

07-1467-CD

Gary Berkley vs PA State Game

FILED *2cc Atty*
M130701
SEP 07 2007
Attypd.
85.00

William A. Shaw
Prothonotary/Clerk of Courts

Brett M. Woodburn, Esquire
Attorney I.D. No. 81786
Caldwell & Kearns
3631 North Front Street
Harrisburg, PA 17110
(717) 232-7661

GARY BERKLEY, : IN THE COURT OF COMMON PLEAS
Plaintiff : CLEARFIELD COUNTY, PENNSYLVANIA
vs. :
: :
: NO. 07-1467-CD
: :
PENNSYLVANIA STATE : CIVIL ACTION - EQUITY
GAME COMMISSION, :
Defendants :
:

PETITION FOR PRELIMINARY INJUNCTION
PRIOR TO NOTICE OR HEARING

To the Honorable Judges of the Court:

The Plaintiff, Gary Berkley, by the undersigned counsel, petitions this Court for a preliminary injunction to be granted prior to a notice and hearing pursuant to Pa.R.C.P. 1531 and sets forth the following in support thereof:

1. The Plaintiff, Gary Berkley, is the owner of a tract of land bordering State Game Land 100 in Cooper Township, Clearfield County, Pennsylvania.
2. The Pennsylvania State Game Commission ("Commission") previously obtained a right-of-way over Plaintiff's land and is currently constructing a bridge within said right-of-way.

3. In the process of constructing the bridge, persons working on behalf of the Commission, and their equipment, have damaged and continue to damage Plaintiff's land outside of the Commission's right-of-way.

4. Plaintiff has sustained and continues to sustain extensive harm to his land as a result of human activity and the operation of heavy equipment by the Commission, including: disruption of the soil, destruction of vegetation, and employees of the Commission defecating and leaving waste paper on Plaintiff's land.

5. The Plaintiff, Gary Berkley, is able to demonstrate the "essential prerequisites" for obtaining preliminary injunctive relief. See Warehime v. Warehime, 860 A.2d 41, 46-47 (Pa. 2004).

6. The issuance of a preliminary injunction is necessary to prevent immediate and irreparable harm to the property of Plaintiff.

7. The harm done and being done by the Commission is irreparable because it can be estimated only by conjecture and is not entirely compensable by money damages. See Sheridan Broadcasting Networks v. NBN Broadcasting, 693 A.2d 989, 995 (Pa. Super. Ct. 1997).

8. No amount of damages awarded to Plaintiff will allow him to fully reclaim the aesthetic and natural character of his land if further destruction occurs.

9. Plaintiff will suffer much greater irreversible damages to his land if the Commission is not enjoined from continuing its wrongful activity, than if an injunction is granted.

10. If the court issues a preliminary injunction, the Commission will suffer no substantial harm. The Commission will be able to complete its project; it will simply be required to do so without harming the Plaintiff's land outside of the Commission's right of way.

11. It is not possible for an injunction to restore the parties to the status quo as it existed before the wrongful acts of the Commission. However, a preliminary injunction would maintain the current status of Plaintiff's land, preventing further harm from occurring.

12. The Plaintiff's right to relief is clear because the Commission has exceeded its right-of-way, the parameters of which the Commission itself formulated, and destroyed property that belongs to the Plaintiff.

13. The injunction sought is reasonably suited to abate the offending activity and is necessary to prevent further irreparable destruction to Petitioner's land.

14. The issuance of a preliminary injunction will not adversely affect the public interest.

WHEREFORE, Plaintiff, Gary Berkley, prays your Honorable Court:

1. Issue a Preliminary Injunction, pending entry of a bond by Plaintiff in an amount set by the Court, enjoining and restraining Defendant, Pennsylvania State Game Commission, their agents, representatives, employees, and all other persons acting in their behalf, until a hearing on the matter, from:
 - a. Entering Plaintiff's land outside of the Commission's right-of-way, including, but not limited to, entry on foot or by means of vehicles or equipment.
2. Issue an Order setting a hearing date within 5 days of the effective date of the granting of the Preliminary Objection to determine whether the Preliminary injunction should be continued, modified or vacated.
3. In the alternative, issue an Order setting a hearing date requiring Defendant to show cause why a Preliminary Injunction should not be ordered to enjoin Defendants, and those acting in concert with them, from the acts described above.

4. Award Plaintiff such other relief as may be just and proper.

Respectfully submitted,

CALDWELL & KEARNS

Dated: 9/5/07

By:

Brett M. Woodburn, Esquire
Attorney I.D. No. 81786
3631 North Front Street
Harrisburg, PA 17110
(717) 232-7661

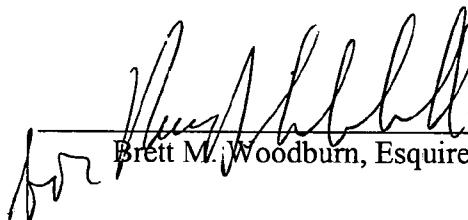
#87135

122089 / 05338

VERIFICATION

I, BRETT M. WOODBURN, Esquire, Attorney for Plaintiff, Gary Berkley, who is authorized to make this Verification on Plaintiff's behalf, verify that the information contained in the foregoing document is true and correct to the best of my information, knowledge and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. 4904, relating to unsworn falsification to authorities.

Date: 9/5/07

 - # 87135
Brett M. Woodburn, Esquire

05-338/122089

GARY BERKLEY, : IN THE COURT OF COMMON PLEAS
Plaintiff : CLEARFIELD COUNTY, PENNSYLVANIA
vs. :
: NO. 07-1467-CD
PENNSYLVANIA STATE :
GAME COMMISSION, : CIVIL ACTION - EQUITY
Defendants :
:

ORDER

AND NOW, this _____ day of _____, 2007, upon consideration of Plaintiff's Complaint in Equity requesting a Preliminary Injunction, it is HEREBY ORDERED AND DECREED that the Pennsylvania Game Commission is forthwith:

ENJOINED from entering all land owned by the Plaintiff, Gary Berkley, bordering State Game Land 100 in Cooper Township, Clearfield County, Pennsylvania, except that to which the Commission has previously obtained a right-of-way.

