

STATE PARK MINERAL EXPLORATION IN LWCF PROJECT

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In a report issued February 27, 2009, the Ohio State Park and Recreational Area Study Committee identified “Oil and Gas Development on State Park Land” as a potential source of additional revenues to compensate for “a steadily decreasing allotment from Ohio’s General Revenue Fund.” Such oil and gas revenues would support the Ohio Department of Natural Resources mission “to provide safe and clean outdoor recreational opportunities” as well as “conserve Ohio’s land and water.” As described by the Committee, “the issue of allowing oil and gas development on State Park land... continues to be debated in state legislatures across the nation as well as in Congress”:

The debate centers on perspectives of land use, i.e. the purpose for which the land was set aside as a park, and perspectives of the impact that an industrial activity would have on a visitor’s experience and the park’s natural habitat.

According to the report, “both Michigan and Pennsylvania have a history of successful and profitable energy development on state-owned property that rewards their citizens and supports state government.” Moreover, the report claimed “the small footprint of natural gas and oil production” allowed the “final installations” to “be unobtrusive and may not even be noticed by most users of the system.”

[http://www.dnr.state.oh.us/Portals/2/PDFs/StParksStudyRpt\\_27Feb09.pdf](http://www.dnr.state.oh.us/Portals/2/PDFs/StParksStudyRpt_27Feb09.pdf)

On April 12, 2012, the Huffington Post reported that the Ohio Department of Natural Resources (ODNR) had “proposed guidelines for drilling in state parks.” As reported, these proposed guidelines “would require natural gas and oil companies to stay at least 300 feet — the length of a football field — from campgrounds, certain waterways and sites deemed historically or archaeologically valuable.” [http://www.huffingtonpost.com/2012/04/12/ohio-fracking-rules-proposed\\_n\\_1421400.html](http://www.huffingtonpost.com/2012/04/12/ohio-fracking-rules-proposed_n_1421400.html)

(SEE: January 2012 ODNR report regarding best management practices and recommendations regarding oil and gas activities on state lands, including state parks:  
<http://ohiodnr.com/portals/11/pdf/leasingbmp.pdf>)

A July 2011 fact sheet from the Ohio Environmental Protection Agency (OEPA) describes natural gas production through hydraulic fracturing or “fracking” in terms which are hardly “unobtrusive,” particularly within the context of land and water resources in a state park. According to OEPA, this process requires up to four million gallons of fresh water “from a stream, river, reservoir or lake near the drill site” are used “to fracture a single well,” raising the specter of significant water pollution and resource degradation from fracking in state parks:

After the well is drilled, a mixture of water, sand and chemical additives is injected at very high pressure to fracture the shale. The sand keeps the fractured shale open and serves as a conduit for extracting the natural gas. The chemical

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additives reduce potential problems during drilling and gas production, such as bacterial build-up and the formation of scale, mineral deposits and rust...

Most of the water used to fracture the shale remains trapped thousands of feet underground after it is injected. However, internal pressure in the geologic formation forces some of the water (around 15-20 percent of the total volume injected) back to the surface through the well bore.

Most of this "flowback" or "frac" water comes back to the surface within seven to ten days after it is injected. Flowback water is stored temporarily in lagoons or tanks before being sent off-site for disposal. It is usually transported off-site by truck, although some companies are exploring rail transportation as an option. "Drilling for Natural Gas in the Marcellus and Utica Shales: Environmental Regulatory Basics"  
<http://www.epa.ohio.gov/portals/0/general%20pdfs/generalshale711.pdf>

### LWCF COMPLIANCE

Moreover, as noted by the Ohio Recreational Area Study Committee, the complex philosophical issue of allowing oil and gas poses many "practical challenges," including the added cost of compliance with the Land and Water Conservation Fund Act (LWCF):

Parks that were created by or ever received federal funding through the Land and Water Conservation Fund would be required to return those funds to the National Park Service if those State Parks were permitted to lease the land for oil and gas exploration. This is a Federal requirement dating back to the creation of the Land and Water Conservation Fund that stipulates the return of Federal investment if the park's land use is converted to anything other than recreational use.

Over the years, ODNR has received a number of LWCF acquisition and development grants, including a LWCF grants in a number of state parks subject to oil and gas drilling exploration and development. (SEE: "find LWCF in your neighborhood" for a listing of projects by State and County <http://waso-lwcf.ncrc.nps.gov/public/index.cfm>)

Title 36 Part 59 of the Code of Federal Regulations describes "Post-Completion Compliance Responsibilities" for assistance to States from the Land and Water Conservation Fund. In particular, Section 6(f)(3) of the LWCF Act assures that once an area has been funded with LWCF assistance, it is to be continually maintained in public recreation use, unless the National Park Service (NPS) "approves substitution property of reasonably equivalent usefulness and location and of at least equal fair market value." If LWCF assisted properties are to be converted to "other than public outdoor recreation uses," the NPS must determine whether the following prerequisites have been met:

- (1) All practical alternatives to the proposed conversion have been evaluated.
- (2) The fair market value of the property to be converted has been established and

the property proposed for substitution is of at least equal fair market value as established by an approved appraisal (prepared in accordance with uniform Federal appraisal standards) excluding the value of structures or facilities that will not serve a recreation purpose.

