

No. 051509

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

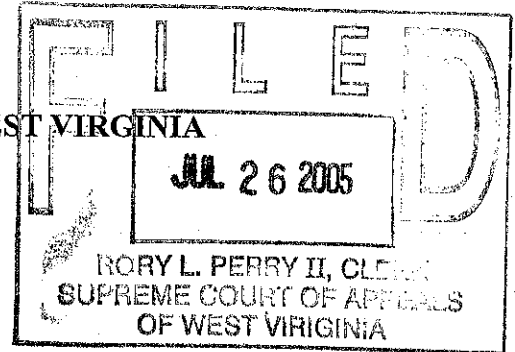
KANAWHA EAGLE LIMITED LIABILITY COMPANY,  
TWIN STAR MINING, INC. #2, and  
KANAWHA EAGLE COAL, L.L.C.,

Petitioners,

v.

HONORABLE JAMES C. STUCKY, in his  
capacity as Kanawha County Circuit Judge,

Respondent.



**TAX COMMISSIONER'S RESPONSE TO  
RENEWED PETITION FOR WRIT OF PROHIBITION**

VIRGIL T. HELTON.  
STATE TAX COMMISSIONER OF  
THE STATE OF WEST VIRGINIA

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

STEPHEN STOCKTON  
SENIOR ASSISTANT ATTORNEY  
Office of the Attorney General  
State Capitol, Building 1, Room W-435  
Charleston, West Virginia 25305  
(304) 558-2522

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES ..... ii, iii

STATEMENT OF FACTS ..... 2

ARGUMENT ..... 4

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

<u>CASES</u>	Page No.
<u>Bluestone Paving, Inc. v. Tax Commissioner,</u> 214 W. Va. 684, 591 S.E.2d 242 (2003) .....	8
<u>Bull v. United States,</u> 295 U.S. 247, 55 S. Ct. 695, 79 L. Ed. 1421 (1935) .....	11
<u>Canyon Public Service District v. Tasa Coal Company,</u> 156 W. Va. 606, 195 S.E.2d 647 (1973) .....	10
<u>Christo v. Dotson,</u> 151 W. Va. 696, 155 S.E.2d 571 (1967) .....	5
<u>Concept Mining, Inc. v. Helton,</u> ____ S.E.2d ____, 2005 WL 1018043 .....	3, 5, 9
<u>Conseco Finance Serv'g Corp. v. Myers,</u> 211 W. Va. 631, 567 S.E.2d 641 (2002) .....	8
<u>Expedited Transport System, Inc. v. Vieweg,</u> 207 W. Va. 90, 529 S.E.2d 110 (2000) .....	7
<u>G. M. Leasing Corp. v. U.S.,</u> 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (2000) .....	11
<u>Kanawha Eagle Limited Liability Company, et al. v. Craig,</u> Civil Action No. 04-AA-51 .....	4
<u>Kanawha Eagle Limited Liability Company, et al. v. Stucky,</u> No. 040715 .....	4
<u>Ladd v. Lamb,</u> 195 Va. 1031, 81 S.E.2d 756 .....	10
<u>Mallory v. Mortgage America, Inc.,</u> 67 F. Supp. 2d 601 (S.D. W. Va. 1999) .....	11
<u>Nelms v. Vaughan,</u> 84 Va. 696, 5 S.E. 704 (1888) .....	10
<u>Newhart v. Pennybacker,</u>	

120 W. Va. 774, 200 S.E. 350 (1938) .....	8
<u>State ex rel. Board of Education of Kanawha County v. Melton,</u> 157 W. Va. 154, 198 S.E.2d 130 (1973) .....	10
<u>State ex rel. Bobrycki v. Hill,</u> 202 W. Va. 335, 504 S.E.2d 162 (1998) quoting .....	4
<u>State ex rel. Boette v. Newman,</u> 85 W. Va. 423, 102 S.E.2d 122 (1920) .....	5
<u>State ex rel. Burgett v. Oakley,</u> 155 W. Va. 75, 181 S.E.2d 19 (1971) .....	4
<u>State ex rel. Heavener v. Perry,</u> 155 W. Va. 353, 184 S.E.2d 136 (1971) .....	9
<u>State v. Carduff,</u> 142 W. Va. 18, 93, S.E.2d 502 (1956) .....	11
<u>State v. Kerns,</u> , 183 W. Va. 130, 394 S.E.2d 532 (1990)) (emphasis omitted .....	7
<u>U.S. Steel Mining Co., et al. v. Helton,</u> No. 32528 .....	2
<u>United States v. Nashville, C. &amp; St. L.R. Co.,</u> 118 U.S. 120, 6 S. Ct. 1006, 30 L. Ed. 81 (1886) .....	11
<u>West Virginia Human Rights Commission v. Garretson,</u> 196 W. Va. 118, 468 S.E.2d 733 (1996) .....	10
<b><u>STATUTES</u></b>	
W. Va. Code § 5-11A-13(o)(1) .....	10
W. Va. Code § 11-10-9 .....	8
W. Va. Code § 11-10-9(b) .....	6
W. Va. Code § 11-10-9(c) .....	passim
W. Va. Code § 11-10A-19 .....	1, 2, 6