This Order shall remain in full force and effect until a hearing is held before this Court on _____, 2007, at _____ o'clock a.m./p.m. in Courtroom No. _____ at Clearfield County Courthouse, 230 East Market Street, Clearfield, Pennsylvania, and a Rule is issued to Defendant to Show Cause why the Preliminary Injunction issued in this matter providing the relief requested by Plaintiff should not be continued. This Preliminary Injunction shall be effective upon Plaintiff's posting of a bond in the amount of \$ _____ in the manner prescribed in Pa.R.C.P. 1531.

BY THE COURT:

J.

(A)

GARY BERKLEY, : IN THE COURT OF COMMON PLEAS
Plaintiff : CLEARFIELD COUNTY, PENNSYLVANIA
vs. :
: NO. 07-1467-CD
PENNSYLVANIA STATE :
GAME COMMISSION, : CIVIL ACTION - EQUITY
Defendants :
:

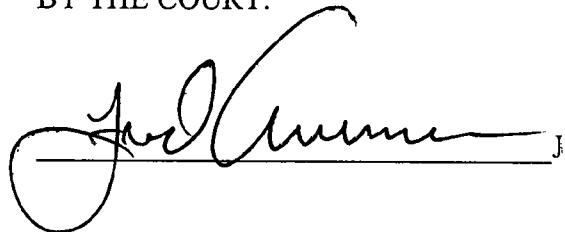
RULE TO SHOW CAUSE

AND NOW, this 11th day of Sept., 2007, upon consideration of

Complaint in Equity requesting a Preliminary Injunction, it is HEREBY ORDERED that:

1. The Defendant show cause before this Court on October 15, 2007, at 10:30 o'clock a.m./p.m. in Courtroom No. 1 at Clearfield County Courthouse, 230 East Market Street, Clearfield, Pennsylvania, why the Preliminary Injunction issued in this matter providing the relief requested by Plaintiff should not be continued; and
2. Plaintiff shall cause this Rule to Show Cause and Complaint in Equity to be served on Defendant at least 10 days before the date of the hearing.

BY THE COURT:



122137/05-338

FILED *09/11/2007* *Atty Woodburn*
SEP 11 2007 *(6)*

William A. Shaw
Prothonotary/Clerk of Courts

GARY BERKLEY

Plaintiff,

-vs-

PENNSYLVANIA STATE GAME
COMMISSION

Defendant

IN THE COURT OF COMMON PLEAS
OF
CLEARFIELD COUNTY, PENNSYLVANIA

No. 07-1467-CD

CIVIL ACTION - EQUITY

TYPE OF DOCUMENT:

RESPONSE TO RULE TO SHOW
CAUSE IN THE NATURE OF
PRELIMINARY OBJECTIONS

FILED ON BEHALF OF DEFENDANT:
PENNSYLVANIA GAME COMMISSION

ATTORNEY FOR DEFENDANT:
BRADLEY C. BECHTEL
ASSISTANT COUNSEL
I.D. # 49681
2001 ELMERTON AVENUE
HARRISBURG, PA 17110-9797
Phone: (717)783-6815
Fax: (717)787-6957

FILED 4CC
M 10:53 AM Oct 15 2007 Atty
Bechtel
William A. Shaw
Prothonotary/Clerk of Courts
(GW)

GARY BERKLEY	:	IN THE COURT OF COMMON PLEAS
Plaintiff,	:	OF
	:	CLEARFIELD COUNTY, PENNSYLVANIA
-vs-	:	No. 07-1467-CD
PENNSYLVANIA STATE GAME	:	
COMMISSION	:	CIVIL ACTION - EQUITY
Defendant	:	TYPE OF DOCUMENT:
	:	PRELIMINARY OBJECTIONS

**RESPONSE TO RULE TO SHOW CAUSE IN THE NATURE OF PRELIMINARY
OBJECTIONS OF THE DEFENDANT,
PENNSYLVANIA GAME COMMISSION**

AND NOW, the ____ day of _____, 2007, comes the Defendant, Pennsylvania Game Commission, and files this RESPONSE TO RULE TO SHOW CAUSE IN THE NATURE OF PRELIMINARY OBJECTIONS to Plaintiff's PETITION FOR PRELIMINARY INJUNCTION PRIOR TO NOTICE OR HEARING, and in support thereof avers:

BACKGROUND

1. The Pennsylvania Game Commission, (hereinafter, PGC) is an independent agency of the Commonwealth of Pennsylvania, with its principal office located at 2001 Elmerton Avenue, Harrisburg, PA 17110.

2. By virtue of an Indenture dated August 18, 2004 and recorded October 25, 2004 to number 200417350, the PGC acquired an easement over land formerly of the Bailey Trust in Cooper Township, Clearfield County. A true and correct copy of this easement is attached hereto as Exhibit A and incorporated herein be reference as if fully set forth.

3. The PGC believes, and therefore avers, that Plaintiff Gary Berkley is now the owner of the servient estate over which this easement passes.

4. The servient estate consists of strip mined acreage comprising 1,300 acres, more or less, which land has road frontage and an old mining haul road off S.R. 1011, and which is neither posted against trespassing, nor to which access is controlled in any manner.

5. The old mining haul road has been historically known as the "Burma Road" and is the road referred to in the easement to the PGC previously identified in Paragraph 2 hereof.

6. The Burma Road was originally constructed by using a "cut and fill" technique where land from the uphill side was removed and used to fill the downhill side.

7. The distance from the toe of the uphill slope to the crest of the downhill slope is generally 40 feet.

8. Beginning in 2007, the PGC began to grade, grub and prepare the Burma Road for vehicular access to the State Game Lands.

9. In the summer of 2007, the PGC began to prepare the crossing over Basin Run to accept a temporary bridge so that the PGC could access the State Game Lands.

10. All such grading, grubbing and preparation was done within a 40 foot wide corridor, between the historical toe of slope on the uphill side of the Burma Road and the crest of the slope on the downhill side of the Burma Road.

