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Two Years after the Pennsylvania Supreme Court's Decision in Belden & Blake Corp. v. Commonwealth Department of Conservation & Natural Resources: The Commonwealth's Struggle to Protect State Lands

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INTRODUCTION

The Marcellus Shale is by far the largest natural gas shale play in the United States¹ and the largest known shale deposit in the world.²

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² Id. at 2. While the Marcellus Shale is the largest, it is not the first shale play to be developed for its natural gas. Id. at 5. Natural gas production from shale deposits in the United States began with the development of the Barnett Shale play in the Fort Worth, Texas region. Id. The success of the development of the Barnett Shale led to the development of several other shale plays, including Antrim in Mich-
Located beneath a large part of the Appalachian basin, it extends north into upstate New York, south into West Virginia and Virginia, and west into Ohio, and geologists estimate that it may contain as much as 489 trillion cubic feet of recoverable natural gas. The Commonwealth of Pennsylvania currently owns 117 parks and three conservation areas in Pennsylvania, making up 2.4 million acres of land—approximately 1.5 million of which are above the Marcellus Shale. Natural gas development in these parks requires, among other things, "land clearing and well pad development, well drilling, and the consumption, treatment, and storage of water and wastewater, and the construction of roads, pipelines and other infrastructure." These drilling activities—especially in a park setting—can result in numerous environmental impacts, including, but not limited to "[f]orest and habitat fragmentation, the introduction of invasive species, soil compaction and erosion, noise, localized air pollution, recreational/aesthetic impacts, and threats to groundwater."

Given the recent boom of natural gas that is being developed from the Marcellus Shale, and the fact that approximately 700,000 acres of Pennsylvania state park and forest are currently available for said development, it is not surprising that issues have arisen as to whether

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3. Id. at 2.
4. Id. During 2009, it was estimated that the natural gas industry would generate about $3.8 billion in value added to the Commonwealth, create 48,000 jobs, and pay $400 million in state and local tax revenues. Id. at 32.
5. PENNSYLVANIA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, http://www.dcnr.state.pa.us/stateparks/economicimpact/index.aspx (last visited Mar. 31, 2011). These state parks generate revenue from visitors, provide jobs for the surrounding communities, and are protected for their natural, scenic, historic, and aesthetic values. Id. A report based on data from 2008 revealed that more than 34.1 million people visited Pennsylvania state parks, and these visitors spent a combined total of $818.3 million on their trips. Id. The state parks also generated 10,551 jobs and created $291.4 million in labor income. Id. See also Pa. Exec. Order No. 2010-05, 40 Pa. Bull. 6637 (Oct. 26, 2010).
7. Id.
and how the Commonwealth can condition the natural gas development so as to fully protect the park’s environment, plants, wildlife, habitats, and the like from being destroyed or injured during the process. This question has been shaped by Pennsylvania’s Constitution as well as a flurry of recent activity from all three branches of Pennsylvania’s government, including: a 2009 Pennsylvania Supreme Court decision; a 2010 moratorium by an outgoing governor; a short-lived policy from the Pennsylvania Department of Conservation and Natural Resources (“DCNR”); and recurring legislation, which is now back before the Pennsylvania House of Representatives. In this article, the authors will analyze the Pennsylvania Constitution’s environmental protection provision and the Pennsylvania Supreme Court case of Belden & Blake v. Commonwealth Department of Conservation & Natural Resources, discuss the recent executive and legislative initiatives attempting to overturn the Belden & Blake decision, and look to the future of natural gas development in Pennsylvania’s state forests and parks.

I. The Pennsylvania Constitution and Belden & Blake

Approximately forty-two state constitutions mention environmental protection and conservation. Of those, only seven contain constitu-

- 200,000 acres of old-growth forests; 128,000 acres with sensitive environmental resources (wetlands, riparian areas, threatened endangered species, steep slopes, unique habitats) and valuable recreation resources (scenic vistas and view sheds, trails, leased camps);
- 299,000 acres in remote areas generally inaccessible by motorized vehicles and offering wilderness experiences paralleling those in the western United States;
- 88,000 acres of highly valued recreational and water resources in the Poconos in close proximity to many residents; and
- 20,000 acres important to ecotourism in the Laurel Highlands region.

Id.


tional mandates that enumerate the citizens’ rights to clean air, pure water, a healthy environment, or other similar environmentally-related rights. Of those seven, Pennsylvania is one of the two with the “broadest environmental rights provisions.” Pennsylvania’s constitutional directive is straightforward: the Commonwealth must protect its natural resources for the benefit of the public. Article I, Section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Without question, Pennsylvania’s Constitution “creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn)” and makes the Commonwealth “the trustee of said resources, commanded to conserve and maintain them.” Through the Conservation and Natural Resources Act (“CNRA”), DCNR has the power and duty “[t]o supervise, maintain, improve, regulate, police and preserve all parks belonging to the Commonwealth.” As such, under Pennsylvania law, DCNR is obligated to preserve state lands on behalf of the people and future generations.

Now let us turn to the Belden & Blake case. The state land at issue in the Belden & Blake case was Oil Creek State Park. The park is located in the northwest corner of Pennsylvania and encompasses 6,250 acres of recreational land. The Commonwealth of Pennsylvania owns the surface of Oil Creek State Park, and Belden & Blake Corpora-

12. Id.
14. PA. CONST. art. 1, § 27.
17. PENNSYLVANIA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, http://www.dcnr.state.pa.us/stateparks/parks/oilcreek.aspx (last visited Mar. 31, 2011). Ironically, the park includes multiple, historical oil derricks from the 1800s and is adjacent to the Drake Well Museum, which is the site of the first successful oil well in the United States. Id.
ration ("Belden & Blake") owns or leases\textsuperscript{18} subsurface oil and natural gas rights on three tracts of land within the park.\textsuperscript{19}

