

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Case No. _____

Judge _____

SIERRA CLUB, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE
UNITED STATES, WEST VIRGINIA HIGHLANDS CONSERVANCY, OHIO
VALLEY ENVIRONMENTAL COALITION, FRIENDS OF BLAIR MOUNTAIN and
THE WEST VIRGINIA LABOR HISTORY ASSOCIATION,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, RANDY C.
HUFFMAN, Secretary of the Department of Environmental Protection of West
Virginia, in his Official Capacity, and THOMAS L. CLARKE, Director of the
Division of Mining and Reclamation at the Department of Environmental Protection of
West Virginia, in his Official Capacity,

Respondents,

Or

SIERRA CLUB, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE
UNITED STATES, WEST VIRGINIA HIGHLANDS CONSERVANCY, OHIO
VALLEY ENVIRONMENTAL COALITION, FRIENDS OF BLAIR MOUNTAIN and
THE WEST VIRGINIA LABOR HISTORY ASSOCIATION,

Plaintiffs,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, RANDY C.
HUFFMAN, Secretary of the Department of Environmental Protection of West
Virginia, in his Official Capacity, and THOMAS L. CLARKE, Director of the Division
of Mining and Reclamation at the Department of Environmental Protection of West
Virginia, in his Official Capacity,

Defendants,

Or

STATE OF WEST VIRGINIA ex rel. SIERRA CLUB, NATIONAL TRUST FOR
HISTORIC PRESERVATION IN THE UNITED STATES, WEST VIRGINIA
HIGHLANDS CONSERVANCY, OHIO VALLEY ENVIRONMENTAL
COALITION, FRIENDS OF BLAIR MOUNTAIN and THE WEST VIRGINIA
LABOR HISTORY ASSOCIATION,

Relators-in-the-Alternative,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, RANDY C. HUFFMAN, Secretary of the Department of Environmental Protection of West Virginia, in his Official Capacity, and THOMAS L. CLARKE, Director of the Division of Mining and Reclamation at the Department of Environmental Protection of West Virginia, in his Official Capacity,

Respondents-in-the-Alternative.

**PETITION FOR JUDICIAL REVIEW UNDER THE ADMINISTRATIVE
PROCEDURE ACT, CIVIL ACTION UNDER WEST VIRGINIA SURFACE COAL
MINING RECLAMATION ACT (WVSCMRA), and
ALTERNATIVE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION**

Comes now the Sierra Club, National Trust for Historic Preservation, West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition, Friends of Blair Mountain, and the West Virginia Labor History Association, and the State of West Virginia on relation of the Sierra Club, National Trust for Historic Preservation, West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition, Friends of Blair Mountain, and the West Virginia Labor History Association who respectfully petition and allege, on information and belief, as follows:

INTRODUCTION

1. This is a petition for judicial review under the Administrative Procedures Act.
2. This petition is submitted pursuant to Chapter 29A, Article 5, Section 4 of the West Virginia Code.
3. This petition is submitted pursuant to Article 3, Chapter 22, Section 1, *et. seq.* of the West Virginia Code.
4. In the alternative, this is an action under W. Va. Code R. §38-2-19.4(c), which is the State corollary to 30 U.S.C. § 1276(e) and establishes a private cause of action allowing “judicial review by a court of competent jurisdiction in accordance with State law” for any decisions or failures to act regarding lands unsuitable for mining petitions. W. Va. Code R. § 38-2-19.4(c).
5. In the alternative, this action seeks writs of mandamus and prohibition to be issued the Department of Environmental Protection of West Virginia and its Cabinet Secretary Randy C. Huffman.
6. The petition for a writ of mandamus is submitted pursuant to Section 2 of Article 1 of Chapter 53 of the West Virginia Code.

7. The petition for a writ of prohibition is submitted pursuant to Sections 1 and 2 of Article 1 of Chapter 53 of the West Virginia Code.

JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to Article VIII, Section 3, of the West Virginia Constitution and W. Va. Code R. § 38-2-19.4(c).

9. Venue is appropriate in this Court under Chapter 53, Article 1, Section 2, of the West Virginia Code because the records and proceedings to which the administrative violation and writs relate are located in Kanawha County, West Virginia and under Chapter 14, Article 2, Section 2, of the West Virginia Code because this action is brought against a state officer and a state agency.

PARTIES

10. Petitioner/Plaintiff/Relator-in-the-Alternative Sierra Club (“Sierra Club”) is a non-profit environmental and conservation organization incorporated under the laws of the State of California, which maintains an office in the state of West Virginia. The Sierra Club has more than 622,500 members nationwide, more than 2,100 of whom live in West Virginia and belong to its West Virginia Chapter, including members who reside near and are directly affected by the Department of Environmental Protection’s decision to reject the lands unsuitable for mining petition as “frivolous” without holding a public hearing. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth’s resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The West Virginia Chapter of the Sierra Club has been involved in efforts to protect Blair Mountain for many years, participating in earlier campaigns to nominate the site for National Register listing, participating in the march to commemorate the 90th anniversary of the Battle at Blair Mountain, and providing grants to local residents and organizations to support their work at the site. Sierra Club was a party to the lands unsuitable for mining petition filed with the Department of Environmental Protection on June 2, 2011, attached hereto as Exh.1. Requiring Respondents to adhere to the procedural process for lands unsuitable for mining petitions would allow Sierra Club members to protect their procedural, recreational and aesthetic interests and would help protect this valuable resource for future generations. Sierra Club brings this action on behalf of itself and its adversely affected members.