No. 051509

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

KANAWHA EAGLE LIMITED LIABILITY COMPANY,  
TWIN STAR MINING, INC. #2, and  
KANAWHA EAGLE COAL, L.L.C.,

Petitioners,

v.

HONORABLE JAMES C. STUCKY, in his  
capacity as Kanawha County Circuit Judge,

Respondent.

**TAX COMMISSIONER'S RESPONSE TO  
RENEWED PETITION FOR WRIT OF PROHIBITION**

By direction of the Court, Virgil T. Helton, State Tax Commissioner of the State of West Virginia ("Tax Commissioner"), submits this Response to the Renewed Petition For Writ of Prohibition previously filed by Kanawha Eagle Limited Liability Company, Twin Star Mining, Inc. #2, and Kanawha Eagle Coal, LLC (collectively, "Taxpayers").

**KIND OF PROCEEDING AND NATURE OF RULING BELOW**

As it came before Judge Stucky, this case was an appeal by the Tax Commissioner, pursuant to the provisions of W. Va. Code § 11-10A-19, of a decision issued by the West Virginia Office of Tax Appeals ("OTA"). The administrative decision had been issued in the transition period between the Tax Commissioner's Office of Hearings and Appeals ("OHA") and the independent OTA, and Judge Stucky ultimately decided that the Tax Commissioner, rather than the OTA, should have issued the decision. By an Order entered 18 December 2003, Judge Stucky remanded the case to the

Tax Commissioner for decision, and the Tax Commissioner complied with that Order by issuing an administrative decision on 5 March 2004. On 19 April 2004, after issuance of the Tax Commissioner's decision, Taxpayers petitioned this Court for a Writ of Prohibition to prohibit Judge Stucky from exercising jurisdiction over the Tax Commissioner's appeal from the OTA decision. This Court refused to hear Taxpayers' petition on 26 May 2004. The Renewed Petition For Writ of Prohibition now before the Court is Taxpayers' second attempt seeking identical relief from Judge Stucky's Order which remanded the matter to the Tax Commissioner.

Substantively, this case is a cousin to U.S. Steel Mining Co., et al. v. Helton, No. 32528, set to be argued to the Court on 20 September 2005. However, the procedural issues which Taxpayers are attempting to re-litigate are not present in the U.S. Steel case.

#### **STATEMENT OF FACTS**

The relevant facts of this case are entirely procedural. In the summer of 2002, Taxpayers brought petitions for refunds of severance tax paid with respect to coal that had been mined in West Virginia and then exported. Taxpayers claimed that, with respect to such coal, West Virginia's severance tax violated the Import-Export Clause of the United States Constitution. A hearing was initiated on 11 December 2002, and at the end of the evidentiary portion of that hearing the administrative law judge requested that the parties submit briefs supporting their positions. The briefing schedule was complete on 10 April 2003, and the case was submitted for decision at that time.

The Office of Tax Appeals issued its Final Decision on 11 July 2003, holding in favor of Taxpayers. Relying on W. Va. Code § 11-10A-19, the Tax Commissioner appealed the OTA Final

Decision to the Circuit Court of Kanawha County on 9 September 2003. Taxpayers filed a motion to dismiss, alleging that the OTA Final Decision was not appealable by the Tax Commissioner. Judge Stucky denied Taxpayers' motion on 24 November 2003. Taxpayers moved the Circuit Court to reconsider its denial of their motion to dismiss on 12 December 2003. On 18 December 2003, before the Tax Commissioner could respond to Taxpayers' motion to reconsider, Judge Stucky issued an Order Vacating the Final Administrative Decision of the West Virginia Office of Tax Appeals and Remanding to the West Virginia Tax Commissioner.

