

SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL	:	
DEFENSE FOUNDATION,	:	
Appellant	:	
	:	
v.	:	No. 10 MAP 2015
	:	
TOM WOLF, GOVERNOR;	:	
COMMONWEALTH OF	:	
PENNSYLVANIA	:	
	:	
Appellees	:	

BRIEF OF APPELLANT

The Pennsylvania Environmental Defense Foundation ("PEDF"), Appellant, submits this brief in support of its appeal as of right to the Supreme Court of Pennsylvania from the Opinion and Order entered by the Commonwealth Court on January 7, 2015 (Docket No. 228 M.D. 2012), attached as **Exhibit A**.

John E. Childe
Attorney for PEDF
I.D. No. 19221
1847 Center Street
Camp Hill, Pa. 17011
717-743-9811
childeje@aol.com

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INTRODUCTION

This case is about the public trust provisions of Article I Section 27 of the Pennsylvania Constitution ("Article I § 27"). The fundamental question raised is whether Governors Rendell and Corbett violated their trustee duties under this Article I public trust provision by requiring the leasing of our State Parks and Forests for the sale and extraction of our natural gas and oil to generate money for the General Fund, rather than for conserving and maintaining the public natural resources of our State Parks and Forests, and by doing so without any prior evaluation of the harm to these public trust assets.

I. STATEMENT OF JURISDICTION

Pursuant to 42 Pa.C.S. § 723(a), the Supreme Court has exclusive jurisdiction over this appeal of the final order issued by the Commonwealth Court under the Declaratory Judgments Act, 42 Pa.C.S. § 7532, as this matter was originally commenced in the Commonwealth Court.

II. ORDER IN QUESTION

The text of the Commonwealth Court order in question is as follows:

AND NOW, this 7th day of January, 2015, upon consideration of the cross-applications for summary relief of PEDF Pennsylvania Environmental Defense Foundation (PEDF) and Commonwealth of Pennsylvania and Governor Thomas W. Corbett, Jr., in his official capacity (Commonwealth Respondents), and for the reasons set forth in the accompanying opinion, it is hereby ORDERED:

1. With respect to PEDF's request for a declaratory judgment that Sections 1602-E and 1603-E of the Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, 72 P.S. §§ 1602-E, 1603-E, are unconstitutional, PEDF's application for summary relief is DENIED and Commonwealth Respondents' application for summary relief is GRANTED.
2. PEDF's constitutional challenges to past leases of State lands for oil and natural gas extraction are DISMISSED due to lack of subject matter jurisdiction because of the absence of indispensable parties.
3. With respect to PEDF's request for a declaratory judgment that the Oil and Gas Lease Fund is, a "trust fund" and that the General Assembly may only appropriate the monies therein to advance the purposes of Article I, Section 27 of the Pennsylvania Constitution, PEDF's application for summary relief is DENIED and Commonwealth Respondents' application for summary relief is GRANTED.
4. With respect to Commonwealth Respondents' request, in its application for summary relief, for a declaration that the Governor may override decisions of the Department of Conservation and Natural Resources under Section 302(a)(6) of the Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, 71 P.S. § 1340.302(a)(6), Commonwealth Respondents' application for summary relief is DENIED.
5. As to all other claims subject to the parties' cross-applications for summary relief, the applications are DENIED.

III. SCOPE AND STANDARD OF REVIEW

This appeal arises from the Commonwealth Court's denial of summary relief to PEDF, and its grant of summary relief to the Commonwealth. In reviewing the Commonwealth Court's decision to grant summary relief, this Court, like the

Commonwealth Court, must consider the record favorably to the non-moving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *The Hospital & Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 602 (Pa. 2013) ("*HHAP*"). A fact is considered material if its resolution could affect the outcome of the case under the governing law. *Id.* When reviewing questions of law, this Court's review is plenary and *de novo*. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 943 (Pa. 2013). The Court is not constrained by the Commonwealth Court's reasoning and may affirm on any grounds, as long as the record supports the judgment. *Id.*

In construing and applying Article I § 27, the touchstone is the actual language of the Constitution itself. The Constitution's language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption. Towards this end, the Court must avoid reading the provisions of the Constitution in any strained or technical manner and must favor a natural reading that avoids contradictions and difficulties in implementation, that completely conforms to the intent of the framers, and that reflects the views of the ratifying voter. *Id.*

IV. STATEMENT OF QUESTIONS INVOLVED

PEDF respectfully requests that this Honorable Court reverse the Commonwealth Court's decision, and based on its plenary authority rule in favor of PEDF on the following questions:

1. Did the Commonwealth Court fail to apply basic principles of constitutional and statutory construction to determine whether a particular action or a particular statutory provision violates Article I § 27?

Suggested Answer: Yes

2. Did the Commonwealth Court err in allowing the balancing of the inalienable rights of the people under the public trust provisions of Article I § 27 against the interest of the government (the Governor and the General Assembly) in promoting economic development when determining whether the leasing of our State Forest and Park land for oil and natural gas extraction violates Article I § 27?

Suggested answer: Yes

3. Does the designation of the Commonwealth as trustee under Article I § 27 impose trustee duties on all three branches of the government, including the Governor and Department of Conservation and Natural Resources ("DCNR") officials?

Suggested Answer: Yes

4. Did the Commonwealth Court err by taking the phrase “for the benefit of all the people” out of the context of Article I § 27, and finding this phrase to be a “general requirement” to be interpreted by the General Assembly without considering its meaning within the context and purpose of Article I § 27?

Suggested Answer: Yes.

5. Did the Governors' decisions to require more leases of State Forest and Park lands in 2009, 2010 and 2014, and to require funds from these leases in the Oil and Gas Lease Fund to be transferred to the General Fund, violate Article I § 27 and the Governors' duties thereunder?

Suggested answer: Yes.

6. Before taking any action or making any decision that might or will impact the public natural resources, does the Governor have the duty, as trustee under Article I § 27, to evaluate the impacts of those actions or decisions to the public natural resources, the impacts to the people who own and use those public natural resources, and the impacts to DCNR’s ability to meet its statutory and constitutional duties to conserve and maintain these public natural resources for the benefit of the people?

Suggested answer: Yes.

7. Did the Governors' actions requiring DCNR to enter into new leases of State Forest and Park lands for oil and gas extraction and taking the rents and

royalties from these leases violate the protections provided by the Conservation and Natural Resources Act to ensure compliance with Article I § 27?

Suggested answer: Yes

8. Did the Commonwealth Court err in failing to recognize that the money obtained from leasing our State Forests and State Parks for oil and gas extraction is a public trust asset that remains part of the corpus of the public trust established by Article I § 27, and that the Oil and Gas Lease Fund into which this money is deposited is a de facto trust fund that must be used for trust purposes?

Suggest answer: Yes

9. Did the Commonwealth Court err by failing to declare that Sections 1601-E through 1605-E of the Fiscal Code, as well as certain provisions of Act 13 of 2012 and the General Appropriations Acts enacted since 2009, violate Article I § 27 by authorizing the use of the Oil and Gas Lease Fund for purposes other than conserving and maintaining the people's public natural resources; and that the Governor violated his Article I § 27 duties by signing them into law before any evaluation of the impacts to the public trust was conducted?

Suggested answer: Yes

10. Did PEDF raise a particular and concrete dispute that supports PEDF's claims as justiciable and establishes PEDF's standing?

Suggested Answer: Yes

V. STATEMENT OF THE CASE

A. Summary of Procedural History

PEDF filed a Petition for Review in the nature of a Complaint for Declaratory Judgment in the Commonwealth Court's original jurisdiction on March 6, 2012 pursuant to the Declaratory Judgment Act, 42 Pa. C.S. §§ 7531 *et seq.* PEDF requested declarations of the rights of its members and the responsibilities of the Governor and the Commonwealth under Article I § 27 when requiring the leasing of State Forest and Park lands for oil and gas extraction to generate money for the General Fund and for other purposes that did not conserve and maintain the public natural resources of our State Forests and Parks.

PEDF filed an Amended Petition on April 30, 2012 removing the State Treasurer as a respondent in response to the Respondents' preliminary objections. The Respondents again filed preliminary objections to the Amended Petition, challenging its legal sufficiency, and asserting that PEDF's claims presented non-justiciable political questions.