11. Petitioner/Plaintiff/Relator-in-the-Alternative The National Trust for Historic Preservation in the United States (“National Trust”) is a private charitable, educational, non-profit corporation chartered by Congress in 1949 to protect and defend America’s historic resources, to further the historic preservation policy of the United States, and to facilitate public participation in the preservation of our nation’s heritage. *See* 16 U.S.C. § 468. The National Trust, which is headquartered in Washington, D.C., operates a program of 29 historic sites open to the public and has nine regional and field offices around the country, including a Southern Field Office, which is responsible for historic preservation issues in West Virginia. The National Trust has nearly 200,000 individual members across the

country, including more than 500 members in West Virginia. The statutory powers of the National Trust include the power to bring suit in its corporate name. *Id.* §468c(b). The National Trust has participated in numerous cases against state and federal agencies seeking to enforce federal laws that protect historic and cultural resources. The National Trust has worked to protect and preserve Blair Mountain for many years, and in 2006 the National Trust included the Blair Mountain Battlefield in its list of *America's 11 Most Endangered Historic Places*. The National Trust was a signatory and co-petitioner of the lands unsuitable for mining petition filed with the Department of Environmental Protection. The National Trust brings this action on behalf of itself and its adversely affected members.

12. Petitioner/Plaintiff/Relator-in-the-Alternative West Virginia Highlands Conservancy (“Highlands Conservancy”) is a nonprofit organization that was incorporated in West Virginia in 1967. It has approximately 1,700 members, the majority of whom reside in West Virginia. The Conservancy is dedicated to protecting West Virginia’s environment, conserving the forests, preventing the fragmentation of the mountainous highlands, and preserving West Virginia’s cultural resources for the enjoyment of its residents and visitors. Its members’ aesthetic, recreational, and procedural interests are injured by Respondents’ actions. Highlands Conservancy was a co-petitioner on the lands unsuitable for mining petition filed in June 2011. The Highlands Conservancy brings this action on behalf of itself and its adversely affected members.

13. Petitioner/Plaintiff/Relator-in-the-Alternative Ohio Valley Environmental Coalition (“OVEC”) is a nonprofit environmental organization with approximately 1,500 members. Its principal place of business is Huntington, West Virginia. OVEC’s mission is to organize and maintain a diverse grassroots organization that is dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media outreach. Members of OVEC have forefathers who battled for the mine workers union at the Blair Mountain uprising. OVEC and its members have worked for nearly a decade to protect and preserve Blair Mountain, including joining in efforts to have the site listed in the National Register of Historic Places and being a sponsor of the lands unsuitable for mining petition submitted to the Department of Environmental Protection. OVEC brings this action on behalf of itself and its adversely affected members.

14. Petitioner/Plaintiff/Relator-in-the-Alternative Friends of Blair Mountain was incorporated on August 2, 2010, in West Virginia with the goal of preserving the historic attributes of the 1600 acre Blair Mountain Battlefield in Logan County. Friends of Blair Mountain has undertaken efforts to educate the public and policymakers about the history and significance of Blair Mountain Battlefield, has supported the effort to secure National Register-listing for the site, and was a co-petitioner on the lands unsuitable for mining petition submitted to the Department of Environmental Protection.

15. Petitioner/Plaintiff/Relator-in-the-Alternative The West Virginia Labor History Association (“WVLHA”) is a nonprofit, tax exempt organization founded in 1976 to promote research, preservation and dissemination of West Virginia’s labor history. WVLHA has approximately 100 members. WVLHA was an original supporter of listing Blair Mountain in the National Register, and was a co-petitioner to the Department of Environmental Protection requesting that the Blair Mountain Battlefield be designated unsuitable for surface coal mining. WVLHA brings this action on behalf of itself and its adversely affected members.

16. Respondent/Defendant Department of Environmental Protection is an instrumentality of the State. W. VA. Code § 22-1-1, *et. seq.*

17. Respondent/Defendant/Respondent-in-the-Alternative Randy C. Huffman is sued in his official capacity as the Cabinet Secretary of the Department of Environmental Protection. In that capacity, Mr. Huffman is charged with adhering to the regulations governing petitions for designating areas as unsuitable for surface coal mining W. VA. Code § 22-1-2, W. Va. Code R. § 38-2-19.1.

18. Respondent/Defendant/Respondent-in-the-Alternative Thomas L. Clarke is sued in his official capacity as Director of the Division of Mining and Reclamation at the Department of Environmental Protection of West Virginia.

LEGAL FRAMEWORK

19. The federal Surface Mining Control and Reclamation Act (SMCRA) was adopted by Congress in 1977 and established a regulatory structure to govern the surface effects of coal mining. *See* 30 U.S.C. §1201(c).

20. SMCRA provides that a state may be given the primary responsibility for regulating coal mining operations within its boundaries if the state can demonstrate that its regulatory program carries out SMCRA's purposes. *Id.* §§ 1201(f), 1202(g), 1253. One requirement of a state program is that it allow for the "establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 1272" *Id.* § 1253(a)(5). Therefore, to be an approved SMCRA program, state statutes and regulations must include a process by which lands can be designated as unsuitable for surface coal mining.

21. Article 3, Chapter 22, Section 1, *et. seq.* of the West Virginia Code contains the West Virginia Surface Coal Mining Reclamation Act (WVSCMRA). WVSCMRA received federal approval for its regulatory scheme in 1981 and, as such, includes a provision for designating lands as unsuitable for mining.

22. Any person with an interest "which is or may be adversely affected" can petition to have an area designated as unsuitable for mining. W. Va. Code § 22-3-22(b). "The petition shall contain allegations of fact with supporting evidence which would tend to establish the allegations." *Id.*

23. The statute requires that "[w]ithin ten months after receipt of the petition, the director shall hold a public hearing in the locality of the affected area after appropriate notice and publication of the date, time and location of the hearing." W. Va. Code § 22-3-22(b)(emphasis added).

24. Respondents must hold a hearing unless "all the petitioners stipulate agreement prior to the requested hearing and withdraw their request." W. Va. Code § 22-3-22(b).

25. Within sixty days after the hearing on the claims made in the petition "the director shall issue ...a written decision regarding the petition and the reasons therefor." W. Va. Code § 22-3-22(b).

26. The statute requires that upon petition Respondent "shall designate an area as unsuitable for all or certain types of surface-mining operations, if it determines that reclamation pursuant to the requirements of this article is not technologically and economically feasible." W. Va. Code § 22-3-22(a)(1)(emphasis added).