In compliance with Judge Stucky's Order Vacating the Final Administrative Decision of the West Virginia Office of Tax Appeals and Remanding to the West Virginia Tax Commissioner, the Tax Commissioner on 5 March 2004 issued an administrative decision denying Taxpayers' petitions for refunds and upholding the severance tax. On 19 April 2004, Taxpayers brought their first Petition For Writ of Prohibition before this Court, seeking to prohibit Judge Stucky from remanding the case to the Tax Commissioner. Then on 4 May 2004, Taxpayers appealed the Tax Commissioner's administrative decision to the Circuit Court of Kanawha County, where it is before Judge Walker. On 24 May 2004, this Court refused to consider Taxpayers' first Petition For Writ of Prohibition, thus apparently ending any controversy over whether Judge Stucky could exercise jurisdiction long enough to remand the case to the Tax Commissioner.

On 28 April 2005, this Court issued its *per curiam* decision in Concept Mining, Inc. v. Helton, \_\_ S.E.2d \_\_, 2005 WL 1018043, which held under similar circumstances that the decision of the OTA should be "deemed" to be a decision of the Tax Commissioner, from which the Tax Commissioner could not appeal. Taxpayers' current Petition For Writ of Prohibition is an attempt

to have the ruling in Concept Mining retroactively applied to its case as it stood before Judge Stucky.

### ARGUMENT

Taxpayers are attempting to use this second petition for writ of prohibition to seek “relief” from a Circuit Court Order that became final when this Court refused to consider the first petition more than a year ago. The Order from which Taxpayers seek relief was entered by Judge Stucky on 18 December 2003 and first brought before this Court on 19 April 2004. This Court refused to consider the first Petition on 26 May 2004. Kanawha Eagle Limited Liability Company, et al. v. Stucky, No. 040715. Since then, Judge Stucky’s Order has been completely executed and the case as it then existed (as an appeal by the Tax Commissioner from a decision of the OTA) no longer exists anywhere on the docket of any court.

Judge Stucky’s Order remanded the matter to the Tax Commissioner for issuance of a decision. Pursuant to the Circuit Court’s remand, the Tax Commissioner issued a decision on 5 March 2004. On 4 May 2004, Taxpayer appealed the Tax Commissioner’s decision to the Circuit Court of Kanawha County, where it now sits before Judge Walker. Kanawha Eagle Limited Liability Company, et al. v. Craig, Civil Action No. 04-AA-51, Cir. Ct. of Kanawha County. The act which Taxpayer seeks to prohibit (Judge Stucky’s remand of the matter to the Tax Commissioner) has already been done, and “Prohibition does not lie to restrain an inferior tribunal after its judgment has been given and fully executed.” Syllabus, State ex rel. Bobrycki v. Hill, 202 W. Va. 335, 504 S.E.2d 162 (1998) quoting syllabus, State ex rel. Burgett v. Oakley, 155 W. Va. 75, 181 S.E.2d 19 (1971);

see also State ex rel. Boette v. Newman, 85 W. Va. 423, 102 S.E.2d 122 (1920) (“Prohibition never goes to undo a thing that has been completely done and ended”).

Although a refusal by the Supreme Court of Appeals to hear a petition may not have precedential value, such a refusal serves to categorically end that case and render the lower tribunal’s decision final.<sup>1</sup> See Christo v. Dotson, 151 W. Va. 696, 155 S.E.2d 571, 574 (1967) (appeal brought by multiple parties was refused with regard to all but one, whereupon the Court noted that “[t]he judgments against all parties to these consolidated actions have become final except the judgments against [the sole remaining appellant]”). What Taxpayers are attempting with their Renewed Petition is nothing less than the resurrection of a completely dead case. The implications for granting such a petition are enormous. If the Court agrees to consider Taxpayers’ renewed petition, then no court decision could ever again be considered truly final.

If this court agrees to hear Taxpayers’ petition, then it should be for the purpose of revisiting the Court’s *per curiam* decision in Concept Mining v. Helton, \_\_ S.E.2d \_\_, 2005 WL 1018043, W. Va. 28 April 2005. The Tax Commissioner still believes that, even if the Court decides that the original administrative decisions should have been issued by the Tax Commissioner rather than by the independent Office of Tax Appeals, the fact remains that both administrative decisions were issued by the Office of Tax Appeals, thus allowing the Tax Commissioner to appeal to the Circuit Court. The Tax Commissioner further believes that, if the Court decides that the Tax Commissioner should have issued the decisions, then Judge Stucky’s remedy of remanding the matter to the Tax Commissioner with orders to do so is more reasonable than the remedy fashioned by this Court in Concept Mining, which deemed the administrative decision to have been issued by the Tax

---

<sup>1</sup>Assuming no federal question that could justify appeal to the United States Supreme Court.

