

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED

October 31, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30670

RELEASED

November 1, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. JAMES E. LOVEJOY,
KEVIN G. LOVEJOY, JOHN D. LOVEJOY, RONALD D. LOVEJOY,
DENESE E. LOVEJOY, BARBARA MYERS, CAROLYN BREWSTER,
RONALD LOVEJOY, II, AND RONALD G. LOVEJOY,
Petitioners

v.

MICHAEL O. CALLAGHAN, SECRETARY,
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,
THE OIL AND GAS CONSERVATION COMMISSION, AND
JAMES MARTIN, CHIEF, OFFICE OF OIL & GAS,
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents

COLUMBIA NATURAL RESOURCES, INC.,
Intervenor

PETITION FOR A WRIT OF MANDAMUS

WRIT DENIED

Submitted: September 17, 2002

Filed: October 31, 2002

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The Opinion of the Court was Delivered PER CURIAM.

JUSTICE MCGRAW dissents and reserves the right to file a dissenting opinion.
JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

2. ““The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.’ Pt. 1, syllabus, *Daurette v. Traders Fed. Savings & Loan Association of Parkersburg*, 143 W.Va. 674, [104 S.E.2d 320 (1958)].” Syl. Pt. 2, *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W.Va. 245, 183 S.E.2d 692 (1971).

Per Curiam:

Petitioners, who are individuals owning the surface rights in a tract of land situated in Lincoln County, West Virginia, seek a writ of mandamus to compel compliance by the governmental Respondents¹ charged with enforcing certain statutes which pertain to oil and gas well drilling permits. Specifically, Petitioners seek the revocation of a well permit that has already been issued and, in fact, released. As part of their request for relief, Petitioners seek to have an administrative rule that concerns the issuance of permits for deep wells declared invalid. Upon a full review of the issues presented, we determine that Petitioners have waived their rights of appeal relative to the permit issuance underlying this matter and further that Petitioners have failed to demonstrate their entitlement to a writ of mandamus. Accordingly, Petitioners' request for a writ of mandamus is hereby denied.

I. Factual and Procedural Background

On April 17, 2000, Columbia² applied to the West Virginia Department of Energy, Division of Oil and Gas (hereinafter referred to as "Office of Oil and Gas") to obtain

¹Respondent Michael Callaghan is the Secretary of the Department of Environmental Protection and Respondent James Martin is the Chief of the Office of Oil and Gas, the West Virginia Department of Environmental Protection.

²Intervenor Columbia Natural Resources, Inc. ("Columbia") owns the rights to the minerals under the surface tract at issue.

a well work permit in connection with its plan to drill a deep test well,³ which is referred to under the applicable statute as a “discovery deep well,”⁴ on Petitioners’ property. W.Va. Code § 22C-9-7(a)(1) (1998) (Repl. Vol. 2002). Columbia only obtained permission from two of the surface owners. One of the non-consenting land owners, Denese Lovejoy,⁵ contacted the Office of Oil and Gas to express her opposition to the issuance of a well permit. On May 5, 2000, the Office of Oil and Gas issued a well work permit to Columbia for the purpose of drilling a discovery deep well⁶ on Petitioners’ property. Petitioners took no timely action to have the permit issuance reviewed⁷ or to stop the drilling process.

The discovery well at issue was drilled sometime between May 17, 2000, and August 23, 2000. After completing the drilling process, Columbia reclaimed the property.⁸

³ A “test well” is defined as “a well intended to discover a ‘new’ pool.” 39 W.Va.C.S.R. § 1-3.21.

⁴See W.Va. Code § 22C-9-7 (1998) (Repl. Vol. 2002).

⁵By letter dated May 1, 2000, Denese Lovejoy informed the Office of Oil and Gas regarding specific concerns she had relative to the drilling. By letter dated May 4, 2000, the Office of Oil and Gas responded to each of the concerns raised by Ms. Lovejoy.

⁶While the parties refer to the well at issue as a “test” well, a term only used in the regulations, we prefer to use the term chosen by the Legislature -- a discovery well. *Cf.* W.Va. Code § 22C-9-7; 39 W.Va.C.S.R. § 1-3.21. We recognize, however, that the terms both are in reference to the same type of well -- a deep well expressly drilled for the purpose of locating a pool of oil or gas.