In December 2004, Belden & Blake informed the DCNR that it was planning to build gas wells on two of the tracts, and in March, 2005, it provided notice to DCNR that it also planned to build a gas well on the third tract.\textsuperscript{20} Belden & Blake additionally provided DCNR with maps detailing the well sites and access routes, along with copies of its draft well drilling permit applications, pursuant to Section 201 of the Oil and Gas Act ("OGA").\textsuperscript{21} Pursuant to Section 215(a)(1) of the OGA, Belden & Blake posted bond with the Department of Environmental Protection ("DEP") in order to guarantee closure of the wells, cover pollution remediation expenses, and ensure well site reclama-

\begin{itemize}
\item \textsuperscript{18} More specifically, Belden & Blake leases the oil and gas rights under one of the tracts from Steven and Dana Rensma, and owns the rights under the other two properties. Brief for Appellee Belden & Blake Corp. at 8, \textit{Belden & Blake Corp. v. Commonwealth Dep't of Conservation & Natural Res.}, 969 A.2d 528 (Pa. 2009) (No. 25 MD 2006).
\item \textsuperscript{19} \textit{Belden}, 969 A.2d at 529. According to DCNR's brief, the Commonwealth obtained the land over a period of several years prior to 1971, while Belden & Blake acquired several of its oil and gas interests in 2003 and others at a time that remains unclear. Brief for Appellant Dep't of Conservation & Natural Res. at 6, \textit{Belden}, 969 A.2d 528 (No. 25 MD 2006). On the other hand, Belden & Blake's brief maintains that the Commonwealth obtained the land subject to Belden & Blake's oil and gas estates and had full knowledge of the estates when it obtained the surface in the early 1970s. Brief for Appellee, \textit{supra} note 18, at 3. Additionally, Belden & Blake's brief states that the Commonwealth neither purchased nor condemned the oil and gas rights when obtaining the surface. \textit{Id.} at 7.
\item \textsuperscript{20} \textit{Belden}, 969 A.2d at 529. Belden & Blake also notified DCNR that it planned to enter the park to survey possible locations to place wells, pipelines, and access roads. Brief for Appellant, \textit{supra} note 19, at 6.
\item \textsuperscript{21} \textit{Belden}, 969 A.2d at 529 (citing 58 PA. CONS. STAT. ANN. § 601.201(a) (West 1996)). Section 201 of the Oil and Gas Act provides, in relevant part, that:

\begin{itemize}
\item [(a)] no person shall drill a well or alter any existing well, except for alterations which satisfy the requirements of subsection (j), without having first obtained a well permit pursuant to subsections (b), (c), (d) and (e). A copy of the permit shall be kept at the well site during drilling or alteration of the well.
\end{itemize}

58 PA. CONS. STAT. ANN. § 601.201(a). After DCNR expressed concerns about the originally proposed access route, Belden & Blake agreed to change the route and acquired a right-of-way across privately-owned, adjoining lands. Brief for Appellee, \textit{supra} note 18, at 9. Belden & Blake also agreed to revise another route as requested by DCNR. \textit{Id.} Furthermore, despite no legal obligation to do so, Belden & Blake offered to cover the cost of removing the timber that was necessary to access the subsurface and pay DCNR the fair market value of the timber. \textit{Id.}
\end{itemize}
Prior to permitting Belden & Blake to access the tracts, DCNR attempted to negotiate with the company and convince it to sign a coordination agreement. The coordination agreement outlined issues such as payment for stumpage, performance bonds to assure restoration of the surface, and other development activities.

22. Belden, 969 A.2d at 529 (citing 58 PA. CONS. STAT. ANN. § 601.215(a)(1) (West 1996)). Section 215(a)(1) provides, in relevant part:

(a)(1) [e]xcept as provided in subsection (d) hereof, upon filing an application for a well permit and before continuing to operate any oil or gas well, the owner or operator thereof shall file with the department a bond for the well and the well site on a form to be prescribed and furnished by the department.

58 PA. CONS. STAT. ANN. § 601.215(a)(1). Belden & Blake's brief notes that, although the Oil and Gas Act affords a procedure in which a surface owner can object to a well permit application, DCNR never objected. Brief for Appellee, supra note 18, at 10 (citing 58 PA. CONS. STAT. ANN. § 601.202(a) (West 1996)).

23. Belden, 969 A.2d at 529. DCNR had originally requested Belden & Blake to enter into a license for a right-of-way, and when Belden & Blake refused, DCNR proposed the Coordination Agreement, which it considered to be a “hybrid access arrangement”. Brief for Appellant, supra note 19, at 6. DCNR anticipated that this agreement would serve to protect the park by defining “the rights, obligations and expectations of both parties”. Id. Belden & Blake’s brief states that DCNR actually required Belden & Blake to comply with the conditions in the Coordination Agreement prior to entering the surface of the park. Brief for Appellee, supra note 18, at 13. DCNR representatives apparently denied that Belden & Blake had an easement, and threatened to arrest Belden & Blake employees if they entered the park prior to agreeing to the conditions. Id.

24. Belden, 969 A.2d at 529. According to DCNR’s brief:

DCNR requested that Belden & Blake enter into a written agreement with DCNR documenting the manner in which the company would coordinate its development activities with the agency. DCNR also requested compensation for trees that would need to be removed from the park as well as some form of financial security to cover the cost of restoration of the surface in the event Belden & Blake (or its successor) failed to properly restore the park. Brief for Appellant, supra note 19, at 1. DCNR also wanted to have the ability “to review and comment on the location of planned oil and gas facilities within the park.” Id. at 6. These requests were embodied in the coordination agreement. Id.