(3) The property proposed for replacement is of reasonably equivalent usefulness and location as that being converted.  
36 CFR 59.3

## CRATER OF DIAMONDS STATE PARK

If past is prologue, the case of *Sierra Club v. Davies*, 955 F.2d 1188, 1992 U.S. App. LEXIS 1468; 119 Oil & Gas Rep. 425 (8<sup>th</sup> Cir. 2/15/1992) provides some insight into the scope and timing of federal judicial review for proposed mineral exploration in a state park which was acquired or developed with LWCF funds. In this particular case, the specific issue before the federal appeals court was whether “preliminary testing in a state park aimed at determining the feasibility of commercial diamond mining constitutes a conversion under the federal Land and Water Conservation Fund Act of 1965.” Moreover, in the absence of an immediate conversion, was such preliminary testing necessary to establish the “fair market value of the property of the property to be converted” at some later date?

In 1906, a diamond was discovered on property south of Murfreesboro in Pike County, Arkansas. Following this initial discovery, successive private and corporate owners were never able to profitably mine the tract. By 1952, the various owners land and the neighboring fields had turned the "Crater" into a tourist attraction.

The land was then consolidated into a single parcel in 1969 and the State of Arkansas purchased the 887.3 acres in 1972, dedicating the tract as Crater of Diamonds State Park. The park contains a thirty-seven-acre, exposed, diamond-bearing, volcanic pipe. Crater of Diamonds State Park is the only diamond-producing site in the world open to the public where “you can experience a one-of-a-kind adventure hunting for real diamonds.” <http://www.craterofdiamondsstatepark.com/> The site was placed on the National Register of Historic Places in 1973 and is listed in the Arkansas Natural Heritage Commission's Registry of Arkansas Natural Areas.

In 1976 Arkansas received a federal matching grant from the National Park Service for \$723,808. The grant--part of an acquisition and development project at the Crater of Diamonds State Park--was made through the Land and Water Conservation Fund Act (LWCF), 16 U.S.C. §§ 460L-4 to 460L-11 (1988). The Act requires all States that receive grants to maintain the benefited land as public outdoor recreational space forever.

Under the LWCF, any conversion of park land to non-recreational use must be approved by the Secretary of Interior and can come only after the Secretary:

(1) finds the conversion in accord with the existing comprehensive statewide outdoor recreation plan, and (2) is assured that the state will substitute other recreational properties of at least equal fair market value and of reasonably

equivalent usefulness and location.

Since the public diamond mining at Crater of Diamonds State Park is unique, it would be nearly impossible to find equivalently useful land to substitute if the Secretary found a conversion. Nevertheless, the LWCF provides that wetlands within the state shall be considered of reasonably equivalent usefulness for all other property within the state. 16 U.S.C. § 460L-8(f)(3).

In 1986, the Arkansas Parks, Recreation and Travel Commission requested a task force to study the viability of commercial mining at the site. The task force recommended legislation permitting the Commission to enter contracts for the commercial exploration of diamonds at the Crater of Diamonds State Park. The Arkansas Legislature in 1987 authorized the Department of Parks and Tourism to execute a lease for the exploration and production of diamonds at the park. Ark. Code Ann. § 22-5-817 (Michie Supp. 1991).

The task force continued to study the issue, but concluded that it lacked sufficient verified information relating to the size and value of the preserve to make valid judgments as to the park's mining potential. It therefore recommended that the state undertake Phase I investigatory drilling of the reserve.

In light of LWCF restrictions, Arkansas sought an opinion from the regional office of the National Park Service as to whether Phase I testing would constitute a conversion:

Phase I testing would consist of drilling twenty-five to thirty holes--with each core measuring 1 and 7/8 inches in diameter--to a maximum depth of 1,000 feet. Each hole that is drilled would be refilled before researchers move on to the next hole. The drilling process would require fencing off a fifty by one hundred foot section in the public digging area for a period of not more than twelve weeks. After the test drilling is complete, the park area would be returned to its normal state.

On May 24, 1989, the acting regional director of the National Park Service rejected the Phase I testing, concluding it would convert a portion of the area from public outdoor use to nonpublic commercial use. The acting regional director said the testing "could have the potential of progressing into a full-blown commercial diamond mining operation."

