells than the simplistic two well example in the body of this brief) can be found on the web site of the West Virginia Surface Owner's Rights Organization, www.wvsoro.org, left pane, "Well Spacing and Royalty Sharing . . ."

[8]"Our first cases seem based upon the theory that oil and gas are both of an inherently migratory or vagrant nature, and our later cases upon the notion that each has a fixed situs until disturbed or released by the act of man." *Boggess* at 127 W.Va. 659.

[9]"At the time [the lease in the case] was drafted [1893], most drilling operations were primarily for oil. Gas wells were left uncontrolled to discharge into the air because profitable uses for natural gas were only then being discovered. See Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia*, 436 (1951). It is therefore not surprising that the standard legal form for a mineral lease at that time provided for a small lump-sum payment when natural gas was extracted. It is equally unsurprising to learn: "In modern leases it is frequently provided that gas shall be on a royalty basis, which, of course, is usually more profitable to the lessor." Donley, supra at 219." *McGinnis v. Cayton* 212 S.E.2d 765; 173 W.Va.102 (W.Va. 1984)

Other states, who came to this problem later in time, avoided this problem. They have enacted statutes that allow affected mineral owners etc. force well spacing and royalty sharing (called "pooling and unitization" here and in most statutes, See W.Va. Code §22C-9-7 (1998)). At least 31 states have some form of well spacing and royalty sharing in at lest some circumstances. *Williams & Myers*, at §912. In this process oil or gas wells are required to be spaced for maximum production based on the porosity, permeability and other geologic properties of the formation. Each mineral tract owner being drained by a particular well receives a share of the royalty which the particular well produces. Each mineral tract owner's share of the royalty is based on the amount of acreage each mineral owner owns out of the total acreage being drained by the particular well[10]. *See* W.Va. Code §22C-9-7(b)(1). (The lessee/operator/driller and his investors also receive their proportionate share of the profit from drilling and producing the well, subject to increase or decrease depending on whether they "participate" up front in the drilling or the financing of the drilling. *See* W.Va. Code §22C-9-7(b)(3).)

Forced Well Spacing in West Virginia.

West Virginia only has forced well spacing and royalty sharing in three limited circumstances, and only then when an interested party "forces" the well spacing and royalty sharing. (In any other circumstance the mineral owners can still voluntarily agree to well spacing and royalty sharing, but it generally cannot be "forced" upon them by a neighboring

[10]This total acreage a well is expected to drain is called a "unit" in the statutes. Thus the term "unitization".

mineral tract owner, a royalty owner, etc. unless all the interested parties agree. "Mandatory" well spacing would require all wells to have state approved well spacing. West Virginia, and probably few if any other states, have that.)

Statutory forced "deep well" spacing.

The first circumstance in which West Virginia statutes provide for forced well spacing and royalty sharing is for gas wells which are defined by statute as "deep wells". W.Va. Code §22C-9-1 *et seq.* See below. The definitions distinguishing statutory deep wells from statutory shallow wells reference the Onondaga formations. However, there is no geological, engineering or other scientific basis for distinguishing all of the wells that are shallower than the Onondaga from all the wells that are deeper than that formation. There are no significant engineering/drilling technique differences for drilling wells at depths below or above the Onondaga then there are for drilling wells at depths above and below the formations next above or next below the Onondaga, etc. The characteristics of the Onondaga formation make it relatively easy for a driller to know when he has reached that formation based on "cutting" samples and speeds during drilling and "well logging" equipment. Much more significant differences would be whether formations above or below they were sands or shales and the resulting difficulties of treating the wells, or whether they were kinds of rock that are hard or easy to drill through.

