

15-1112

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**

WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION, DIVISION OF  
HIGHWAYS, a State Agency,

Petitioner,

vs.

MCNB BANK AND TRUST CO.,  
a West Virginia corporation,  
and the Sheriff of Raleigh County,  
West Virginia

Defendants

AND

MCNB BANK AND TRUST CO.,  
A West Virginia corporation,  
Third-Party Plaintiff,

vs.

EXXON MOBIL, and  
H.C. LEWIS OIL COMPANY,

Third-Party Defendants

UPON PROCEEDINGS TO CONDEMN  
LAND FOR PUBLIC USE.

PROJECT NO. U341-19-14.47 00;  
PARCEL NO. 109  
CIVIL ACTION NO. 14-C-506  
Judge Robert A. Burnside, Jr.

**ORDER PERMITTING DEPOSIT and GRANTING DEFEASIBLE TITLE**

On this the 28th day of August, 2014 came the Petitioner, West Virginia Department of Transportation, Division of Highways by William Criss, Right of Way agent, and by counsel, Leah R. Chappell, Esq., the Defendant MCNB Bank and Trust Co. by counsel David A. Barnette, Esq. and Vivian H. Basdekis, Esq.; Third-Party Defendant Exxon Mobil by counsel Ramonda C. Lyons, Esq.; Third-Party Defendant H.C. Lewis Oil Company by counsel John D. Wooten, Esq.

This matter came on for hearing on Petitioner's Motion for Order Granting Defeasible Title to Subject Property and Permitting Deposit, Petitioner's Motion to

Quash Civil Case Subpoena and to Impose Sanctions, and on Petitioner's Motion to

Quash Second Civil Case Subpoena and to Impose Sanctions. The Petitioner, by counsel, and tendered and asked leave to pay into Court by virtue of Chapter 54, Article 2, Section 14(a), of the Official Code of West Virginia, 1931, as amended, the sum of FOUR HUNDRED SEVENTEEN THOUSAND ONE HUNDRED and 00/100 DOLLARS (\$417,100.00), which sum Petitioner estimates to be the fair value of the property or estate, right or interest therein, sought to be condemned in this proceeding, including the damages, if any, to the residue of the land of the Defendants beyond the benefits, if any, to any such residue by reason of the taking.

Whereupon, the Court heard the argument and proffer of counsel for the Petitioner and the Defendant MCNB Bank and Trust Co. on all pending motions. At the conclusion of the same, the Court did FIND and ORDER as follows:

Petitioner's Motion for Order Granting Defeasible Title to  
Subject Property and Permitting Deposit

- a. There has not, as yet, been any report by condemnation commissioners or verdict of a jury and the Petitioner has not entered, taken possession, appropriated, or used the land sought to be condemned in this proceeding;
- b. There appears to be no dispute that this case is one in which the Petitioner has the lawful right to take the subject private property for the public purposes stated in the Petition heretofore filed in this case;
- c. The report of Kent Kesecker, a certified general appraiser hired by the Petitioner, provides that the fair market value of the property sought to be condemned in this proceeding, including the damages, if any, to the residue of the land of the Defendants beyond the benefits, if any, to any such residue

---

---

by reason of the taking, is One Million Twelve Thousand Five Hundred

---

---

Dollars (\$1,012,500). The Petitioner, in establishing just compensation pursuant to its obligations under 49 CFR 24, deducted the estimated costs of environmental cleanup and remediation, to-wit: \$595,400, from the sum reported by Kent Kesecker.

- d. It is undisputed, for purposes of this hearing, that the subject property was identified as the site of petroleum contamination in or about 1992 and is currently undergoing monitoring by the West Virginia Department of Environmental Protection for said contamination. The Defendant MCNB disputes that it is liable for any such costs and has joined third parties into this action incident to its claim that said third parties bear the liability for said costs.

- 
- e. West Virginia Code 54-2-14a provides as follows: "Before entry, taking possession, appropriation, or use, the applicant shall pay into court such sum as it shall estimate to be the fair value of the property, or estate, right, or interest therein, sought to be condemned, including, where applicable, the damages, if any, of the residue beyond the benefits, if any, to such residue, by reason of the taking."

- f. The Petitioner's appraiser, Kent Kesecker, calculated fair market value of the property to be taken, along with damages to the residue, to be \$1,012,500. Mr. Kesecker's report includes compensation for machinery and equipment (also referred to as furnishings, fixtures and equipment) appraised by other consultants hired by the Petitioner. The Defendant has obtained an appraisal

---

---

~~which establishes the fair market value of the entirety of the property before~~  
any taking at \$1,294,100.