After the preliminary objections were fully briefed, Judge Simpson denied them on January 22, 2013, finding that PEDF's Amended Petition contained averments that fall within the three-pronged test set forth in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973) ("*Payne I*"). Opinion attached as **Exhibit B**. Regarding the political question challenge, Judge Simpson concluded that PEDF's

Amended Petition did "not seek a determination that would intrude on the legislature's function of budget enactment", but rather "challenges as unconstitutional various enactments that it alleges diverted funds which were created to protect Pennsylvania's State Parks and Forests "in violation of Article I § 27, for which the Commonwealth Court developed "judicially manageable standards for analyzing" in *Payne I*. Judge Simpson also concluded that "consideration of the constitutionality of the challenged enactments does not implicate a review of legislative policy, but rather a determination of whether the enactments are, in fact, consistent with the Pennsylvania Constitution."

The Republican Caucuses of both the House and Senate of the Pennsylvania General Assembly filed a Petition to Intervene, which was denied as to PEDF's allegations under Article I § 27, but was granted as to PEDF's allegations under Article III, Sections 3 and 11 of the Pennsylvania Constitution.

After initial discovery, PEDF filed its Second Amended Petition on December 30, 2013 alleging specific violations of the Governor's fiduciary duties as trustee under Article I § 27, as well as violation of the rights of PEDF's members thereunder. PEDF removed allegations under Article III, Sections 3 and 11 of the Pennsylvania Constitution, and the limited intervention of the Republican Caucuses was rescinded.

As a result of Governor Corbett's 2014 Executive Budget proposing to lease additional State Park and Forest land to raise \$75 million for the General Fund, and to require DCNR to take another \$117 million from the Oil and Gas Lease Fund for operations, PEDF took several actions. First, PEDF filed an addendum to its Second Amended Petition adding the two new 2014 actions to the pleadings. The pleadings closed on April 21, 2014 after the Respondents filed an answer to the addendum, and PEDF filed an answer to the Respondents' new matter. PEDF also filed a motion for summary judgment and supporting brief on April 21, 2014.

Because the General Assembly was required to pass its general appropriation act for the upcoming fiscal year by June 30, 2014, and the Governor's proposed spending would require additional leasing of State Park and Forest land to generate money for the General Fund, PEDF filed an Application for Special Relief in the Nature of a Preliminary Injunction and a Request for Expedited Consideration on April 28, 2014. On May 9, 2014, PEDF filed an application for a hearing on its preliminary injunction request, which was granted. A hearing was held on May 28, June 2 and June 3, 2014, before Judge Brobson, who subsequently issued an Order on July 17, 2014 resolving PEDF's preliminary injunction request based on a stipulation of settlement reached by the parties.

On July 10, 2014, PEDF filed an addendum to its motion for summary judgment and its supporting brief to incorporate testimony and exhibits presented

during the three-day hearing. On August 29, 2014, Respondents filed their joint answer and brief in opposition to PEDF's motion for summary judgment, as well as a cross-motion for summary judgment. PEDF filed its response and brief in opposition to the Respondents' cross-motion for summary judgment on September 8, 2014. Several amicus curiae briefs were also filed.

The Commonwealth Court held oral argument on October 8, 2014, and issued an Order and Opinion authored by Judge Brobson on January 7, 2015 disposing of all matters in this case on the motion and cross-motion for summary judgment (**Exhibit A**).

B. Summary of Undisputed Facts

The Commonwealth Court summarizes many of the undisputed facts presented by PEDF, but fails to include important facts relating to the Governors' actions and prior knowledge associated with decisions to lease additional State Forest and Park lands for oil and gas extraction. The court also excludes all evidence presented by PEDF of the immediate and long term harm to State Forests and Parks caused by the leases, all evidence of the harm to DCNR's ability to conserve and maintain State Parks and Forests from the loss of the control of leasing and the loss of the money from leasing, and all evidence of the impacts of that harm on the people, including PEDF's members. This evidence is central to PEDF's requests for declaratory relief.

PEDF provides the following summary of the relevant undisputed facts relating to these issues, including the testimony of the witnesses and documents at the hearing before the Commonwealth Court, as well as undisputed exhibits and affidavits provided in its motion for summary judgment and support brief, as supplemented through addenda.

1. History of State Forest Oil and Gas Leasing

In 1947, the Pennsylvania Department of Forest and Waters began leasing State Forest land for oil and gas extraction. In 1955, a statute was enacted creating a special fund known as the Oil and Gas Lease Fund. Rents and royalties from State Forest leases are deposited into this fund exclusively for recreation, conservation and flood control projects, and the Department of Forest and Waters was given exclusive control to carry out projects to enhance State Forests and State Parks. 71 P.S. §§ 1331-1333; RR23, 530-561, 597-605, 1040.

In 1971, as a result of overwhelming support of the people, Article I § 27 was added to Pennsylvania's Constitution creating a public trust, which provides that Pennsylvania's public natural resources are the common property of the people, including generations yet to come, and that the Commonwealth, as trustee, shall conserve and maintain those resources for the benefit of all the people.

In 1995, the Conservation and Natural Resources Act ("CNRA") was enacted to establish DCNR as a "cabinet-level advocate for our State parks, forests,

rivers, trails, greenways and community recreation and heritage conservation programs to provide more focused management of the Commonwealth's recreation, natural and river environments." 71 P.S. § 1340.101(b)(1) .

The first provision of the CNRA requires that the public natural resources must be conserved and maintained for the use and benefit of all its citizens as guaranteed under Article I § 27. 71 P.S. § 1340.101(a)(1); RR15.

Under CNRA, in furtherance of its duty to conserve and maintain, DCNR's primary mission is "to maintain, improve and preserve State Parks, to manage State forest lands to assure their long-term health, sustainability and economic use, to provide information on Pennsylvania's ecological and geologic resources, and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental programs across Pennsylvania." 71 P.S. § 1340.101(b)(1).

Dr. James R. Grace, who directed DCNR's Bureau of Forestry from 1987 until 2010 as the State Forester and the Deputy Secretary for Parks and Forestry, and who has had a distinguished career in both academics and forest management (RR14), testified that the DCNR Bureau of Forestry developed its strategic plan in 1995, entitled *Penn's Woods—Sustaining Our Forests* (RR530-561), to implement the duty to conserve and maintain the public natural resources under Article I § 27. RR15-17.

This plan describes the Bureau's use an ecosystem management approach to conserve and maintain Pennsylvania's forests. Ecosystem management requires an understanding of the connectivity of all the resources, and that balancing the uses and values of the resources requires retaining the ecological integrity of the forest's basic biological and ecological functions. RR21-22, RR 530-561.

Under CNRA, DCNR is given the authority to enter into leases for oil and gas extraction on our State Forests and Parks when DCNR determines it is in the best interest of the Commonwealth. 71 P.S. §§ 1340.302(a)(6) & 1340.303(a)(9). CNRA also gives DCNR the exclusive control over the Oil and Gas Lease Fund. 71 P.S. § 1340.304(c).

Dr. Grace testified that natural gas is a non-renewable natural resource and that the DCNR Bureau of Forestry relies on the ecosystem management principles in its strategic plan to determine when leasing is in the best interest of the Commonwealth. RR 22; *See also* RR442 (testimony of Respondents' witness, Dan Devlin).

When DCNR leases State Forest land for oil and gas extraction, the leases allow extraction from all depths and horizons within the acreage of the tract leased. The lessee pays annual rental payments on the acreage leased unless oil or gas is produced and sold from certain acreage, at which time royalty payments are made in lieu of rental payments on that acreage. RR1113-1115.

With conventional oil and gas development, oil and gas is not present throughout the leased tract, but occurs in underground reservoirs that are discovered through exploration. When such reservoirs are found and developed, lessees typically release the remaining acreage under a lease back to DCNR rather than continue to pay rental payments on the entire leased acreage. However, if the lessee continues to make rental payments, the entire leased acreage remains available for future development. Since Marcellus Shale lies beneath entire leased tracts, lessees that continued rental payments on their entire leased tracts can now develop those entire tracts using unconventional shale gas techniques. RR35; 132, 830-831.