Commissioner and thus not appealable by the Tax Commissioner, even where the administrative decision in that case so clearly was not, either on its face or by its import, issued by the Tax Commissioner.

At its core, this case is a creature of the transition between the Office of Hearings and Appeals, which was an entity under the control of the Tax Commissioner, and the Office of Tax Appeals, which the Legislature established as independent of the Tax Commissioner. For purposes of this case, there are two important features of that transition. First, the Legislature provided that all petitions on the Tax Commissioner's (OHA's) docket as of 31 December 2002, for which a hearing had already been held, were to remain on the Tax Commissioner's docket and the Tax Commissioner was to issue a decision no later than 31 March 2003. W. Va. Code § 11-10-9(c).

(b) All petitions which are on the tax commissioner's docket on the thirty-first day of December, two thousand two, for which no administrative hearing has been held, shall be transferred by the tax commissioner to the office of tax appeals no later than the thirty-first day of January, two thousand three; and thereafter, the petition shall, for all purposes except timeliness of filing, be treated as if it had been filed with the office of tax appeals.

(c) All petitions which are on the tax commissioner's docket on the thirty-first day of December, two thousand two, for which an administrative hearing has been held prior to that date, shall remain on the tax commissioner's docket and the tax commissioner shall issue an administrative decision no later than the thirty-first day of March, two thousand three.  
W. Va. Code § 11-10-9(b) and (c).

The second feature of the transition from OHA to OTA is that the Tax Commissioner may appeal from decisions of the OTA, whereas he could not appeal from decisions of the OHA. W. Va. Code § 11-10A-19.

**§ 11-10A-19. Judicial review of office of tax appeals decisions**

(a) Either the taxpayer or the commissioner, or both, may appeal the final decision or order of the office of tax appeals by taking an appeal to the circuit court

of this state within sixty days after being served with notice of the final decision or order.

Between the administrative law judges of OHA/OTA and the Tax Commissioner, the decision was made to interpret the transition rules such that the briefing schedule was considered part of the administrative hearing. Therefore, cases with an ongoing briefing schedule after 31 December 2002 were to be decided by OTA, while those cases which had been fully briefed before 31 December 2002 were to be decided by the Tax Commissioner. That this interpretation is reasonable should be clear from the fact that the statute also required the Tax Commissioner to issue all decisions for which she was responsible by 31 March 2003. The fact that the briefing schedule at the administrative level in this case was actually not complete until 10 April 2003, ten days after the date on which the Tax Commissioner was to have issued the decisions she was responsible for under W. Va. Code § 11-10-9(c), perfectly illustrates the logistical problem confronted if the statute is given the interpretation urged by Taxpayers.<sup>2</sup>

It would be an absurd, unjust and unreasonable result for a statute to require an administrative decision in a complex case with a thick record to be issued before all sides had been allowed a full opportunity to submit arguments on the legal issues through briefs. This Court prefers constructions of statutes which do not result in absurd, inconsistent, unjust or unreasonable outcomes.

... when assigning a meaning to an undefined term, we will not embrace a definition that would produce absurd, inconsistent, or incongruous results. "It is the 'duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.'" Expedited Transp. Sys., Inc. v. Vieweg, 207 W.Va. 90, 98, 529 S.E.2d 110, 118 (2000) (quoting State v. Kerns, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990)) (emphasis omitted). Thus, "[w]here a particular construction of a statute would result in an absurdity, some

---

<sup>2</sup>The second page of the OTA Final Decision notes that the case was "SUBMITTED FOR DECISION on BRIEFS" on 10 April 2003.

other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, Newhart v. Pennybacker, 120 W.Va. 774, 200 S.E. 350 (1938). Accord Syl. pt. 2, Conseco Fin. Serv'g Corp. v. Myers, 211 W.Va. 631, 567 S.E.2d 641 (2002) ("It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." Syllabus Point 2, Click v. Click, 98 W.Va. 419, 127 S.E. 194 (1925)."). Bluestone Paving, Inc. v. Tax Commissioner, 214 W. Va. 684, 591 S.E.2d 242, 247 (2003).