The statute for forced well spacing and royalty sharing for statutory "deep wells" in West Virginia, and the demarcation line, was a legislative compromise between major well drillers and the independents when the deep well statute was first enacted. The

characteristics of the Onondaga formation make it relatively easy for a driller to know when he has reached that formation based on "cutting" samples and speeds during drilling, plus the readouts of their "well logging" equipment. The major well drillers did not want to put a lot of money into exploring for and finding a new good place/formation to drill into, particularly a deeper, more expensive well, only to have an independent come along and "off set" that well and using the Rule of Capture legally steal the gas the major had found. So the major well drillers went to the Legislature to get a well spacing and royalty sharing statute.[11] The independents opposed them favoring the continuation of the Rule of Capture. A political compromise was worked out at the depth of the Onondaga group.

The Petitioner's brief makes mention of certain legislative findings made those many years ago. Those findings state in part that "The Legislature hereby determines and finds that oil and natural gas found in West Virginia in shallow ands or strata have been produced continuously for more than one hundred years . . ." W.Va. Code §22C-9-1 (1994). But the statute refers to no geologic, engineering or other reasons for the divide chosen, and indeed the laws of physics are immutable and not subject to legislation. And the Marcellus Shale formation at issue here has only been produced for one year or two or three, not one hundred!

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[11]Note the "Exxon" deep well mentioned on page 35 of the transcript.

Statutory forced "shallow well" spacing.

The second circumstance in which West Virginia statutes provide for forced well spacing is where the gas wells will penetrate a coal seam, and the coal seam owner objects. See W.Va. Code §22C-8-1 *et seq.*

Coal seam owners want the fewest possible number of wells through their coal seams. They were able to persuade the Legislature to enact forced well spacing (and the accompanying royalty sharing that had to come with it) in situations where the coal owner wanted it to apply to wells through the coal seam owners' coal seams. The Shallow Gas Well Review Board is the agency that controls this process. *Ibid.* Using the Shallow Well Review Board process for wells like those in question, the coal owner can force a minimum 1500 to 2000-foot well spacing for the wells in question.[12] Generally, statutory deep wells governed

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[12] **§ 22C-8-8. Distance limitations**

(a) If the well operator and the objecting coal seam owners present or represented at the time and place fixed by the chair for consideration of the objections to the proposed drilling location are unable to agree upon a drilling location, then the written order of the board shall direct the director to refuse to issue a drilling permit unless the following distance limitations are observed:

(1) For all shallow wells with a depth less than three thousand feet, there shall be a minimum distance of one thousand feet from the drilling location to the nearest existing well as defined in subsection (b) of this section; and

(2) For all shallow wells with a depth of three thousand feet or more, there shall be a minimum distance of one thousand five hundred feet from the drilling location to the nearest existing well as defined in subsection (b) of this section, except that where the distance from the drilling location to such nearest existing well is less than two thousand feet but more than one thousand five hundred feet and a coal seam owner has objected, the gas operator shall have the burden of establishing the need for the drilling location less than two thousand feet from such nearest existing well. Where the distance from the drilling location proposed by the operator or designated by the board to the nearest existing well as defined in subsection (b) of this section is greater than two thousand feet, distance criterion will not be a ground for objection by a coal seam owner.

by the Oil and Gas Conservation Commission must be drilled 3000 feet apart[13], unless the Commission makes an exception for an individual well or a whole field, which it did in the case at bar, requiring only 1000 foot minimum spacing as a "special field rule".

For statutory deep wells it is the Oil and Gas Conservation Commission that can determine and force the pooling and unitization of deep wells if the mineral owners cannot agree on how to space the wells and divide the royalty and the cost and profit of drilling the well. (An interested party has to make an application to the Commission to force this to occur.)

Recall as noted in the introdcution however, that under the Shallow Gas Well Review Board, only the coal seam owners of the tract actually being drilled upon can force well spacing. A neighboring coal seam owner who also owns the gas cannot force well spacing under this scheme to share the royalties if his gas is getting drained. The Rule of Capture would apply. If the well is a statutory deep well, the Commission can force well spacing and royalty sharing by neighboring mineral tracts who are being drained.

Other forced well spacing.