Prior to 2009, DCNR had approximately 250,000 acres of State Forest land under active oil and gas leases. DCNR received \$3-5 million on average annually from these leases and gas storage leases, which was deposited in the Oil and Gas Lease Fund. In addition, approximately 290,000 acres of our State Forests and 80% of our State Parks are subject to oil and gas extraction through private leases because the Commonwealth does not own the oil and gas rights on these lands. RR29, 836-837; 1014-1015.

DCNR has used the Oil and Gas Lease Fund to acquire land for many of our State Parks and State Forest, to build dams and to enhance recreational opportunities within them, to mitigate the harm to these public natural resources

from oil and gas extraction, and to conserve and maintain them for the people of Pennsylvania, including future generations. RR597-605.

2. Leasing and Use of the Oil and Gas Lease Fund by Governor Rendell

In 2008, DCNR faced increased pressure from the natural gas industry and the General Assembly to lease additional acreage of State Forest for oil and gas development as a result of the discovery of techniques to extract natural gas from shale formations, and the successful extraction of natural gas from Pennsylvania's Marcellus Shale. Bills were introduced in both the House and Senate to require leasing of all State Forest land. RR595.

As a result of this continuing pressure, DCNR offered 18 tracts of State Forest land totaling 74,023 acres for lease in 2008 even though it had no experience with this new shale gas development and limited understanding of its potential impacts. On September 3, 2008, DCNR received bids for this acreage of over \$168 million in upfront rental payments, commonly called "bonus bids". RR599.

John Quigley, who was serving as the DCNR Chief of Staff at the time, testified during the hearing before the Commonwealth Court that he advised Governor Rendell by written memorandum the day after the bid opening of the bid amounts, which would be deposited into the Oil and Gas Lease Fund when the leases were executed. He also advised the Governor of the mandate under the Oil

and Gas Lease Fund Act for DCNR to use these funds exclusively for projects on State Park and Forest land, and provided an extensive list of projects that needed to be funded with proceeds from the sale. RR209, 597-605.

Shortly after the bids were received in September 2008, around the end of the year, DCNR was informed by the Governor's Office that the money from the leasing (bonus payments, not royalty payments) was being placed in budgetary reserve and would not be available to DCNR. RR32-33.

John Norbeck, former Director of the DCNR Bureau of State Parks from April 2006 to October 2012, also testified at the hearing before the Commonwealth Court that the list of projects submitted to Governor Rendell on September 4, 2008 contained projects to address the tremendous infrastructure needs of the State Parks, including dam repairs and replacements, acid mine drainage treatment, acquisition of privately owned mineral rights under State Parks, and other land acquisitions. RR305-306.

Former Director Norbeck testified that the Commonwealth does not own the mineral rights under about 80% of the State Park land and that 61 of Pennsylvania's 120 State Parks are located in the Marcellus Shale region. RR311. He estimated the purchase of these mineral rights would cost hundreds of millions of dollars. RR308. He also estimated that the cost of treating acid mine drainage would also be hundreds of millions of dollars. *Id.*

DCNR executed the leases from the 2008 lease sale in January 2009 and deposited the bonus bid payments in the Oil and Gas Lease Fund. When the 2008 leases were awarded, DCNR had no experience with the Marcellus Shale unconventional gas development and what it would mean for the State Forest. DCNR learned quickly that it was completely different than conventional gas development and was not like anything it had previously experienced. RR34. With Marcellus Shale under the entire State Forest leased area in the northern tier of Pennsylvania, this entire area will be developed. RR35.

When DCNR started to realize the impacts from Marcellus Shale unconventional gas development, it also realized that not only would the 74,000 acres of the newly leased State Forest be developed, but development would also occur on the 250,000 acres of previously leased State Forest, and on the 290,000 acres of State Forest land with severed mineral rights under private ownership – over 660,000 acres of State Forest in total. RR36.

With this realization, DCNR made the decision that no further leasing of State Forest land should occur until the impacts to the land currently being developed could be monitored and understood because it was going to have to deal with a tremendous amount of gas activity on the State Forest over the next 50 years. *Id.*

Despite DCNR's protests, Governor Rendell proposed in his Executive Budget for Fiscal Year 2009-10 issued on February 4, 2009, the transfer of \$174 million in the Oil and Gas Lease Fund from the 2008 lease sale to the General Fund to support his proposed spending (RR755); and directed DCNR to prepare to lease additional State Forest acreage to raise more money for the General Fund. DCNR continued to object to the Governor's course of action. RR152-153.

3. Harm To DCNR's Ability To Conserve and Maintain Natural Resources

On March 27, 2009, then DCNR Secretary Michael DiBerardinis sent a memorandum to the Governor stating: "Wholesale leasing will damage our State Forest landscape. It would scar the economic, scenic, ecological, and recreational values of the forest - especially the most wild, and remote areas of our state in the Pennsylvania Wilds." RR646. Former Secretary DiBerardinis testified at the hearing before the Commonwealth Court that being told when and how much State Forest to lease destroys the mission of DCNR to manage the State Forest in a sustainable way. RR224-225.

Mr. DiBerardinis testified that he believed the loss of control over State Forest leasing jeopardized DCNR's historic mission to balance the broad environmental, social and economic interests in the State Forest, and at the same time to insure the uses and the health of the forest for all Pennsylvanians over time.

RR231-232. He also expressed concern that over drilling could ruin the economic investments in ecotourism and outdoor venues in the Pennsylvania Wilds. RR247.

In his March 27, 2009 memorandum, then Secretary DiBerardinis further wrote that “diverting the Oil and Gas Lease Fund sales and royalty proceeds toward general use and away from their legislated purpose sets a dangerous precedent. This reliable funding stream, intended to offset the impacts of resource extraction, has endured through 50 years and multiple administrations, providing stable investments in conservation and environmental protection. The Fund has supported the acquisition, infrastructure, investments, and maintenance of our State Parks and Forests that make them what we enjoy today.” RR646.

Secretary DiBerardinis concluded: "One hundred years ago, the land that would become the state's forests was a denuded landscape that was scarred by rampant resource extraction ... The wise stewardship of these lands since then has struck an appropriate balance between economic development and environmental protection. A rush to drill places the state forest and all its benefits at great risk. A course of balanced management will protect and enhance the legacy we inherited and allow us to deliver it safely to future generations of Pennsylvanians." *Id.*

Mr. DiBerardinis testified that when the Governor required DCNR to lease State Forest land for General Fund revenues, DCNR is deprived of its legislative mission to advocate for, protect and manage our State Parks and Forests. DCNR

loses its management prerogative when the leasing decision is taken out of its hands and it is told to generate this amount of revenue or put this many acres out for lease sale. RR249. He testified that his statement in the memo of his personal concern over the interest in additional leasing reflected his feeling that to take away DCNR's ability to manage the leasing of State Parks and Forest is to take away its meaning and reason to exist. RR250.

Dr. Grace testified that when Governor Rendell mandated additional leasing by DCNR in 2009, the Bureau of Forestry had no experience with shale gas development or what it would mean for the State Forest, but quickly learned it was completely different than conventional gas development and was not like anything it had previously experienced. R34.

Secretary DiBerardinis left his position shortly after sending his memorandum and John Quigley was appointed as DCNR Secretary. In a memorandum to Governor Rendell dated May 6, 2009, acting Secretary Quigley expressed concern regarding the mandate to lease additional State Forest for oil and gas extraction. RR648-649. He advised that field staff were already overextended in attempting to manage activity on the 660,000 acres of State Forest land currently available for exploration and that additional leasing would only add to the challenge. *Id.*

Former Secretary Quigley testified during the hearing before the Commonwealth Court that DCNR clearly communicated to the Governor that it did not want to lease any additional State Forest land for gas extraction after the 2008 lease sale, but was nevertheless ordered to do two additional lease sales. RR152-153. He testified that the Governor's order to conduct additional leasing had two extraordinarily detrimental effects on DCNR. First, it took away DCNR's management control of the State Forest. Second, being ordered to lease State Forest land to raise money for the General Fund took away the money that DCNR needed to mitigate the impacts of that leasing activity. *Id.* He also testified that the Governor's decisions to require two additional lease sales created a very slippery slope and a situation where the State Forest was being used as a cash cow. He believed that such decisions create an existential threat to the resource. RR153-154, 760-768).