- g. The Petitioner contends that just compensation in this matter permits it to deduct environmental cleanup and remediation costs from the sum proposed to be deposited by the Petitioner. The Court finds that WV Code 54-2-14a does not allow the Petitioner to deposit less than \$1,012,500.00 in order to gain defeasible title and right of entry to the subject property.
- h. The Court finds that it is not required to determine who bears liability for the cost of environmental cleanup and remediation at this stage of the proceedings. If the Court ultimately finds Defendant MCNB to be correct in its assertion that it is not liable for said costs, this finding would affect the ultimate award of just compensation to the Defendant, but not necessarily the Court's determination of what initial deposit should be made for the Petitioner to gain right of entry and defeasible title to the subject property.
- i. At this stage of the proceedings, the Court finds that the report of Petitioner's appraiser, Kent Kesecker, represents the Petitioner's estimate of "fair value" of the property to be taken and damages to the residue at \$1,012,500. The Petitioner shall be required to deposit the sum of \$1,012,500 with the Clerk of the Court in order to gain right of entry and defeasible title to the property described in the original Application.
- j. The Petitioner shall deposit as fair value of the property sought to be condemned in this proceeding, including the damages, if any, to the residue of the land of the Defendants beyond the benefits, if any, to any such residue

---



---

by reason of the taking, the sum of One Million Twelve Thousand Five  
 Hundred Dollars (\$1,012,500).

k. Upon the Petitioner's deposit of the total sum of \$1,012,500 with the Clerk of the Court, the Petitioner, its agents, employees and contractors shall be permitted to at once enter upon, take possession of, appropriate and use said land sought to be condemned for the purposes stated in the Petition filed in this case. Upon said deposit, the Petitioner shall immediately be granted defeasible title to the property described in the Petition filed in this case and shown on the plat attached to said Petition in the West Virginia Department of Transportation, Division of Highways, a public corporation, (subject to the provisions of Chapter 54, Article 2, Section 14(a), of the Official Code of West Virginia, 1931, as amended) which property is situate in the City of Beckley, Raleigh County, West Virginia, and is more particularly bounded and described as follows:

TRACT 1 - NONCONTROLLED ACCESS RIGHT OF WAY

BEGINNING at a point in the division line between Harvey's Inc. and MCNB Bank and Trust Co., said point being in the northern existing right of way line of Industrial Drive and 19 feet left of and at right angle to proposed US Route 19 centerline at Station 321+55, Project U341-19-14.47 00, Raleigh County, West Virginia;

thence, westerly, meandering with said existing right of way line 95 feet, more or less, to a point 14 feet left of and at right angle to centerline at Station 322+50;

thence, northwesterly, meandering with said existing right of way line 51 feet, more or less, to a point in the eastern existing right of way line of US Route 19 and WV Route 16 (Robert C. Byrd Drive), said point being 14 feet radially right of centerline at Station 322+81;

thence, northerly, meandering with said existing right of way line 161 feet, more or less, to a point in the eastern proposed noncontrolled access right of way line of proposed US Route 19, said point being 175 feet radially right of centerline at Station 322+77;

thence, southeasterly, with said proposed noncontrolled access right of way line 103 feet, more or less, to a point 89 feet right of and at right angle to centerline at Station 322+33;

thence, easterly, continuing with said proposed noncontrolled access right of way line 72 feet, more or less, to a point in the division line between Harvey's Inc., and MCNB Bank and Trust Co., said point being 85 feet right of and at right angle to centerline at

Station 321+61;

thence, southerly, with said division line 105 feet, more or less, to the place of beginning and containing 14,936 square feet (0.34 acre), more or less.

### TRACT 2 – TEMPORARY CONSTRUCTION EASEMENT

BEGINNING at a point in the division line between Harvey's Inc. and MCNB Bank and Trust Co., and in the eastern proposed temporary construction easement line of proposed US Route 19, said point being in the eastern proposed noncontrolled access right of way line of proposed US Route 19 and 85 feet right of and at right angle to proposed US Route 19 centerline at Station 321+61, Project U341-19-14.47 00, Raleigh County, West Virginia;

thence, westerly, with said proposed noncontrolled access right of way line 72 feet, more or less, to a point 89 feet right of and at right angle to centerline at Station 322+33;

thence, northwesterly, continuing with said proposed noncontrolled access right of way line 103 feet, more or less, to a point in the eastern existing right of way line of US Route 19 and WV Route 16 (Robert C. Byrd Drive), said point being 175 feet radially right of centerline at Station 322+77;

thence, easterly, with said existing right of way line 20 feet, more or less, to a point 175 feet radially right of centerline at Station 322+69;

thence, northerly, continuing with said existing right of way line 10 feet, more or less, to a point 185 feet radially right of centerline at Station 322+70;

thence, westerly, continuing with said existing right of way line 20 feet, more or less, to a point 185 feet radially right of centerline at Station 322+81;

thence, northerly, continuing with said existing right of way line 3 feet, more or less, to a point in the eastern proposed temporary construction easement line of proposed US Route 19, said point being 188 feet radially right of centerline at Station 322+81;

thence, easterly, with said proposed temporary construction easement line 125 feet, more or less, to a point 180 feet right of and at right angle to centerline at Station 321+66;

thence, southerly, continuing with said proposed temporary construction easement line 95 feet, more or less, to the place of beginning and containing 9,496 square feet (0.22 acre), more or less.

