

IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

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CLERK OF COURT
SUPREME COURT OF WEST VIRGINIA
WETZEL COUNTY, WV

CASE NO: 07-C-9

CBC HOLDINGS, LLC v. DYNATEC CORPORATION, USA, DYNATEC ENERGY, INC., DYNATEC DRILLING, INC., NEW GAULEY COAL CORPORATION, and the unknown HEIRS, SUCCESSORS AND ASSIGNS OF HUGH COSGRAY, CATHERINE COSGRAY, CORA B. STEWART, E.E. STEWART, I.C. COSGRAY, W.B. COSGRAY, T.L. COSGRAY, JOHN A. COSGRAY, LUCY L. COSGRAY, TOLLA SOLE, LYDIA BOOTH AND BERTHA D. COSGRAY.

PETITION OF PLAINTIFF CBC HOLDINGS, LLC, APPEALING THE LOWER COURT'S DECISION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES UNDER THE COALBED METHANE ACT (W.Va. Rev. Code Sections 22-21-1 et seq.) PENDING RULING OF THE DIVISION OF OIL AND GAS

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

CBC HOLDINGS, LLC, a West Virginia
Limited Liability Company, in its own Behalf
And on behalf of the other owners of undivided
Interests in the minerals underlying the realty
In question,

Plaintiffs,

v.

Supreme Ct. No.
Lower Ct. No. 07-C-9 (Wetzel)
Lower Ct. Judge: Hon. John T. Madden

DYNATEC CORPORATION, USA, a foreign
Corporation not licensed to do
Business in West Virginia, DYNATECH ENERGY,
INC., a foreign Corporation licensed to do business
in West Virginia, DYNATECH DRILLING, INC., a
foreign corporation licensed to do business in West
Virginia, NEW GUALEY COAL CORPORATION,
a West Virginia corporation, Licensed to do business
in West Virginia, and the other UNKNOWN HEIRS,
SUCCESSORS and ASSIGNS OF HUGH K. COSGRAY,
CATHARINE COSGRAY, CORA B. STEWART,
E.E. STEWARD, I.C. COSGRAY, W.B. COSGRAY,
T.L. COSGRAY, JOHN A. COSGRAY, LUCY L.
COSGRAY, TOLA SOLE, LYDIA BOOTH AND
BERTHA D. COSGRAY,

Defendants.

APPELLANT CBC HOLDING'S BRIEF SUPPORTING ITS APPEAL

I.) The Kind of Proceeding and Nature of the Ruling in the Lower Tribunal.

The above-mentioned lawsuit was initially filed by Plaintiff CBC Holdings, LLC on January 22, 2007 in the Circuit Court of Wetzel County, West Virginia. Plaintiff's Complaint asserted that Plaintiff is the majority owner of all minerals (excepting coal from the Nine Foot Pittsburg[h] or River coal seam) and all oil and gas, including all coalbed methane gas, in, on and underlying a significant number of different tracts or parcels of land situate in the Church, Center

and Grant Districts of Wetzel County, West Virginia. The Plaintiff's Complaint contends that Defendants are only legally entitled to remove coal from the Pittsburgh Coal seam, not the coalbed methane therein, and that the lease from their lessor, the owner of only the Nine Foot Pittsburg(h) or River Seam of coal, or other document can grant them the authority to drill for methane gas in that or any other coal seam or other subterranean formation.

Plaintiff's Complaint sought a declaratory judgment from the lower court confirming its rights to such coalbed methane and a corresponding judgment declaring the leasehold interests asserted by these Defendants null and void under the law. Also, the Plaintiff's Complaint sought an adjudication of subsurface trespass against the Defendants and an accounting as to any coalbed methane gas previously produced and marketed from such lands. In other words, the Plaintiff requested the Court to act and construe the rights and entitlements of the various parties in regards to the minerals underlying the subject realty. In the event the Court agreed that Defendants, rather than the Plaintiff, were entitled to the coalbed methane gas in question located in the layer of the subsurface realty to which Defendants are entitled to mine coal (i.e., the Pittsburgh Coal Seam), Plaintiff's Complaint alternatively sought an adjudication that these Defendants committed trespass and conversion against these Plaintiffs by positioning their wells and conducting their mining activities in such a manner that coalbed methane and natural gas lying outside the Pittsburgh Coal seam belonging to Plaintiff were being removed, thus making these Defendants liable to Plaintiff for damages.

On November 16, 2007, the lower court issued a ruling dismissing Plaintiff's entire Complaint under the rationale that each and every prayer for relief and request for damages advanced by Plaintiff was encompassed and governed by the Coalbed Methane Act (W.Va.

Code Section 22-21-1 et. Seq.), and Plaintiff could not maintain its suit without first applying for relief under that Act. Despite clear language in Plaintiff's Complaint requesting "A declaratory judgment or ruling finding that the coalbed methane leases in question (the leases under which Defendants claim title to the subject minerals) are null and void and of no legal effect" (See Plaintiff's Complaint pg. 8), the lower court committed clear error in holding in its findings of fact that Plaintiff's Complaint asserts "Pursuant to the leases, the Dynatec Defendants had the right to drill for and commercially develop the coalbed methane from the Pittsburgh Seam." (See Final Order, Pg. 2). Plaintiff's Complaint mentions that Defendants claim the right to drill for said methane gas from various leasehold interests, but consistently asserts that such leasehold interests are null and void when viewed in light of the chain of title to the subject mineral interests. The lower court committed clear error and abused its discretion in holding that the Coalbed Methane Act (W.Va. Code Section 22-21-1 et seq.) gives jurisdiction and power to the Division of Oil and Gas to construe record ownership of mineral rights and leasehold interests and expressly takes this power away from our courts. No language of the subject Coalbed Methane Act grants any such power to the Division of Oil and Gas as the statute is intended to regulate the permitting and operation of methane gas wells.

Going further, the subject Coalbed Methane Act in no way dictates and in no way provides exclusive remedies for trespass and conversion of coalbed methane. Plaintiff asserts that the lower court clearly erred in grossly misunderstanding and misconstruing the scope and purpose of the Coalbed Methane Act and is acting to deprive Plaintiff of its rightful mineral interests while leaving Plaintiff no avenue for redress in the courts of law.

II. Statement of Facts of the Case Relevant To This Petition.

The Dynatech Defendants (Dynatech Corporation, USA, Dynatech Energy, Inc., and Dyantech Drilling, Inc.), namely Dynatech Corporation, USA, in Answer to Plaintiff's Complaint, asserts that it is the lessee of record of a November 21, 2002, coalbed methane lease, which leaseholds were obtained by assignments from lessor Defendants Western Pocahontas Properties, L.P. and New Gauley Coal Corporation. Upon further review of the chain of title for the subject realty, Plaintiff asserts that the Defendants' purported leasehold interests granting them the right to drill for coalbed methane gas in the Pittsburgh coal seam are invalid and/or non-existent.