Despite DCNR's concerns, the Governor negotiated and on October 9, 2009 approved the General Appropriations Act of 2009, which authorized the transfer of \$143 million from the Oil and Gas Lease Fund to the General Fund. On the same day, the Governor approved amendments to the Fiscal Code providing statutory authority to override the restrictions of the Oil and Gas Lease Fund Act to allow the transfer of another \$60 million needed to support the General Appropriations Act of 2009. 72 P.S. §§ 1602-E – 1604-E. The Fiscal Code amendments also

restricted DCNR's use of the Oil and Gas Lease Fund to up to \$50 million with priority given to use of the money by DCNR for operations, not conservation and recreation projects as mandated by the Oil and Gas Lease Fund Act. *Id.*

For the first time in the history of leasing State Forest land for oil and gas extraction, the funds received from leasing were removed from DCNR's control for use for the benefit of the State Park and Forest system. RR33. Mr. Quigley testified that he first learned of the Fiscal Code provisions on the morning of the day they were passed. RR155. He was shocked and angered that these provisions took away from DCNR the ability to spend money for conservation, recreation and flood control projects, the three exclusive statutory purposes of the Oil and Gas Lease Fund authorized to mitigate the damage from the gas extraction on State Forests. RR156.

Dr. Grace testified that the problem was not just that another 65,000 acres of State Forest land would be leased. DCNR's primary concern was not the drilling of a single well or a single well pad. It was the cumulative effect of the gas area of the State Forest. DCNR was concerned with how the balancing of the values of the State Forest would be met. RR60. Dr. Grace, like former Secretaries DiBerardinis and Quigley, observed that DCNR's loss of control over the decision when to lease State Forest land set a terrible precedent, without consideration of all the other

State Forest uses, values, and environmental factors, he stated that DCNR cannot maintain the balance necessary to sustain the State Forest. R61.

Dr. Grace testified that to lose the rents from the leases and royalties from gas sold from the State Forest means DCNR cannot effectively mitigate the impacts of the gas development and no longer has control to manage the State Forest effectively. *Id.* Dr. Grace stated that DCNR has a list of up to a billion dollars of State Park and Forest projects that are needed to fulfill its mandate under Article I § 27. RR62.

Since the Oil and Gas Lease Fund did not have sufficient money to pay for the \$203 million in transfers authorized by the General Appropriations Act and the Fiscal Code amendments on October 9, 2009, DCNR was directed by the Governor to offer six additional tracts of State Forest totaling approximately 32,000 acres for lease, which it did on November 9, 2009. RR153, 651-652. DCNR executed leases for these six additional tracts in January 2010 and received approximately \$128 million in upfront rental payments for deposit into the Oil and Gas Lease Fund. RR788. Upon completing these leases, DCNR again made the determination that no further leases should be entered into until the current gas extraction impacts could be evaluated. RR694.

Despite DCNR's determination, the Governor proposed on February 9, 2010 in his Executive Budget for Fiscal Year 2010-11 the transfer of another \$180

million from the Oil and Gas Lease Fund to the General Fund to support his proposed spending. RR756. Again, this transfer was more than currently available in the Oil and Gas Lease Fund even with the January 2010 leases, so the Governor directed DCNR to lease additional State Forest land, which it did on May 10, 2010. RR153, 789. DCNR executed 11 additional leases for approximately 33,000 acres of State Forest land, and received approximately \$120 million in upfront rental payment for deposit into the Oil and Gas Lease Fund. RR789.

The Governor then negotiated and on July 6, 2010 signed Section 1605-E to the Fiscal Code authorizing the transfer of an additional \$180 million from the Oil and Gas Lease Fund to the General Fund to support spending authorized by the General Appropriations Act of 2010, which he also approved. 72 P.S. § 1605-E.

On October 26, 2010, Governor Rendell issued Executive Order 2010-05 placing a moratorium on further leasing of State Forest or State Park land. RR721-723.

4. Leasing and Use of the Oil and Gas Lease Fund by Governor Corbett

Governor Corbett, in his Executive Budget for Fiscal Year 2011-12, recommended decreasing DCNR's annual appropriation from the General Fund for DCNR's administrative operating expenses (*i.e.*, salaries, travel, office space and supplies, vehicles, etc.), and proposed that DCNR use the Oil and Gas Lease Fund to pay for these annual operating expenses. RR791-805. As with Governor

Rendell's recommendations, the General Assembly followed Governor Corbett's recommendations and passed the General Appropriations Act of 2011, which Governor Corbett then signed into law, making DCNR for the first time reliant upon the Oil and Gas Lease Fund for its annual operations, contrary to the provisions of the Oil and Gas Lease Fund Act directing exclusive use of these funds for conservation and recreations projects. *Id.*

In addition to continuing to use the Oil and Gas Lease Fund to replace General Fund spending, Governor Corbett signed into law Act 13 of 2012, which authorizes the transfer of \$50 million annually from the Oil and Gas Lease Fund to a newly created Marcellus Legacy Fund. 58 Pa.C.S. § 2505(b). Act 13 then directs that these funds be transferred to other funds (the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund) and used largely to pay for projects to restore or protect private lands. While DCNR receives some funds back from the Environmental Stewardship Fund for projects on State Parks and Forests, DCNR loses more than 80% of these funds transferred from the Oil and Gas Lease Fund. 27 Pa.C.S. §§ 6104, 6105. In addition, although the Act 13 impact fee has been imposed on the more than 400 unconventional wells drilled and producing natural gas on State Forest land, DCNR does not receive any funds from the Unconventional Gas Well Fund. RR794-796, 803-805, 850.

On February 4, 2014, Governor Corbett recommended in his Executive Budget for 2014-15 the transfer to the General Fund of \$75 million from the Oil and Gas Lease Fund, which would be generated by additional leasing of State Forest and State Park land for oil and gas extraction. RR807. He also recommended the use over \$117 million from the Oil and Gas Lease Fund for DCNR's annual operating expenses, further reducing DCNR's General Fund appropriation to \$27 million. RR795.

Dan Devlin, the DCNR Deputy Secretary for Parks and Forests under Governor Corbett, testified that he had recommended against further leasing to raise money for the General Fund. RR277-278. He testified that the provisions of the Bureau of Forestry mission statement set forth in the 1995 *Penn's Wood—Sustaining Our Forests* are the requisites for analysis of whether to approve any additional leasing of State Forest land. RR442. According to Mr. Devlin, the premise of ecosystem management is sustaining the functions of all the different interrelated processes that exist in the forest over time, so if one of those functions or processes is threatened by a specific activity, it would not be a good management practice to allow more of that activity. RR443.

In April 2014, DCNR published its *Shale-Gas Monitoring Report* (RR842-1107) describing the program it had initiated to monitor impacts of shale gas development on our State Forests, along with its preliminary findings from

monitoring conducted through 2012. RR874. With only an estimated 20% of the expected shale gas development completed under the existing leases, DCNR identified many immediate and long term impacts from the gas extraction and conveyance processes. RR850.

Despite the fact that DCNR was just beginning to evaluate the impacts to the State Forest currently subject to oil and gas extraction and recommended against further leasing, Governor Corbett issued Executive Order 2014-03 on May 23, 2014 rescinding the moratorium on leasing of State Forest and State Park land issued by Governor Rendell, and authorizing further leasing that would allegedly not result in additional surface disturbance on State Forest or State Park lands. RR1251-1253.

Dr. Grace, who currently serves as Chairman of the DCNR Natural Gas Advisory Committee, testified that these new leases will have impacts. RR64. John Norbeck testified that oil and gas drilling next to some of Pennsylvania's State Parks have caused impact to the parks. During his tenure as Director, Mr. Norbeck received numerous letters and complaints from State Park users about truck traffic, noise, and air pollution associated with oil and gas extraction. RR309, 769-771.

After issuing his Executive Order to authorize leasing of State Forest and Park land, Governor Corbett proceeded to negotiate the General Appropriations Act of 2014 and further amendments to the Fiscal Code, which he signed on July

10, 2014. RR1109-1135. The Fiscal Code amendments authorized the transfer of \$95 million from additional leases (RR1135), and the General Appropriations Act authorized over \$112 million from the Oil and Gas Lease Fund for DCNR's annual operating expenses (RR1119,1124-1125), while reducing DCNR's General Fund appropriation to just \$15 million (RR1120-1123).