The third circumstance in which West Virginia statutes provide for forced well spacing and royalty sharing is for coal bed methane wells. W.Va. Code §22-21-15 (1994). There may be one other category of wells. But none of these wells are generally relevant to the present case.

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[13]See 39 C.S.R. 1- 4.3 and 4.3.

The Parties Affected, and Their Positions.

The current suit is over wells that produce gas from the "Marcellus Shale " formation. The Marcellus Shale formation is the formation that sits right on top of the Onondaga formation group, in most places in West Virginia. Drillers say that using modern technology, in order to drill a well to produce gas from the Marcellus formation, some additional well bore, called a "rat hole", has to be drilled into the Onondaga about 75 feet. See the Petition in this case. The statute only allows "shallow" wells to penetrate the Onondaga by 20 feet for the rathole. See below.

Again, where does this leave everyone?

The coal owners want the Marcellus wells to be statutory "shallow wells" in order that the coal owners can use the Shallow Gas Well Review Board to impose a minimum 1500 to 2000-foot well spacing whenever the coal owners want it.[14] The coal owners might have been able to live with the spacing ordered below by the Oil and Gas Conservation Commission if it had declared the well spacing to be the 1500 or 2000 feet that the coal owners can impose on statutory "shallow wells". Surface owners would agree with them, but would prefer 3000 feet, or even better, horizontal drilling.

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[14]The coal owners also complain that they only get publication notice when the Oil and Gas Conservation Commission deals with "deep" wells, but direct written notice for shallow wells through coal seams under the Shallow Gas Well Review Board. The problem would be ameliorated if the Oil and Gas Conservation Commission would distribute/publish its notices using the web site/services of the Department of Environmental Protection. Upon information and belief, it refuses to do this in order to bolster its view of itself as a separate agency. Also there are well known associations of the named parties who might be given notice. Written notice to all of the coal owners of a half a million acres would certainly be unworkable. And new legislation could certainly deal with the problem by allowing direct written notice and opt out requests for individual wells during the permit applications.

Some oil and gas drillers prefer to fall under the statutory "deep well" jurisdiction of the Oil and Gas Conservation Commission which has given them closer spacing. (Exhibit #2 has hand drawn outlines, by topographic quadrangles as submitted to the Commission, of the vast acreage covered by the special field rule applications on appeal, and awaiting the outcome of this appeal.) Some oil and gas drillers do not to be subject to forced pooling of the Oil and Gas Conservation Commission, so they want these wells to be statutory shallow wells.

Surface owners also like forced well spacing and royalty sharing, since the result is fewer wells sites and access roads getting bulldozed on their lands! So they want them to be deep wells. Also there is a requirement that the driller of a deep well must get new surface owner consent.[15] However, the State has followed legal authority that allows it to interpret this provision very narrowly and so only rarely requires it.[16]

WVSORO contends that those who invest in oil and gas drilling, groundwater specifically, the environment generally, and even many operators, if forced to drink the water, would benefit from the forced well spacing that would derive from these wells being statutory deep wells.

The statute may not allow the drilling of these wells at all.

The Oil and Gas Conservation Commission has held that these wells are statutory deep wells. It no doubt believes that well spacing and royalty sharing is by far the best public

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[15]W.Va. Code §22C-9-7(b)(4).

[16]*See, State ex rel Lovejoy v. Callahan,*576 S.E.2d. 246, 213 W.Va. 1 (W. Va., 2002) Albright concurring at W.Va. p. 7; *Ashland Exploration Inc. v Miller*, Kanawha County Circuit Court No. Misc. 82-17 (1985) Judge Smith.

policy. It no doubt thinks that it should be legal to drill these wells. So it rules that these are statutory deep wells.

The Statutory Definitions.

Much of the problem is caused by the poor drafting technique used in the relevant statutory definitions.[17] The statutory definition language includes wording that is also permissive and limiting language. Permissive/limiting language should not be drafted into a statutory definition. The question then arises how this permissive/limiting language limits or expands the definition language, particularly when the definition is cross referenced by a complimentary definition. And here we are.