Belden & Blake’s brief notes that the additional fees, bonds, and double damages combined are about $100,000, Brief for Appellee, supra note 18, at 3-4, and that the $30,000 of performance bonds “cover the same conditions, obligations, and circumstances already covered by the bond posted to DEP under the Oil and Gas Act and related regulations. Id. at 12 (citing 58 PA. CONS. STAT. ANN. § 601.215(a)(1) (West 1996)). Belden & Blake’s brief also states that the agreement required Belden & Blake to forego its right to appeal DCNR’s decisions to a court. Id. In the case of a dispute, DCNR required Belden & Blake to follow a process in which the dispute would be ultimately decided “through the General Counsel’s Office, of which DCNR’s legal office is a part.” Id. at 12-13. Additionally, DCNR attempted to con-
Belden & Blake alleged that when it obtained the oil and gas estates, it received an implied easement with a right to enter the land, and that the sole limitation on the easement was a good faith requirement to only use the surface of the land in "a reasonably necessary manner" when removing the minerals. Asserting that it far surpassed this requirement, Belden & Blake filed a petition for review in the Commonwealth Court of Pennsylvania seeking declaratory and equitable (injunctive) relief, and to enjoin DCNR from additional intervention. In support of its contention, Belden & Blake indicated that it planned with DCNR to determine how best to preserve the surface; informed DCNR of its plans well in advance; granted DCNR a period of time to remove the necessary trees; supplied maps of the wells; offered to buy the timber at its fair market value after removing it; and changed its access route, even though it had to secure a right-of-way over adjoining private property. Belden & Blake also argued that only the DEP has regulatory power concerning well drilling under the OGA. Furthermore, Belden & Blake averred that because DCNR does not have the authority to control private property under either the CNRA or the Pennsylvania Constitution, its actions constitute "a taking without just compensation."

In response, DCNR relied on Article I, Section 27 of the Pennsylvania Constitution in arguing that it has the power to restrict the surface use of a state park, because it is a trustee for public resources. It also claimed that the public trust doctrine is relevant in this situation. Furthermore, DCNR asserted that precedent required the Commonwealth Court to determine whether Belden & Blake’s surface use was reasonable, and that the Commonwealth Court failed to make...
To ensure that Belden & Blake’s surface use was reasonable, DCNR created the coordination agreement, arguing that such an agreement would be the best manner to guarantee that Belden & Blake would not unilaterally control what constitutes reasonable use.

On partial summary judgment, the Commonwealth Court held that DCNR cannot require Belden & Blake to enter into a coordination agreement, because DCNR does not have the power to condition Belden & Blake’s right to enter the land and extract the minerals. Instead, Belden & Blake must exercise its right to enter the land in a reasonable manner, while giving consideration to the surface owner’s rights. A court of equity can control either party if the need arises. To arrive at this conclusion, the Commonwealth Court relied on Chartiers Block Coal Co. v. Mellon, a case decided in 1893. In Chartiers, the Pennsylvania Supreme Court held that the subsurface owner had a right to use the surface as necessary to remove the minerals, but must exercise this right with due regard to the rights of the surface owner. The Commonwealth Court further held that the CNRA does not allow DCNR to impose stumpage fees, and that Belden & Blake does not have to post performance bonds on each well, because it already posted bond pursuant to the OGA.

DCNR appealed the judgment of the Commonwealth Court, along with filing an automatic supersedeas that was vacated by the Commonwealth Court. DCNR then appealed to the Pennsylvania Supreme Court to reinstate the supersedeas, which was granted. On appeal, the Pennsylvania Supreme Court addressed the issue of whether a governmental agency with a statutory mandate to conserve and maintain public natural resources has authority under Pennsylva-

35. Id.
36. Id.
37. Id. at 530.
38. Belden, 969 A.2d at 530.
39. Id. at 531.
40. 25 A. 597 (Pa. 1893).
41. Belden, 969 A.2d at 530.
42. Id. at 532 (citing Chartiers, 25 A. at 598).
43. Id. at 530-31 (citing 58 PA. CONS. STAT. ANN. § 601.215(a)(1) (West 1996)).
44. Id. at 531.
45. Belden, 969 A.2d at 531.
nia law to impose conditions on the subsurface owner’s use of the
government-owned surface of a state park.46

A. Justice Eakin’s Majority Opinion

Justice J. Michael Eakin delivered the majority opinion for the
Pennsylvania Supreme Court.47 The majority agreed with the Com-
monwealth Court and held that in Pennsylvania, government agencies
are treated the same as any other surface owner, regardless of the na-
ture of their statutory mandate, and are unable to condition the subsur-
face owner’s use of the surface to any greater extent than any other
surface owner.48 Other surface owners can only condition the subsur-
face owner’s land in a reasonable manner, and DCNR is held to the
same standard.49 Because governmental agencies are unable to re-
quire a subsurface owner to agree to conditions beyond those that are
reasonable, DCNR cannot require Belden & Blake to comply with
additional conditions when drilling wells in Oil Creek State Park, even
though DCNR has a statutory mandate to maintain and preserve state
parks.50

Relying on Turner v. Reynolds,51 the court found that Belden &
Blake had the right to enter the surface of the tracts to obtain the min-
erals.52 In Turner, the court held that the owner of mineral rights has

46. Id. at 532.
47. Id. at 529. Chief Justice Castille, Justice Baer, and Justice McCaffery joined
Justice Eakin’s opinion. Id. at 533. Justice Saylor filed a dissenting opinion in
which Justice Todd joined. Id. (Saylor, J., dissenting).
48. Id. at 532-33 (majority opinion). The court held that:
[a] ‘regular’ surface owner cannot unilaterally impose extra conditions on the
subsurface owner beyond those that are reasonable. DCNR may wish to do so
because of its statutory duties, but its mandate does not allow it to do so unilat-
erally, nor does it shift the burden of seeking redress to the subsurface owner.

Id.
49. Id.
50. Belden, 969 A.2d at 532-33 The court held that:
[w]hatever its admirable obligations to the public, as concerns the owner of
private property, the government and its agencies must be held to the same
standard as any other surface owner. DCNR may seek additional conditions
because of its mandate, but it has no authority to impose them unilaterally
without compensation.

Id.
51. 23 Pa. 199 (Pa. 1854).
52. Belden, 969 A.2d at 532.
the right of possession of the land even against the owner of the surface, to the extent necessary to extract the minerals. The majority in Belden & Blake then relied on Chartiers Block Coal Co. v. Mellon, in which the court held that the subsurface owner’s right to enter the surface must be exercised in a reasonable manner, with a due regard for the rights of the surface owner. The court concluded that Belden & Blake facially satisfied its obligation to exercise its subsurface rights in a reasonable manner.