The chain of title which Plaintiff asserts to prove that Defendants are entitled solely to the coal located within the Pittsburgh vein underlying the subject realty and not the coalbed methane gas therein, is illustrated in Plaintiff's Complaint as follows:

"A. By a coal deed dated November 2, 1901, recorded in the Office of the aforesaid Clerk in Deed Book 79, at Page 239, Hugh K. Cosgray and Catherine Cosgray, his wife, conveyed to Samuel S. Patterson and Jacob T. Kendall, as trustees, "... the nine foot, Pittsburgh or River vein or seam of coal within and underlying...." two certain tracts of 153 acres and 23 ¼ acres on land situate in Church and Center Districts of Wetzel County, West Virginia.

B. By a similar coal deed dated June 22, 1901, recorded in the Office of the aforesaid Clerk in Deed Book 70, at Page 580, Catharine Cosgray and Hugh K. Cosgray, her husband, conveyed to Samuel S. Patterson and Jacob T. Kendall, as trustees, "...all the nine foot, Pittsburgh or River vein or seam of coal within and underlying...." a certain described 63 ¼ acres of land situate in Church District of Wetzel County, West Virginia.

C. By a similar coal deed dated April 28, 1902, recorded in the Office of the aforesaid Clerk in Deed Book 75, at Page 579, Cora B. Stewart and E.E. Stewart, her husband, and Hugh K. Cosgray and Catherine Cosgray, his wife, conveyed to Virgil L. Highland, as trustee, "all the nine foot, Pittsburgh or River vein of coal..." underlying a certain described 128 acre tract of land situate in Grant District of Wetzel County, West Virginia.

D. By and through various mesne deeds, conveyances, mergers, etc. it is the best information and belief of the Plaintiff that the coalbed methane lessors and defendants from Western Pocahontas Properties, L.P., Western Pocahontas Properties, LLC and New Gauley Coal Corporation acquired and are the present owners of the right and title to the nine foot Pittsburgh or River seam of coal which were conveyed away by some or all of the three above described coal deeds.

E. By reason of a partition suit filed in the Circuit Court of Wetzel County styled O.C. Cosgray, et al., v. John A. Cosgray, et al., the surface of the various tracts of land owned by Hugh K. Cosgray, his wife Catherine Cosgray, Cora B. Steward and her husband, E.E. Stewart were partitioned and allotted to the various children and heirs of such parties but the mineral rights were not partitioned or allotted and remained in the parties according to their interests. Thus, at the time of such proceeding as the orders therefrom which were recorded will confirm the mineral ownership of such lands were owned as follows:

I.C. Cosgray	1/8
W.B. Cosgray	1/8
T.L. Cosgray	1/8
John A. Cosgray	1/8
Lucy L. Cosgray	1/8
Tolla Sole	1/8
Lydia Booth	1/8

And the heirs of F.M. Cosgray, deceased:

F. Waid Cosgray	1/48
Wayne Cosgray	1/48
Nellie Gump	1/48
Ralph Postlethwait	1/48
Bessie Gump Jones	1/48
Margaret Gump	1/48

(See Plaintiff's Complaint).

Plaintiff's Complaint alleges that in light of the above-mentioned coal deeds, the Defendants' lessor did not have the right to lease to the Dynatech Defendants the coalbed methane located under the Plaintiff's above-described mineral lands. As these Defendants have commenced and/or are drilling and currently producing coalbed methane gas and plan in the near future to drill and further develop said coalbed methane gas that Plaintiff asserts rightfully

belongs to them, the actions of these Defendants in producing and/or attempting to produce said methane gas amounts to trespass, usurpation and conversion of Plaintiff's mineral resources.

Plaintiff's Complaint further alleged in the alternative, if the Defendants were found to own the coalbed methane gas located within the Pittsburgh or River Seam of coal underlying the subject realty, the Defendants were, nevertheless, trespassing upon and converting minerals from the other formations that they do not own which are owned by Plaintiff in that Defendants' wells and casing utilized to extract coalbed methane are located on top of and not within such Pittsburgh(h) coal seam. Also, even if the Defendants were found to own the coalbed methane gas located within the Pittsburgh or River Seam of coal underlying the subject realty, the Defendants were, nevertheless, trespassing in that Defendants' coalbed methane well boreholes and casing which are located within such close proximity to neighboring lands owned by Plaintiff that the Defendants are necessarily taking and draining coalbed methane from formations belonging to Plaintiff and not the above-named Defendants.

As shown above, the main emphasis of Plaintiff's Complaint is focused on requesting that the lower Court issue a declaratory judgment dictating the lawful ownership of minerals and leasehold interests relating to the subsurface realty in question. As the Coalbed Methane Act in no way removes jurisdiction for these legal issues from the circuit courts and in no way grants authority and/or jurisdiction to determine ownership of mineral or leasehold interests to the West Virginia Division of Oil and Gas, the lower Courts actions constituted clear error.

III. Assignments of Error

- A. The Lower Court was clearly erroneous in stating in its findings of fact and conclusions of law that Plaintiff's Complaint conceded the fact that Defendants were legally entitled to drill for coalbed methane gas on Plaintiff's mineral lands despite express and unambiguous language to the contrary. (Plaintiff's Complaint expressly requests that Defendant's purported leasehold interests be declared null and void which is totally at odds with an express admission the Defendants as coalbed lessees have the right to be operating on Plaintiff's minerals; See Plaintiff's Complaint Pg. 8).
- B. The Lower Court erred in its interpretation of the Coalbed Methane Act (W.Va. Code Section 22-21-1 et seq.) by concluding that the subject West Virginia Code sections mandate that requests for declaratory judgments to determine rightful ownership of mineral rights leases and mineral interest ownership should be directed to the W.Va. Div. of Oil and Gas rather than a court of law despite no language in the subject statute granting such jurisdiction to the Div. of Oil and Gas.
- C. The Lower Court erred in determining that under the Coalbed Methane Act Plaintiffs are unable to bring an action for trespass and/or conversion of their minerals in any court of law without first resorting to the remedies provided by the Coalbed Methane Act despite no such remedy contemplated under the act.
- D. The Lower Court erred in determining that the Coalbed Methane Act precludes Plaintiff's request in a court of law for an accounting of all coalbed methane gas illegally removed from the subject realty by Defendants.
- E. The Lower Court erred in determining that the Coalbed Methane Act precludes Plaintiff from seeking damages and/or injunctive relief in a court of law to prevent Defendants from removing minerals from the layers of realty in question other than the Pittsburgh Coal Seam.