The most literal reading of the statute is that the wells that the drillers want to drill are not legal to drill. They are not literally deep wells. They are literally shallow wells, and shallow wells cannot have a rat hole deeper than twenty feet into the Onondaga.

What the Oil and Gas Conservation Commission has done with this mess is to try to get everyone out of this thicket of poorly drafted statutory enactments that incompletely solve

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[17]The apparently identical definitions are contained in three places. W.Va. Code §22-6-1 (g) and (r) (1994); W. Va. Code §22C-8-2(8)and (21) (1994); and

§ 22C-9-2. Definitions

(a) Unless the context in which used clearly requires a different meaning, as used in this article:

. . .

(11) "Shallow well" means any well drilled and completed in a formation above the top of the uppermost member of the "Onondaga Group": Provided, That in drilling a shallow well the operator may penetrate into the "Onondaga Group" to a reasonable depth, not in excess of twenty feet, in order to allow for logging and completion operations, but in no event may the "Onondaga Group" formation be otherwise produced, perforated or stimulated in any manner;

(12) "Deep well" means any well, other than a shallow well, drilled and completed in a formation at or below the top of the uppermost member of the "Onondaga Group"; . . . [1994]

the terrible public policy problems caused by the ancient Rule of Capture. The Commission has said that these Marcellus wells are statutory "deep wells" that can be drilled, but they are subject to forced well spacing and royalty sharing and special field rules of the Commission.

Surface owners agree with this, but believe, with the coal parties, that 1000 feet spacing is spacing wells too close together.

The geology and science presented at the hearings before the Commission below did not justify the 1000 foot spacing granted. And that could be up to 9 gas wells located, including locating them on the edges, of 100 acres of surface owner's land! Indeed, the evidence presented to the Commission below by the parties seeking the spacing was that the 1000-foot spacing was "arbitrary". Transcript of May 17, 2007, hearing, page 48. For further argument on this, see the Intervener/Petitioner's initial brief.

Deference to the Agency.

When interpreting the statutory definitions in question, the Supreme Court should give deference to the agency charged with enforcing this law, the Oil and Gas Conservation Commission. *See, Appalachian Power Company vs. State Tax Department of West Virginia* 466 S.E.2d. 424 (W.Va. 1995). It should honor the Commission's interpretation of its law and find that Marcellus wells with ratholes deeper than 20 feet are statutory "deep wells". Even if a concept of deference is not applicable, the agency's position should be adopted.

This Court should however overrule the agency and make the spacing much more than 1000 feet as is sought in WVSORO's petition and initial brief. (Deference to the agency

should not occur where the agency's ruling was "arbitrary" as to the 1000 feet ruled upon, again as discussed in WVSORO's initial brief.)

And if the result makes no one happy, that may be the best result. It will force them to go to the Legislature. It will hopefully force the interested parties to move toward well spacing and royalty sharing for all gas and oil wells. And a process to require horizontal wells instead of vertical wells where possible.

Drilled "And" Completed – these wells are not statutory "shallow wells".

The Petitioners argue that the wells in question are drilled AND completed in a formation above the top of the Onondaga and therefore are statutory shallow wells.

If the Petitioners are right, then why did the Legislature add the proviso to the definition?

The first part of the definition, all three times it is used, states, "'Shallow well' means any well drilled and completed in a formation above the top of the uppermost member of the 'Onondaga Group':" "And" means that both have to occur for the definition to apply to a well. Wells are not drilled "and" completed above the top of the Onondaga if they are drilled into the Onondaga. They may be completed above the top of the Onondaga (assuming for the sake of argument the Petitioner's definition of "completed", see below) . But without the proviso, if the wells are drilled even 2 feet into the Onondaga, they may be completed into the Marcellus Shale, but they are drilled into the Onondaga. So considering just the first phrase of the definition, these wells are not drilled and completed above the Onondaga.