5. Direct, Immediate, and Cumulative Long Term Harm To Pennsylvania's Forests Documented by DCNR

The DCNR *Shale-Gas Monitoring Report* identifies direct, immediate and cumulative long-term harm to the State Forest in 2012. These impacts and/or identified data gaps include: the unprecedented scale of industrial development (RR858); the clearing of approximately 1,500 of forests to construct well pads, roads, pipelines, and other infrastructure (RR875); the increase in invasive species (RR935); increased susceptibility of the forest to pest attack (RR940); potential impacts to exceptional and high quality streams (RR943); violations of environmental laws and regulations by gas companies (RR982); erosion and sediment control issues (RR968); stormwater control (RR971); unknown potential for air impacts (RR975); unknown wildlife impacts (RR985); impacts to hiking and snowmobile trails (RR996-1002); decreases in recreational visitor experiences(RR1012); scenic drive impacts from heavy traffic, noise and dust(RR1002); noise from natural gas compression stations (RR1009); impacts on timber management (RR1021); fragmentation from pipeline and road construction

and current and future gas well drilling (RR1047); and loss of the wild character of the State Forest (RR1050). PEDF provides a more detailed summary of these impacts and data gaps in its brief in opposition to the Respondents' cross-motion for summary judgment filed on September 8, 2014.

Deputy Secretary Devlin testified that what DCNR was most concerned about with Marcellus Shale gas development under its leases was forest fragmentation. RR446-447. He testified that many of the DCNR monitoring programs discussed in the *Shale-Gas Monitoring Report* have just begun to be put into place and the impacts to the State Forest over the lifetime of the existing leases is not known. RR457.

Mr. Devlin testified that the *Shale-Gas Monitoring Report* does not evaluate the economic impacts to the Pennsylvania Wilds as a result of the gas extraction in the area. *Id.* The report states: “In addition to environmental concerns, shale gas development could alter the character of the north central Pennsylvania, an area known as the Pennsylvania Wilds, that abounds with scenic beauty and outdoor recreational opportunities. Understanding impacts to State Forest visitors is critical to sustaining tourism and the ability to provide healthful outdoor recreation opportunities in Pennsylvania to Pennsylvanians.” RR456-457.

When asked about the value to our public natural resources of additional leasing of State Forest land for gas extraction, Mr. Devlin answered that additional

leasing would provide no value to the natural resources and no benefit from an ecological standpoint. RR458.

6. Harm To Pennsylvania's Outdoor Recreational Tourist Economy

The Conservation and Natural Resources Act finds that Pennsylvania's State Parks and Forests are critical to the continued success of our tourism and recreation industry, the second largest industry in the State. 71 P.S. § 1340.101(a)(4). DCNR supports this sustainable economic development through its Conservation Landscape Initiatives.

Cindy Adams Dunn, the former DCNR Deputy Secretary for Conservation and Technical Services (and now acting DCNR Secretary), testified that the Pennsylvania Wilds is one of DCNR's Conservation Landscape Initiatives, and encompasses a 12-county area in north central Pennsylvania that includes 27 State Parks and 8 State Forest Districts. She stated that the Pennsylvania Wilds is focused on revitalizing local economies by developing key assets, including the Pine Creek Rails Trails. RR341. A 2010 brochure on the Pennsylvania Wilds enumerates the numerous investments DCNR has made in this initiative, highlights the nature resources of the area and markets the Pennsylvania Wilds as an ecotourism outdoor recreation destination. RR342, 814-833.

Ms. Dunn testified that the Pennsylvania Wilds is being marketed as a wilderness experience. When people drive through the area and encounter

industrial natural gas drilling activities, truck traffic and forest areas fragmented by this activity, their experience is impacted. RR343. The geographic relationship between the Pennsylvania Wilds and the State Forest subject to gas extraction in the Marcellus Region is almost identical. *Id.* About 40 % of the State Forest in the Pennsylvania Wilds has been leased for natural gas development now. RR343.

Ms. Dunn testified that the Oil and Gas Lease Fund is needed to provide grants and funding for projects to further support the Conservation Landscape Initiatives. Many projects have not had funding to date. RR344.

7. Harm to PEDF's Members

As set forth in the 14 affidavits of PEDF's members, both individuals and organizations (RR471-528), PEDF has a substantial, direct and immediate interest in the outcome of this litigation. PEDF's members enjoy outdoor activities including fishing, hiking, bird watching, biking, canoeing, kayaking, camping, picnicking, and hunting, all of which allow them to experience the solitude and wild character of the hundreds of thousands of acres of State Park and State Forest land that are part of the Pennsylvania Wilds. *Id.* PEDF's members have experienced first-hand the harm to these public natural resources that has and is continuing to occur from the industrialized activity of Marcellus Shale natural gas extraction now occurring on the State Forest. *Id.*

The conversion of thousands of acres of remote wild areas of the State Forest to private industrial sites (well pads, roads, pipelines, compression stations, impoundments, etc.), the heavy truck traffic, tree cutting, land clearing, construction, noise, dust, diesel engine exhaust and other pollution that accompanies any industrial activity of this magnitude, has fundamentally altered the wild character of areas of the State Forests under development. *Id.* The areas of the State Forest being developed for natural gas will be unavailable to PEDF's members throughout the shale gas development process, which could be more than 40 to 60 years. *Id.*

PEDF's members have experienced the direct loss of scenic vistas, hiking trails, dark skies and favorite hunting places and, in some case, been told by gas companies that they can no longer access parts of the State Forest. They have also experienced impacts from the natural gas industrial development on the State Forest to species of birds, mammals, reptiles, and amphibians, particularly those that rely on forest interior habitats. *Id.*

Eleven of 14 Affidavits are from member groups from the northern tier of Pennsylvania with State Forests subject to unconventional shale gas development. *See* Affidavits of Pennsylvania Pine Creek Preservation Association (RR487-491); Keystone Trails Association (RR493-494); Lycoming Creek Watershed Association (RR496-499); Muncy Creek Watershed Association (RR501-502);

Tiadaghton Audubon Society (RR504-506); Lycoming Audubon Society (RR508-511); Responsible Drilling Alliance (RR513-515); Slate Run Sportsman (RR517-518); Pine Creek Headwaters Protective Group (RR520-521); Pennsylvania Forest Coalition (RR523-524); and the Loyalsock Creek Watershed Association (RR526-528).

In addition to the harm experienced from direct impacts to the State Forest from natural gas drilling, PEDF's members have also experienced harm to the substantial regional efforts that have been undertaken to establish a sustainable ecotourism economy in north central Pennsylvania. Paul Hoffmaster, President of the Pine Creek Preservation Association, describes in his affidavit (RR487-491) the depth of the collaborative relationship of DCNR with his organization and others in the development of the recreational and tourist economy of the Pine Creek Valley. These relationships have resulted in the "Pine Creek Valley Management Plan", the "Pine Creek Rail Trail Plan", the "PA Wilds Economic Development Program" and the "Pine Creek Watershed River Conservation Plan". These plans and programs all integrate the uses of the natural resources of the State Forests and Parks in the area with the recreational and economic development of the Pine Creek Valley, the four-county region of Pine Creek, and the twelve-county area of the PA Wilds. These efforts are all dependent on DCNR's continued

protection of the public natural resources of the State Parks and Forests and continued funding the local community ecotourism initiatives.

Cindy Bower, PEDF's Vice President for Northcentral Pennsylvania, testified at the hearing before the Commonwealth Court about the harm to the Tiadaghton State Forest that she and her family have experienced. She testified that DCNR has leased all of the Tiadaghton State Forest in the vicinity of Waterville for Marcellus Shale gas development, and the impact has been unbelievably destructive. RR361. She testified, using photographs she took depicting areas of the Tiadaghton State Forest before and after the ongoing Marcellus shale gas development, of impacts to environmentally sensitive areas along the Mid State Trail. RR362-363.

Ms. Bower further testified that the Tiadaghton State Forest roads prior to Marcellus shale gas development were narrow (about 14 feet wide) and had tree canopies over the road, but have been completely changed to wide open industrial roads ranging from 79 to 180 feet in width. RR363-364. She testified that Ramsey Road in the Tiadaghton State Forest formerly provided access to two scenic vistas. Now the road is closed to the public and an impoundment has been constructed along the road preventing access to the vistas. Those vistas were popular spots for her family, several of whom cannot walk the distance to enjoy them now that Ramsey Road is closed. RR370-371.