SOVEREIGN IMMUNITY

11. Paragraphs 1 through 10 hereof are hereby incorporated herein by reference as if fully set forth.

12. The PGC enjoys sovereign immunity generally pursuant to Article I, Section 11 of the Pennsylvania Constitution, 1 Pa.C.S. §2310 and 42 Pa.C.S.A. §8521, unless sovereign immunity has been waived pursuant to 42 Pa.C.S.A. § 8522.

13. The actions complained of by the Plaintiff (all of which are denied and strict proof demanded) are disruption of the soil, destruction of vegetation, and employees of the Commission defecating and leaving waste paper on Plaintiff's land, presumably outside the right of way of the PGC.

14. Whether negligent or intentional, nowhere in Plaintiff's Petition has any exception to sovereign immunity been plead, nor can it reasonably be inferred.

WHEREFORE, the PGC respectfully requests this Honorable Court to dismiss with prejudice Plaintiff's Petition.

LACK OF SUBJECT MATTER JURISDICTION

15. Paragraphs 1 through 14 are hereby incorporated herein by reference as if fully set forth.

16. The PGC claims all work has been done within or along the area delineated in its easement, or is necessarily implied by the easement's requirements of repair and maintenance.

17. Plaintiff's claims rest necessarily upon a claim of ownership to land which is clearly occupied or claimed by the PGC.

18. Exclusive jurisdiction of cases involving the title to land or interests therein brought by persons who claim an interest in the title to lands occupied or claimed by the Commonwealth is vested in the Board of Property. Section 1207 of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §337; Stair v. Pennsylvania Game Commission, 368 A.2d 1347 (Pa. Cmwlth. 1977).

19. The Plaintiff, Gary Berkley, claims a superior interest in title to lands occupied or claimed by the Commonwealth in the form of ownership of a right of way and construction of a road thereon.

20. As such, Your Honorable Court does not have jurisdiction to hear this case.

WHEREFORE, Defendant, PGC, requests Your Honorable Court to enter an Order dismissing Plaintiffs' Petition.

DEMURRER

21. The averments of paragraphs 1 through 20 hereof are incorporated herein by reference as if fully set forth.

22. Plaintiff has pled no facts which would support injunctive relief, in that:

a. Plaintiff has failed to plead any prevent immediate and irreparable harm which cannot be adequately compensated by damages in that all actions complained of took place in the past and can be compensated by money damages.

b. Plaintiff has failed to plead facts that would show that greater injury will result from refusing the injunction than granting it and, conversely, that issuing a preliminary injunction will not substantially harm other interested parties in that all actions complained of took place in the past and would not be rectified by an injunction and, in fact, other persons would be harmed by the granting of a preliminary injunction.

c. Plaintiff has failed to plead facts that would show that a preliminary injunction will restore the parties to the position they were in immediately prior to the

alleged wrongful conduct because only undoing the work that has been done can restore the land to the condition it was in.

d. Plaintiff has failed to plead facts showing that the activity complained of is actionable, the right to relief clear and the wrong manifest (i.e., the Plaintiff is likely to succeed on the merits) in that Plaintiff has failed to plead his title or that of the PGC such that any averment that a right to relief for infringing upon property rights is conclusory and has no basis in the pleadings, even viewed in the light most favorable to the Plaintiff.

e. Plaintiff has failed to plead facts to show that an injunction is reasonably suited to abate the offending activity, or indeed that the offending activity can be controlled by an order of any kind.

f. Plaintiff has failed to plead facts showing that a preliminary injunction will not adversely affect the public interest in accessing a large tract of land for wildlife management, public hunting and trapping.

23. Plaintiff has thus failed to plead a cause of action supporting an injunction.

WHEREFORE, Defendant, PGC, requests Your Honorable Court to enter an Order dismissing Plaintiff's Petition.

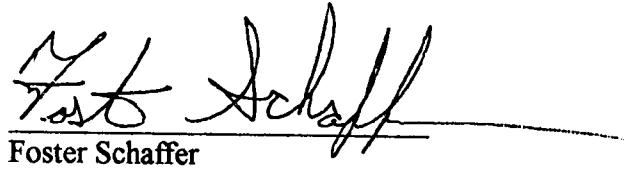
Respectfully submitted,



Bradley C. Bechtel, Assistant Counsel
Pennsylvania Game Commission
Pa. I.D. #49681
2001 Elmerton Avenue
Harrisburg, PA 17110-9797
(717) 783-6815
Fax (717) 787-6957

VERIFICATION

I, Foster Schaffer, Engineer for the Pennsylvania Game Commission, hereby affirm that the statements made in the foregoing Preliminary Objections are true and correct to the best of my knowledge, information and belief. I understand that this Verification is being made under penalty of 18 P.S. Section 4904, relating to unsworn falsification to authorities.



Foster Schaffer

GARY BERKLEY : IN THE COURT OF COMMON PLEAS
Plaintiff, : OF
-vs- : CLEARFIELD COUNTY, PENNSYLVANIA
PENNSYLVANIA STATE GAME : No. 07-1467-CD
COMMISSION :
Defendant : CIVIL ACTION - EQUITY
:

CERTIFICATE OF SERVICE

I, Bradley C. Bechtel, Esquire, Assistant Counsel of the Pennsylvania Game Commission, hereby certify the foregoing RESPONSE TO RULE TO SHOW CAUSE IN THE NATURE OF PRELIMINARY OBJECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION was served by depositing same in the United States First Class Mail, this 10th day of October, 2007, upon the following:

Brett M. Woodburn, Esquire
Cladwell & Kearns
3631 North Front Street
Harrisburg, PA 17110



Bradley C. Bechtel
Assistant Counsel
Pa. I.D. #49681
2001 Elmerton Avenue
Harrisburg, PA 17110-9797
(717) 783-6815
Fax (717) 787-6957

CLEARFIELD COUNTY RECORDER OF DEEDS

Karen L. Starck, Recorder

Maurene Inlow - Chief Deputy

P.O. Box 361

1 North Second Street, Suite 103
Clearfield, Pennsylvania 16830

*RETURN DOCUMENT TO:

PENNSYLVANIA GAME COMMISSION

Instrument Number - 200417350

Recorded On 10/25/2004 At 11:39:45 AM

* Instrument Type - RIGHT OF WAY

* Total Pages - 5

Invoice Number - 119609

* Grantor - MID-EAST OIL COMPANY

* Grantee - COMMONWEALTH OF PENNSYLVANIA

* Customer - PENNSYLVANIA GAME COMMISSION

* FEES

STATE WRIT TAX \$0.50

RECORDING FEES - \$13.00

RECORDER

RECORDER IMPROVEMENT \$3.00

FUND

COUNTY IMPROVEMENT FUND \$2.00

TOTAL \$18.50

I hereby CERTIFY that this document
is recorded in the Recorder's Office of
Clearfield County, Pennsylvania.