27. The statute also commands that “a surface area may be designated unsuitable for certain types of surface-mining operations, if the operations... affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific and aesthetic values and natural systems.” W. Va. Code § 22-3-22(a)(2).

28. Respondents have promulgated regulations for the implementation of these statutes. These rules are in Title 38, Series 2, of the Code of State Regulations.

29. Nothing in these regulations can be interpreted as giving Respondents the ability to reject a lands unsuitable for mining petition on the merits without holding a public hearing and adhering to the other procedures outlined W. Va. Code § 22-3-22.

30. The definition of “historic lands” as used in W. Va. Code § 22-3-22(a)(2) means historic, archaeological, cultural, and scientific areas. Examples of historic lands include archaeological sites, sites listed on or eligible for listing on a state or national register of historic places, national historic landmarks...sites for which historic designation is pending. W. Va. Code R. § 38-2-2.62.

31. Respondents may reject petitions that do not satisfy the requirements of subsection 19.1.b as “frivolous.” W. Va. Code R. § 38-2-19.1.c.

32. The term “frivolous” is not defined in the West Virginia Code or the Code of State Regulations.

33. Federal SMCRA regulations define frivolous as: “A frivolous petition is one in which the allegations of harm lack serious merit.” 30 C.F.R. § 764.15(a)(3)(defining state processes for unsuitability petitions on non-federal lands).

34. “Frivolous, for a designation or termination petition, means that: (i) The allegations of harm lack serious merit; or (ii) Available information shows that no “mineable” coals resources exist in the petitioned area or that the petitioned area is not or could not be subject to related surface coal mining operations[...].” 30 CFR § 769.14(a)(3)(defining federal process for unsuitability petitions on federal lands.)

35. The West Virginia Supreme Court of Appeals has created a rule of statutory construction with regard to West Virginia’s surface mining program that requires the state program to be interpreted consistently with the federal program. See, e.g., Canestraro v. Faerber, 179 W.Va. at 793, 374 S.E.2d 319), Syll. Pt. 1 (“When a provision of the West Virginia Surface Coal Mining and Reclamation Act . . . is inconsistent with federal requirements in the Surface Mining Control and Reclamation Act, . . . the state act must be read in a way consistent with the federal act.” (Emphasis added; internal citations omitted.)).

36. Accordingly, “frivolous” under the West Virginia program must mean the same thing as it does under the federal program.

37. Subsection 19.1.b requires that petitioner shall provide: “1. A U.S.G.S. topographic map on which is noted the location and size of the area covered by the petition; 2. Allegations of facts and supporting evidence which would tend to establish that the area is unsuitable for all or certain types of surface coal mining operations; 3. A description of how mining of the area has affected or may adversely affect people, land, air, water or other resources; 4. The petitioner’s name, notarized signature, address and telephone number; and 5. A statement which identifies the petitioner’s interest which is or may be adversely affected, including how the petitioner meets an ‘injury in fact’ test by describing the injury to his or her specific affected interests and demonstrates how he or she is among the injured.” W. Va. Code R. § 38-2-19.1.b(1)-(5).

38. Petitioners' lands unsuitable for mining petition submitted on June 2, 2011, contained all of the elements specified in Subsection 19.1.b, as outlined in Complaint ¶¶ 72 and Exh. 1 at 8-35.

39. Subsection 19.2.d. provide for Respondent to determine if the new petition presents new allegations of facts "[w]hen considering a petition for an area which was previously and unsuccessfully proposed for designation." If the petition does not contain new allegations of fact "the Secretary shall not consider the petition and shall return the petition to the petitioner, with a statement of its findings and a reference to the record of the previous designation proceedings where the facts were considered." W. Va. Code R. § 38-2-19-2d.

40. The requirements of the lands unsuitable for mining "do not apply to lands on which surface-mining operations were being conducted on the third day of August, one thousand nine hundred seventy-seven, or under a permit issued pursuant to this article, or where substantial legal and financial commitments in the operations were in existence prior to the fourth day of January, one thousand nine hundred seventy-seven." W. Va. Code, § 22-3-22(5).

41. The Secretary's decision on the lands unsuitable petition shall be based on: "relevant information contained in the data base and inventory system;...[i]nformation provided through public comment or by other governmental agencies;...[t]he detailed statement prepared under subdivision 19.3.e...and [a]ny other relevant information submitted during the comment period." Va. Code R. § 38-2-19-19.4.a.

42. "The decision of the Secretary with respect to a petition, or the Secretary's failure to act within the time limits set forth herein shall be subject to judicial review by a court of competent jurisdiction in accordance with State law." W. Va. Code R. § 38-2-19.4.c.

43. The federal regulations governing state program requirements for lands unsuitable petitions also provide for judicial review: "The decision of the State regulatory authority with respect to a petition, or the failure of the regulatory authority to act within the time limits set forth in this section, shall be subject to judicial review by a court of competent jurisdiction in accordance with State law under section 526(e) of the Act and § 775.13 of this chapter." 30 C.F.R. § 764.19(c).

44. "Action of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law[...]" 30 U.S.C. § 1276(e) (SMCRA § 526(e)).

45. Federal SMCRA proceedings involving federal lands are also subject to judicial review: "A final decision of the Director or the Secretary is subject to judicial review in accordance with § 775.13 of this chapter and section 526(a)(2) and (b) of the Act." 30 CFR § 769.18(d).

46. "Any order or decision issued by the Secretary in...any other proceeding required to be conducted ...shall be subject to judicial review on or before 30 days from the date of such order or decision...in the United States District Court for the district in which the surface coal mining operation is located." 30 U.S.C. § 1276(a)(2)(SMCRA § 526(a)(2)).

FACTS

47. Blair Mountain, located in Logan County, is the site of the Battle of Blair Mountain, which was fought along the Spruce Fork Ridgeline between August 30 and

September 4, 1921, and was the site of the largest armed labor conflict in U.S. history.