The majority recognized that Section 303 of the CNRA and Article I, Section 27 of the Pennsylvania Constitution require DCNR to protect and conserve state parks as public natural resources. The court reasoned, however, that holding that DCNR’s duties provide it with authority to enforce conditions controlling the subsurface owners’ use of the surface would be contrary to precedent, because it would place the burden on the subsurface owner to request judicial redress. The court further found that even though a government agency with a statutory mandate may own the surface of a tract of land, the subsurface owner’s rights cannot be reduced. Although DCNR does not have the authority to unilaterally impose conditions on the subsurface owners’ use of the surface, DCNR’s statutory mandate allows it to attempt negotiations regarding such conditions. If the two parties do not agree on further conditions, the surface owner must be the party to request judicial redress. Furthermore, the Commonwealth must compensate the subsurface owner for any reduction in its rights if additional conditions are imposed, or the Commonwealth can condemn the subsurface interests under the Eminent

54. Belden, 969 A.2d at 532 (citing Chartiers, 25 A. 597, 598 (Pa. 1893)).
55. Id.
57. Belden, 969 A.2d at 532 (citing PA. Const. art. 1, § 27).
58. Id. According to the majority, Chartiers holds that the surface owner must be the party to seek judicial redress when there is a conflict between the surface owner’s rights and the subsurface owner’s rights. Justice Eakin further emphasized that it must be the surface owner who seeks judicial redress, and not the subsurface owner. Id.
59. Id.
60. Id. at 533.
61. Belden, 969 A.2d at 533.
62. Id.
Accordingly, the court affirmed the order of the Commonwealth Court and relinquished jurisdiction. 64

B. Justice Saylor's Dissent

Justice Thomas G. Saylor dissented, joined by Justice Debra Todd. 65 He asserted that DCNR should have a part in deciding whether the subsurface owner's use of the park's surface is reasonable, because of its directive to protect state parks. 66 He disagreed with the majority's decision that DCNR cannot impose conditions to control unreasonable activity that will harm the park. 67 In order to ensure that Commonwealth agencies are able to carry out their statutory duties, he reasoned that the General Assembly gives them implied powers. 68 Justice Saylor pointed to Commonwealth v. Beam 69 to support his position. 70 In Beam, the court was looking at whether the Department of Transportation had authority to bring an action to enjoin the operation of an unlicensed private airport where the statute did not provide explicit authority to do so. 71 The dissent noted that "[i]n Beam, this Court observed that "it is evident from the Aviation Code that the Legislature intended to confer upon the Department an ability to secure compliance with . . . statutory requirements' having substantial public safety and welfare implications." 72 Justice Saylor argued that the General Assembly similarly intended to give DCNR the power to form agreements with the owners of the subsurface. 73

65. Id. (citing 71 PA. CONS. STAT. ANN. § 101 (West 1990)). See also Nicole R. Snyder Bagnell & Stephanie L. Hadgkiss, Eastern Shale Plays: A Game Plan for Success, 55 ROCKY MTN. MIN. L. INST 32-1 (2009) ("DCNR also may try to purchase the mineral rights under certain park acreage." According to James Grace, DCNR Deputy Secretary for Parks and Forestry, even just "[p]urchasing the mineral rights for all of the parks in the western part of the state is, however . . . financially impossible").
64. Bagnell, supra note 65, at 32-1.
65. Belden, 969 A.2d at 533 (Saylor, J., dissenting).
66. Id.
67. Id.
68. Id.
70. Belden, 969 A.2d at 533.
71. Id. at 358.
73. Id. at 534.
Justice Saylor also disagreed with the majority’s reading of Chartiers Block Coal Co. v. Mellon, because he contended that Chartiers does not hold that the surface owner must be the plaintiff and that the subsurface owner must be the defendant in litigation involving their respective interests; he claimed that Chartiers does not specify. Furthermore, and more importantly, he indicated that the Commonwealth Court did not base its conclusion on an analysis and discussion of the facts when determining the reasonableness of Belden & Blake’s actions, even though it granted summary judgment. In fact, he argued that the Commonwealth Court did not even balance the parties’ interests, so he felt that the Commonwealth Court should not have granted Belden & Blake’s motion.

To him, it is impossible to ascertain whether the Commonwealth Court decided that DCNR never has the power to impose conditions in order to limit access, or whether the court’s decision was due to the specific facts of this case. He noted that the Commonwealth Court concluded that DCNR lacked the power to impose conditions, although the court never analyzed the conditions. According to Justice Saylor, the court should not have created a universal rule that DCNR does not have the power to impose conditions. He argued that a dispute between a state surface owner and a private subsurface owner should turn on the reasonableness of the surface owner’s conditions. Consequently, Justice Saylor would have remanded the case to the Commonwealth Court to evaluate the reasonableness of DCNR’s conditions.

C. Analyzing Belden & Blake

Although not mentioned by either the majority or the dissent, the Pennsylvania Supreme Court faced an issue of first impression in Belden & Blake, because there is no Pennsylvania precedent involving

74. Id.
75. Id. at 535.
76. Id.
77. Belden, 969 A.2d at 535
78. Id. at 534-35.
79. Id.
80. Id.
81. Id. at 535. Justice Saylor stated that he would “remand for further development of the Commonwealth Court’s reasoning and a fuller explanation of the nature of the declaratory relief awarded.” Id.
a dispute between a public surface owner and private subsurface owner—let alone one where a state park is involved. None of the cases cited by the majority, the dissent, or the parties involve a dispute between a public surface owner and a private subsurface owner. All of the cases cited involve either a dispute between a private surface owner and a private subsurface owner, or a dispute between two public interests. Until *Belden & Blake*, the Pennsylvania Supreme Court had never resolved a dispute between a public surface owner and a private subsurface owner.

Nevertheless, it appears that the majority erred in failing to recognize this as a public trust issue and thereby failed to weigh the facts consistent with Pennsylvania’s public trust doctrine that is articulated in *Payne v. Kassab*. Compounding this error, the majority also erred in finding that a subsurface owner’s rights cannot be reduced, even if a government agency with a constitutional directive owns the surface. This holding is incorrect and contrary to precedent. These errors will be discussed in turn, followed by an analysis of the *Payne* test and how it can be utilized to resolve disputes such as those set forth in *Belden & Blake*.