Karen L. Starck

Karen L. Starck
Recorder of Deeds

THIS IS A CERTIFICATION PAGE

Do Not Detach

THIS PAGE IS NOW PART OF THIS LEGAL DOCUMENT

* - Information denoted by an asterisk may change during the verification process and may not be reflected on this page.

THIS INDENTURE

MADE the 18th day of August, 2004

BETWEEN

MID-EAST OIL COMPANY, a Pennsylvania corporation, with an address of P.O. Box 1378, Indiana, Pennsylvania 15701, as GRANTOR, or party of the first part,

And

COMMONWEALTH OF PENNSYLVANIA acting through the PENNSYLVANIA GAME COMMISSION, of 2001 Elmerton Avenue, Harrisburg, Pennsylvania 17110-9797, GRANTEE, or party of the second part

WITNESSETH

THAT the said party of the first part, in consideration of one and no one-hundredths dollars (\$1.00) to it now paid by the said party of the second part, does grant, bargain, sell, release and confirm unto the said party of the second part, its successors and assigns,

ALL the non-exclusive free and uninterrupted easement, right of way, use, liberty, privilege of, and passage in and along that certain presently existing strip of land or passage way sometimes referred to as the "Burma Road", 40 feet in width extending across the property of Robert Bailey Trust Tracts, situate in the Township of Cooper, County of Clearfield and Commonwealth of Pennsylvania, the area of said easement or right of way being more specifically described on a certain map or survey prepared by Timothy P. Botsford dated August 28, 2002, and attached hereto, incorporated herein and marked as Exhibit A to this Indenture.

AND being located on those certain tracts of land located in Cooper Township, Clearfield County, Commonwealth of Pennsylvania, set forth and described on the tax assessment maps as Parcel Nos. 110-S06-1, 2, 3, 6, 7, and 110-S-7-1, 2, 13, and 14;

TOGETHER with non-exclusive free and uninterrupted ingress, egress and regress in, on and along said easement or right of way to and for Grantee, its successors and assigns, in common with Grantor, and Grantor's predecessors, successors and assigns.

EXCEPTING and RESERVING to Grantor, its predecessors, successors and assigns, the non-exclusive free and uninterrupted ingress, egress and regress in, on and along said easement or right of way in common with Grantee, its successors and assigns.

UNDER and SUBJECT to the obligation of grantor, its successors and assigns, to share pro rata in the maintenance and repair said easement or right of way so as to keep said easement or right of way in a reasonable and passable condition for highway motor vehicles.

UNDER and SUBJECT to the obligation of Grantor, its successors and assigns, to erect such gates in and along said easement or right of way as are reasonably requested by Grantee and the Robert Bailey Trust.

THIS grant fulfills the clause in the Indenture dated October 4, 2002 from COUNTY NATIONAL BANK to MID-EAST OIL COMPANY, which states:

UNDER and SUBJECT to the restriction that Grantee, its successors and assigns, may only assign the easement or right-of-way herein granted to its successors, the assigns, if any, to its Oil and Gas Lease of May 2, 2002 with Grantor, and to the Commonwealth of Pennsylvania, Pennsylvania Game Commission to obtain access including public access to its lands adjoining or near to Grantor's Tracts.

TOGETHER with the full, complete and unfettered right of Grantee, its successors and assigns, to transfer all or part of its interest in and to said easement or right-of-way to any or all of its successors and/or assigns, and/or to its licensees, contractors, subcontractors, agents and/or employees, with the full, complete and unfettered specific right to transfer all or part of its interest in and to said easement or right-of-way to the Commonwealth of Pennsylvania, Pennsylvania Game Commission, so as to enable the said Commonwealth of Pennsylvania, Pennsylvania Game Commission to obtain access including public access to its lands adjoining or near to Grantor's Tracts.

BEING the same property conveyed to the grantor herein by a deed dated October 4, 2002, and recorded in Centre County at Instrument NO. 200372302, by and between COUNTY NATIONAL BANK, Successor Trustee, under the Last Will and Testament of Robert Bailey, as Grantor, and MID-EASE OIL COMPANY, as Grantee.

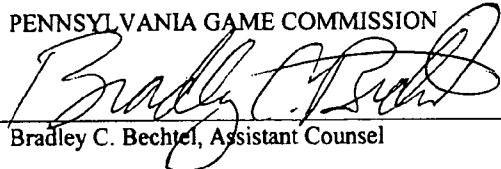
TO HAVE and TO HOLD the same unto and for the use of the said party of the second part, its successors and assigns forever,

AND the said party of the first part for itself, its heirs, executors and administrators covenant with the said party of the second part, its successors and assigns against all lawful claimants GENERALLY the same and every part thereof to Warrant and Defend.

NOTICE this document may not/does not sell, convey, transfer, include or insure the title to the coal and right of support underneath the surface land described or referred to herein, and the owner or owners of such coal may have/have the complete legal right to remove all of such coal and, in that connection, damage may result to the surface of the land and any house, building or other structure on or in such land. The inclusion of this notice does not enlarge, restrict or modify any legal right or estate otherwise created, transferred, excepted or reserved by this instrument. (This notice is set forth in the manner provided in Section 1 of the Act of July 17, 1957, P.L. 984, as amended, and is not intended as notice of unrecorded instruments, if any.)