IV. POINTS AND AUTHORITIES RELIED UPON BY PLAINTIFF	Page(s)
1.) W.Va. Rev. Code Section 22-21-1	11
2.) W.Va. Rev. Code Section 22-21-1 (b) (1-5)	13
3.) W.Va. Rev. Code Section 22-21-4	13
4.) W.Va. Rev. Code Section 22-21-6 (g)	17, 18
5.) W.Va. Revised Code Section 22-21-15	18, 19
6.) <i>Appalachian Power Co. v. State Tax Dep't of W.V.</i> , 195 W.Va. 573, 466 S.E. 2d 424 (1995)	9
7.) <i>Collins v. Elkay Mining Co.</i> , 179 W.Va. 549, 371 S.E.2d 46, (1988)	16
8.) <i>Daurelle v. Traders Federal Savings & Loan Association of Parkersburg</i> , 143 W.Va. 674, 104 S.E. 2d 320	15
9.) <i>Dworning v. Euclid</i> , Ohio App. 8 Dist. 2006, 2006 WL 3743822, (Ohio 2006)	16
10.) <i>Martin v. Ohio Dept. of Rehab. & Corr.</i> , 140 Ohio App. 3d 831, 749 N.E. 2d 787, (Ohio 2001)	16
11.) <i>Texas & Pacific R. Co. v. Abilene Cotton Oil Co.</i> , 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 2d 553	16
12.) <i>Wheeling-Pittsburg Steel Corp. v. Rowling</i> , 205 W.Va. 286, 517 S.E.2d 763 (W.Va. 1997)	16
13.) <i>White v. Haines</i> , 217 W.Va. 414, 618 S.E. 2d 423, (W.Va. 2005)	9

V. DISCUSSION OF LAW

A. Standard of Review

In reviewing challenges to the findings and conclusions of the circuit court, the Supreme Court of Appeals reviews the final order and the ultimate disposition under an abuse of discretion standard, the circuit court's underlying factual findings under a clearly erroneous standard and questions of law are subject to a de novo review. *White v. Haines*, 217 W.Va. 414, 618 S.E. 2d 423, (W.Va. 2005). In regards to the Lower Court's interpretation of the subject Coalbed Methane Act (W.Va. Code Section 22-21-1 et seq.) it has consistently been held that "Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review." See *White*, 217 W.Va. 414, (2005) and *Appalachian Power Co. v. State Tax Dep't of W.V.*, 195 W.Va. 573, 466 S.E. 2d 424 (1995). Thus, the Lower Court's findings of fact and conclusions of law, which state that Plaintiff's Complaint concedes the fact that Defendants are legally entitled to drill for coalbed methane gas from the Pittsburgh coal seam underlying the subject realty despite clear language and evidence to the contrary expressly asserted in Plaintiff's Complaint should be viewed under a clearly erroneous standard as it pertains largely to a question of fact. When reviewing the Lower Court's interpretation of the Coalbed Methane Act, which Plaintiff contents was grossly misconstrued and misapplied in order to dismiss all facets of Plaintiff's Complaint, a de novo review must be utilized.

B. The Lower Court was clearly erroneous in stating in its findings of fact and conclusions of law that Plaintiff's Complaint conceded the fact that that Defendants were legally entitled to drill for coalbed methane gas on Plaintiff's mineral lands despite express and unambiguous language to the contrary. (Plaintiff's Complaint expressly requests that Defendant's purported leasehold interests be declared null and void which is totally at odds with an express admission the Defendants as coalbed lessees have the right to be operating on Plaintiff's minerals; See Plaintiff's Complaint Pg. 8).

In reaching its conclusion that each and every facet of Plaintiff's Complaint should be dismissed pending adjudication from the Division of Oil and Gas, the lower Court did so based upon clearly erroneous factual grounds. As stated above, Plaintiff's Complaint sought a declaratory judgment ruling that Plaintiff is the rightful owner of all minerals, excepting coal from the Pittsburgh Coal seam, underlying the realty in question. Defendants assert two or more coalbed methane leases that they argue grant them the right to remove said coalbed methane gas. Plaintiff, after conducting a chain of title report for the subject realty, disputes the legitimacy and legality of the Defendants' purported leases. On page 2 of the Findings of Fact and Conclusions of Law of the Order that is the subject of this appeal, the Lower Court incorrectly holds, "Pursuant to the leases, the Dynatec Defendants had the right to drill for and commercially develop the coalbed methane from the Pittsburgh Seam. (Compl. ¶ 5)." (See Exhibit A, pg. 2). Not only does the Court quickly conclude this fact without even evaluating the chain of title proposed by Plaintiff, but it actually cites Plaintiff's Complaint as authority for the proposition. As the record will reflect, Plaintiff's Complaint does not even remotely make such a contention in paragraph 5 and in the corresponding prayer for relief requests "a declaratory judgment or ruling finding that the two coalbed methane leases in question are null and void and of no legal effect..." (See Plaintiff's Complaint, pgs. 6-8).

While interpreting mineral rights leaseholds and chains of title is certainly an onerous and unexciting facet of the legal community, Defendant can point to no legal authority or language contained in the Coalbed Methane Act which takes this authority away from a court of law and provides the same to the Division of Oil and Gas. The subject Order itself contains no language

to this effect. (See Exhibit A). By erroneously concluding that Defendants were the rightful leasehold owners of the coalbed methane gas located within the Pittsburgh seam, the Lower Court Effectively ignored the largest and most important aspect of Plaintiff's Complaint. This being Plaintiff's request for a Declaratory Judgment to ascertain the validity of Defendant's purported leasehold interests. While the Lower Court may have not relished this undertaking, it was certainly required by law to interpret these leasehold and mineral rights interests. As will be shown below, the language of the Coalbed Methane Act in no way mentions or even contemplates the absurd proposition that the Division of Oil and Gas should be charged with construing mineral rights leasehold interests and title issues. The statute's narrow focus and legislative findings exhibit that the act was intended merely to facilitate the safe removal of Coalbed Methane gas from our coal seams. (See **W.Va. Rev. Code Section 22-21-1**). The statute should in no way be construed to take away a court of law's power to interpret mineral rights and leasehold and ownership interests.

Defendants' own Motion to Dismiss for Failure to Exhaust Administrative Remedies Under the Coalbed Methane Act reinforces the fact that the Lower Court committed clear error in dismissing this facet of Plaintiff's Complaint. Counsel for Defendant states, "To the extent the Plaintiff has a conflicting claim to the actual ownership of (the coalbed methane located within the Pittsburgh seam), the Defendants agree that this narrow issue is one to be decided by this Court." (See Defendants' Motion to Dismiss for Failure to Exhaust Adm. Remedies, pg. 2, footnote, 1). How the Lower Court came to its final conclusion in light of this language is inexplicable and enigmatic. Plaintiff has consistently argued that Defendants were not entitled to any Coalbed Methane gas, located in any formation underlying the subject realty and even went

as far as advancing a chain of title that purported to confirm the same. The Lower Court's failure to act in protecting Plaintiff's interests by reviewing the subject leaseholds and chain of title to determine proper ownership of the same constituted clear and reversible error.