⁷See W.Va. Code §§ 22-6-41 (1994) (Repl. Vol. 2002); 29A-5-4 (1998).

⁸Columbia represents that the costs of drilling, completing, and reclaiming the
(continued...)

On April 29, 2002, the Office of Oil and Gas issued a release of the well work permit at issue after a final inspection to assure that Columbia had met all of its regulatory obligations to reclaim Petitioners' property in connection with the resulting disturbance occasioned by the well drilling.

On May 2, 2002, Petitioners filed a civil action in the Circuit Court of Lincoln County, West Virginia, against Columbia and the contracting company employed by Columbia wherein they assert various statutory⁹ and common law claims arising out of the drilling of the discovery well at issue. Petitioners filed their action with this Court on May 16, 2002, seeking, through an original proceeding in mandamus, revocation of the deep well work permit and declaration of the invalidity of an administrative rule¹⁰ for failure to comply with the rule making provisions of the Administrative Procedures Act. *See* W.Va. Code §§ 29A-3-1 to -18 (1988) (Repl. Vol. 1998 & Supp. 2002).

This Court issued a rule to show cause on June 25, 2002, and ordered the West Virginia Oil and Gas Commission ("Commission") to participate in the proceeding due to its

⁸(...continued)

well site to date are approximately 2.6 million dollars. The discovery well drilling was apparently successful, as Petitioners relate that the well is now a production well.

⁹Petitioners seek damages under the Oil and Gas Production Damage Compensation Act. *See* W.Va. Code §§ 22-7-1 to -8 (1994) (Repl. Vol. 2002).

¹⁰*See* 39 W.Va.C.S.R. § 1-4.4(a).

drafting of the administrative rule, the validity of which is challenged by Petitioners.¹¹ The Independent Oil and Gas Association of West Virginia was granted permission to participate in this original proceeding as an *amicus curiae*.

II. Standard of Review

Our three-prong standard for the issuance of a writ of mandamus is well-ensconced in the law:

A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

We proceed to determine whether Petitioners can meet this standard.

III. Discussion

Given the extraordinary relief nature of this proceeding, Petitioners are required to demonstrate a clear right to the relief sought; a legal duty on the part of the respondent to perform the act at issue; and the absence of an available and adequate remedy. *See Kucera*, 153 W.Va. at 539, 170 S.E.2d at 367, syl. pt. 2. We further recognized in *Kucera* that

¹¹*See supra* note 10.

“[p]etitioners in mandamus must have a clear legal right to the relief sought therein and such right cannot be established in the proceeding itself.” *Id.* at syl. pt. 1.

At the center of the relief sought by Petitioners is a statutory provision located in the article of the West Virginia Code addressing Oil and Gas Conservation. *See* W.Va. Code §§ 22C-9-1 to -16 (1994) (Repl. Vol. 2002). This provision, known as the “consent and easement” provision, provides that:

No drilling or operation of a deep well for the production of oil or gas shall be permitted upon or within any tract of land unless the operator shall have first obtained the written consent and easement therefor, duly acknowledged and placed on record in the office of the county clerk, for valuable consideration of all owners of the surface of such tract of land, which consent shall describe with reasonable certainty, the location upon such tract, of the location of such proposed deep well, a certified copy of which consent and easement shall be submitted by the operator to the commission.

W.Va. Code § 22C-9-7(b)(4). We identify the “consent and easement” provision as necessary background to this matter and its correlation to the administrative rule which Petitioners challenge,¹² preferring to leave for another day a full discussion of this provision and its application.

¹²The administrative rule states that “[f]or all wells other than test wells, [operators shall obtain] a certificate of consent and easement from all owners of the surface of the tract on which the deep well is to be drilled.” 39 W.Va.C.S.R. §1-4.4(a).