The tracts of land hereinabove described are a portion of that same real estate conveyed unto MCNB Bank and Trust Co., from James G. Anderson, III, Substitute Trustee, by deed dated December 4, 2012, of record in the Office of the Clerk of the County Commission of Raleigh County, West Virginia, in Deed Book 5049 at Page 7404.

- l. The Clerk of the Court shall distribute by check the sum of \$1,012,500, representing the Petitioner's estimate of just compensation, to the Defendant MCNB Bank and Trust Co.
- m. If the Petitioner eventually prevails on its argument that remediation costs affect the fair value, the difference shall be restored to the Petitioner by the mechanism provided by statute.

- ~~n. The Court defers ruling on whether the Petitioner's deposit of additional monies over and above the sum of \$417,100 affects the Petitioner's obligation to pay statutory interest on any final judgment in this matter which exceeds the sum of \$417,100.~~
- o. It is further Ordered that a copy of this Order be certified by the Clerk of this Court to the Clerk of the County Commission of Raleigh County, to be recorded and indexed in the proper deed book of said County, in the same manner as deeds are required to be recorded and indexed, as provided by law.

Petitioner's Motion to Quash Civil Case Subpoena and to Impose Sanctions and  
Petitioner's Motion to Quash Second Civil Case Subpoena and to Impose Sanctions

- p. To the extent that the identity of Kent Kesecker as an expert witness retained by the Petitioner may not have been known to the Defendant MCNB when it issued the subpoenas *duces tecum* which are the subject of these motions, Mr. Kesecker has now clearly been identified as such by the Petitioner. Therefore, Rule 26 of the West Virginia Rules of Civil Procedure applies to any effort by the Defendant to discover Mr. Kesecker's opinions and the bases therefor.
- q. The Petitioner's Motion to Quash Civil Case Subpoena and to Impose Sanctions and Petitioner's Motion to Quash Second Civil Case Subpoena and to Impose Sanctions are GRANTED and said Subpoenas are quashed. The Petitioner withdrew its request for any further relief at this time.

r. Any further actions by either party to discover the opinions of expert witness

shall generally be governed by Rule 26, rather than by Rule 45, of the West Virginia Rules of Civil Procedure.

The objection of each party to any and all adverse rulings contained herein are noted and preserved.

The Clerk shall mail an attested copy of this Order to the following persons:

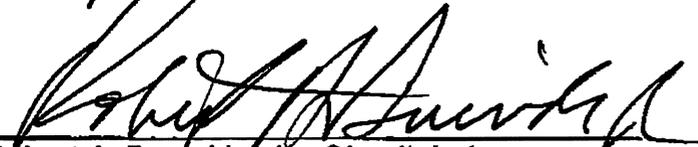
Leah R. Chappell, Esq.  
Adams, Fisher & Chappell, PLLC  
P.O. Box 326  
Ripley, WV 26164  
Counsel for Petitioner

David Allen Barnette, Esq.  
Vivian H. Basdekis, Esq.  
Jackson Kelly PLLC  
P.O. Box 553  
Charleston, WV 25322  
Counsel for Defendant MCNB Bank and Trust Co.

Ramonda C. Lyons, Esq.  
Lewis Glasser Casey & Rollins, PLLC  
P.O. Box 1746  
Charleston, WV 25326  
Counsel for Defendant Exxon Mobil Company

John D. Wooton, Esq.  
Wooton, Wooton & Davis, PLLC  
P.O. Box 2600  
Beckley, WV 25802-2600  
Counsel for H.C. Lewis Oil Company

Dated this 18 day of September, 2014.

  
Robert A. Burnside, Jr., Circuit Judge

The foregoing is a true copy of an order entered in this office on the 18 day of Sept., 2015.  
By ADV Deputy  
PAUL H. PEANAGAN, Circuit Clerk of Raleigh Co., WV

---

---

*(WV DOT/DOH vs. MCNB Bank and Trust Co., et. als.  
Raleigh County Civil Action No. 14-C-506B, Order Aug. 28, 2014)*

---

---

**PREPARED BY:**

  
\_\_\_\_\_  
Leah R. Chappell, Esq., WVSB 5530  
Adams, Fisher & Chappell, PLLC  
P.O. Box 326  
Ripley, WV 25271  
(304) 372-6191  
Counsel for Petitioner