WITNESS, the hand and seal of:

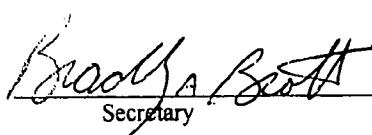
PENNSYLVANIA GAME COMMISSION



Bradley C. Bechtel, Assistant Counsel

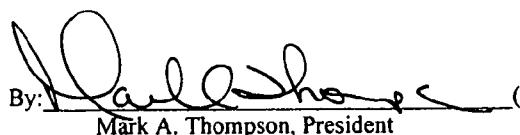
NOTICE the undersigned, as evidenced by the signature(s) to this notice and the acceptance and recording of this deed, (is, are) fully cognizant of the fact that the undersigned may not be obtaining the right to protection against subsidence, as to the property herein conveyed, resulting from coal mining operations and that the purchased property, herein conveyed, may be protected from damage due to mine subsidence by a private contract with the owners of the economic interest in the coal. This notice is inserted herein to comply with the Bituminous Mine Subsidence and Land conservation Act of 1966 (as amended 1980, October 10, P.L. 874, No. 156, Section 1.)

ATTEST:



Secretary

MID-EAST OIL COMPANY

By: 

Mark A. Thompson, President (SEAL)

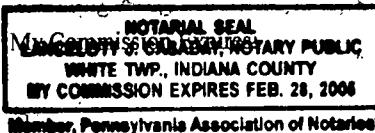
COMMONWEALTH OF PENNSYLVANIA

: SS.

COUNTY OF INDIANA

On this the 16th day of August, 2004, before me, the undersigned officer, personally appeared MARK A. THOMPSON, who acknowledged himself to be the President of MID-EAST OIL COMPANY, a Pennsylvania corporation, and that he as such President, being authorized to do so, executed the foregoing instrument for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and office seal.



CERTIFICATE OF RESIDENCE

I, Bradley C. Bechtel, do hereby certify that the Grantee's precise place of business is 2001 Elmerton Avenue, Harrisburg, Pennsylvania 17110-9797.

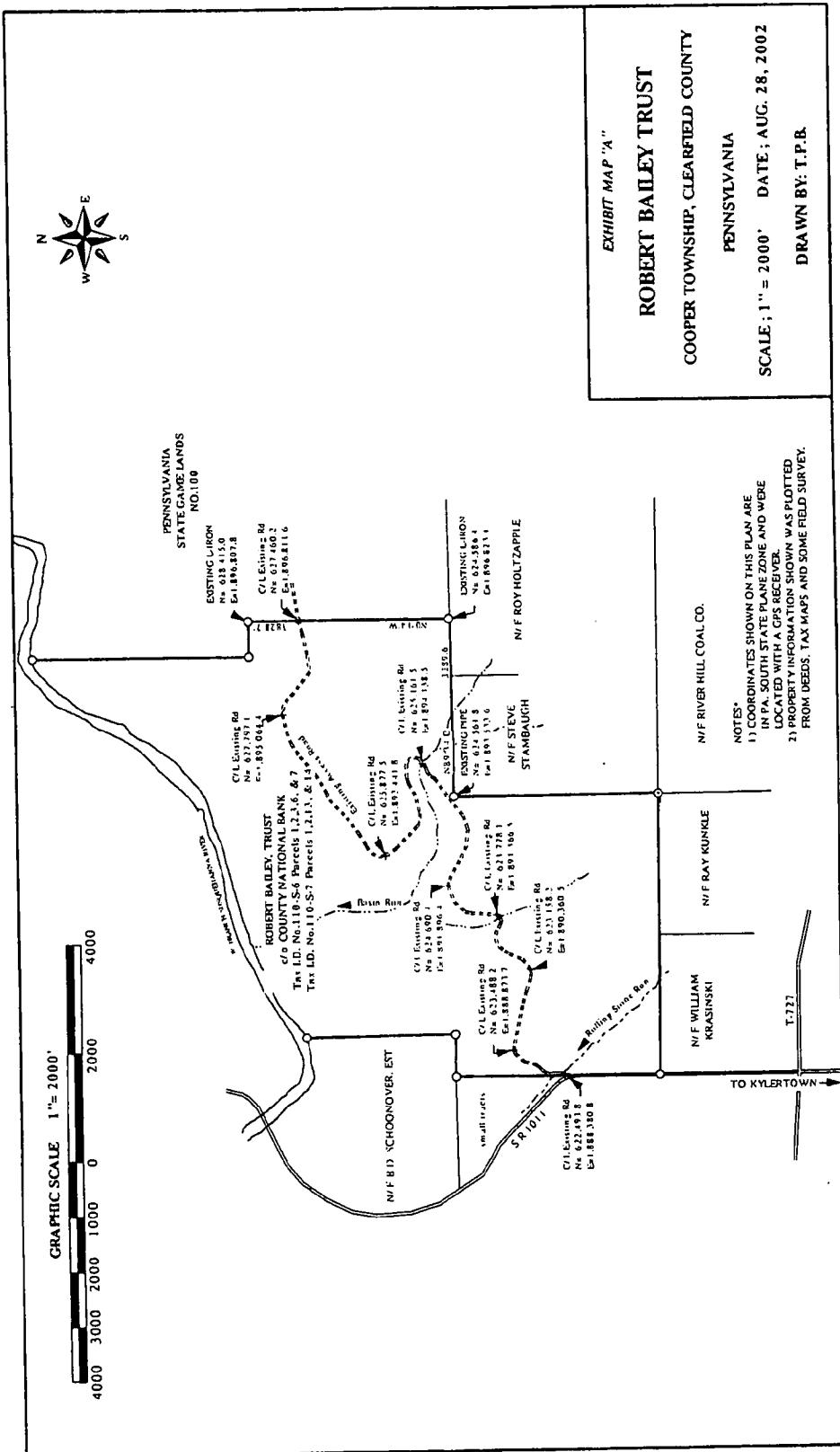
Witness, my hand this 25th day of June, 2004.

Bradley C. Bechtel
Assistant Counsel
Pennsylvania Game Commission

1878

4003 SS 100

11047720834



IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

GARY BERKLEY

:

VS.

: NO. 07-1467-CD

PENNSYLVANIA STATE

:

GAME COMMISSION

:

O R D E R

AND NOW, this 15th day of October, 2007, following taking of testimony relative the request for Preliminary Injunction; the Court finding that the Plaintiff has not shown sufficient legal basis for the issuance of a Preliminary Injunction, the said request for Preliminary Injunction is hereby denied.