48. The Battle of Blair Mountain was caused by the United Mine Workers of America's (UMWA) unsuccessful, three-year long struggle to unionize the coal miners of Logan, Mingo, McDowell, and Mercer counties, and the murder of Matewan Police Chief Sid Hatfield on August 2, 1921, which ultimately ignited the Battle.

49. Shortly after Hatfield's murder, on August 30, 1921, between 10,000 and 15,000 coal miners—many of whom were members of the UMWA—assembled in Kanawha County to arm themselves for a march over the mountains to avenge Hatfield's death and to free illegally imprisoned miners in Mingo County.

50. The marchers were met by a force of approximately 3,000 individuals, many of whom were on coal company payrolls. The opposition forces established a defensive line along 10 miles of Spruce Fork Ridge on Blair Mountain. There, the opposition forces blocked roads, dug trenches, dropped handmade bombs, and fired nearly 1 million rounds of ammunition. At least 16 individuals were killed in the Battle.

51. The Battle at Blair Mountain concluded when federal troops arrived and the miners surrendered on September 5, 1921.

52. Blair Mountain holds state and national significance for labor and coal mining history, and contains many archaeological sites.

53. A preliminary historical survey of the area was drafted by the Institute for the History of Technology and Industrial Archaeology in March 1991

54. On April 1, 1991, Perry McDaniel, on behalf of West Virginia Wildlife Federation, the United Mineworkers of America, the West Virginia Labor History Association and the West Virginia Miners History Association, filed a lands unsuitable for mining petition with the West Virginia Division of Energy requesting that 9,000 acres of land northeast of Logan be declared as unsuitable for surface coal mining on the grounds that mining would “[a]ffect fragile or historic lands.” The petition cited the March 1991 preliminary survey as a significant basis for request to designate the area as unsuitable for surface mining.

55. Stephen C. Keen, Director of the Mine and Minerals Section of the West Virginia Division of Energy, rejected the petition on May 17, 1991, as “both incomplete and frivolous,” asserting that the narrative description was smaller than the boundary outlined in the map, that the allegations lack specificity and that the evidence submitted was vague; that past mining had occurred in part of the area, that petitioners had not stated how their specific interests are affected; and that petitioners had not indicated how and what historical resources would be affected by proposed mining.

56. Respondents' May 17, 1991, rejection of the lands unsuitable for mining petition also indicated that the “Keeper of the National Register of Historic Places has confirmed that there are no historic places listed or eligible to be listed in the National Register within the petition area boundary.”

57. On June 6, 1991, the West Virginia Wildlife Federation, the United Mineworkers of America, the West Virginia Labor History Association and the West Virginia Miners History Association re-filed their lands unsuitable petition requesting that 12,000 acres be deemed unsuitable for surface coal mining. In their re-filing, the cover letter indicated: “Petitioners are advised that DOE has disposed of all other unsuitability petitions filed this year [1991] on the same purported grounds [incomplete and frivolous.]”

58. On July 8, 1991, Stephen C. Keen, Director of the Mine and Minerals Section of the West Virginia Division of Energy, rejected the petition on the grounds that it

was “either incomplete or frivolous, or both” and cited reasons similar to their earlier denial. The denial notes that the “petition boundary clearly contains large tracts of lands which are not significant to the Battle, while at the same time it excludes other sites which would seem to clearly have significance” and denied the petition as frivolous in that regard.

59. The West Virginia Wildlife Federation, the United Mineworkers of America, the West Virginia Labor History Association and the West Virginia Miners History Association re-filed their lands unsuitable for mining petition again on July 24, 1991.

60. On August 26, 1991, Stephen C. Keen, Director of the Mine and Minerals Section of the West Virginia Division of Energy, rejected the July 24, 1991, lands unsuitable petition stating that it did not present “new substantive information regarding the area or the reasons for the requested unsuitability determination. It contains no new substantive allegations of fact, or new supporting evidence,” and again found that the petition was “incomplete and frivolous.”

61. In 1996, the National Park Service asked the West Virginia State Historic Preservation Officer (“WV SHPO”) to assess the Battle of Blair Mountain Site for possible suitability as a National Historic Landmark due to its significance to the nation as a whole. *See* June 2, 2011, Blair Mountain Battlefield Lands Unsuitable for Mining Petition (2011 LUMP), attached hereto as Exh. 1 at 14.

62. While the WV SHPO initially declined to nominate Blair Mountain Battlefield to the National Register due to concerns that surface mining activities, particularly along the site’s southern crest, had altered some of the site’s topographical features, the WV SHPO ultimately determined that the site as a whole retained its integrity of feeling, setting, location, and association, and was eligible for listing in the National Register. *See* 2011 LUMP, Exh. 1 at 14.

63. As such, on July 21, 2005, the West Virginia Archives and History Commission voted unanimously to nominate Blair Mountain Battlefield for listing in the National Register. *See* 2011 LUMP Exh. 1 at 14.

64. Dr. Harvard Ayers, a professor emeritus of Anthropology and Archaeology at Appalachian State University, led an initial archaeological field survey of the Blair Mountain Battlefield in 2006 with Zan Rothrock and Kenny King uncovering 1108 artifacts at 14 sites located in the National Register Nomination Area. *See* 2011 LUMP Exh. 1 at 12. Before 2006, no sites in the Blair Mountain Battlefield had been professionally recorded by archaeologists and “investigations in the 90s by historians were tenuous at best.” *Id.* at 13.

65. The National Trust listed Blair Mountain Battlefield on its list of America’s 11 Most Endangered Historic Places in 2006.

66. On March 30, 2009, the Keeper of the National Register of Historic Places listed Blair Mountain Battlefield on the National Register after finding that all of the conditions for listing the area had been met. *See* 2011 LUMP Exh. 1 at 14.

67. As nominated to the National Register of Historic Places, the Blair Mountain Battlefield consists of 1668 acres, which cover approximately ten miles across the summit of Spruce Ridge Fork in Logan County near the community of Blair. The site also contains numerous documented archaeological sites containing artifacts such as firearms, buttons, shell casings, and ordinances that could yield more important information about the Battle of Blair Mountain. *See* 2011 LUMP Exh. 1 at 8.