Ms. Bower has also experienced Marcellus shale gas development approximately a mile from her house. She testified that the drilling rattled her windows and that the impact from the flare-off from the Marcellus shale gas wells was horrific. She testified that the constant noise is like the sound of a jet engine on the tarmac of an airport and it never gets dark during a flare-off. RR377-378.

VI. SUMMARY OF ARGUMENT

When the citizens of this Commonwealth amended their Constitution to include Article I § 27 in 1971, they declared themselves and future generations to be the owners of the public natural resources of this Commonwealth. They also established a trust to conserve and maintain these important assets for their benefit, and imposed trustee duties on all Commonwealth government, including the Governor and appointed agency officials, the members of the General Assembly, and the judiciary.

Governor Rendell in 2009 and 2010, and Governor Corbett in 2014, directed DCNR to lease our State Forests and Parks for large-scale industrial shale gas development for the sole purpose of generating revenue for the General Fund. Both the State Forest land subject to these leases and the natural gas subsequently extracted and sold from these leased lands are public natural resources owned by the people and protected by the Article I § 27 as trust assets. Both Governors also directed use of the Oil and Gas Lease Fund to non-trust purposes, either by direct

transfers to the General Fund or the Marcellus Legacy Fund, or by replacing General Fund money needed to operate DCNR, rather than allow DCNR to continue the historic use of this money for projects to conserve and maintain the public natural resource of our State Parks and Forests.

Governors Rendell and Corbett violated their trustee duties under Article I § 27 by directing additional leasing and the transfer of money without any evaluation of the harm to the public natural resources or the measures needed to remedy that harm. The large scale industrial shale gas development occurring on our State Forests as a result of these additional leases, as well as prior DCNR leases and privately-held leases on State Forest and Park land with severed mineral rights, have caused and will continue to cause immediate and long term harm to the people's public natural resources for decades to come.

DCNR decided that no further leasing should occur after its 2008 lease sale until it could evaluate the impacts of the new large scale unconventional shale gas development that would occur on the 660,000 acres of State Forests currently subject to such development. DCNR had no prior experience with or knowledge of the impacts associated with this type of development.

The Governors violated their duty as trustees by disregarding the constitutional protections established in 1995 under the Conservation and Natural Resources Act by establishing a new agency, DCNR, to serve as trustee of our

State Forests and Parks, with the duty to “conserve and maintain” them for the benefit of the people, including future generations. That same year, DCNR developed a long term strategic plan to carry out this constitutional responsibility for our State Forests entitled *Penn’s Woods, Sustaining our Forests*.

The Governors’ decision to direct additional leasing and to take the money from this leasing away from DCNR violated the constitutional protections established through CNRA to ensure that any future leasing of State Forests and Parks for oil and gas extraction was to be done consistent with the rights of the people and limits on the Commonwealth government mandated by Article I § 27.

The Commonwealth Court dismissed all of PEDF’s requests for declarations regarding the Governor's trustee duties under Article I § 27 and whether their actions violated those duties. The Commonwealth Court also dismissed all the uncontroverted evidence of harm that PEDF established – harm to the State Forest and Parks, harm to DCNR’s ability to conserve and maintain those lands, and harm to PEDF’s members’ interests as property owners and beneficiaries of the public trust.

Instead, the Commonwealth Court has dismantled the public trust provisions of Article I § 27 through its findings. First, the court refuses to impose any trustee duties on the Governor and declares the DCNR is not the trustee of our State Parks and Forests. Second, the court finds that the General Assembly has complete

discretion to spend the money in the Oil and Gas Lease Fund for any public purpose without any consideration of the Article I § 27 mandate to conserve and maintain public natural resources. Third, the court sanctions the balancing of the people's inalienable right to protection of their public natural resources with economic benefits, thus ensuring the degradation of the public natural resources. And finally, the court refuses to recognize the Oil and Gas Lease Fund is a de facto trust fund even though the money in the fund is from the sale of public trust assets.

PEDF asks this Court to reverse the Commonwealth Court decision and grant the declaratory relief it requests as a matter of law.

VII. ARGUMENT

A. Commonwealth Court Dismantles Meaning of Article I § 27

The Commonwealth Court makes several erroneous conclusions in its analysis and application of Article I § 27 to PEDF's requests for declaratory relief. These errors, when viewed together, have the result of rendering Article I § 27 virtually meaningless, at least in the context of protection our State Forests and Parks. These errors are presented below as a preface to PEDF's subsequent discussion of the proper analysis and application that it requests of this Court.

1. Failure To Apply Principles of Construction of Article I § 27

The Commonwealth Court quotes key parts of this Court's analysis of Article I § 27 in *Robinson Twp.*, observing that none of the concurring or

dissenting justices disputed the plurality's construction of Article I § 27, including the rights and duties imposed on the Commonwealth. 108 A.3d 156-158, 167- 168. Among the quotes is this Court's statement that "[c]ourts are equipped and obliged to weigh parties' competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by other branches of government. The benchmark for decision is the express purpose of [Article I § 27] to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality." *Id.* at 156-157 (quoting *Robinson Twp.*, 83 A.3d at 953). In this case, PEDF asked the Commonwealth Court to apply Article I § 27 as a bulwark against actual and likely degradation of our State Forests and Parks from oil and gas extraction required by the Governors Rendell and Corbett to generate money for general government spending.

Rather than apply the this Court's construction of the plain language of Article I § 27, however, the Commonwealth Court finds that "The legal reasoning and conclusions contained...in the plurality opinion are not binding on this court. As a result, it is "persuasive only to the extent it is consistent with binding precedent from [the Commonwealth Court] and the Supreme Court on the same subject." *Id.* at 158, n. 37. The court then discusses its three-part test in *Payne I* and concludes that "[i]n the absence of a majority opinion from the Supreme Court

or a decision from [the Commonwealth Court] overruling *Payne I*, that opinion is still binding on [the Commonwealth Court].” *Id.* at 159.

Despite this conclusion, the Commonwealth Court fails to analyze PEDF's requests using the three-part test in *Payne I*. If it had done so, it would have concluded that the Governors' actions violated Article I § 27. Neither Governor Rendell or Corbett complied with the statutory mandates of the Conservation and Natural Resources Act, which direct DCNR to determine when leasing State Forest and Park land for oil and gas extraction is in the best interest of the Commonwealth, or the mandates of the Oil and Gas Lease Fund Act, which directs DCNR to use the Oil and Gas Lease Fund to carry out projects that benefit State Park and Forest land. Neither Governor Rendell nor Corbett even considered the environmental incursions that would result from their actions, let alone developed a record to demonstrate that such incursions were minimized. Finally, neither Governor Rendell nor Corbett conducted any analysis of the harms and benefits associated with their actions to determine if a proper balance had been struck.

In reality, the test in *Payne I* is not the proper analysis for Article I § 27, as this Court observed in *Robinson Twp.* and the Commonwealth Court acknowledges. The Commonwealth Court erred by failing to analyze the constitutionality of the Governors' actions based on Article I § 27 principles and fiduciary standards enunciated in *Robinson Township*. PEDF asks this Court to

declare those principles and standards to be the proper basis for Article I § 27 analysis and to apply them to grant PEDF its requested declaratory relief.

2. Err in Finding that DCNR, and by Implication the Governor, Is not a Trustee

This Court, in *Robinson Twp.* states that as trustee under Article I § 27, "the Commonwealth" is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. 83 A.3d at 957. The Commonwealth Court points to this statement to reach the conclusion that DCNR is not the trustee of our State Forests and Parks. 108 A.3d at 160. The Commonwealth Court recognizes DCNR is a cabinet-level agency vested with the authority to protect our State Park and Forest lands consistent with Article I § 27. *Id.* However, since it does not exercise this authority to the exclusion of the General Assembly, the Governor, or even the courts, the Commonwealth Court somehow concludes DCNR cannot be the trustee under Article I § 27. Since no branch of Commonwealth government exercises its authority to the exclusion of the other branches, the Commonwealth Court implies through its analysis that no one is actually the trustee.