C. The Lower Court Erred In Dismissing Plaintiff's Complaint for Failure to Exhaust Administrative Remedies Under the Coalbed Methane Act and by Doing So Committed A Gross Misreading and Misunderstanding of the Purpose and Nature of the Statute.

NOTE: Because Assignments of Error B, C, D, and E above pertain to the lower Court's misunderstanding and misconstruction of the subject Coalbed Methane Act, these Assignments of Error shall be dealt with under this same section of Plaintiff's Petition for Appeal.

i. Background and Statutory Purpose of The Coalbed Methane Act.

Just as natural gas was once looked upon as a nuisance gas that later became a most valuable natural resource, the same is true of coalbed methane gas. With its high BTU content and the more modern horizontal drilling procedures that have been developed, coalbed methane has rather suddenly become a valuable and commercial asset that is presently being developed by coal operators and natural gas operators alike. In West Virginia it is not at all uncommon to have the ownership of coal underlying a particular tract of land divided apart from the ownership of the oil and natural gas under the very same tract. This situation begs the question that the Lower Court erroneously left for the Division of Oil and Gas, an administrative agency with no such authority or expertise. This question being, when one person or entity owns the coal under a tract of land and another owns the oil and natural gas under the same, who is entitled to the coalbed methane gas? After all, methane is a gas and should not the owner of the natural gas also own the coalbed methane which is likewise a gas regardless of its location in a coal seam? On the other hand, the methane is located mostly within the seam or seams of coal under the realty

which the coal owners are claiming title as part of their ownership of the coal. There can be no mistake that Plaintiff's Complaint sought an answer to this very important question and there can likewise be no mistake that the answer and resolution of this question does not lie within the parameters of the Coalbed Methane Act.

The Coalbed Methane Act (W.Va. Rev. Code Sections 22-21-1 et seq.) was advanced by our legislature in an attempt to condone the exploration of coalbed methane gas and to overcome the old train of thought that the same was a nuisance gas that was severely dangerous to coal miner safety. The public policy set forth by the statute included goals to:

- 1) preserve coal seams for future mining while facilitating the expeditious evacuation of coalbed methane from the State of West Virginia,
- 2) To foster, encourage and promote the commercial development of coalbed methane by establishing procedures for issuing permits and forming drilling units for coalbed methane wells,
- 3) to protect and enforce the rights of coalbed methane well operators and coalbed methane owners in a pool of coalbed methane,
- 4) to Safeguard the mineability of coal during the removal of coalbed methane,
- 5) Create a permitting procedure and authority to provide for and facilitate coalbed methnate development as encouraged by the Energy Policy Act of 1992...

(See W.Va. Rev. Code Section 22-21-1 (b) (1-5).

When dealing with the powers of the Division of Oil and Gas under the Coalbed Methane Act, the powers thus provided include,

“(a) The duty of issuing permits and otherwise supervising the execution and enforcement of the provisions of this article, (b) the power to enact rules necessary to effectuate the purposes of this article, (c) (1) the power to perform all duties imposed by the provisions of this article, (2) the power to perform all duties as the permit issuing authority for the state in all matter pertaining to the exploration, development, production and recovery of coalbed methane, (3) power to perform all such acts as may be necessary and appropriate to secure to this state the benefits of federal legislation by establishing programs relating to the exploration, development, production and recovery of coalbed methane, (4) the power to visit and inspect any coalbed methane well or well site and call for the assistance of any oil and gas inspector or other employee of the office of oil and gas in the

enforcement of this article, (5) Power to collect the permit application fee for the drilling of coalbed methane wells, and (6) Power to collect the permit application fee for a drilling unit.”

(See W.Va. Rev. Code Section 22-21-4).

As the express wording and delineation of powers quoted above indicates, the lower court erred in giving the Coalbed Methane Act a much too broad and powerful interpretation and jurisdiction. By dismissing Plaintiff’s entire Complaint, including Plaintiff’s request for judicial interpretation of leasehold and mineral rights issues, the breadth of the act was grossly misunderstood. No where in the public policy behind the statute’s legislative intent and no where in the powers delineated to the Division of Oil and Gas under the statute is the subject of leasehold and/or mineral rights interest interpretation and adjudication even remotely mentioned. It would be an absurd proposition to contend that the Division of Oil and Gas should be charged with these legal tasks.

ii. The Lower Court Erred in ruling that Actions for Declaratory Judgment to determine rightful ownership of mineral rights leases and mineral interest ownership should be directed to the W.Va. Div. of Oil and Gas rather than a court of law despite no language in the subject statute granting such jurisdiction to the Div. of Oil and Gas. (Assignment of Error B Above).

Based on the language quoted from the Coalbed Methane Act in the proceeding section, the Lower Court’s statement in the Order that is the subject of this appeal that “While the Court acknowledges that the Defendants may not be the owners of the coalbed methane in the Pittsburgh seam, the question of whether the Defendants had the right to drill and extract methane from the aforementioned coalbed is one for the Division of Oil and Gas rather than this Court” is legally unsustainable when read in light of the limited powers provided by the act. (See Exhibit A, pg. 3). When the above-quoted Coalbed Methane Act provisions are read it is clear

that most of the power and duties provided to the Div. of Oil and Gas under the Act are procedural in nature in that they deal with issuance of permits, safety regulations, etc. No wording in the Coalbed Methane Act can even remotely be construed to grant the Division of Oil and Gas powers of judicial interpretation over mineral rights and leasehold ownership issues. In fact, I would represent that the employees at the Division of Oil and Gas would whole-heartedly agree and thank us for pointing out this seemingly self evident observation.

iii. The Lower Court erred in determining that under the Coalbed Methane Act Plaintiffs are unable to bring an action for trespass and/or conversion of their minerals in any court of law without first resorting to the remedies provided by the Coalbed Methane Act despite no such remedy being contemplated under the act. (Assignments of Error C, D and E Above).

As stated above, the Coalbed Methane Act was not intended to place the burden of construing mineral rights issues on the Division of Oil and Gas, and neither was it intended to take away legal remedies from mineral rights interest holders who alleged that their mineral rights interests had been trespassed upon or converted. In fact, no such remedies are even remotely contemplated by the act.

