

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II

CIVIL ACTION No. 09-CI-407

**ENTERED**

SEP 10 2010

FRANKLIN CIRCUIT COURT  
SALLY JUMP, CLERKMILLER BROS. COAL, LLC  
and  
GENE D. CAMPBELL

PLAINTIFFS

vs.

ENERGY AND ENVIRONMENT CABINET,  
and  
BEVERLY MAY,  
and  
FLOYD COUNTY CHAPTER OF  
KENTUCKIANS FOR THE  
COMMONWEALTH

DEFENDANTS

**OPINION AND ORDER**

This matter is before the Court upon *Plaintiff's* (hereinafter Miller Bros.) *Appeal from Certain Conditions Imposed by the Secretary of the Energy and Environment Cabinet* in a Final Order dated February 9, 2009. Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court now comes and **AFFIRMS** the Final Order of the Secretary and **DISMISSES** the Petition.

**STATEMENT OF FACTS**

On or about March 26, 2008, Beverly May (who is affiliated with the Floyd County Chapter of Kentuckians for the Commonwealth) petitioned to designate 2,000 acres of the Wilson Creek watershed in Floyd County as unsuitable for all types of surface mining. Though the original Petition was revised twice it was eventually accepted and deemed complete by the Cabinet on May 20, 2008. Because Miller Bros. had filed

preliminary application for a permit to conduct surface coal mining operations in a portion of the Wilson Creek watershed it was treated as a party to the petition proceedings. After a public hearing and a public comment period, the Secretary denied the lands unsuitable Petition, but it imposed five restrictive conditions on future mining in the Wilson Creek watershed that would apply to Miller Bros.' These restrictions were as follows.

(a). Due to the condition, size and setting of Wilson Creek Road and Big South Fork Road in a residential area, these roads shall not be used for the purposes of gaining access to a surface coal mining and reclamation operation or for coal haulage. This condition does not bar the use of these roads for emergency vehicles or for purposes of water monitoring or pre-blast and subsidence surveys;

(b). A forested post-mining land use shall be required in order to be consistent with existing land uses, and shall utilize RAM #124 methods, which have been demonstrated to promote rapid growth of quality hardwood species and reduce surface run-off and sedimentation, as part of the mine reclamation plan;

(c). The design of sediment control plan shall emphasize flood prevention by providing adequate detention to restrict predicted during-mining discharges at or below pre-mining levels;

(d). Secondary sediment control measures and the use of best management practices (such as rock checks and straw bale checks in diversions) shall be required in addition to primary sediment control measures;

(e). Approximate original contour variances shall not be approved in order to minimize stream buffer zone loss and overall fill volumes, thereby reducing the surface mining footprint.

## **ANALYSIS**

Miller Bros alleges numerous arguments to get there, but the fundamental nature of its complaint is simply this: if the Secretary wishes to impose the above-listed mining

restrictions he or she must do it via the permit application process and not via a lands unsuitable petition.

A. *405 KAR 24:030 Section 8(3) and Federal Law*

Although Miller Bros argues that 405 KAR 24:030 Section 8(3) is more stringent than Federal law, the Court disagrees. In particular, 30 U.S.C § 1272 *Designating areas unsuitable for surface coal mining*, subsection (b) provides in part that: “[w]hen the Secretary determines an area on Federal lands to be unsuitable for all or certain types of surface coal mining operations, he shall withdraw such area or condition any mineral leasing or mineral entries in a manner so as to limit surface coal mining operations on such area.” Miller Bros. argues that the Secretary of Interior can only limit specific types of mining. For support, it relies on the following language from H.R. No. 95-218, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 94 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 631 “[t]he designation can merely limit *specific types of mining* and thus the coal resources may still be *extracted. . .*” *Plaintiff’s Reply* p. 2 (emphasis added by Plaintiff). The Court concedes that standing alone this language appears to prohibit the Secretary from placing any restrictions under a lands unsuitable petition other than a total mining prohibition or a limitation of the specific types of mining. This is primarily due to one word: merely. However, when viewed in its proper context, it is clear that the Secretary has more discretion than alleged by the Plaintiff. The pertinent language is as follows:

[T]he State could determine that no lands should be designated thereunder, or, on the other, could prohibit all or some types of surface mining entirely. In addition to the discretionary designation criteria, the designation process includes other elements of flexibility. For example, the designation of unsuitability will not necessarily result in prohibition of mining. The designation can merely limit specific types of mining and thus the coal resource may still be extracted by a mining technology which would protect the values upon which the designation is premised.