The Commonwealth is its three branches of government and every branch, along with all its parts, is obligated to carry out the mandates of our Constitution. To state that DCNR is the trustee of our State Parks and Forests under Article I § 27 does not mean that no other Commonwealth official has trustee duties.

Government official, including the Governor, Commonwealth agency officials, members of the General Assembly and Commonwealth judges, all are trustees and have fiduciary duties to conserve and maintain public natural resources when carrying out their various Commonwealth government functions.

This Court recognized DCNR's trustee duties in *Belden and Blake Corp. v. DCNR*, 969 A.2d 528, 532 (Pa. 2009), stating that “DCNR has a duty to maintain and preserve state parks pursuant to § 303 of the CNRA, and *fiduciary obligations to conserve and maintain them as public natural resources pursuant to Article I, § 27 of Pennsylvania’s Constitution*” (emphasis added). The fact that both Commonwealth agencies and the Governor are trustees was clearly stated in the legislative history of Article I § 27 (“As trustee of these resources, *the Commonwealth through all agencies and branches of government, is required to conserve and maintain them for the benefit of all the people* (emphasis added).) RR 775.

The Commonwealth Court clearly erred in declaring that DCNR is not the trustee of our State Parks and Forests, including the natural gas and oil that are a part of those public natural resources. PEDF requests that this Court declare that DCNR and the Governor are trustees with fiduciary obligations under Article I § 27 to conserve and maintain all public natural resources of our State Parks and Forests.

3. Err in Allowing the Legislature to Determine the Meaning of “For the Benefit of All the People”

PEDF challenges the various uses of money from leasing State Forest and Park land deposited into of the Oil and Gas Lease Fund, as proposed and then authorized by Governors Rendell and Corbett. In considering the use of the Oil and Gas Lease Fund, the Commonwealth Court concludes that the only constraint on the use of this money under Article I § 27 "is the general requirement that the monies be used 'for the benefit of the people'", and then concludes that deciding "the public benefit to which those monies are put lies within the discretion of the General Assembly." 108 A.3d at 168.

This construction of Article I § 27 violates its plain meaning. Article I § 27 states that “[t]he Commonwealth, as trustee, shall conserve and maintain the [public natural] resources for the benefit of all the people.” To construe this phrase to mean that the Commonwealth can sell the people's public natural resources and use the money for any public benefit the General Assembly deems appropriate turns the mandate to conserve and maintain these resources on its head.

The Commonwealth has a duty to conserve and maintain the people's public natural resources for their benefit, as well as for the benefit of future generations. In this case, the Commonwealth Court separates the action that generates the money in question (the leasing of State Forest and Park land for oil and gas extraction) from the use of the money itself. The Commonwealth Court then

separates the duty to conserve and maintain public natural resources from the duty to benefit the people. Both separations are inappropriate and lead to erroneous conclusions. Separating the meaning of “benefit” from the duty to “conserve and maintain” takes the heart out of Article I § 27. This interpretation does not give any meaning to the public trust and completely subjects it to legislative interpretation.

The Commonwealth Court erred by giving the General Assembly discretion to use the Oil and Gas Lease Fund for any public benefit separate and apart from conserving and maintaining the people's public natural resources. PEDF asks this Court to declare that the General Assembly does not have the discretion to use these funds for any public benefit.

4. Error in Balancing Harm to “Inviolate Rights” with Economic Development

The Commonwealth Court recognizes that “there is neither a mandate nor an expectation created by [Article I § 27] that state-owned lands or natural resources (e.g. timber, coal, oil, and natural gas) would be leased or sold for reasonable economic development.” 108 A.3d at 170. The court goes on, however, to observe that “development promoting the economic well-being of the citizenry obviously is a legitimate state interest” and that Article I § 27 was not intended to “derail development leading to an increase in the general welfare, convenience, and prosperity of the people.” *Id.* (quoting *Robinson Twp.*, 83 A.3d at 954.) The Commonwealth Court then concludes that “[i]f anything, when environmental

concerns of development are juxtaposed with economic benefits of development, [Article I § 27] is a thumb on the scale, giving greater weight to the environmental concerns in the decision-making process." *Id.*

In *Robinson Twp.*, this Court had the difficult task of balancing the interests of private landowners who want to develop their natural gas with neighbors (or surface owners in the case of severed rights) who may be impacted by such development, and determining the appropriate role of municipal zoning versus statewide regulation in that balancing. Those issues are not present in this case and the Commonwealth Court errs by somehow attempting to justify the harm to State Forests and Parks from oil and gas leasing ordered by Governors Rendell and Corbett based on the economic benefits derived to support general government spending.

This case involves public, not private, lands that are themselves public natural resources to be conserved and maintained under Article I § 27 for the benefit of the people. The Commonwealth Court quotes this Court's assessment in *Robinson Twp.* that "[t]he plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources." *Id.* at 168 (citing 83 A.3d at 957). This Court also observed that "[a]s trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public

natural resources, whether such degradation, diminution or depletion would occur through direct state action or indirectly because of the state's failure to restrain the actions of private parties." *Id.* This Court also noted that Article I § 27 protects both "against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term". *Id.* at 959.

The large scale industrial shale gas development occurring on our State Forests is causing and will continue to cause degradation of our State Forests for decades to come. The Commonwealth Court failed to acknowledge this harm in any way, and instead found the state has a legitimate interest in economic welfare of its citizens that trumps the need for the Governor or the General Assembly to evaluate such harm under Article I § 27 when making leasing decisions to generate money for general government spending.

In establishing this new balancing test the Commonwealth Court did not examine the explicit language of Article I § 27, which states that the public natural resources are the "common property" of the people. These resources are the corpus of the public trust and must be conserved and maintained for the benefit of the people. Article I § 27 does not allow degradation of public natural resources if the Governor needs money to balance the budget. To suggest such an intent is to give a

meaning to the words that just doesn't exist. If constitutional language is clear and explicit, courts must not "delimit the meaning of the words used by reference to a supposed intent." *Id.* at 945 (quoting *Commonwealth ex rel. MacCallum v. Acker*, 162 A. 159, 160 (Pa. 1932)).

The people's property rights are also protected under Article I Section 1 of the Pennsylvania Constitution, which preserves the people's inherent and inalienable rights to possess and protect their property. The ability of the Commonwealth government to infringe on the people's declared rights in Article I is explicitly limited by Article I § 25, which states that “[t]o guard against the transgressions of high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”

The Commonwealth Court erred by failing to consider the fundamental protections afforded the people in these Article I provisions. The court evaded the plain meaning of Article I § 27 by allowing the Governor and the General Assembly to make general government spending decisions predicated on leasing State Forest and Park lands for oil and gas extraction without any assessment of the impact on the corpus of the trust. A trustee may use the assets of the trust only for the purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee

claims to be acting solely to advance other discrete interests of the beneficiaries. *Id.* at 978 (citing *Metzger v. Lehigh Valley Trust & Safe Deposit Co.*, 69 A. 1037, 1038 (Pa. 1908)).

PEDF asks this Court to declare invalid the Commonwealth Court's balancing test that authorizes the leasing of State Forest and Park land and the sale the natural gas and oil (*i.e.*, the conversion public trust assets) to support general government spending proposed by the Governor and the General Assembly without any consideration of the impact to the trust when the money will promote the economic well-being of the citizenry.

5. Err in Balancing DCNR's Statutory Duty with the Governor's Right to Require Leasing for Economic Benefit

Even though the Commonwealth Court does not recognize DCNR as the trustee under Article I § 27, the Court recognizes that the DCNR Secretary has been delegated the exclusive authority to make leasing decisions under the Conservation and Natural Resources Act. 71 P.S. § 1340.302(a)(6). The Court also acknowledges that the DCNR Secretary serves at the pleasure of the Governor. 108 A.3d at 171. In making the decision to lease, the Commonwealth Court states that the DCNR Secretary has a duty as an appointed officer of the Commonwealth to serve the people of the Commonwealth by protecting and preserving their natural resources. *Id.* The Commonwealth Court imposes no similar duty on the Governor or the General Assembly, stating that these government officials are not "precluded

from attempting to influence DCNR's leasing decisions." *Id.* The Court acknowledges that the Governor has the constitutional duty to obey the laws of the Commonwealth, *id.*, but allows the Governor to challenge DCNR's decision not to lease in direct conflict with that duty.