Under West Virginia law, a Motion to Dismiss for Failure to Exhaust Administrative Remedies, being a dispositive motion, is normally only utilized in light of express wording that provides a specific remedy tailored to a unique factual circumstance. The general proposition provides, "that where an administrative remedy is provided by statute, relief must be sought from the administrative body and that such remedy must be exhausted before the courts will take jurisdiction." *Daurette v. Traders Federal Savings & Loan Association of Parkersburg*, 143 W.Va. 674, 104 S.E. 2d 320. When first enunciated by the Supreme Court of the United States, the assertion that the doctrine should only be utilized when a specific remedy is expressly

outlined governing a specific set of facts was stated as “the courts are without jurisdiction to grant relief to any litigant complaining of any act done or omitted to have been done if such act or omitted act is within the rules and regulations of the administrative agency involved.” *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 2d 553.

The West Virginia Supreme Court of Appeals has held that the doctrine of exhaustion of administrative remedies is inapplicable where as here no administrative remedy is provided by law. *Wheeling-Pittsburg Steel Corp. v. Rowling*, 205 W.Va. 286, 517 S.E.2d 763, (W.Va. 1997). Going further, this court has construed the doctrine not to apply when a Plaintiff’s claim is not outside the conventional experience of judges and does not require the exercise of administrative discretion. *Collins v. Elkay Mining Co.*, 179 W.Va. 549, 371 S.E.2d 46, (1988). In fact several recent West Virginia Supreme Court of Appeals decisions have required a specific remedy and express language requiring the exhaustion of explicit administrative remedies before the doctrine will take effect. In *Collins*, 179 W.Va. 549 (1988), it was held that except in those cases where the legislature vests exclusive primary jurisdiction in an agency, a plaintiff may seek relief in our trial courts. In *Wheeling-Pittsburg Steel Corp.*, 205 W.Va. 286, (W.Va. 1997), it was likewise held that a statute should unequivocally state that exhaustion of the grievance process provided by an administrative statute is a prerequisite before the case may be heard by the courts before the doctrine of exhaustion of remedies can be utilized to dispose of the claim.

Other jurisdictions from which West Virginia has sought guidance in applying the doctrine have reached similar narrow constructions. In the Ohio case of *Martin v. Ohio Dept. of Rehab. & Corr.*, 140 Ohio App. 3d 831, 749 N.E. 2d 787, (Ohio 2001), a prisoner-plaintiff sought relief from the courts despite express and unambiguous language found within 42

U.S.C.A. § 1997 (e) but had his claim dismissed due to plain language found within the federal statute that expressly dictated that a state inmate “must exhaust all available state administrative remedies. In *Dworning v. Euclid*, Ohio App. 8 Dist. 2006, 2006 WL 3743822, (Ohio 2006), it was stated that “The most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand.”

In the instant case, the Lower Court dismissed each and every contention advanced by Plaintiff Complaint under the guise that the same fall squarely within the directives and remedies provided by the Coalbed Methane Act despite the very narrow scope and intent of the statute. For instance, in regards to Plaintiff’s contention that Defendants have been trespassing upon, converting and/or improperly draining minerals owned by Plaintiff, the lower court incorrectly concludes that “the proper course of action for Plaintiff is to seek to have the Chief of the Division of Oil and Gas remedy such violation.” (See Exhibit A, pg. 4). The Lower Court goes as far as quoting what it feels is the exact code section of the Coalbed Methane Act that dictates this result by citing W.Va. Rev. Code Section 22-21-6(g). The very title of this code section, “Permit required for coalbed methane well; permit fee; application; soil erosion control plan; penalties” should evidence the fact that clear error was committed in this application of the law. As the title suggests, this code section merely deals with the permitting, fees associated with such permitting, required submission of a soil control plan and resulting penalties if any of the above-

mentioned directives are not followed. The actual subsection (g) quoted by the Lower Court as legal justification for dismissing this claim states:

“The chief shall deny the issuance of permit if he or she determines that the applicant has committed a substantial violation of a previously issued permit, including the erosion and sediment control plan, or a substantial violation of one or more of the rules promulgated hereunder, has failed to abate or seek review of the violation.”

See W.Va. Rev. Code Section 22-21-6 (g).

A plain reading of this provision and the Coalbed Methane Act provisions cited above should indicate that the Lower Court grossly misconstrued and misinterpreted the subject statute. The very subsection cited by the Court as authority to preclude Plaintiff's rights to seek damages for conversion and/or trespass of its mineral interests, subsection (g), speaks to very specific factual circumstances that do not encompass trespass and/or conversion. The subject provision deals with violations of rights to drill bestowed by permit, failure to follow an erosion and sediment control plan, etc. (See **W.Va. Rev. Code Section 22-21-6 (g)**). The Lower Court's finding that this narrow provision precluded Plaintiff from seeking damages in a court of law for conversion and/or trespass are clearly erroneous.

In addition to the misinterpreted Coalbed Methane Act provision cited above, the Lower Court also advanced W.Va. Revised Code Section 22-21-15 as justification for its decision to dismiss each and every facet of Plaintiff's Complaint. This section, titled “Drilling units and pooling of interests”, can in no reasonable way be read to act as a remedy for Plaintiff's allegations. This section states,

“In the absence of a voluntary agreement, an operator, owner or other party claiming an ownership interest in the coalbed methane may file and application with the chief to pool (i) separately owned interests into a single tract, (ii)

separately owned tracts, (iii) separately owned interests in any tract, and (iv) any combination of (i), (ii) and (iii) to form a drilling unit for the production of coalbed methane from one or more coalbed methane wells.”

See W.Va. Revised Code Section 22-21-15.

This section deals exclusively with the potential pooling of interests of already defined and legally entitled coalbed methane well operators so that they may be joined together and have the methane derived from their pooled wells distributed pursuant to their perspective interests. The language (or complete lack there of) contained within this narrow statute can in no way be construed to provide a remedy for mineral rights owners who allege that their mineral interests have been either converted or trespassed upon. In fact, the words remedy, conversion, improper draining, etc. are not even utilized in the statute. A correlation can be made to the oil and natural gas industries in that when adjoining mineral rights owners fear that their neighbor’s deep well may be draining minerals rightfully belonging to another person or entity, they can petition the Division of Oil and Gas for a order requiring that the two wells be joined in a pool or unit and the resources derived therefrom be distributed equally among the parties pursuant to their interests. However, in the instant case, the Plaintiff not only questioned the lawfulness of the Defendants’ removing methane gas from any layer of the subsurface, but also alleged that improper gas drainage is occurring from other subsurface formations belonging to Plaintiffs, thus evidencing that Plaintiff’s minerals are being converted from different layers located directly on top or below the other mineral layers. In other words, while the pooling and unitization of deep gas wells that has been common in the oil and gas industry contemplates the pooling of neighboring, adjoining or adjacent wells, no such pool or unit could possibly be ordered for accusations that minerals are being converted from above or beneath subject formations.