Construing W. Va. Code § 11-10-9(b) and (c) to require that the Tax Commissioner issue an administrative decision before all parties have had a chance to make written arguments is a recipe for a denial of due process.

The decision signed by ALJ Reed in this case is not an administrative decision issued by the Tax Commissioner under W. Va. Code § 11-10-9(c). The cases decided by the Tax Commissioner under the transition rules were signed by the Tax Commissioner, not an ALJ, and were issued on OHA letterhead. Cases decided by the Tax Commissioner under the transition rules on this exact issue came to an opposite conclusion from the OTA holding in this case, which begs the question of what remedy would be appropriate were the Court to decide that the decision in this case should have been issued by the Tax Commissioner. When someone other than the Tax Commissioner signs a Final Decision directly contrary to previous decisions signed by the Tax Commissioner, it is not reasonable to hold the Tax Commissioner to the decision she did not make.

The transition rules in W. Va. Code § 11-10-9 do not say: "all decisions where the transcribed evidentiary portion of the hearing was held before 31 December 2002 are administrative decisions, regardless of who drafts and signs the decision." Rather, the transition rules provide that cases where the administrative hearing (however that is defined) was completed before 31 December 2002 shall be decided by the Tax Commissioner. If Taxpayer's argument that the Tax Commissioner

should have issued the decision in this case is correct, then the proper remedy would be to vacate the decision of the independent OTA and remand the matter to the Tax Commissioner for decision. The logic of the former rule, that the Tax Commissioner could not appeal a decision of the OHA because it was essentially her own decision, does not apply in this case. In this case, the Tax Commissioner not only did not sign the OTA Final Decision but, in fact, had signed at least two OHA decisions whose holdings were directly opposite to the outcome in this case, highlighting the fact that the decision by OTA in this case is certainly not like the decision the Tax Commissioner would have made.

The Court's *per curiam* decision in Concept Mining completely failed to address the Tax Commissioner's argument that the word "shall" in W. Va. Code § 11-10-9(c) is directory rather than mandatory. Several decisions of this Court interpret the word "shall" as directory when setting a time for administrative action. While it is true that W. Va. Code § 11-10-9(c) states that "the tax commissioner shall issue an administrative decision no later than the thirty-first day of March, two thousand three" (emphasis added), it is also true that "[i]n numerous cases this Court has considered statutes using the word 'shall' though mandatory in form, to be directory in effect." State ex rel. Heavener v. Perry, 155 W. Va. 353, 184 S.E.2d 136, 138 (1971). In 1973, in holding that use of the word "shall" in a statute setting forth requirements of notice and time within which to set a hearing was directory rather than mandatory, the Supreme Court of Appeals quoted at length from *Corpus Juris Secundum*:

"As a rule a statute prescribing the time within which public officers are required to perform an official act regarding the rights and duties of others, and enacted with a view to the proper, orderly, and prompt conduct of business, is directory unless it denies the exercise of power after such time, or the phraseology of the statute, or the nature of the act to be performed, and the consequences of doing or failing to do it

at such time are such that the designation of time must be considered a limitation on the power of the officer. When the legislature prescribes the time when an official act is to be performed, the broad legislative purpose is to be considered in deciding whether the time prescribed is directory or mandatory. \* \* \* ‘ 67 C.J.S. Officers § 114(b), page 404.’ Ladd v. Lamb, 195 Va. 1031, 1035 - 1036, 81 S.E.2d 756, 759. Canyon Public Service District v. Tasa Coal Company, 156 W. Va. 606, 195 S.E.2d 647, 652 (1973); see also State ex rel. Board of Education of Kanawha County v. Melton, 157 W. Va. 154, 198 S.E.2d 130, 137 (1973) (“Generally the rule is where a statute specifies a time within which a public officer is to perform an act regarding the rights and duties of others, it will be considered as merely directory, unless the nature of the act to be performed or the language shows that the designation of time was intended as a Limitation of power” quoting Nelms v. Vaughan, 84 Va. 696, 699 - 670, 5 S.E. 704, 706 (1888).

In 1996, Justice Cleckley writing for a unanimous Supreme Court of Appeals considered a scenario where W. Va. Code § 5-11A-13(o)(1) provided that the attorney general “shall” commence a civil action within thirty days after a party elects to have a fair housing case litigated in circuit court, and the attorney general did not commence such an action until two months after the election. West Virginia Human Rights Commission v. Garretson, 196 W. Va. 118, 468 S.E.2d 733 (1996).