1. *The Public Trust Doctrine*

As noted by DCNR, the question presented in *Belden & Blake* is how to balance the rights of a private subsurface owner with the rights of a public surface owner that has a statutory mandate to protect the park for the benefit of the citizens of the state. In *Payne*, the court faced a similar question when the Pennsylvania Department of Transportation ("Penn DOT") proposed a street-widening project for River Street in Wilkes-Barre, and a group of community members filed a
complaint in equity to stop the project,\(^8^5\) arguing that it would have a harmful effect on the River Common by decreasing its historical, scenic, recreational, and environmental values.\(^8^6\) River Street ran the entire length of the east side of the River Common.\(^8^7\)

The group opposing the project argued that it was unconstitutional and must be halted, because the Commonwealth is a trustee of public natural resources under Article I, Section 27 of the Pennsylvania Constitution and it violated its duties as trustee by approving the project.\(^8^8\) The court reasoned that the Article created “a public trust of public natural resources for the benefit of all the people” and that as trustee, the Commonwealth must preserve these resources.\(^8^9\) The majority also recognized that the River Common was public property that en-

\(^8^5\) Payne, 361 A.2d at 264.

\(^8^6\) Id. The court explained that:

> [t]he River Common is a tract of approximately thirty-two acres which is bounded on the north and south by North and South Streets respectively, on the west by the Susquehanna River and which has as its eastern boundary the easterly curb of River Street. Approximately eleven acres of the Common area consist of the Luzerne County courthouse, railroad tracks and various streets. The remaining twenty-one acres are a tree-lined park area utilized for many and varied recreational and leisure activities. Also contained within the boundaries of the Common are several historical markers and monuments.

\(^8^7\) Id. at 264-65. The court stated that:

> [t]he plan envisions the widening and realigning of River Street to a uniform four lane road having a minimum width of forty-two feet and improvement of River Street's intersection with North and South Streets. Land from both sides of River Street will be taken with incursions of up to twelve feet, varying according to the need at various points. The total amount of land from the Common to be diverted to this use is .59 acres. Presently located to the path of the proposed fourth lane are sections of tree lawns and sidewalks. [. . .] The plan calls for replacement of these areas once construction of the new lane is finished. The disrupted area will be recurbed and restructured. The tree lawn is to be reconstituted with twenty-eight trees replacing the twenty-three which will be removed. The whole area will be relandscaped and the stone wall bordering the sidewalk on the Common side will be reconstructed with its original materials; recent flood damage to the wall will also be repaired. Two historical markers, the historical significance of which is unrelated to any exact location, will be moved to other points in the Common area. In addition, provision has been made that the entrance steps to the Luzerne County Courthouse at the north end of the Common will be undisturbed, with the necessary widening at that point to be accomplished entirely on the eastern side of River Street.

\(^8^8\) Id. at 272 (citing PA. CONST. art. 1, § 27).

\(^8^9\) Id.
compassed the requisite values. Writing for the majority, Justice Thomas W. Pomeroy noted, however, that just because one can claim a common right to a protected value under this amendment and that this value is about to be violated, that does not mean that one has an automatic right to relief. The court noted that the Commonwealth also has to perform other duties, including preserving the highways and road systems.

The majority thus held that a balancing must take place, and that in enacting Section 13 of the Act of May 6, 1970 ("Act 120"), the Legislature ensured that Penn DOT will appropriately balance the required factors. Penn DOT should analyze a project, and if there are no other options, Penn DOT must minimize the environmental impact of the project. The court concluded that the provisions of Act 120 will ensure that Penn DOT will not violate the trust established by the Pennsylvania Constitution, and that in this case, the Commonwealth fulfilled its obligation as trustee, because Penn DOT complied with Act 120. According to the precedent established in Payne, the Commonwealth Court thus failed to analyze the reasonableness of either Belden & Blake's actions or DCNR's conditions in deciding the motion for summary judgment.

2. The Public Purpose

Moreover, the Belden & Blake Court's finding that a subsurface owner's rights are absolute and cannot be reduced – even if a governmental agency with a constitutional directive owns the surface – is incorrect and contrary to precedent. In Machipongo Land & Coal Co., Inc. v. Commonwealth, the Pennsylvania Supreme Court stated that courts have long held that all owners possess property with an

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90. Payne, 361 A.2d at 272.
91. Id. at 273.
92. Id.
93. Id. (citing 71 Pa. Cons. Stat. Ann. § 512 (West 1990)). Section 512 provides that the Department of Transportation must consider a list of enumerated effects that a proposed transportation route or program may have, and that the Secretary of Transportation must publish a written finding showing that no adverse environmental effects will result, that there are no feasible alternatives, and that reasonable steps have been taken to minimize any adverse environmental effects. 71 Pa. Cons. Stat. Ann. § 512.
94. Payne, 361 A.2d at 272.
95. Id.
implied duty that their use will not harm the community’s interests.\textsuperscript{96} If a state government determines that a private owner’s intended use of his property is in conflict with a legitimate public purpose, the government thus has the power to prohibit the private use.\textsuperscript{97} The Commonwealth Court, however, did not analyze the reasonableness of either Belden & Blake’s actions or the conditions that DCNR sought to impose.\textsuperscript{98} Although the majority held that Belden & Blake facially satisfied its obligation to exercise its subsurface rights in a reasonable manner,\textsuperscript{99} the Pennsylvania Supreme Court likewise did not analyze which of Belden & Blake’s actions were reasonable and why they were reasonable.\textsuperscript{100} Justice Saylor also noted in his dissent that, although the Commonwealth Court mentioned the conditions proposed by DCNR, it did not analyze them and simply concluded that DCNR did not have the authority to impose the conditions.\textsuperscript{101} Furthermore, the court should have considered DCNR’s statutory mandate to preserve and protect state parks\textsuperscript{102} as a factor in analyzing the reasonableness of both Belden & Blake’s initial actions when accessing the subsurface, and the conditions that DCNR plans to impose. For these reasons, the Commonwealth Court’s holding was contrary to precedent.