BY THE COURT,



President Judge

FILED *cc Atlys:*
07/4/00/07
OCT 16 2007
Woodburn
Bechtel

William A. Shaw
Prothonotary/Clerk of Courts

(6)

GARY BERKLEY

Plaintiff,

-vs-

PENNSYLVANIA STATE GAME
COMMISSION

Defendant

IN THE COURT OF COMMON PLEAS
OF
CLEARFIELD COUNTY, PENNSYLVANIA

No. 07-1467-CD

CIVIL ACTION - EQUITY

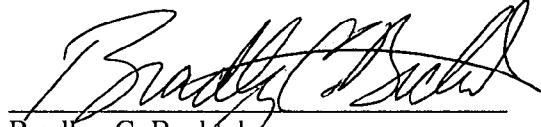
FILED *(initials)*

OCT 18 2007
10/18/07
William A. Shaw
Prothonotary/Clerk of Courts
no 4c

CERTIFICATE OF SERVICE

I, Bradley C. Bechtel, Esquire, Assistant Counsel of the Pennsylvania Game Commission, hereby certify the foregoing BRIEF IN SUPPORT OF RESPONSE TO RULE TO SHOW CAUSE IN THE NATURE OF PRELIMINARY OBJECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION was served by depositing same in the United States First Class Mail, this 10th day of October, 2007, upon the following:

Brett M. Woodburn, Esquire
Cladwell & Kearns
3631 North Front Street
Harrisburg, PA 17110



Bradley C. Bechtel
Assistant Counsel
Pa. I.D. #49681
2001 Elmerton Avenue
Harrisburg, PA 17110-9797
(717) 783-6815
Fax (717) 787-6957

GARY BERKLEY

Plaintiff,

-vs-

PENNSYLVANIA STATE GAME
COMMISSION

Defendant

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY
PENNSYLVANIA

No. 07-1467-CD

CIVIL ACTION - EQUITY

TYPE OF DOCUMENT:

BRIEF IN SUPPORT OF RESPONSE
TO RULE TO SHOW CAUSE IN THE
NATURE OF PRELIMINARY
OBJECTIONS

FILED ON BEHALF OF DEFENDANT:
PENNSYLVANIA GAME COMMISSION

ATTORNEY FOR DEFENDANT:
BRADLEY C. BECHTEL
ASSISTANT COUNSEL
I.D. # 49681
2001 ELMERTON AVENUE
HARRISBURG, PA 17110-9797
Phone: (717)783-6815
Fax: (717)787-6957

RECEIVED

OCT 15 2007

Court Administrator's
Office

GARY BERKLEY	:	IN THE COURT OF COMMON PLEAS
		OF
Plaintiff,	:	CLEARFIELD COUNTY, PENNSYLVANIA
-vs-	:	No. 07-1467-CD
PENNSYLVANIA STATE GAME	:	
COMMISSION	:	CIVIL ACTION - EQUITY
Defendant	:	

**BRIEF IN SUPPORT OF RESPONSE TO RULE TO SHOW CAUSE IN THE NATURE
OF PRELIMINARY OBJECTIONS OF THE DEFENDANT, PENNSYLVANIA GAME
COMMISSION**

STATEMENT OF MATERIAL FACTS

The Pennsylvania Game Commission, (hereinafter, PGC) is an independent agency of the Commonwealth of Pennsylvania, with its principal office located at 2001 Elmerton Avenue, Harrisburg, PA 17110. By virtue of an Indenture dated August 18, 2004 and recorded October 25, 2004 to number 200417350, the PGC acquired an easement over land formerly of the Bailey Trust in Cooper Township, Clearfield County. This easement was in and along what was identified as the "Burma Road", 40 feet in width.

Plaintiff Gary Berkley (hereinafter, Berkley) is now the owner of the servient estate over which the "Burma Road" passes. The servient estate consists of strip mined acreage comprising 1,300 acres, more or less, which land has road frontage and an old mining haul road (the "Burma Road") off S.R. 1011. The former Bailey Trust property is not posted against trespassing, nor is access controlled in any manner.

The Burma Road was originally constructed by using a "cut and fill" technique where land from the uphill side was removed and used to fill the downhill side. The distance from the toe of the uphill slope to the crest of the downhill slope is generally 40 feet. Beginning in 2007, the PGC began to grade, grub and prepare the Burma Road for vehicular access to the State

Game Lands. In the summer of 2007, the PGC began to prepare the crossing over Basin Run to accept a temporary bridge so that the PGC could access the State Game Lands. All such grading, grubbing and preparation was done within a 40 foot wide corridor, between the historical toe of slope on the uphill side of the Burma Road and the crest of the slope on the downhill side of the Burma Road.

Berkley has filed a Petition for an injunction to stop the PGC from entering his land outside of the PGC's easement.

STATEMENT OF ISSUES

1. Whether this action is barred by sovereign immunity?

(Suggested Answer: Yes.)

2. Whether exclusive jurisdiction of this action involving title to land or interest therein brought by a person who claims an interest in the title to lands occupied or claimed by the Commonwealth is exclusively vested in the Board of Property?

(Suggested Answer: Yes.)

3. Whether Plaintiff has failed to plead a cause of action by failing to plead any facts to support the essential prerequisites for a preliminary injunction?

(Suggested Answer: Yes.)

SUMMARY OF ARGUMENT

The Commonwealth enjoys sovereign immunity generally and suits may only be brought if they fall within one of the exceptions to sovereign immunity found in 42 P.S. §8521(b). Plaintiff has not pled any of those exceptions. In addition, this case involves determining who has title to certain property upon which the Commonwealth is exercising dominion or control. Stated another way, the Commonwealth is occupying and claiming the property. Thus, exclusive jurisdiction of the dispute is in the Board of Property.

Finally, there is no basis for a request for injunctive relief. Assuming Plaintiff has a wrong which should be remedied, the law provides for money damages. In addition, this is actually a title dispute, not a mere trespass case. If the title is declared in Plaintiff, then the injunction would be unnecessary.