As a reading of the provisions of the above-quoted Coalbed Methane Act indicates, no remedy is advanced by the statute that would act to preclude Plaintiffs from asserting their claims in a court of law. According to the above-cited case law, Motions to Dismiss for Failure to Exhaust Administrative Remedies, as is true with all dispositive motions holding the power to deprive a citizen of his or her day in court, must be strictly construed to ensure that explicit language contained within the statute purported to provide exclusive remedies for certain factual situations actually exists. In the instant case, not only does the lack of explicit language appear evident, but also equally absent are any and all remedies aimed at addressing the Complaint of this Plaintiff. In short, the Lower Court utilized a legislative statute geared solely towards condoning and facilitating the exploration of a once dangerous resource to dismiss each and every facet of Plaintiff's Complaint. This occurred despite the fact that the subject Coalbed Methane Statute in no way provides remedial relief for Plaintiff's prayer for relief and in no way even contemplates persons in Plaintiff's factual position. For this reason the Lower Court's ruling in dismissing Plaintiff's Complaint should be vacated.

Addressing Plaintiff's further assignments of error above, it is clear that the complete lack of remedies provided to compensate citizens in Plaintiff's position who allege the improper removal and/or conversion of minerals indicates that such circumstances are better suited for a court of law. For instance, in the oil and gas industry it is quite common for an aggrieved party to request an accounting as to all resources sold from a particular well. These accountings are utilized to evidence the propriety or impropriety of oil and gas producers in taking only those minerals to which they are entitled and to ensure that if minerals not belonging to them are realized, that just compensation be paid to those whose rights have been adversely effected. The

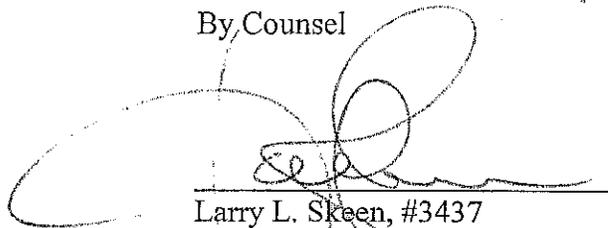
Coalbed Methane Act provides for no such accounting.

Finally, as shown in detail above, the Coalbed Methane Act either provides very limited remedies that are suited for factual circumstances not presented in the instant case or, in the opinion of counsel for Plaintiff, no remedies at all that would replace citizens' legal and/or equitable remedies. For this reason, the Lower Court committed clear error in dismissing all of Plaintiff's prayers for legal and/or equitable relief.

VI. CONCLUSION AND PRAYER FOR RELIEF

Based upon the foregoing, your Appellant, CBC Holdings, LLC, represents that it has in effect and in essence been deprived of its legal resources and property and then denied any proper recourse as to same, and it prays that this appeal be granted; that full briefs and arguments be entertained by this Court; and that this Court reverse the final Order Dismissing Plaintiff's Complaint in favor of a ruling of the Division of Oil and Gas entered by the Circuit Court of Wetzel County, West Virginia on November 16, 2007, in accordance with the assignments of error set forth herein; and, that Appellant have such other and further relief as the Court may see fit.

APPELLANT CBC HOLDINGS, LLC
By Counsel



Larry L. Skeen, #3437
Skeen and Skeen
108 Hills Plaza
Charleston, WV 25301
Counsel for Appellant

IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

CBC HOLDINGS, LLC, a West Virginia
Limited Liability Company, in its own Behalf
And on behalf of the other owners of undivided
Interests in the minerals underlying the realty
In question,

Plaintiffs,

v.

Supreme Ct. No.
Lower Ct. No. 07-C-9 (Wetzel)
Lower Ct. Judge: Hon. John T. Madden

DYNATEC CORPORATION, USA, a foreign
Corporation not licensed to do
Business in West Virginia, DYNATECH ENERGY,
INC., a foreign Corporation licensed to do business
in West Virginia, DYNATECH DRILLING, INC., a
foreign corporation licensed to do business in West
Virginia, NEW GUALEY COAL CORPORATION,
a West Virginia corporation, Licensed to do business
in West Virginia, and the other UNKNOWN HEIRS,
SUCCESSORS and ASSIGNS OF HUGH K. COSGRAY,
CATHARINE COSGRAY, CORA B. STEWART,
E.E. STEWARD, I.C. COSGRAY, W.B. COSGRAY,
T.L. COSGRAY, JOHN A. COSGRAY, LUCY L.
COSGRAY, TOLA SOLE, LYDIA BOOTH AND
BERTHA D. COSGRAY,

Defendants.

CERTIFICATE OF SERVICE

I, Larry L. Skeen, attorney for Appellant CBC Holdings, LLC, do hereby certify that the
foregoing Petition for Appeal and Docketing Statement were duly served upon all counsel of
record and the Circuit Court and Judge below by mailing true copies thereof, by United States
Mail, postage prepaid, on this 4th day of February, 2008, addressed to them as follows:

Brian R. Swiger, Esq.
Blair M. Gardner, Esq.
Jackson and Kelly, PLLC
P.O. Box 553
Charleston, WV 25322

Honorable John T. Madden
Chief Judge, 2nd Judicial Circuit
Marshall County Courthouse
600 Seventh Street
Moundsville, West Virginia 26041



Larry L. Skeen #3437
Counsel for Plaintiff

Supreme Court of Appeals of West Virginia
DOCKETING STATEMENT

Style of Case (use style from final order)

CBC HOLDINGS,LLC, a West Virginia Limited Liability Company,
in its own Behalf and on behalf of the other owners of undivided
interests in the minerals underlying the realty in question,

Plaintiffs,

vs.

DYNATEC CORPORATION, USA, et al.

Defendants,

Type of Action

Civil
Criminal

Petitioner(s):

Plaintiff(s)
Defendant(s)

Circuit
Number:

Circuit Judge: John T. Madden

County: Wetzel

FILED
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WETZEL COUNTY, WV

TIMELINESS OF APPEAL

Date of entry of judgment or order appealed from: **November 16, 2007**

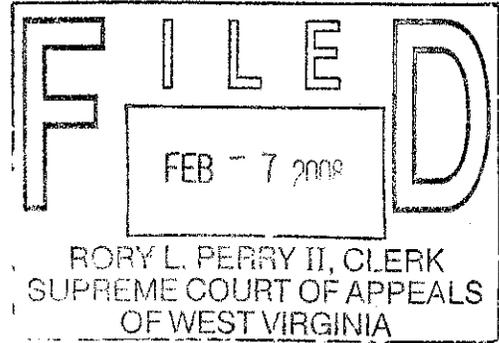
Filing date of any post-judgment motion filed by any party
pursuant to R. Civ. P. 50(b), 52(b), or 59: **N/A**

Date of entry of order deciding post-judgment motion: **N/A**

Date of filing of petition for appeal:

Date of entry of order extending appeal period: **N/A**

Time extended to: **N/A**



FINALITY OF ORDER OR JUDGMENT

Is the order or judgment appealed from a final decision on the merits as to all issues and parties?