Justice Cleckley noted:

Many jurisdictions have considered the issue of whether a statute listing a time limit without specifying consequences should operate to actually divest a court of jurisdiction to hear a case for an agency’s failure to abide by the time limit. Frequently, these jurisdictions have held that the absence of a section providing for consequences for inaction or late action creates a presumption that these statutes merely fill a directory function and no consequences befall the negligent agency’s failure to comply. We have been presented with no persuasive basis in law or reason for departing from this solid line of authority.

Id. at 740-741 (footnote omitted).

While Garretson involved housing discrimination, and there existed an important public policy reason for allowing the case to proceed in spite of the Attorney General's failure to comply with the letter of the statute, taxes also present important issues of public policy. See G. M. Leasing Corp. v. U.S., 429 U.S. 338, 97 S. Ct. 619, 627, 50 L.Ed.2d 530 (2000) (taxes are "the lifeblood of government, and their prompt and certain availability an imperious need" quoting Bull v. United States, 295 U.S. 247, 259, 55 S.Ct. 695, 699, 79 L.Ed. 1421 (1935)). The public interest in the "lifeblood" of government brings into play "the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'" Garretson, *supra* at 741, quoting United States v. Nashville, C. & St. L.R. Co., 118 U.S. 120, 125, 6 S. Ct. 1006, 1008, 30 L.Ed. 81, 83 (1886).

If a statute is directory rather than mandatory, then substantial compliance, rather than strict compliance, is sufficient. Mallory v. Mortgage America, Inc., 67 F.Supp.2d 601, 607 (S.D. W. Va. 1999). The federal Court in Mallory relied upon State v. Carduff, 142 W. Va. 18, 93, S.E.2d 502 (1956), which held that a statute setting forth the procedure for selection of a grand jury was mandatory with regard to the preparation of a list of qualified jurors, but only directory with regard to specifying the time at which the list is to be prepared and the maximum number of persons on the list. Carduff, 93 S.E.2d at 513-514. Analogously, the requirement in W. Va. Code § 11-10-9(c) that the Tax Commissioner must issue an administrative decision is mandatory, while the timing of that decision is directory. Thus, Judge Stucky properly decided that the Tax Commissioner could issue a decision beyond the statutory deadline of 31 March 2003, and properly vacated the OTA Final Decision and remanded this case to the Tax Commissioner for decision on the merits.

CONCLUSION


Judge Stucky's Order remanding this matter to the Tax Commissioner for a decision was a reasonable solution to a unique set of circumstances. This Court's refusal to grant Taxpayers' first Petition For Writ of Prohibition seeking to block Judge Stucky's Order was also eminently reasonable. The Court should either dismiss this, Taxpayers' second bite at the apple, or accept this matter for argument for the sole purpose of revisiting and overruling the Court's *per curiam* decision in Concept Mining.

Respectfully submitted,

VIRGIL T. HELTON,  
State Tax Commissioner of the  
State of West Virginia

By Counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

  
STEPHEN STOCKTON  
SR. ASST. ATTORNEY GENERAL  
Attorney General's Office  
Tax and Revenue Division  
Building 1, Room W-435  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305  
304-558-2522

No. 051509

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**KANAWHA EAGLE LIMITED LIABILITY COMPANY,  
TWIN STAR MINING, INC. #2, and  
KANAWHA EAGLE COAL, L.L.C.,**

**Petitioners,**

**v.**

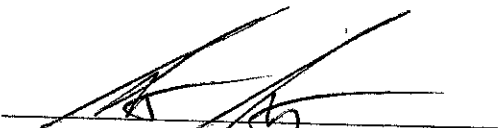
**HONORABLE JAMES C. STUCKY, in his  
capacity as Kanawha County Circuit Judge,**

**Respondent.**

**CERTIFICATE OF SERVICE**

I, Stephen Stockton, Senior Assistant Attorney General, do hereby certify that the foregoing "*Tax Commissioner's Responses to Renewed Petition for Writ of Prohibition*" was served upon the opposing counsel by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 26th day of July 2005 addressed as follows:

Richard E. Boyle, Jr., Esquire  
Matthew S. Criwell, Esquire  
Kay Casto & Chaney, PLLC  
1500 Bank One Center  
P. O. Box 2031  
Charleston, West Virginia 25327

  
Stephen Stockton