ARGUMENT

1. This action is barred by sovereign immunity.

Suits may only be brought against the Commonwealth in the manner and in such courts and cases as directed by the Legislature. Pa. Const. Art.1, §11. The Commonwealth enjoys sovereign immunity pursuant to 1 Pa.C.S.A. §2310. Hall v. Acme Markets, Inc., 110 Pa.Cmwlth. 199, 532 A.2d 894 (1987). This immunity is subject to certain enumerated exceptions set forth in 42 P.S. §8521(b). Immunity from suit may be raised by either preliminary objections or New Matter. Harris v. Rundle, 27 Pa. Cmwlth. 445, 366 A.2d 970 (1976). There, the liability of defendants was based on their status as agents for the Commonwealth. The court reasoned that “if [the plaintiff’s] claim is devoid of merit because of the immunity of the appellees, clearly this issue is joined on the face of the complaint.” Id., at 451, 366 A.2d at 974. In Safeguard Mut. Ins. Co. v. Commonwealth, 4 Pa. Cmwlth. 477, aff’d per curiam, 455 Pa. 632, 303 A.2d 822 cert. denied, 414 U. S. 957 (1972), plaintiff argued that sovereign immunity may not be raised by demurrer. The court rejected this argument, holding that “it is well established that (sovereign immunity) may be raised by demurrer.” Id. at 482. In Commonwealth ex rel Milk Marketing Board v. Sunnybrook Dairies, 32 Pa. Cmwlth. 313, 379 A.2d 330 (1977), the court stated “We have . . . acknowledged preliminary objections to be a proper vehicle for raising sovereign immunity when that defense is apparent on the face of the pleadings.” Id., at 316, 379 A.2d at 332. These decisions hold that affirmative defenses may be raised by preliminary objection when the defense is obvious from the pleadings.

In this case, Gary Berkley has brought an action against the Pennsylvania Game Commission of the Commonwealth of Pennsylvania, which is an independent administrative commission. 34 Pa. C.S §103(a). The only possible exception to sovereign immunity is the motor vehicle exception 42 Pa.C.S. §8522(b)(1). The PGC submits this exception is inapplicable

because in this case it is not the operation of the vehicle that caused damage, but the location. If within the rights of the PGC, no damage at all has been caused by the dozer. If the work is not encompassed within the property rights of the PGC, then Berkley may have sustained some damage because of the work. However, it is not by the negligent operation of a motor vehicle. Thus, sovereign immunity is apparent on the face of the pleadings and the Petition should be dismissed with prejudice.

2. Exclusive jurisdiction of this action involving title to land or interest therein brought by a person who claims an interest in the title to lands occupied or claimed by the Commonwealth is vested exclusively in the Board of Property.

Suits may only be brought against the Commonwealth in the manner and in such courts and cases as directed by the Legislature. Pa. Const. Art. I, §11. The Commonwealth enjoys sovereign immunity pursuant to 1 Pa.C.S.A. §2310. This immunity is subject to certain enumerated exceptions set forth in 42 P.S. §8521(b). None of these exceptions are concerned with title disputes or specific performance.

However, exclusive jurisdiction of such cases is vested in the Board of Property by the Administrative Code through Section 1207 (71 P.S. §337). The Commonwealth Court has reaffirmed this principle in the case of Stair v. Commonwealth for the use of the Pennsylvania Game Commission, 28 Pa. Cmwlth. 457, 368 A.2d 1347 (1977). Additionally, Section 1207 of the Administrative Code provides (inter alia):

The Board of Property shall also have jurisdiction to hear and determine cases involving the title to land or interest therin brought by persons who claim an interest in the title to lands occupied or claimed by the Commonwealth.

Pennsylvania Rule of Civil Procedure 1032 (b) provides that whenever it appears by suggestion of the parties or otherwise that a court lacks subject matter jurisdiction, the action should be transferred to a court of the Commonwealth which has jurisdiction.

This case, however, was pled in such a manner as to try to avoid the title issue. Berkley assumes title and requests an injunction to stop the PGC from using land to which they are not entitled. Entry of such an order begs the question of whether the PGC has actually encroached upon Berkley's land or exceeded the scope of the PGC's easement.

Procedurally, this case is similar to the case of Krulac v. Commonwealth, Pennsylvania Game Commission, 702 A.2d 621 (Pa. Cmwlth. 1997). In Krulac, the Plaintiff brought an action for ejectment and damages. The trial court found exclusive jurisdiction in the Board of Property. On appeal, the Commonwealth Court found the title issue was exclusively within the jurisdiction of the Board of Property and that the damages issue was within the purview of the Court of Common Pleas. Interestingly, the Commonwealth Court noted that it did not matter whether the damage claim was in trespass or eminent domain. In addition, The Commonwealth Court stayed all proceedings in the trial court pending the outcome of the ejectment action.

Applying this decision to the case at hand, the title issue is integral to any decision. That issue should be heard by the Board of Property. The effect of a Board of Property decision awarding title to Berkley would be the same as an order of the Court of Common Pleas issuing an injunction: the PGC is bound by both decisions. Clearly, the Court of Common Pleas has exclusive jurisdiction over any damage claim and that portion of the case must be heard in the Court of Common Pleas. However, those proceedings should not go forward until the outcome of the case in the Board of Property.

3. Plaintiff has failed to plead a cause of action by failing to plead any facts to support the essential prerequisites for a preliminary injunction.

Plaintiff's Petition requests an injunction against the PGC enjoining further entry by the PGC outside of the PGC's casement. There are six "essential prerequisites" a party must establish prior to obtaining a preliminary injunction. These are that a party must show that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; that greater injury will result from refusing the injunction than granting it and, conversely, that issuing a preliminary injunction will not substantially harm other interested parties; that a preliminary injunction will restore the parties to the position they were in immediately prior to the alleged wrongful conduct; that the activity complained of is actionable, the right to relief clear and the wrong manifest (i.e., the Plaintiff is likely to succeed on the merits); that an injunction is reasonably suited to abate the offending activity; and that a preliminary injunction will not adversely affect the public interest. Warehime v. Warehime, 580 Pa. 201, 210, 860 A.2d 41, 46, 47 (2004). The PGC submits that none of these essential prerequisites exist in this case.