The Legislature recognized that problem, and it added the proviso: "Provided, That in drilling a shallow well the operator may penetrate into the 'Onondaga Group' to a reasonable depth, not in excess of twenty feet, in order to allow for logging and completion operations, ". So the Legislature added the proviso so that the driller could drill into the Onondaga for 20 feet and remain a statutory shallow well. Without the proviso, drill into the Onondaga, and it is not a shallow well.

Following that same reasoning, the reasoning of the Legislature, if the driller penetrates more than the 20 feet allowed by the proviso, the driller is not drilling a shallow well. Wherever the driller completed, the driller drilled more than 20 feet into the Onondaga. The Petitioner's analysis is incorrect.

"Completion" – These Wells Are Statutory "Deep Wells".

Petitioners' analysis of the meaning of "Completion" should not be relied upon.

Petitioners state, "[A] well completed in only the Marcellus formation will produce gas from no other formation other than the Marcellus formation." This may well be the *intention* of someone "treating" the Marcellus formation by fracturing the rock in order to get the gas to flow to the well bore more quickly along the fractures in the intended formation. "Fracing" however may not always be so tamed. In practice the fractures may go above and, importantly here, below the target formation. The fractures may produce gas from the locations of those fractures outside the target formation too, should gas be there. So there is no guarantee that a well "fraced" in the Marcellus will not produce from the Onondaga. If the fractures go into the Onondaga more than 20 feet, it is not a statutory shallow well.

There is no statutory definition of "completion". Petitioners believe that completion is only shooting holes through the bottom hole casing into the gas bearing formation ("perforating?) and then fracturing or otherwise treating the formation through those holes before production. WVSORO takes the position that "completion" also includes putting in the production pipe and cementing it into the bottom of the gas well bore at, above, and below the target productino zone. If that is part of completion, and if part of that is done more than 20 feet intot he Onondaga, then these clearly are statutory deep wells.

The pipe and cement job does not just cover the vertical distanceof the target productino formation. There would be too much risk of leakage of gas out of the formation, but not through the holes shot through from the pipe to the target production formation. The driller extends the pipe and the bottom hole cement job above and below the target production formation. If that is done more than 20 feet into the Onondaga, then the completion is done more than 20 feet into the Onondaga, and the well is a statutory deep well.

This is confirmed by the statutory language in the definition. Although there is no statutory definition of "completion", there is a statutory use/reference to "completion" and it is in the statute in question. It is in the proviso. "Provided, That in drilling a shallow well the operator may penetrate into the 'Onondaga Group' to a reasonable depth, not in excess of twenty feet, in order to allow for logging *and completion* operations, [Emphasis added]".

The whole idea of being able to use the Onondaga is, in part, for completion – by statute.

In addition to putting casing and cement into the Onondaga as part of "completion", the "rat hole" is used for another most important part of completion. Humor can be an illustrator, and by this point the reader may be ready for comic relief.

As the joke goes, at the time when all computers were mainframes, a business's computer was malfunctioning. The businessman calls for the repairman and explains the problem to the repairman. The repairman takes out a screwdriver, walks behind the machine, opens an access door, picks out a screw, and turns the screw a half a turn. The computer is fixed. The repairman hands the businessman a bill for $100. The businessman complains that $100 is too much to pay for just turning a screw. The repairman prepares another bill – itemized this time. "Item #1: Turning screw – charge $1. Item #2: Knowing which screw to turn, and how far to turn it – charge $99."

A more familiar analogy. A lawyer's charge for writing a brief is not just for the time spent physically creating sentences and paragraphs on paper. It is for the time spent researching. Gathering the necessary information is part of producing a brief.