The Interior Department, however, found "the Park Service's rejection was premature since the state sought only to make limited tests to determine the feasibility of commercial mining." While acknowledging that commercial mining "would certainly constitute a conversion under the Act," in the opinion of the Interior Department, "it was possible that commercial mining may never take place at the park." Accordingly, the acting regional director reconsidered the initial decision and approved Phase I testing.

In January 1990, the Sierra Club, the Arkansas Wildlife Federation, Inc. and the Friends of Crater of Diamonds State Park, (hereinafter referred to collectively as "Sierra") filed a lawsuit to stop the testing and mining. The federal district court allowed the mining companies, Capricorn Diamonds, Ltd. and Kennecott Corporation, to intervene and join the lawsuit.

After negotiations between the parties failed, the State began taking bids for Phase I testing. The federal district court initially rejected Sierra's motion to enjoin the testing. The mining companies funded the Phase I testing and anticipate submitting bids if full-scale commercial mining is approved at the park. Testing began on July 8 and continued until August 6, when the district court decided to permanently enjoin Phase I testing. The mining companies appealed this judgment.

#### ON APPEAL

On appeal, Sierra claimed Phase I testing constituted a "conversion," triggering the requirements of Section 6(f)(3) in the LWCF. The federal appeals court characterized Section 6(f)(3) as the "heart" of the LWCF which provides, in pertinent part, as follows :

No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location. 16 U.S.C. § 460L-8(f)(3).

As characterized by the NPS acting regional director, Phase I testing was merely a permitted "temporary non-conforming use" and not a conversion. In so doing, the director emphasized the NPS decision was "emphatically limited to Phase I testing":

This approval in no way commits the Federal government to making a similar finding for any testing beyond Phase I. "Any future proposal will require rigorous review and analysis." Moreover, the director stated that any subsequent testing proposals would have impact inseparable from actual mining and would, therefore, have to comply with the procedural substitution requirements of § 6(f)(3), as well as the National Environmental Policy Act. 42 U.S.C. §§ 4321 to 4370a.

In response, Sierra contended "the state's elaborate planning as well as the funding by the mining companies indicates that Phase I testing is just a precursor to the inevitable commercial mining of the park." The federal appeals court, however, found the "limited Phase I testing" did not necessarily "contemplate or permit any subsequent testing or mining activity." In so doing, the court refused to "render a speculative decision" which prematurely assumes future Phase I testing would reveal significant "potential for commercial mining at the park."

If this occurs, it is possible that the elected representatives of the people of Arkansas will decide to mine the park commercially. If they do, they will need to comply with § 6(f)(3) and the National Environmental Policy Act. 42 U.S.C. §§ 4321 to 4370a. The agency's approval, if granted, will be reviewable at that point.

## APA REVIEW

Pursuant to the Administrative Procedure Act (APA), the federal appeals court would “determine whether NPS’s decision was arbitrary and capricious.” In so doing, the court’s review would determine whether the decision was “based on the relevant factors” and “whether there has been a clear error of judgment.” In so doing, the court would conduct an exhaustive inquiry into the facts, but it would not “substitute its judgment for that of the agency.” Further, federal appeals court noted that “[t]he LWCF does not define conversion.” Moreover, in defining a “conversion” within the context of this particular case, the court would “not impose its own construction of the [LWCF] statute.” Instead, the federal appeals court would limit its analysis to whether NPS’s “construction of the statute was permissible.”

Since the agency was vested with policy-making power, it is authorized to fill in the gaps that may have been left by Congress and this court cannot substitute its judgment for that of the agency, unless the court finds the agency's construction inconsistent with the statutory mandate or that it frustrates the purpose of Congress.

The federal appeals court would, therefore, determine “whether the agency's determination that Phase I testing would not constitute a conversion was a reasonable construction of the Act.” In the absence of a statutory definition of “conversion” in the LWCF, the court found the NPS had determined that “conversions generally occur in four situations”:

- (1) Property interests are conveyed for nonpublic outdoor recreation uses.
  - (2) Nonrecreation uses (public or private) are made of the project area, or a portion thereof.
  - (3) Noneligible indoor recreation facilities are developed within the project area without (National Park Service) approval.
  - (4) Public outdoor recreation use of property acquired or developed with LWCF assistance is terminated.
- LWCF Grants Manual, Chapter 675.9.3(A).