U.S.C.C.A.N. 593, 630-631 (1977)(emphasis added). Hence, the language does not provide that the Secretary may only limit the specific types of mining, but instead that limiting the types of mining is simply one example of the elements of flexibility bestowed upon the Secretary. Thus, it follows that the Secretary can also impose conditions which are less restrictive than limiting the permissible types of mining. Even more telling is the following language, located just two paragraphs below.

It should be noted that the designation process is structured to be applied on an area basis, rather than a site by site determination which presents issues more appropriately addressed in the permit application process. The committee believes that the area by area approach of section 522 thus serves the industry since such a process may, in advance of application, identify lands which are either not open to surface mining or where surface mining is subject to restrictions.

*Id.* at 631 (emphasis added).

For these same reasons set forth above, the Court finds that the regulation at 405 KAR 24:030 Section 8(3) does not expand the scope of KRS 350.610(1) and therefore, is permissible under KRS Chapter 13A. Nor is this area so comprehensively regulated by other portions of KRS Chapter 350 that Chapter 13A prohibits the agency from adopting 405 KAR 24:030 Section 8(3). Stated simply, the Secretary's Order did not exceed the Cabinet's statutory authority.

*B. Substantial Evidence*

Alternatively, Miller Bros. contends that even if the regulation is valid and properly applied to the lands unsuitable petition, that the conditions imposed by the Secretary are not supported by substantial evidence. Plaintiff argues that "[n]o where is this more clearly evidenced than on the page of the secretary's Order that imposes the conditions but does not contain a single reference to any evidence in support of any of the

conditions.” *Plaintiff’s Brief* p.17. Though technically correct the Court finds Miller Bros.’s characterization of the Secretary’s Order to be unfair. As to condition (a) restrictions on road usage, the Secretary found as follows:

One of the primary concerns of the Petitioner and of those who spoke at the public hearing was the perceived danger that surface mining would present to children and other residents of Wilson creek attributable to coal truck traffic and homes subject to dust and noise should Wilson Creek Road become a haul road. . . . It was also a concern which was voiced by several people who spoke at the public hearing, and was further documented in a letter signed by 84 residents of Wilson Creek and addressed to the Director of the Division of Mine Permits, the Floyd County Fiscal Court, the Department of Surface Mining (sic) and Governor Steve Beshear, seeking to deny the use of Wilson Creek Road as a coal haul road.

The roads in Wilson Creek were traveled and observed by Department staff on several occasions during their study of the Petitioner’s allegations, most recently on the day of the public hearing on December 1, 2008. Both Wilson Creek Road and Big South Fork Road were observed to be very narrow, winding roads with many residences situated in close proximity thereto. It was the consensus of staff that due to these factors both Wilson Creek Road and Big South Fork Road were inappropriate for large coal haulage vehicles.

*Final Order* pp. 17-18. Due to its deferential nature, this satisfies substantial evidence review.

As to condition (b) forested post mining land use, Plaintiff concedes that this condition is intended to reduce surface run-off and sedimentation, but argues that any flooding potential is purely theoretical and “there is no basis to impose such measures where Wilson Creek is not a natural hazard land and not actually prone to flooding.”

*Plaintiff’s Brief* pp. 17-18. However, the Secretary also noted that currently “approximately 81% of the Petition area is forested according to the Kentucky Division of Forestry.” *Final Order* p. 4. KRS 350.410 and KRS 350.435 express a legislative preference for post-mining land use which is consistent with the surrounding region, and

for that reason, the Court finds that the Secretary acted reasonably in imposing condition (b).