68. The particular boundary for the National Register site was chosen

because included the line of battle defined by the coal company defensive forces and was where the most intense battle activity occurred, as noted in the Nomination: “The boundary of the district encompasses the area between the 1400-2073 foot elevations on either side of the ten-mile long Spruce Fork Ridge of the Blair Mountain in Logan County, which was the line of battle defined by the defenders when they erected armed pickets across the mountain at fifty yard intervals. The general area of the battle has been well documented in no less than four scholarly publications.... Archaeological findings throughout the ten-mile ridgeline and subsequent extrapolations indicate that the most intense activity occurred within the narrow, steep area encompassed by the proposed boundary.” *See* 2011 LUMP Exh. 1 at 8.

69. On December 30, 2009, the Keeper removed Blair Mountain Battlefield from the National Register pursuant to 36 C.F.R. § 60.15(k), because of an alleged “procedural error” in calculating the percentage of private property owners objecting to the National Register nomination. *See* 2011 LUMP Exh. 1 at 14-15.

70. On January 8, 2010, and March 17, 2010, the Keeper published notice in the Federal Register that Blair Mountain was removed but “determined eligible” for the National Register. *See* 2011 LUMP Exh. 1 at 15.

71. Petitioners filed a lands unsuitable for mining petition on June 2, 2011, with Respondents seeking to have the same 1668 acre area that is currently eligible for listing on the National Register designated as unsuitable for surface coal mining pursuant to W. Va. Code § 22-3-22(a); W. Va. Code R. § 38-2-19.7.b. *See* 2011 LUMP Exh. 1.

72. The lands unsuitable for mining petition contained all required elements for such a petition as outlined in W. Va. Code R. § 38-2-19.1.b(1)-(5). The petition included a U.S.G.S. topographic map, allegations of facts and supporting evidence to support that the area is unsuitable for all or certain types of surface coal mining, a description of how mining of the area has adversely affected people, land, air water or other resources, notarized signatures, and statements about how the petitioners meet an injury in fact test. *See* Exh. 1. The petition argued that Blair Mountain Battlefield was unsuitable for surface coal mining because reclamation is “not technologically and economically feasible”, and because mining would “affect fragile or historic lands.” W. Va. Code § 22-3-22(a).

73. From June 6 to June 11, 2011, hundreds of labor union members, archaeologists, historic preservationists, community and environmental activists and others marched to commemorate the 90th anniversary of the historic miner’s march on Blair Mountain. Marchers started in Marmet, West Virginia, and walked ten miles a day along the same route that union miners took on their historic 1921 march, ending at the crest of Blair Mountain where the Battle was held. Many members of the Petitioners’ groups took part in this march.

74. On or about July 5, 2011, Thomas L. Clarke purporting to act in his capacity as Director of the Division of Mining and Reclamation at the Department of Environmental Protection of West Virginia, on behalf of that Division, issued a decision denying the lands unsuitable for mining petition as “frivolous,” attached hereto as Exh. 2.

75. The July 5, 2011, decision cited 4 reasons for Respondent’s “frivolous” determination: (1) that approximately 494 of the 1668 acres for which Petitioners requested designation were covered by a permit issued after August 3, 1977; (2) that three previous lands unsuitable for mining petitions covering approximately 75% of the area in the current petition were rejected and that no new allegations of facts were presented; (3) that part of Respondents’ basis for rejecting the June 1991 petition was that it purported to protect historic

lands associated with the Battle of Blair Mountain but that it includes lands with no connection to the Battle and excludes many sites which had a connection to the Battle, and Respondents found that this current 2011 petition also “excludes many sites which had a connection to the Battle;” and (4) that a significant portion of the lands identified in the petition have been affected and continue to be affected by oil, gas, and logging operations so the petition would not effectively protect the historic integrity of the lands in the petition. *See* Exh. 2.

76. Respondents did not hold a public hearing, or give notice for such a public hearing, regarding the lands unsuitable for mining petition.

77. Petitioners did not waive their right to such a hearing.

78. On information and belief, Respondents’ denial of the lands unsuitable for mining petition is part of a pattern and practice of denying lands unsuitable for mining petitions regarding Blair Mountain as frivolous without holding the required public hearing.

79. Respondents’ July 5, 2011, letter cites S-5005-03, S-5049-91, U-5003-89, U-5004-89, U-5088-86, S-5011-88, UO-447, and S-5013-90 as overlapping with part of the 1668 acres for which petitioners seek a lands unsuitable designation. *See* Exh. 2 at 2, and accompanying exhibits.

80. Permits U-5003-89, U-5004-89 and U-5088-86—as portrayed on a map prepared by Respondents and attached to Respondents’ July 5, 2011, letter—do not overlap with the 1668 acres for which Petitioners seek a lands unsuitable for mining designation. *See* Exh. 2.

81. Numerous new facts have developed in the 20 years since the 1991 petitions were submitted, and these new allegations of fact were stated in Petitioners’ June 2, 2011, lands unsuitable petition.

82. For example, the National Park Service requested a survey of the Battlefield for historic register eligibility in 1996. Complaint ¶ 61. In July, 2005, the West Virginia Archives and History Commission voted to nominate Blair Mountain Battlefield for listing in the National Register. Complaint ¶ 63. Blair was nominated to the National Register of Historic Places, and in March, 2009, the Keeper of the National Register listed Blair Mountain Battlefield on the National Register. Complaint ¶ 66.

83. Although Blair was removed from the National Register pending dispute of the property owner vote, the Keeper of the National Register of Historic Places determined Blair Mountain Battlefield—the exact 1668 acres for which petitioners seek a lands unsuitable for mining designation—to be “eligible for listing,” a status that it currently holds. 2011 LUMP. Exh. 1 at 15; Complaint ¶ 66-70. Respondents’ May 17, 1991, rejection cited the fact that Blair had not been deemed eligible for listing at that time as one reason it rejected the petition. Complaint ¶ 56.