3. \textit{The Proper Analysis: The Payne Test}

To determine reasonableness, the Court should apply the three-part balancing test that is based on the public trust doctrine. In \textit{Payne v. Kassab}, the Commonwealth Court first recognized the public trust doctrine in relation to Article I, Section 27 of the Pennsylvania Con-

\textsuperscript{97} Id. at 754 (citing \textit{Penn Central Transp. Co. v. City of New York}, 438 U.S. 104, 124-25, (1978)).
\textsuperscript{98} \textit{Belden}, 969 A.2d at 534-35 (Saylor, J., dissenting).
\textsuperscript{99} Id. at 532 (majority opinion).
\textsuperscript{100} Id. at 534-35 (Saylor, J., dissenting). In \textit{Machipongo}, the Pennsylvania Supreme Court held that reasonableness is essentially a factual inquiry, whereas a question of the public’s right in a matter is a question of law. 799 A.2d at 754 (citing \textit{Com. v. Barnes & Tucker Co.}, 319 A.2d 871, 879-80 (1974)).
\textsuperscript{101} Id.
\textsuperscript{102} \textit{Belden}, 969 A.2d at 533. The court stated that “DCNR may seek additional conditions because of its mandate.” Id. (second emphasis added).
stitution and held that it "was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania." The court recognized the need for development, but that the development must be tempered in accordance with the constitutional directive, noting that:

"decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources."

Through an application of this test, the reasonableness of Belden & Blake's actions would be analyzed as well, and the court would balance the public's interest in environmental preservation of the state parks with Belden & Blake's right to develop its subsurface mineral estates.

Under the first prong of the Payne test, the court must ascertain whether the parties abided by all pertinent statutes and regulations that the Legislature created to safeguard Pennsylvania's public natural resources. The second prong requires the court to determine whether the subsurface owner has made a reasonable effort to ensure that environmental interference is as minimal as possible. Finally, the court must ascertain whether the benefits to the subsurface owner of taking


Judicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic. The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Id. DCNR argued for the adoption of the Payne test in its brief, and applied the three prongs of the test to the factual situation at hand. Brief for Appellant, supra note 19, at 35-38.

104. Payne, 312 A.2d at 94.

105. Id.

106. Id.
the challenged actions clearly outweigh the environmental damage that such actions will cause.\textsuperscript{107} If the court determines that the conditions are reasonable, the court must then decide whether the conditions diminish the rights of the subsurface owner.\textsuperscript{108} If the subsurface owner’s rights are diminished, DCNR must compensate Belden & Blake, or condemn the mineral estates in accordance with the Eminent Domain Code.\textsuperscript{109} An application of the Payne test, therefore, would allow DCNR to fulfill its constitutional directive, while ensuring that the subsurface owner’s rights are not diminished, and neither party will have the unilateral authority to determine the reasonableness of the actions or conditions.

II. Legislative and Executive Attempts to Soften Any Potential Impact of Belden & Blake

After \textit{Belden & Blake}, a bill was introduced and passed the Pennsylvania House of Representatives last legislative session that would have placed a temporary moratorium on state forest land leasing.\textsuperscript{110} Before the end of the 2010 session, however, the bill stalled and died in the Senate.\textsuperscript{111} 2010 was an election year that saw the end of the final term in office of Governor Edward “Ed” Rendell. Before leaving office, then Democratic Governor Rendell signed an Executive Order for a moratorium to prohibit any further gas leases in state forests.\textsuperscript{112} In conjunction with the Executive Order, DCNR issued a policy placing further protections on state parks from future natural gas development.\textsuperscript{113}

On November 4, 2010, Republican Tom Corbett was elected Governor of Pennsylvania. Shortly after taking office, Governor Corbett appointed a new secretary to the DCNR, who in turn repealed the policy on stricter permitting requirements, stating that it was unnecessary.\textsuperscript{114} To date, Governor Corbett has not officially repealed the moratorium. Instead, he has established a Governor’s Marcellus Shale

\textsuperscript{107} Id.
\textsuperscript{108} Belden, 969 A.2d at 533.
\textsuperscript{109} Id. (citing 71 PA. CONS. STAT. ANN. § 101 (West 1990)).
\textsuperscript{113} 40 Pa. Bull. 6482 (Nov. 6, 2010).
\textsuperscript{114} 41 Pa. Bull. 8 (Feb. 19, 2011).
Advisory Commission to review all existing and proposed laws and make recommendations of any “[a]dditional steps necessary to protect, conserve and enhance the Commonwealth’s environment and natural resources and further mitigate impacts from development on the state’s air, land, and water resources” while still promoting natural gas development. The results of that report are due July 22, 2011.

On March 9, 2011, a similar bill to the 2010 bill was introduced in the House of Representatives for the 2011 session. House Bill No. 150 would provide a three-year moratorium on leasing state forest lands for natural gas development until the impacts of such drilling can be fully assessed and addressed. The bill would require that DCNR prepare a comprehensive environmental impact statement within two years from the bill’s enactment to assess the potential impacts to water, soil, forest fragmentation, plants, wildlife, habitats, and the like. Importantly, the bill would also require an analysis as to whether existing lease terms should “be modified to mitigate any identified environmental or social impacts.” If this bill were to pass, it would seemingly overrule Belden & Blake and allow DCNR to modify existing leases and condition future development of gas wells so as to prohibit adverse social and environmental impacts to state parks and forests. These will be discussed in turn.

A. Rendell’s Moratorium

Citing to DCNR’s obligation under the Conservation and Natural Resources Act of 1995 “to conserve and maintain state forests and state parks for the use and benefit of all its citizens as guaranteed by Section 27 of Article I of the Constitution of Pennsylvania,” and because “advances in technology that have made development of gas in the Marcellus shale formation possible and profitable have led to a rapid and significant increase in the level of development activity on state forest and state park land,” Governor Rendell issued an executive order.

116. Id. at 3.
118. Id.
119. Id. at 2.
120. Id. at 6.
order prohibiting any future leasing of these lands for natural gas extraction. The moratorium was not limited to any specific time. As soon as it was signed, it was obvious that the moratorium would have little effect. First, Governor Rendell only had four more months in office and the incoming governor could simply repeal the moratorium (which he has not done as of the submission of this article); and second, the moratorium did not stop the drilling on the hundreds of acres of park land the state had already leased for oil and gas development.