Condition (c) sediment control plan to emphasize flood prevention, and condition (d) secondary sediment control measures, are closely related and to some extent, also related to condition (b). The Cabinet points out that Miller Bros. does not address condition (d) in its brief and purports that it most likely because it “considers these measures to be *de minimus* devices written into virtually every mine plan reviewed by the Cabinet.” *Cabinet’s Response Brief* p. 18. In any event, the Court will not address condition (d). As to condition (c), the Court finds that there was substantial evidence to support the Secretary’s determination that flooding could occur. In fact, common sense alone should put one on notice that serious flooding problems could ensue in an area which was previously 81% forested and was not reforested post-mining. In any event, there is substantial evidence to support the Secretary’s conclusion that flooding would (might) occur absent mandatory reforestation.

As to condition (e) no “AOC” variances, the Petition area was characterized as a steep slope area. As a matter of law a forested post-mining land use in a steep slope area would not qualify Miller Bros for an AOC variance under 405 KAR 20:060

*C. Impairment of Contracts*

Miller Bros. also argues that the Secretary’s Order unlawfully impairs its contracts with lessors. Specifically, the Secretary required the Plaintiffs to return the Wilson Creek Watershed to a forested post-mining land use. For reasons discussed above, this restriction was within the Secretary’s power. In *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 307-308 (1935) the Supreme Court wrote:

Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

Because Congress expressly extended its power to declare lands unsuitable to the States (who also inherently possessed such power) and because Kentucky's General Assembly has further delegated that determination to the Secretary, Plaintiff's claim necessarily fails.

*D. Section 2 of KY. CONST.*

When this case is inevitably appealed, either the Cabinet or Beverly May and the Floyd County Chapter of the Kentuckians for the Commonwealth may be inclined to argue that the Court erred in even addressing this argument because it is raised for the first time in *Miller Bros.'s Reply Brief* and consequently, they have had no opportunity to respond. *See e.g. Milby v. Mears*, 580 S.W.2d 724, (Ky.App. 1979)(Court of Appeals admonishing counsel for raising new issues in its reply brief but reaching the merits because the case was important and opposing counsel responded to the issues during oral arguments). While it is true that Section 2 of the KY. CONST. is not mentioned in *Miller Bros.'s Brief*, there are allegations of arbitrariness and unreasonableness. Thus, (at the very least) *Miller Bros.'s* has indirectly referenced Section 2 in its original brief. In fact, it is a very rare occasion for this Court to review an administrative appeal where that particular Section is not referenced in some fashion. That being said, because this argument mirrors much of *Miller Bros.'s* previous arguments (i.e., no substantial evidence, conditions unreasonable, etc.) further judicial analysis can be appropriately narrow.

Plaintiff's argue that Section 2 when read in concert with 30 U.S.C. § 1263; KRS § 350.465(2)(c),(d); KRS § 350.0301 establish upon permit applicants a right to be heard and ergo, establish a right to adjudicative proceedings. However, this argument ignores the primary reason that the lands unsuitable process was established: to designate (in advance of the permit process) certain areas of land unsuitable for mining, unsuitable for certain types of mining, **or subject to restrictions.**

The committee believes that the area by area approach of section 522 thus serves the industry since such a process may, in advance of application, identify lands which are either not open to surface mining or where surface mining is subject to restrictions.

U.S.C.C.A.N. 593, 631 (1977)(emphasis added). Moreover, because KRS 350.610 provides for an appeal to this Court pursuant to the provisions of KRS 224.10-470 the procedure comports with constitutional due process.

### CONCLUSION

**WHEREFORE, IT IS HEREBY ORDERED** that the Final Order of the Secretary is **AFFIRMED** and the Petition is **DISMISSED**.

This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 9<sup>th</sup> day of September 2010.

  
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**THOMAS D. WINGATE**  
Judge, Franklin Circuit Court

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Opinion and Order was mailed, this 10<sup>th</sup> day of Sept., 2010, to the following:

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**Sally Jump, Franklin County Circuit Court Clerk**