84. Since 1991, several new studies of the Blair Mountain Battlefield have been undertaken. These studies confirm new archaeological and historic data—including 15 new archaeological sites—pertaining to the Battle at Blair Mountain, and the importance of the particular 1668 acres at issue in the lands unsuitable for mining petition. 2011 LUMP Exh.1 at 12-13; Complaint ¶ 64.

85. Respondents’ denial of the petition was a final order. W. Va. Code § 29A-1-2(e), § 29A-5-4(a)

PETITION FOR JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURES ACT

86. Petitioners incorporate the allegations included in Paragraphs 1 through 85 supra.

87. As membership-based nonprofit organizations dedicated to the conservation and historic preservation of West Virginia's lands and natural resources, Petitioners Sierra Club, National Trust, Highlands Conservancy, OVEC, Friends of Blair Mountain, and the WVLHA's recreational, aesthetic, environmental and procedural interests and those of its members are injured by Respondents' actions and inactions.

CAUSE OF ACTION

88. The Administrative Procedures Act allows review of final agency orders, such as Respondents' determination for the lands unsuitable for mining petition as described above. W. Va. Code § 29A-5-4(a), § 29A-1-2(e).

89. The Administrative Procedures Act provides that the reviewing court "shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are . . . [i]n violation of constitutional or statutory provisions...[i]n excess of statutory authority...[m]ade upon unlawful procedures...[a]ffected by other error of law...clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion[.]" W. Va. Code § 29A-5-4(g)(1)-(6).

90. Respondents' actions were in violation of the Administrative Procedures Act, Article 3 Chapter 22 of the West Virginia Code and the West Virginia Code of State Regulations for the following reasons:

91. Respondents' actions were in violation of nondiscretionary, ministerial statutory provisions of Article 3 Chapter 22 of the West Virginia code. Petitioners' lands unsuitable for mining petition submitted on June 2, 2011, contained all of the elements specified in West Virginia Code § 22-3-22(b) and Code of Regulations § 38-2-19.1.b, and thus there were no grounds upon which Respondents could reject the petition as frivolous under Code of Regulations § 38-2-19.1c in their July 5, 2011, decision.

92. Respondents' actions were in violation of the nondiscretionary provisions of Article 3 Chapter 22 of the West Virginia Code and Code of Regulations § 38-2-19.1c and 30 C.F.R 764.15(a)(3) and 30 C.F.R. 769.14(a)(3) because the Petitioners presented meritorious allegations in their June 2, 2011 lands unsuitable for mining Petition. Additionally, the petition and the Respondents' answer thereto acknowledge that mineable coal resources exist in the area.

93. Respondents' actions were in violation of the nondiscretionary provisions of Article 3 Chapter 22 of the West Virginia Code and Code of Regulations § 38-2-19.1c and 30 C.F.R 764.15(a)(3) and 30 C.F.R. 769.14(a)(3) because Respondents made a determination that the Petition was frivolous without finding that Petitioners' "allegations of harm lack serious merit" or that "[a]vailable information shows that no 'mineable' coal resources exist in the petitioned area."

94. Respondents' actions were further in violation of nondiscretionary, ministerial statutory provisions of Article 3 Chapter 22 of the West Virginia code because their July 5, 2011, decision was made on the merits and upon unlawful procedures—an improper determination under West Virginia Code § 22-3-22(b) without the required public hearing, notice and proper consideration of evidence and public comment.

95. Respondents' July 5, 2011, actions were clearly wrong in view of the reliable, probative and substantial evidence on the whole record. Respondents' letter and attached exhibit cite permits U-5003-89, U-5004-89, U-5088-86 as overlapping with the 1668 acres for which Petitioners seek a lands unsuitable for mining designation, and therefore the area would be exempt from W. Va. Code § 22-3-22(5). The permits do not overlap the area for which Petitioners seek designation, as shown on the map Respondents provided as an exhibit to their letter.

96. Respondents' actions were wrong in violation of the nondiscretionary statutory provisions at issue. Even if valid mining permits issued after August 3, 1977, existed in 494 acres of the 1668 for which Petitioners requested designation, as Respondents assert, Article 3, Chapter 22 of the West Virginia Code still requires the consideration of 1174 remaining acres of Blair Mountain Battlefield as lands unsuitable for surface coal mining.

97. Respondents' actions were in violation of the nondiscretionary statutes at issue and were clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. As required in W. Va. Code R. § 38-2-19.2d, Petitioners stated new facts from the submission of the 1991 Blair Lands Unsuitable for Mining Petitions, and Respondents improperly declared the lands unsuitable petition frivolous on these grounds. These new allegations of fact were stated in Petitioners' June 2, 2011, lands unsuitable for mining petition. These facts include, for example, that the National Park Service requested a survey of the Battlefield for Historic Register inclusion in 1996; that in 2005, the West Virginia Archives and History Commission voted to nominate Blair Mountain for listing on the National Register; that a number of new studies of the Blair Mountain Battlefield have been undertaken since 1991, and that these studies confirm new archaeological and historic data, including 15 new archaeological sites, that Blair Mountain Battlefield—and the exact 1668 acres at issue in the June 2 petition—was placed on the National Register in 2009, and that Blair was removed from the National Register but is still considered "eligible for listing," a status that Blair Mountain Battlefield currently holds. Complaint ¶¶ 81-84.

98. Respondents' actions were in violation of the nondiscretionary statutory provisions at issue. Even assuming Respondents were correct and that no new allegations of fact were provided, Respondents failed to consider the petition as to 25% of the 1668 acres (417 acres) at issue and improperly rejected the lands unsuitable petition as frivolous.

99. Respondents' actions were in excess of the statutory authority granted in Article 3 Chapter 22 of the West Virginia code. Respondents' third reason for denying the petition as frivolous in its July 2011 letter—that part of the State's original basis for rejecting the June 6, 1991, petition was that it purported to protect historic lands associated with the Battle of Blair Mountain but that it includes lands with no connection to the Battle and excludes many sites which had a connection to the Battle—has no basis in the applicable law. W Va. Code § 22-3-22; W. Va. Code R. § 38-2-19.