First, Berkley claims a preliminary injunction is necessary to prevent immediate and irreparable harm which cannot be adequately compensated by damages. However, everything that Berkley complains about are things that have already happened in the past. The only remaining piece of construction is to actually place a 16 foot wide the temporary bridge in place, within the historic limits of the Burma Road. Once completed, the ability of hunters and trappers to utilize the roadway will be complete. PennDOT and other private parties pay for rights to build roads all the time. How Berkley is any different is a mystery.

Second, Berkley must show that greater injury will result from refusing the injunction than granting it and, conversely, that issuing a preliminary injunction will not substantially harm

other interested parties. An order simply stating the PGC should stay within its easement can hardly be disputed. However, this begs the question whether the PGC has done work outside the easement. Thus, simply issuing an injunction to stay within the easement will not change the nature or extent of the PGC's operations at all. It is unclear how finishing the project and being done with construction can in any way be worse than stopping a construction project in mid stream and requiring everything to stay where it is. The PGC already has a contract to finish the project which could be in jeopardy if the project is halted. It is true that the contractor will not be paid if it does not deliver the bridge. The hunters and trappers who would otherwise use this road to access the Game Lands will not be able to get there. Finally, it is presumed that if the damage is as severe as claimed by Berkley (which is flatly denied by the PGC), that Berkley will at some point want the alleged damage repaired. This would necessarily entail continuing to do work: not stopping. Thus, Berkley's request for an injunction fails on the second essential prerequisite.

Third, Berkley must show that a preliminary injunction will restore the parties to the position they were in immediately prior to the alleged wrongful conduct. As pointed out, only undoing the work that has been done can restore the land to the condition it was in. Berkley does not even seriously request this, as he does not have a right to have the property in the condition it was in: the PGC has a right to construct and maintain a road. Thus, leaving things where they are does nothing to protect the interests of either party.

Fourth, Berkley must show that the activity complained of is actionable, the right to relief clear and the wrong manifest (i.e., the Plaintiff is likely to succeed on the merits). The conclusory allegations of the Petition do not meet the standards of a clear right to relief. Berkley has not even identified the instruments by which the parties acquired their titles. Clearly, the basis for finding someone acted outside the scope of their rights must begin with an examination

of those rights. Without such allegations, the Petition is too vague to show a clear right to relief. Bootstrapping an injunction by an implied claim for trespass does not afford a basis for a preliminary injunction. The PGC has a right to use and maintain a road. The building of the road in and of itself is not actionable. Thus, doing work on the road is not clearly and manifestly unreasonable or actionable. It is only if the PGC is found to have done work not contemplated by the easement that an action would lie. In that case, the remedy would not be an injunction, but rather damages and an order to undo to the extent feasible the work done improperly. Thus, any way one looks at this case, the right to an injunction is not clear in any way.

Fifth, Berkley must show that an injunction is reasonably suited to abate the offending activity. As has been discussed, an injunction stating the PGC must only do work within the scope of its easement begs the real question. However, there is an additional allegation which has not been dealt with before. Plaintiff has alleged that employees of the PGC have defecated and left waste paper on Plaintiff's property. The PGC is unaware of anyone being authorized to defecate, let alone actually defecating on Plaintiff's property. The PGC will simply state that this land is open to anyone, such as hikers, bikers, hunters, fishermen, ATV operators, truck drivers or anyone else (including Berkley himself) engaged in an occupation or avocation that causes them to be outdoors for extended periods of time, not in close proximity to a toilet facility. The PGC takes issue with the characterization of Plaintiff that such a normal human activity has somehow irreparably damaged the aesthetic character of Plaintiff's land. In addition, the PGC takes issue with Berkley's claim that it was employees of the PGC who defecated at all. With all due respect, it is suggested that the Courts do not need to enter an injunction against natural actions which would take an inordinate amount of resources to police. If the person did not have to go, they probably would have waited for a more private place, if they really had to go, no order telling them not to is going to stop them.

Finally, Berkley must show that a preliminary injunction will not adversely affect the public interest. The PGC, on its own behalf and on behalf of the hunters and trappers and other persons legally using the Game Lands, have been trying to obtain a legal access to this portion of State Game Lands No. 100 since the 1980's. The PGC has been unable to do habitat management work and the public has been unable to hunt. The PGC currently has a contract for a bridge to be placed on the easement. That contract calls for the bridge to be placed in time for access before this year's rifle deer season. If there is an injunction stopping the work, the bridge will not be placed, the Commonwealth will need to find a place for the bridge, perhaps pay more to have it placed later, the contractor may not get paid, and no management work and no hunting will again take place for this year. While not evoking the emotions of someone defecating on an old strip mine, the PGC submits that these losses are more severe than those complained of by Berkley.

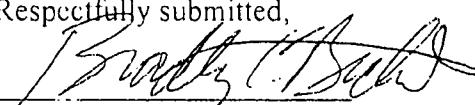
Because the Petition fails to set forth all required elements for an injunction, the PGC submits the Preliminary Injunction should be refused.

CONCLUSION

Your Honorable Court is not the proper jurisdiction for the present dispute over land. The Board of Property has exclusive jurisdiction over all cases involving the title to land or interest therein brought by persons who claim an interest in the title to lands occupied or claimed by the Commonwealth. Clearly, the Plaintiff has pled in the improper jurisdiction and the Petition should be dismissed.

Further, the Petition fails to state a cause of action for an injunction and should be dismissed.

Respectfully submitted,



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GARY BERKLEY : IN THE COURT OF COMMON PLEAS
Plaintiff, : OF
CLEARFIELD COUNTY, PENNSYLVANIA
-vs- : No. 07-1467-CD
PENNSYLVANIA STATE GAME :
COMMISSION : CIVIL ACTION - EQUITY
Defendant :

CERTIFICATE OF SERVICE

I, Bradley C. Bechtel, Esquire, Assistant Counsel of the Pennsylvania Game Commission, hereby certify the foregoing BRIEF IN SUPPORT OF RESPONSE TO RULE TO SHOW CAUSE IN THE NATURE OF PRELIMINARY OBJECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION was served by depositing same in the United States First Class Mail, this 10th day of October, 2007, upon the following:

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