YES NO

If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)?

YES NO N/A

Has the defendant been convicted? YES NO N/A

Has a sentence been imposed? YES NO N/A

Is the defendant incarcerated? YES NO N/A

Has this case previously been appealed? YES NO

If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court?

YES NO

If yes, cite the case and the manner in which it is related on a separate sheet.

CASE INFORMATION

State generally the **nature of the suit**, the **relief sought**, and the **outcome below**. [Attach an additional sheet, if necessary.]

Plaintiffs are the rightful owners of all minerals, excepting the coal located within the Nine Foot Pittsburgh or River Coal Seam underlying two tracts of land located in Wetzel County, West Virginia. Plaintiffs allege that the named Defendants as lessees have either intentionally or unintentionally trespassed on and converted minerals from the subject mineral tracts and have removed coalbed methane gas from the Pittsburgh seam, despite the fact that the severance deed to their lessor grants only the ". . . nine foot, Pittsburg or River seam of coal. . ." In addition to unlawfully removing coalbed methane from the Pittsburgh seam, Defendants have also been removing coalbed methane from other subterranean formations of the earth outside the Pittsburgh seam which belong exclusively to Plaintiff.

Plaintiffs' Complaint sought; 1) a declaratory judgment adjudicating the ownership interests of the various parties of the mineral rights and leasehold interests in question and a declaration that Defendants leasehold interests in any coalbed methane, or at least in any coalbed methane outside the Pittsburgh Seam, be declared null and void, 2) a determination that the Defendants have trespassed and converted minerals belonging to Plaintiff and are liable for damages as a result, 3) An accounting of all coalbed methane produced from the subject realty, 4) A determination that the Defendants are liable for trespass and conversion in regards to minerals underlying the subject realty that lie outside the Pittsburgh coal Seam rightfully belonging to Plaintiff.

OUTCOME BELOW: Defendant's filed a Motion to Dismiss Plaintiff's entire complaint and all prayers for relief due to Plaintiff's purported failure first to exhaust administrative remedies under the Coalbed Methane Act. The Court entered an Order Nov. 16, 2007 which concluded that Plaintiff did not exhaust all administrative remedies and stayed the Defendants' Motion in favor of a ruling from the West Virginia Division of Oil and Gas. (In this Order the lower court incorrectly found that Plaintiff's Complaint expressly conceded the fact that Defendants were entitled to drill for coalbed methane gas under the subject realty despite Plaintiff's consistent assertion the Defendant purported mineral rights and leasehold interests are not legally valid.

State the **issues to be raised on appeal**. [Attach an additional sheet, if necessary. Use carriage returns to number the issues in a manner corresponding with the petition for appeal.]

1.) The lower court was clearly erroneous in stating in its findings of fact and conclusions of law that Plaintiff's Complaint conceded the fact that Defendants were legally entitled to drill for coalbed methane gas despite express and unambiguous language to the contrary. Plaintiff's Complaint expressly requests a declaratory judgement from the lower court determining that Defendant's purported leasehold interest in the subject coalbed methane be adjudicated null and void.

2.) The lower court erred in its interpretation of the Coalbed Methane Act (W.Va. Code Section 22-21-1, et seq.) by concluding that the subject West Virginia Code provisions mandate that requests for declaratory judgement to determine rightful ownership of mineral rights and mineral interests should first be directed to the WV Division of Oil and Gas before the same can be heard in a court of law.) The subject Act clearly deals only with the issuance of permits and regulations to follow in exploring and/or drilling for coalbed methane and no way contemplates or remotely mentions the authority or jurisdiction of the Division of Oil and Gas to make legal conclusions of law in regards to mineral rights ownership and/or lease construction).

3.) The lower court erred in determining that under the Coalbed Methane Act the Plaintiffs are unable to bring an action for trespass and/or conversion of their minerals in any court of law in the State without first exhausting all remedies provided by the Coalbed Methane Act. (Plaintiffs assert that the clear language of the Coalbed Methane Act does not provide a remedy for such legal violation and as such should not act to preclude an action for the same).

List the Petitioner(s) name: CBC HOLDINGS, LLC

If incarcerated, provide institutional address:

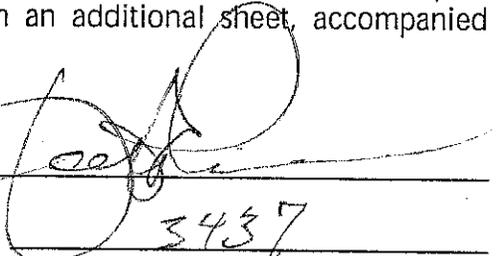
Name of attorney or pro se litigant filing Docketing Statement: Enter name here. Delete this text first.

ATTORNEY PRO SE

Will you be handling the appeal? YES NO

If so, provide firm name, address, and telephone number: Larry L. Skeen, (WVSB # 3437)
Skeen and Skeen Attorneys at Law
108 Hills Plaza
Charleston, WV 25312
Phone: 304-344-4748
Fax: 304-720-9070

If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all petitioners concur in this filing.

Signature: 

WV Bar No. 3437

Date: February 4, 2008

Remember to Attach:

1. Additional pages, if any, containing extended answers to questions on this form.
2. A copy of the order or judgment from which the appeal is taken.
3. A Certificate of Service.

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA

CBC HOLDINGS, LLC, a West Virginia Limited Liability Company, in its own Behalf on in behalf of the other owners of undivided interests in the minerals underlying the realty in question,

Plaintiffs,

v.

Civil Action No. 07-C-9
Judge John T. Madden

DYNATEC CORPORATION, USA, a foreign Corporation not licensed to do business in West Virginia, DYNATEC ENERGY, INC., a foreign Corporation licensed to do business in West Virginia, DYNATEC DRILLING, INC., a foreign corporation Licensed to do business in West Virginia, NEW GAULEY COAL CORPORATION, a West Virginia corporation, Licensed to do business in West Virginia, and the other UNKNOWN HEIRS, SUCCESSORS AND ASSIGNS OF HUGH K. COSGRAY, CATHARINE COSGRAY, CORA B. STEWART, E.E. STEWART, I.C. COSGRAY, W.B. COSGRAY, T.L. COSGRAY, JOHN A. COSGRAY, LUCY L. COSGRAY, TOLLA SOLE, LYDIA BOOTH AND BERTHA D. COSGRAY,

Defendants.

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WETZEL COUNTY, WV

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ORDER

On a prior day, the Defendants', in the above-styled case, moved this Court to dismiss the Complaint on the ground that the Plaintiff failed to exhaust the administrative remedies available to it under the Coalbed Methane Act, W.Va. Code § 22-21-1, *et seq.* All filings on this Motion before the Court have been done timely as per the Court's Scheduling Order, entered August 27, 2007.