100. Respondents' actions were in excess of the statutory authority granted in Article 3 Chapter 22 of the West Virginia Code. Respondents' fourth reason for denying the petition as frivolous—that a significant portion of the lands identified in the petition have been affected and continue to be affected by oil, gas, and logging operations so the petition would not effectively protect the historic integrity of the lands in the petition—has no basis in the applicable law or facts. W Va. Code § 22-3-22; W. Va. Code R. § 38-2-19. The determination is in violation of these statutory provisions and is in excess of Respondents' statutory authority.

101. On information and belief, Respondents' decision to deny the lands unsuitable for mining petition as frivolous was arbitrary, capricious and characterized by abuse of discretion and demonstrates a pattern and practice of disregarding lands unsuitable for mining procedures, as the 2011 and 1991 petitions and Respondents' rejections as "frivolous" demonstrate.

PRAYER FOR RELIEF

Petitioner respectfully prays that this Court issue an order:

- (1). Vacating Respondents' July 5, 2011, decision to deny the lands unsuitable petition for the archaeologically and historically significant Blair Mountain Battlefield as frivolous;
- (2). Declaring that Respondents must comply with the procedural requirements of Section 22 Article 3 of Chapter 22 of the West Virginia Code, including, but not limited to, declaring that the petition is complete; providing public notice; holding a public hearing within ten months of receiving the petition unless all petitioners agree otherwise; and issuing a decision on the merits of the petition and considering all evidence and public comment within 60 days of such hearing.
- (3). Declaring that the pattern and practice of Respondents of denying such lands unsuitable for mining petitions as frivolous violates Article 3 of Chapter 22 of the West Virginia Code and is, consequently, unlawful;
- (4). Awarding Petitioners their costs and fees associated with bringing this action; and
- (5). Awarding other such relief as this Court deems necessary and proper.

COMPLAINT UNDER WEST VIRGINIA SURFACE COAL MINING RECLAMATION ACT (WVSCMRA)

102. Plaintiffs incorporate the allegations included in Paragraphs 1 through 101 supra.

CAUSE OF ACTION

103. Article 3, Chapter 22, Section 1, *et. seq.* of the West Virginia Code contains the West Virginia Surface Coal Mining Reclamation Act (WVSCMRA). Title 38, Series 2, Section 19.4 of the Code of State Regulations implementing WVSCMRA provides for "judicial review by a court of competent jurisdiction in accordance with State law" for any

decisions or failures to act regarding lands unsuitable for mining petitions. W. Va. Code R. § 38-2-19.4(c).

104. Defendants' actions were in violation of the mandatory statutory provisions of WVSCMRA found at Article 3 Chapter 22 of the West Virginia code and the accompanying regulations found in title 38, Series 2 of the Code of State Regulations for the following reasons:

105. Plaintiffs' lands unsuitable for mining petition submitted on June 2, 2011, contained all of the elements specified in West Virginia Code § 22-3-22(b) and Code of Regulations § 38-2-19.1.b, and thus there were no grounds upon which Respondents could reject the petition as frivolous under Code of Regulations § 38-2-19.1c or 30 C.F.R. 764.15(a)(3) and 30 C.F.R. 769.14(a)(3) in their July 5, 2011, decision.

106. Defendants' actions were in violation of the nondiscretionary provisions of Article 3 Chapter 22 of the West Virginia Code and Code of Regulations § 38-2-19.1c and 30 C.F.R. 764.15(a)(3) and 30 C.F.R. 769.14(a)(3) because the Plaintiffs presented meritorious allegations in their June 2, 2011 lands unsuitable for mining petition. Additionally, the petition and the Respondents' answer thereto acknowledge that there are mineable coal resources in the area.

107. Defendants' actions were in violation of the nondiscretionary provisions of Article 3 Chapter 22 of the West Virginia Code and Code of Regulations § 38-2-19.1c and 30 C.F.R. 764.15(a)(3) and 30 C.F.R. 769.14(a)(3) because Defendants made a determination that the lands unsuitable petition was frivolous without finding that Petitioners' "allegations of harm lack serious merit" or that "[a]vailable information shows that no 'mineable' coal resources exist in the petitioned area."

108. Defendants' actions were further in violation of WVSCMRA found at Article 3 Chapter 22 of the West Virginia code because their July 5, 2011, decision was made on the merits and upon unlawful procedures—an improper determination under West Virginia Code § 22-3-22(b) without the required public hearing, notice and proper consideration of evidence and public comment.

109. Defendants' actions were in further violation of WVSCMRA because several of the permits that they cited as existing in the area in which Plaintiffs request lands unsuitable designation appear not to overlap and are therefore irrelevant to exceptions stated in W. Va. Code, § 22-3-22(5). Complaint ¶¶96.

110. Defendants' actions were in violation of WVSCMRA, and W. Va. Code R. § 38-2-19.2d because Defendants did not consider the new allegations of fact raised by petitioners since the 1991 lands unsuitable petitions were filed. Complaint ¶¶97.

111. Defendants' actions were in violation of WVSCMRA because even if Respondents were correct and no new factual allegations were raised, Respondents failed to consider the petition as to 25% of the 1668 acres (417 acres) at issue. Complaint ¶¶ 98.

112. Defendants' actions were in violation of WVSCMRA because Defendants asked petitioners to list all historic sites associated with any of the events at Blair Mountain in the lands unsuitable petition, a requirement that has no basis in the WVSCMRA law. W. Va. Code §22-3-22, W. Va. Code. R. § 38-2-10. Complaint ¶¶ 99.

113. Defendants' actions were in violation of WVSCMRA because Defendants response claimed that a significant portion of the lands identified in the petition have been affected and continue to be affected by oil, gas, and logging operations so the petition would not protect the historic integrity of the lands in the petition, which has no basis

in the applicable law or facts. W. Va. Code §22-3-22, W. Va. Code. R. § 38-2-10. Complaint ¶100.