A. Permit Revocation

Before we address the issue of the rule challenge, however, we discuss the central issue in this extraordinary relief proceeding -- the revocation of the working well permit. We note initially that there is no procedure, codified or otherwise, that addresses the permit revocation sought by Petitioners.¹³ Most important, however, to the resolution of this matter is Petitioners' complete failure to avail themselves of the remedies supplied by law in connection with the issuance of the well permit. The provisions of West Virginia Code § 22-6-41 provide that:

Any party to the proceedings under section sixteen [§ 22-6-16] of this article adversely affected by the order of issuance of a drilling permit or to the issuance of a fracturing permit or the refusal of the director to grant a drilling permit or fracturing permit is entitled to judicial review thereof. All of the pertinent provisions of section four [§ 29A-5-4], article five, chapter twenty-nine-a of this code shall apply to and govern such judicial review with like effect as if the provisions of section four were set forth in extenso in this section.

The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of section one [§ 29A-6-1], article six, chapter twenty-nine-a of this code.

¹³Respondents argue that because there is no procedure for permit revocation, there consequently is no clear right to enforce a permit revocation through the mechanism of mandamus. Furthermore, they cite case law in support of the position that Columbia would have grounds for filing a writ of mandamus based on their acts of reliance on the issued working well permit were we to issue a writ of mandamus against them. *See Drury Displays, Inc. v. Brown*, 715 N.E.2d 1230 (Ill. App. 1999) (granting mandamus to direct reissuance of permit issued to billboard owner and then revoked based on owner's change of position and reliance following initial issuance of permit).

Pursuant to the authority provided by West Virginia Code § 22-6-41, which grants an administrative right of appeal in connection with the issuance of drilling permits, Petitioners had a clear right to appeal the decision to issue the working well permit.¹⁴ Under the provisions of the Administrative Procedures Act, this appeal was required to be filed within thirty days of the issuance of the agency's decision to issue the well permit. *See* W.Va. Code § 29A-5-4. No such appeal was taken by Petitioners. Not until more than two years later did Petitioners take any action relative to the issuance of the drilling permit.

In failing to take a direct appeal from the issuance of the drilling permit, Petitioners have violated a basic tenet of administrative law.

“The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.” Pt. 1, syllabus, *Daurette v. Traders Fed. Savings & Loan Association of Parkersburg*, 143 W.Va. 674, [104 S.E.2d 320 (1958)].

Syl. Pt. 2, *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W.Va. 245, 245-46, 183 S.E.2d 692, 693 (1971). The complete failure of Petitioners to utilize the rights of appeal set forth in West Virginia Code § 22-6-41 and § 29A-5-4 is fatal to this case. Petitioners simply

¹⁴Petitioners were notified by letter dated May 5, 2000, regarding the decision to issue the working well permit. They met with the inspector on May 22, 2000, to discuss the decision to issue the permit.

sat on their rights of appeal and in so doing, have waived their right to challenge the issuance of the working well permit.

B. Administrative Rule Challenge

Petitioners contend that the administrative rule implemented by the Commission, which exempts discovery or test wells from the “consent and easement” provision, is a legislative rule. *See supra* note 12. Due to the lack of legislative approval, Petitioners argue that the administrative rule is consequently invalid and unenforceable. *See generally Appalachian Power Co. v. State Tax Dep’t of W.Va.*, 195 W.Va. 573, 583, 466 S.E.2d 424, 434 (1995) (discussing three classifications of agency rules: legislative, interpretative, and procedural); W.Va. Code § 29A-1-2 (1982) (Repl. Vol. 1998) (defining three types of agency rules).

Having determined that Petitioners have failed to comply with the administrative procedures set in place for challenging the issuance of a well permit, we find it unnecessary to address the issue of whether the rule complained of is invalid for non-compliance with the rule-making procedures set forth by law. *See* W.Va. Code §§ 29A-3-1 to-18.

We conclude that Petitioners have failed to demonstrate the elements necessary to issuance of a writ of mandamus.¹⁵ Accordingly, we deny Petitioners' request for the issuance of a writ of mandamus.

Writ denied.

¹⁵We note, however, that Petitioners are not without the availability of a remedy, as they have pending an action in the Circuit Court of Lincoln County through which they seek compensation under the Oil and Gas Production Damage Compensation Act, as well as various common law remedies in connection with Columbia's use of their land, which may provide Petitioners another remedy for their alleged injuries. *See* W.Va. Code §§ 22-7-1 to -8 (1994) (Repl. Vol. 2002).