B. The "Policy"

On October 25, 2010, the Department of Environmental Protection ("DEP") and DCNR issued a "Policy for the Evaluation of Impacts of Oil and Gas Development on State Parks and State Forests." The purpose of the Policy was to provide guidance in implementing the Oil and Gas Act so as to "ensur[e] that well operators properly coordinate with DCNR to determine the impact of proposed oil and gas wells on [s]tate [p]ark or [s]tate [f]orest land prior to their submission of well permit applications for such proposed wells to DEP." Most likely due to the holding in Belden & Blake, DEP and DCNR claimed that the policy is not a regulation, but only a guidance mechanism to "establish[] the framework within which DEP will exercise its administrative discretion in the future." The six-page policy starts off by quoting Article I, Section 27 of the Pennsylvania Constitution, which grants the people of Pennsylvania the “right” to, among other things, “the preservation of the natural scenic, historic and esthetic values of the environment,” and directing the state, “[a]s trustee of these resources,” to “conserve and maintain them for the benefit of all the people.”

The policy required well operators to identify on a topographic map any lands that would be “disturbed” by natural gas development.

122. Id.
123. 40 Pa. Bull. 6482 (Nov. 6, 2010).
124. Id.
125. Id.
126. Id. at 1. The policy also points out that the “Conservation and Natural Resources Act found that State Parks and State Forests are important public natural resources to be conserved and maintained for the use and benefit of all citizens as guaranteed by this Constitutional provision.” Id. (citing Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §§ 1340.101).
127. Id. at 2.
DCNR would then perform an environmental review and outline the areas of concern and provide "an analysis of potential impacts and recommended response measures to minimize or mitigate such impacts." This review would delineate thirteen types of habitats, resources, and lands that could be impacted by the development and then analyze fifteen areas of concern to minimize or mitigate impacts to those areas. The well operator and DCNR would then "coordinate" an agreement for "recommended response measures" and that letter of agreement would be given to DEP to be placed as conditions on the well permit. DEP had the authority to find an application incomplete without this coordination agreement. On February 19, 2011, the newly appointed DCNR Secretary rescinded the policy, stating that it was never submitted for public comment or review and that it was "unnecessary and redundant of existing practice."

C. House Bill No. 150

House Bill No. 150, entitled the State Forest Natural Gas Lease Moratorium Act (the "Moratorium Act"), is a seven-page bill introduced on March 9, 2011. If enacted, the bill would place a three-year moratorium on the leasing of state lands for the purpose of natural gas "exploration, drilling or production." The Moratorium Act would direct DCNR to prepare – within two years – a "Comprehensive Environmental Impact Review (the "CEIR"), which would detail

128. *Id.*
129. 40 Pa. Bull. 6482 at 2. The thirteen types of habitats are: (1) Species of Concern Habitat; (2) Water Resources; (3) Public Water Supply Watershed; (4) Wetlands and Floodplains; (5) Forest Resources; (6) Other Natural Resources; (7) Steep Slopes; (8) Public Recreation Areas; (9) Scenic Viewsheds; (10) Private Facilities; (11) Geologic Features; (12) Other Features [of Significance]; and (13) Archaeological Historic Sites. *Id.* at 3.
130. *Id.* The fifteen areas of concern are: (1) Surface Water Quality/Quantity; (2) Ground Water Quality/Quantity; (3) Air Quality; (4) Ecological Diversity & Integrity; (5) Forest Fragmentation; (6) Invasive Species; (7) Stormwater, Erosion & Sedimentation; (8) Public Access/Safety; (9) Aesthetic Impacts; (10) Noise; (11) Roads; (12) Vegetation; (13) Recreational Impacts; (14) Cumulative Impacts; and (15) Other Impacts. *Id.* at 4-5.
131. *Id.*
132. *Id.* at 5.
133. 41 Pa Bull. 8 (Feb. 19, 2011).
134. H.B. 150.
135. *Id.* at 2.
the “environmental, economic and societal impacts of the leasing” of state lands.\textsuperscript{136} DCNR would start by outlining the “maximum possible development” of natural gas on state lands where the mineral rights are (1) already leased by DCNR for that purpose; or (2) “not owned by the Commonwealth”\textsuperscript{137} and then make an assessment of all potential impacts of each development.\textsuperscript{138} DCNR would be looking at how or whether “pad development, drilling operations, road and bridge development, collection and transmission lines, compression facilities, treatment plants, waste disposal, water withdrawals and other associated development” potentially impact “[s]tate forest lands and private landowners and communities.”\textsuperscript{139}

After the completion of the CEIR, the Legislative Budget and Finance Committee (the “Finance Committee”) would conduct its own study – using the CEIR – and assess the impacts of leasing the state lands.\textsuperscript{140} The Finance Committee may, but need not, investigate on its own or use other data sources to complete its report.\textsuperscript{141} In any event, it must include – among other things – analysis as to the “overall cumulative” economic, recreational, social, and environmental “impacts to both the Commonwealth and its citizens.”\textsuperscript{142} Importantly, the Finance Committee would then make a recommendation as to whether existing lease terms “for [s]tate land should be modified to mitigate any identified” impacts.\textsuperscript{143}

After all the reports are in and the moratorium is over, the Moratorium Act would prohibit DCNR from leasing any state park or forest land for the purposes of natural gas development unless DCNR, “in its sole discretion, determines that State forest can be sustained in a balanced state that preserves water and air quality, plant and animal habitats and the multiple ecosystems, recreational, social and aesthetic values of the forest with the proposed lease.”\textsuperscript{144} Interestingly, the proposed Moratorium Act does not include financial and budgetary issues as a factor in determining whether to allow leasing.