FINDINGS OF FACT

The Plaintiff, CBC Holdings, LLC, is a West Virginia limited liability company. The Plaintiff alleges that it is the majority owner of all of the coal (except for the Pittsburgh Seam), oil and gas and other minerals on and underlying several tracts of land situate in Wetzel County, West Virginia. (Compl. ¶ I).

The Plaintiff alleges that Dynatec Corporation USA and Dynatec Energy, Inc. (collectively "Dynatec Defendants") entered into coalbed methane leases with New Gauley Coal Corporation and/or its affiliates, the owners of the Pittsburgh Seam. (Compl. ¶ III). Pursuant to the leases, the Dynatec Defendants had the right to drill for and commercially develop the coalbed methane from the Pittsburgh Seam. (Compl. ¶ V).

On January 29, 2007, CBC Holdings filed suit against the Dynatec Defendants and New Gauley Coal Corporation. The Plaintiff's claims are twofold. First, the Plaintiff claims that it, as the owner of the oil and gas owns the coalbed methane located within any and all coal seams underlying the tracts. (Compl. ¶ VI). As such, the Plaintiff asks this Court for a declaration that it is the rightful owner of the coalbed methane in the Pittsburgh Seam. (*Id.*). Second, the Plaintiff claims that even if it is not the owner of the coalbed methane in the Pittsburgh Seam, the Dynatec Defendants are trespassing upon the other coalbed methane that the Plaintiff does own. The Plaintiff claims that the Dynatec Defendants' boreholes and casing are located in such close proximity to

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OFFICE

the Plaintiff's adjoining property that the Dynatec Defendants are "taking and draining the coalbed methane from the Plaintiffs' coalbed methane formations." (Compl. ¶ VII). It seeks this declaration notwithstanding its admission that it does not own the Pittsburgh Seam of coal.

As set forth below, the Coalbed Methane Act, W.Va. Code § 22-21-1, *et seq.*, sets forth detailed administrative procedures that the Plaintiff, at the very least, is required to follow prior to pursuing these claims in a court of law. As a result, the Complaint must be dismissed because of the Plaintiff's failure to exhaust the administrative remedies provided to it. Although it claims that the Dynatec Defendants are draining the coalbed methane from other coal seams, the Plaintiff neither identifies what wells under the Defendants permit are affecting Plaintiff's property nor the location of its property allegedly being affected.

CONCLUSIONS OF LAW

The Plaintiff asserts that, contrary to the Defendants' statement in the second paragraph of the Defendants' statement of proposed admitted facts, the Plaintiff did not, in paragraph V of the Complaint, acknowledge that: ". . . the Dynatec Defendants had the right to drill for and commercially develop the coalbed methane from the Pittsburg Seam."

While the Court acknowledges that the Defendants may not be the owners of the coalbed methane in the Pittsburgh Seam, the question of whether the Defendants had the right to drill and extract methane from the aforementioned coalbed is one for the Division of Oil and Gas rather than this Court.

As required by the Act, the Division of Oil and Gas issued the well permits to the Dynatec Defendants. See W.Va. Code § 22-21-6. The permits were issued to the Dynatec Defendants on the basis that their application complied with and contained all of the information required by the Act, including the provision that no interests in lands except those of the Defendants would be affected by the wells. See W.Va. Code § 22-21-6. The Plaintiff is now challenging the veracity of the conclusion made by the Division of Oil and Gas. However, the proper place for the Plaintiff to challenge this presumptively correct conclusion lies with the Division of Oil and Gas, not this Court. See *Brammer v. West Virginia Human Rights Commission*, 183 W. Va. 108, 112, 394 S.E.2d 340, 343 (1990) (“As a general rule, the decisions or orders of an administrative body are, in the absence of evidence to the contrary, presumptively correct and valid.”).

If the Plaintiff believes that, contrary to their permit, the Dynatec Defendants are improperly draining coalbed methane or other natural gas that it owns, the proper course of action for the Plaintiff is to seek to have the Chief of the Division of Oil and Gas remedy such violation. See W.Va. Code § 22-21-6(g) (if the chief of the division of oil and gas determines that a “substantial violation has occurred with respect to existing operation and that the operator has failed to abate or seek review of the violation . . . , [the chief] may suspend the permit on which said violation exists”).

In addition to the remedy set forth in Section 6(g) of the Act, the Act also gives the Plaintiff the opportunity to seek a “pooling order.” See W.Va. Code §

22-21-15(a) (in the absence of a voluntary agreement, a “party claiming an ownership interest in the coalbed methane may file an application with the chief¹ to pool . . . (ii) separately owned tracts . . . to form a drilling unit for the production of coalbed methane from one or more coalbed methane wells”). This would give the Plaintiff the opportunity to have a hearing before the Coalbed Methane Review Board (“Review Board”) and to put forth evidence concerning “[t]he area which may be drained efficiently and economically by the proposed coalbed methane well or wells” and “[t]he nature and extent of ownership of each coalbed methane owner or claimant and whether conflicting claims exist.” W.Va. Code § 22-21-17(b)(1),(6). Moreover, under the Act, if the Review Board enters a pooling order, the owners of the separately owned tracts subject to the pooling order are required to either become a working interest owner, a carried interest owner, or to lease or sell their interests in the coalbed methane.

As to the Plaintiff’s further arguments concerning notice, the Division of Oil and Gas’ ruling on the drilling permits and coalbed methane formation ownership will allow this Court to accurately determine whether proper notice was given to the Plaintiff before drilling on the methane formation commenced.

It is the decision of this Court that Plaintiff did not exhaust the administrative remedies presented by the Coalbed Methane Act. To avoid any statutory limitation problems, Defendants’ motion to Dismiss for Failure to Exhaust Administrative Remedies is STAYED in favor of a ruling of the Division of Oil and Gas.

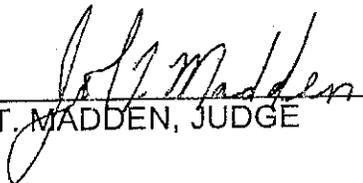
¹ The term “chief” as used in the Act means the chief of the office of oil and gas of the division of environmental protection. W.Va. Code § 22-21-2(i).

It is so ORDERED.

Objections and exceptions are saved.

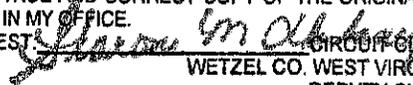
The Clerk shall transmit a copy of this order to all counsel of record.

Dated this 13th day of November, 2007.



JOHN T. MADDEN, JUDGE

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT
IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON
FILE IN MY OFFICE.

ATTEST: 

SHARON M. ALBRIGHT
CIRCUIT CLERK
WETZEL CO. WEST VIRGINIA
BY: _____ DEPUTY CLERK