In this case, the federal appeals court noted “[t]he acting regional director did not articulate the basis for his decision that the Phase I testing was permissible as a temporary nonconforming use and, therefore, not a conversion under the LWCF.” In the absence of an articulated basis for the NPS’s decision, the federal appeals court would “uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.” In this particular instance, the court found the only relevant situation considered a conversion by the NPS was the second above-cited scenario, i.e., “where a non-recreational use is made of a project area.” Accordingly, in the opinion of the court, Phase I testing “plausibly could constitute a conversion” if it constituted a “nonrecreational use.”

## TEMPORARY INTRUSION

Under the circumstances of this case, the federal appeals court found there was “use of the park only in the strictest sense.” Specifically, the court found the “park’s purpose is by no means

turned non-recreational” through Phase I testing:

The exploratory drilling does not limit public use of the park, except for the ten-to twelve-week period when a 5,000 square foot region will be cordoned off. No permanent damage will come to the land and the available supply of minerals available to public visitors will not be depleted.

In the opinion of the federal appeals court, “[a]n interpretation of the regulations holding such [Phase I testing] activity a non-recreational ‘use’ would render virtually any temporary, de minimis [i.e. lacking significance or importance; so minor as to merit disregard], nondestructive activity a conversion.” As characterized by the court, the NPS “certainly does not read its own regulations so broadly.” On the contrary, the court found the record in this case was “replete with instances in which the agency has construed temporary, nondestructive activities as being other than conversions”:

The agency specifically exempts from the definition of conversion underground utility easements which do not have a significant impact on the recreational utility of the park. LWCF Grants Manual, Chapter 675.9.3(A)(5)(a).

The administrative record also reveals an interpretation by the Director of the Bureau of Outdoor Recreation [predecessor to NPS in administering LWCF] that the construction by a non-owner of a waterline, pipeline, underground utility or "similar construction" which does not impair the present or future recreational use of the property might not constitute a conversion if the surface area is restored to its "preconstruction condition" and there is no relinquishment of control over the property.

The agency also has concluded that the sale of subsurface rights or the nondestructive extraction of oil and gas from Land and Water Conservation Fund-assisted land does not constitute a conversion under the Act. LWCF Grants Manual, Chapter 675.1(E).

Accordingly, the federal appeals court found the NPS had clearly “determined that the statute requires more than de minimis and temporary intrusions on small portions of fund-assisted land to constitute a conversion.” The court, therefore, found “the acting regional director's determination that Phase I testing would not constitute a conversion clearly was a permissible construction of the statute, and therefore was not arbitrary and capricious” in violation of the APA.

This construction by the agency reflects the common-sense determination that the agency's discretion--while not boundless--must be exercised in certain cases in order that the flexibility necessary to maintain, improve, and study LWCF land is not replaced with a grid of arbitrary distinctions.

This need for flexibility is shown by the agency's response to a query seeking the agency's policy under the LWCF for dealing with underground utility or irrigation

line crossings. The agency concluded that the possible impacts of underground construction on various types of recreation areas were so diverse that no ironclad policy could be created. Rather, the potential problems must be addressed case by case.

Further, the court found Section 6(f)(3) itself underscored NPS's "need for flexibility in determining whether nondestructive testing is a conversion."

In order to convert a fund-assisted parcel to another purpose--such as commercial mining--the Secretary must first be assured the state will substitute land of equivalent value and usefulness. 16 U.S.C. § 460L-8(f)(3). But the Secretary must know the value of the converted parcel first.

In so doing, the federal appeals court acknowledged "[t]he LWCF does not forbid conversions, it merely dictates that the state must replace the converted land with a suitable substitute."

Accordingly, in this case, prior to approving any conversion of this state park to a commercial diamond mine, the Secretary of the Interior, through the NPS, would have to first ascertain "the value" of Crater of Diamonds State Park in order to create a substitute park of "reasonably equivalent usefulness and value." The federal appeals court, therefore, concluded that it was a reasonable interpretation of the LWCF statute for the NPS to "make nondestructive tests on fund-assisted land to determine its commercial value or potential for other recreational purposes."

In this particular instance, the court noted that "no change in the character of the land at Crater of Diamonds State Park would take place" as a result of Phase I testing. Instead, the court found "[t]he only effect on park land would be a temporary disruption on approximately 5,000 square feet in the public access area."

## CONCLUSION

As a result, the federal appeals court held that NPS could reasonably interpret the LWCF statute to "conclude that temporary, nondestructive testing conducted within the confines of the Phase I proposal does not constitute a conversion." In so doing, however, the federal appeals court reiterated and adopted the NPS position that "any further testing would be inextricably woven with commercial mining and, therefore, would have to comply not only with § 6(f)(3) but with the National Environmental Policy Act. 42 U.S.C. §§ 4321 to 4370a (1988)." The federal appeals court, therefore, reversed the permanent injunction by the federal district court which had terminated Phase I testing at Crater of Diamonds State Park.

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