The primary reason that the oil and gas companies sought to be able to drill a deeper rathole is so they can take their new, longer logging tools deeper, past the bottom of the target production formation. They do this in large part so they know how deep the bottom of the target production formation is, as well as how less deep the top of the target production formation is. With that information they know where to cement the bottom of the hole and, importantly, they know vertically where they need to shoot holes in the casing in order to perform the treatment/frac job. etc. (etc. including casing and cementing too, WVSORO asserts).

Part of "completion" is knowing where to perforate etc. Knowing where to perforate requires use of the rathole for the tools. Penetrating more than 20 feet into the Onondaga to for the rathole means that the rathole beyond 20 feet has been used for completion, and therefore that the well has gone beyond the definition of "shallow well". It has been drilled and completed in part in the Onondaga. According to the definition of "deep well" it has become a statutory "deep well".

Adequacy of Notice to Petitioners.

Blue Eagle et al. complain that the publication notice of the proceedings below before the Commission was constitutionally inadequate. Coal owners get individual notice of proceedings for statutory shallow wells before the Shallow Gas Well Review Board. Coal owners only get publication notice of proceedings before the Commission.

There may or may not be merit to the position. It is certainly clear that lots of very interested entities came late, and therefore not well prepared, to the process – including WVSORO.

But this is only an argument as to the procedures for all proceedings before the Commission. This is not an argument that the Marcellus Shale wells are statutory shallow wells. That determination is based on the other analysis addressed by the Intervener/Petitioner's briefs. And the wells in question are indeed statutory deep wells.

Conclusion.

The Oil and Gas Conservation Commission has ruled that Marcellus Shale wells that are drilled by penetrating more than 20 feet into the Onondaga are statutory "deep wells" subject to its jurisdiction for special field rules and well spacing forced by affected parties. A close reading of the statutes shows that the Commission is correct. The West Virginia Supreme Court was right when it stated in the precursor to this action that, "Under the applicable statutory language, it cannot be said, from the limited record before this Court [the same record now before this Circuit Court], that the Commission's exercise of its jurisdiction is clearly erroneous." *State ex rel. Blue Eagle Land, LLC v. West Virginia Oil and Gas Conservation Commission,* 664 S.E.2d 683, at 686 (W.Va. 2008). And it is the best public policy that the law governing the drilling of these wells should be dragged, literally, out of the Dark Ages.

This Court should hold that the Commission has jurisdiction. However, as argued in the Intervener/Petitioner's initial brief, this Court should find that the 1000 foot well spacing was, as the proponent's witness stated, "arbitrary". It should order no variance from the current 3000-foot well spacing, or it should order 1500-foot well spacing but only on a temporary basis. Or, in the alternative, it should order that the Commission does have jurisdiction, but remand the case for the opportunity for proper evidence.

Respectfully submitted:

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Intervener/Petitioners
By Counsel