\textsuperscript{136} Id. The report would thereafter be submitted annually. Id. at 4.
\textsuperscript{137} Id. at 2.
\textsuperscript{138} Id.
\textsuperscript{139} H.B. 150 at 3. Public comment would be allowed “60 days prior to initiation of the work to prepare the report.” Id. at 4.
\textsuperscript{140} Id. at 5-6. No public comment period was set forth for this study.
\textsuperscript{141} Id. at 6.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} H.B. 150, at 7.
III. The Future of the Commonwealth’s Ability to Protect State Lands

Since *Belden & Blake*, there has been great concern as to how the Commonwealth can act as trustee for the people to protect the state’s natural resources from negative impacts of drilling and natural gas development – as it is required to do under the Pennsylvania Constitution – when any tools the state may have had in conditioning well permits has been, at the very least, minimized. Moreover, in a time of economic downturn, when states are looking to any means possible to find financial stability, this concern is amplified by the amount of money that could be made from leasing the mineral rights on state lands.\(^{145}\)

While the Pennsylvania Supreme Court set a concerning precedent\(^{146}\) in *Belden & Blake*, it remains to be seen how the courts will apply it. Thus far, *Belden & Blake* has only been cited in three court opinions, none of which rely on or even apply the court’s holding. In *Fiore v. County of Allegheny*, the Commonwealth Court affirmed the order of the Allegheny County Court of Common Pleas denying Fiore the right to strip mine his coal that lies beneath a public park owned by the County.\(^{147}\) Although the Fiore majority did not cite *Belden & Blake*, Judge Mary Hannah Leavitt cited *Belden & Blake* in her dissenting opinion, arguing that the majority should not limit its inquiry

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145. 71 PA. CONS. STAT. ANN. § 1340.303(a)(9) (West 1990). DCNR is allowed to lease park land, as stated in Section 303(a)(9) of the Conservation and Natural Resources Act, which provides, in relevant part:

(a) [p]owers and duties enumerated.- The department shall have the following powers and duties with respect to parks: (9) To make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any oil or gas that may be found in a State park whenever it shall appear to the satisfaction of the department that it would be for the best interests of this Commonwealth to make such disposition of said oil and gas.

Id.

146. Moreover, the *Belden* majority did not provide a clear and easily applicable holding, so courts could arrive at different conclusions as to the court’s decision. As Justice Saylor noted in his dissent, it is impossible to ascertain whether the Commonwealth Court decided that DCNR never has the power to impose conditions in order to limit access, or whether the court’s decision was due to the specific facts of this case. *Belden & Blake Corp. v. Commonwealth Dep’t of Conservation & Natural Res.*, 969 A.2d 528, 535 (Pa. 2009) (Saylor, J., dissenting). Either way, the implications are concerning.

to the language in the deed, but that it needs to determine "whether the mineral rights owner's proposed method of extraction was necessary to access the subsurface resources."\textsuperscript{148}

*Belden & Blake* is also cited in *Minard Run Oil Company v. United States Forest Service*.\textsuperscript{149} In a footnote, the court stated that the Pennsylvania Supreme Court reaffirmed "that a mineral estate owner has an absolute right to access and extract their minerals without consent of the surface estate owner and that the surface owner 'cannot unilaterally impose extra conditions on the subsurface owner.'"\textsuperscript{150} The court further stated that the *Belden & Blake* Court held that "‘a property owner's interests and rights cannot be lessened, nor their reasonable exercise impaired without just compensation, simply because a government agency with a statutory mandate comes to own the surface.’"\textsuperscript{151} Although the court did not rely on *Belden & Blake* in its holding, the briefs filed for the plaintiffs relied heavily on *Belden & Blake*. Finally, *Belden & Blake* is cited solely for the Pennsylvania Supreme Court's summary judgment rules in *John XXII Home v. Department of Public Welfare*.\textsuperscript{152}

In the meantime, the Pennsylvania legislature is working hard to combat the *Belden & Blake* decision before any courts can apply its potentially broad holding. If House Bill No. 150 passes and becomes law, the Commonwealth will have a few years of reflection and breathing room to make an analysis as to future actions to ensure that DCNR preserves and protects the surface of state parks from the actions of subsurface mineral owners.

For now, if this matter should come again before a court, the court should apply the public trust doctrine. Even if there is a presumption that the subsurface owner will act reasonably, and if the state surface owner believes that the subsurface owner will not act reasonably, the surface owner should be able to seek redress with the court to impose additional conditions that are consistent with its constitutional directive. Because DCNR has a constitutional directive to preserve and protect state parks, DCNR can, therefore, request that the subsurface owner comply with additional conditions. When taking into consideration DCNR’s directive, the court, however, must analyze both the

\begin{itemize}
  \item \textsuperscript{148} *Id.* at 8 (Leavitt, J., dissenting).
  \item \textsuperscript{149} 2009 WL 4937785, at *23 (2009).
  \item \textsuperscript{150} *Id.* (citing *Belden*, 969 A.2d at 532-33).
  \item \textsuperscript{151} *Id.* (citing *Belden*, 969 A.2d at 533).
  \item \textsuperscript{152} 994 A.2d 636, 638 (Pa. Commw. Ct. 2010).
\end{itemize}
reasonableness of the surface owner's initial actions when accessing the subsurface, and the conditions that DCNR plans to impose, and should do so through an application of the Payne test. Satisfaction of the Payne test would at least help to ensure that Pennsylvania's state parks will be adequately preserved for future generations.

Former Pennsylvania DCNR Secretary, John Quigley, said it best when he recently testified before a Maryland House Environmental Matters Committee about natural gas development in Pennsylvania parks.\textsuperscript{153} Natural gas is certainly the wave of the energy future. It "can replace gasoline and diesel fuel in the vehicles we drive, and replace coal in our power plants."\textsuperscript{154} It is by far the cleanest burning fossil fuel and "substitution of it for more polluting fossil fuels can help clean our air, reduce global warming emissions, reduce soot and mercury pollution, and improve public health."\textsuperscript{155} It is also seen by many to be the "bridge" to move us from fossil fuels to the future of renewable energy.\textsuperscript{156} However, the excitement of benefits cannot cause us to overlook the potential environmental and social threats of unfettered natural gas extraction.\textsuperscript{157} Only through protective, forward-looking legislation can the Commonwealth meet its obligation to conserve state parks and forests for the benefit of the public and for future generations.


\textsuperscript{155} Id.