114. On information and belief, Defendants' denial of the lands unsuitable petition as frivolous was part of a pattern and practice of disregarding the procedures governing lands unsuitable for mining petitions, as demonstrated by the denials of the 2011 and 1991 petitions pertaining to Blair Mountain as frivolous. Complaint ¶101.

115. On information and belief, the decision issued by Defendants was not based on information required under Code of Regulations § 38-2-19.4, including information contained in the database and inventory system, information provided through public comment or by other governmental agencies, a detailed statement prepared by Respondents about coal resources and competing environmental and economic interests, and other information submitted during the comment period.

116. On information and belief, Defendants did not provide the decision by certified mail to the Field Office Secretary of the Office of Surface Mining as required by Code of Regulations § 38-2-19.4.b.

PRAYER FOR RELIEF

Petitioner respectfully prays that this Court issue an order:

- (1). Vacating Defendants' July 5, 2011, decision to deny the lands unsuitable petition for the archaeologically and historically significant Blair Mountain Battlefield as frivolous;
- (2). Declaring that Defendants must comply with the procedural requirements set forth in WVSCMRA, found at Section 22 Article 3 of Chapter 22 of the West Virginia Code and the accompanying regulations, including, but not limited to, declaring that the petition is complete; providing public notice; holding a public hearing within ten months of receiving the petition unless all petitioners agree otherwise; and issuing a decision on the merits of the petition and considering all evidence and public comment within 60 days of such hearing.
- (3). Awarding other such relief as this Court deems necessary and proper.

ALTERNATIVE PETITION FOR WRIT OF MANDAMUS

GROUND FOR WRIT OF MANDAMUS

117. Relators-in-the-Alternative incorporate by reference all allegations contained in Paragraphs 1 through 116 supra.

118. As membership-based nonprofit organizations dedicated to the conservation and historic preservation of West Virginia's lands and natural resources, Relators-in-the-Alternative Sierra Club, National Trust, Highlands Conservancy, OVEC, Friends of Blair Mountain, and the WVLHA's interests and those of its members are injured by Respondents' actions and inactions. Consequently, Relators-in-the-Alternative have a clear right to a writ of mandamus.

119. Relators-in-the-Alternative have no other adequate remedy at law to obtain prospective relief.

120. Respondents-in-the-Alternative have a nondiscretionary, mandatory duty under state law to comply with the terms of Article 3 of Chapter 22 of the West Virginia Code and to not exceed their statutory authority.

121. Respondents-in-the-Alternative are not currently performing any of the mandatory duties described in Paragraphs 90-116. For the reasons described in the Petition for Judicial Review under the Administrative Procedure Act and the Complaint under West Virginia Surface Coal Mining Reclamation Act (WVSCMRA), the decision on the lands unsuitable petition described above was issued in violation of law.

ALTERNATIVE PETITION FOR WRIT OF PROHIBITION

GROUND FOR WRIT OF PROHIBITION

122. Relators-in-the Alternative incorporate by reference all allegations contained in Paragraphs 1 through 121 supra.

123. Respondents-in-the-Alternative, by issuing a frivolous determination for Relators-in-the-Alternative's lands unsuitable petition regarding Blair Mountain Battlefield, are acting beyond their statutory jurisdiction and in excess of their powers under the statutes and the common law.

124. A writ of prohibition lies against Respondents-in-the-Alternative to prohibit them from issuing frivolous determinations such as those described above on the ground that such determinations are beyond Respondents' statutory authority under Article 3 of Chapter 22 of the West Virginia Code.

125. Alternatively, a writ of prohibition lies against Respondents-in-the-Alternative to force them to adhere to their mandatory duties of public process as outlined in Article 3 of Chapter 22 of the West Virginia Code before issuing a decision on the merits of a lands unsuitable for mining petition. Those duties include, but are not limited to: providing public notice; holding a public hearing; and issuing a decision that conforms to the criteria outlined in W. Va. Code § 22-3-22 and W. Va. Code R. § 38-2-19.

PRAYER FOR RELIEF

Petitioner, on the relation of Relators-in-the-Alternative, respectfully prays that this Court issue rules in mandamus and prohibition directing Respondents-in-the-Alternative to show cause why:

(1). This Court should not order them to perform their nondiscretionary, mandatory duty under state law to comply with the terms of Article 3 of Chapter 22 of the West Virginia Code and to not exceed their statutory authority by denying as frivolous a lands unsuitable for mining petition for the 1668 acre historic Blair Mountain Battlefield that meets the petition criteria outlined under the law.

(2). This Court should not prohibit them from issuing frivolous determinations such as those described above on the grounds that such determinations are beyond Respondents' statutory authority under Article 3 of Chapter 22 of the West Virginia Code.

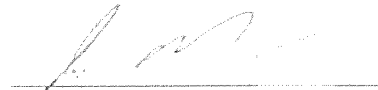
(3). This Court should not order them, in the alternative, to perform their nondiscretionary, mandatory duty under Article 3 of Chapter 22 of the West Virginia Code to follow certain procedures to consider a lands unsuitable for mining petition before denying

such a petition on the merits. Those duties include, but are not limited to, providing public notice; holding a public hearing; and issuing a decision that conforms to the criteria outlined in W. Va. Code § 22-3-22 and W. Va. Code R. § 38-2-19.

(4). This Court should not declare unlawful the frivolous determination they made regarding Petitioners' lands unsuitable for mining petition for Blair Mountain Battlefield;

(5). This Court should not award Relators their costs and attorney fees occurred in this litigation; and, after hearing thereon, that this Court so order.

Respectfully submitted,



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Alternative Sierra Club, National Trust for Historic
Preservation in the United States, West Virginia
Highlands Conservancy, Ohio Valley Environmental
Coalition, Friends of Blair Mountain, and the West
Virginia Labor History Association.

August 4, 2011