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Exhibit #1

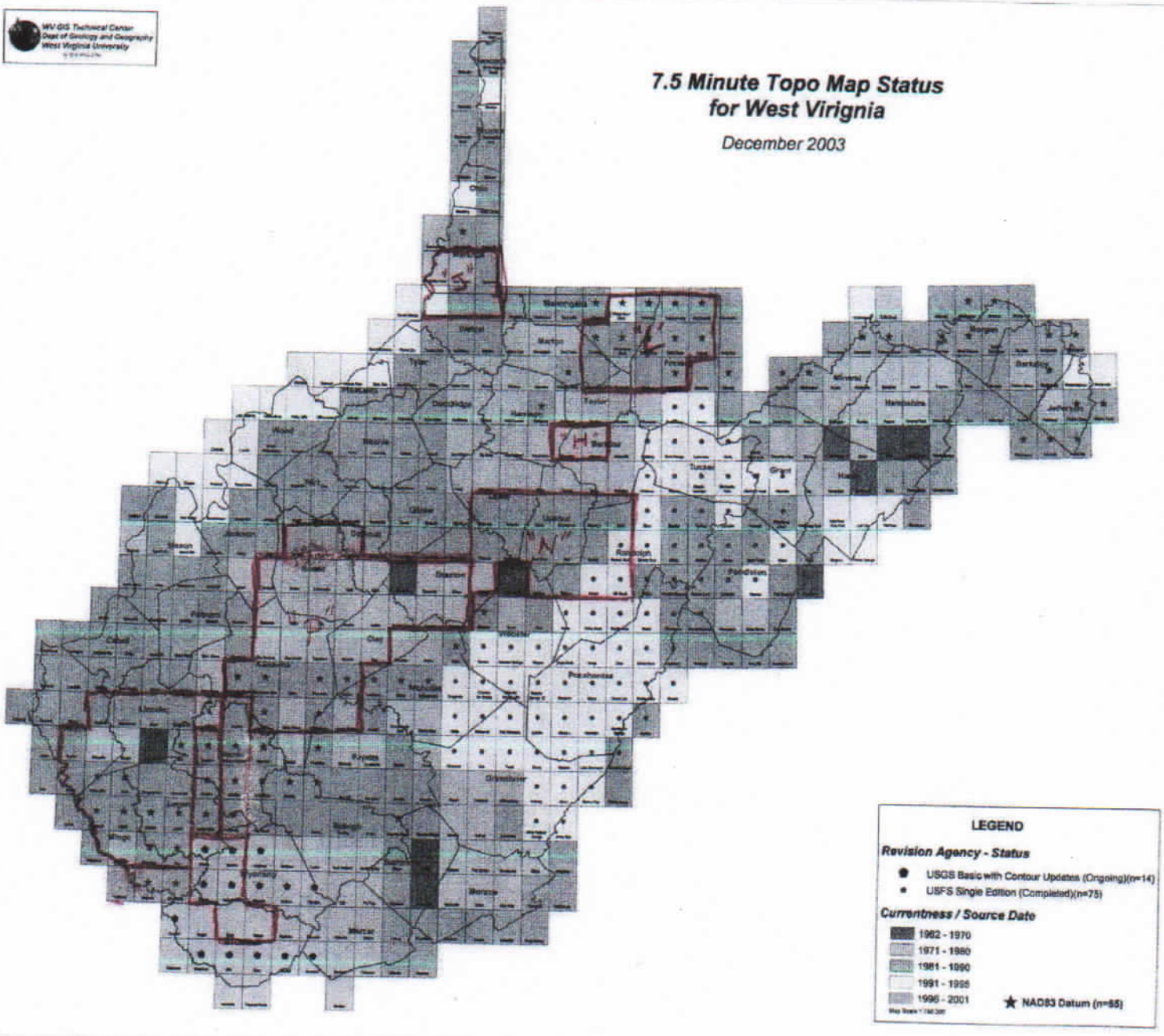
WV GIS Technical Center
Dept of Geology and Geography
West Virginia University
7.5 Minute Topo Map Status
for West Virignia
December 2003
LEGEND
Revision Agency - Status
USGS Basic with Contour Updates (Ongoing)(n=14)
USFS Single Edition (Completed)(n=75)
Currentness / Source Date
1962 - 1970
1971 - 1980
1981 - 1990
1991 - 1995
1996 - 2001
NAD83 Datum (n=55)

Exhibit #2

CERTIFICATE OF SERVICE

I, David McMahon, do hereby certify that I have served a true and exact copy of the foregoing brief upon all counsel of record by e-mailing a true copy in Portable Document Format (.pdf) on the 14th day of July, 2009, to:

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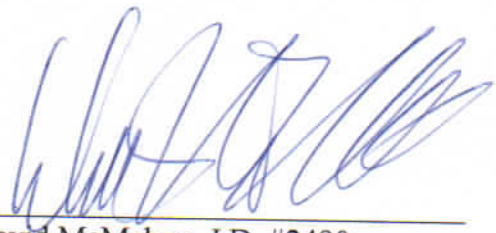

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