The Commonwealth Court charges DCNR with carrying out its duties "even when faced with overwhelming political pressure, perhaps from the Governor, to act against [her] better judgment." *Id.* at 172. By sanctioning such political pressure, the Governor can continue to develop Executive Budgets and then approve General Appropriation Acts and Fiscal Code amendments that force DCNR to lease additional State Forest and Park land to generate money to pay for proposed and authorized general government spending. DCNR cannot challenge those actions. The only recourse DCNR officials would have under those circumstances is to resign, and the Governor will then simply appoint someone else who will do his or her bidding. In the meantime, the people's public natural resources continue to be degraded and the money needed to remedy that degradation will be gone.

To make DCNR the sole agency responsible for the decision to lease, and to give the Governor and the General Assembly to right to pressure DCNR to lease without any duty imposed on the Governor to meet his duties as trustee under the public trust is a violation of the clear meaning of the public trust under Article I

§ 27. PEDF asks this Court to declare that the Governor and General Assembly are trustees with the duty to conserve and maintain our State Forests and Park. While they may question DCNR's rationale for its decision to lease or not to lease and ask for further analysis, they cannot apply political pressure to alter DCNR's decision without an evaluation of the impacts of their position on the public natural resources.

B. Governors' Decisions to Lease State Lands for Natural Gas Extraction to Generate Revenue Violate Article I § 27

1. Decisions to Require Leasing Violate the Public Trust

In *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976) ("*Payne II*"), this Court states that Article I § 27 establishes trustee duties without the need for implementing legislation, stating:

There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including generations as yet unborn) and that the Commonwealth is made trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes. The Amendment does so by its own Ipse dixit.¹

The public trust portion of Article I § 27 establishes that the public natural resources are the common property of the people and that the Commonwealth has

¹ The Commonwealth Court acknowledges that its own binding precedent has found Article I § 27 to be self-executing and without need for implementing legislation. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892 (Pa. Cmwlth. 1973).

the fiduciary duty to protect the trust resources. The Commonwealth is all three branches of government. The Governor, as the chief executive officer of the Commonwealth, is a trustee under Article I § 27.

In *Commonwealth v. National Gettysburg Battlefield Tower, Inc.* 311 A.2d 588, 593 (Pa. 1973), this Court stated that “[u]nder a constitution providing for a balance of powers, such as Pennsylvania’s Constitution, when power is simply given to the Commonwealth, it is power to be shared by the government’s three co-equal branches.”² This principle was clearly stated in the legislative history of Article I § 27: "As trustee of these resources, the Commonwealth, *through all agencies and branches of government*, is required to conserve and maintain them for the benefit of all the people." RR775.

This Court recognized in *Robinson Twp.* that the plain meaning of the terms conserve and maintain in Article I § 27 implicates the duty of the government "to prevent and remedy the degradation, diminution, or depletion of our public natural resources." 83 A.3d at 957. The extraction of natural gas by its nature requires industrial development of our State Forests. It requires well pads, compression

² This Court also states in *National Gettysburg Battlefield Tower* that the Governor cannot decide, alone, how or when to exercise the power of trustee, but must have legislative authority to take an action against an individual to protect against undefined natural, scenic, historic and esthetic values. *Id.* These concerns are not implicated in this case, however, because it is the Governor's duty to protect these values on public lands that is at issue, not the Governor's authority to take action against a private property owner to protect these values. *Id.*

stations, pipelines, new and enlarged access roads, construction equipment and heavy vehicle traffic. RR 725-755. That development directly impacts the public natural resources.

Governors Rendell and Corbett made multiple decisions that violate Article I § 27 because the decisions mandated additional leasing of State Forests and Parks for oil and gas extraction when they knew DCNR recommended against such leasing without further evaluation to understand the impacts, and because they conducted no evaluation of the impact his decision on the public trust. Decisions that mandated leasing include: (1) Issuance of Executive Budgets for FY 2009-10, FY 2010-11 and FY 2014-15 that relied upon the transfer of future deposits into the Oil and Gas Lease Fund from additional leasing; (2) Approval and signature of General Appropriation Acts for 2009, 2010 and 2014 that relied upon the transfer of future deposits into the Oil and Gas Lease Fund from additional leasing; (3) Approval and signature of Fiscal Code amendments (Sections 1602-E through 1605-E) in 2009, 2010 and 2014 that authorized transfers of future deposits into the Oil and Gas Lease Fund from additional leasing.

These decisions have caused and will continue to cause degradation of the public natural resources of our State Forests and Parks. This degradation will continue for decades to come, thus affecting both current and future generations. Yet the Governors made these decisions without any evaluation of this degradation

and the measures necessary to remedy it. These decisions also took away DCNR's basic management responsibility for conserving and maintaining our State Forests and State Parks under the Conservation and Natural Resources Act by removing its ability to determine when to lease, how much to lease, and how to use the funds from those leases.

The Commonwealth Court failed to review the Governors' actions as requested by PEDF and declare them in violation of Article I § 27. For the reasons discussed more fully below, PEDF asks this Court to do so.

2. Failure to Perform Evaluation of Harm Prior to Leasing

Before making a decision or taking an action that might or will negatively impact the public natural resources of our State Forests or State Parks, the Governor, as the chief of the executive branch of the Commonwealth government, as well as the members of the General Assembly, have the fiduciary duty under Article I § 27 to understand what those impacts are or might be, both to the public natural resources and to the peoples' uses and benefits to those resources, and to the peoples' rights established in the amendment.

This Court has stated in *Robinson Twp.* that “[c]ause one of Section 27 requires *each branch of government* to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does

not excuse the constitutional obligation because the obligation exists *a priori* to any statute purporting to create a cause of action.” *Id.* at 952.

The effects of adding 70,000 acres of State Forest land to the almost 600,000 acres already subject the new shale gas extraction process that may result in industrial activity for a period of 50 years or more was unknown at the time of the Governors' decisions. As trustee, the Governors had a fiduciary duty to conduct an evaluation of the potential for immediate, long term and cumulative degradation, diminution, or depletion of the public natural resources of our State Forests and Parks prior to directing the additional leasing. The evaluation must also include both the immediate and long term measures that can be taken to prevent, minimize and remedy such harm, and an evaluation of the cost to do so. Any uncertainty in the analysis must be construed in favor of the public natural resources to ensure they are conserved and maintained.³

Nothing in the plain language of Article I § 27 or this Court's analysis of the Commonwealth's trustee duties allows for degradation of our public natural resources. That is not to say that environmental harm can never occur, which

³ Contrary to the terms of the legislative history in Section 1601.1-E of the Fiscal Code (72 P.S. § 1601.1-E), the revenue generated from the leasing of State Forest and Parks in excess of that necessary to remedy unpreventable harm cannot be transferred to the General Fund and used for any purpose deemed appropriate by the General Assembly and the Governor. As also discussed below, this revenue is part of the public trust established by Article I § 27 and must be used to conserve and maintain the public natural resources of our State Forests and Parks.

appears to be the point of confusion. If so, the leasing of our State Forests and Parks for oil and gas extraction could never occur because harm to the public natural resources of our State Forests and Parks is inherent in oil and gas extraction activities. Rather, as testified to by both James Grace and Dan Devlin, both State Foresters, leasing can only occur if the harm does not impact the ecological integrity of the forest's basic biological and ecological functions, under the principles of ecosystem management. RR22, 422.

As this Court states in *Robinson Twp.*, the plain meaning of the terms conserve and maintain implicates a duty *to prevent and remedy* the degradation, diminution, or depletion of our public natural resources. *Id.* at 957. The Governors violated Article I § 27 by failing to evaluate what harm might or will be caused by their decisions, and what measures would be necessary to remedy harm that cannot be prevented, before making their decisions to lease more State Forest land. They cannot fulfill their fiduciary duty to conserve and maintain the public natural resources without this evaluation.

The Commonwealth Court did not impose any duty upon the Governor or the General Assembly to evaluate the impact of their decisions on the people's public natural resources. In fact, the court fails to even discuss this issue even though it is central to PEDF's request for declaratory relief. Presumably, the court ignores this issue because neither the Governors nor the General Assembly conduct

any such evaluation. DCNR itself acknowledges in its environmental reviews in support of the mandated lease sales that its reviews are perfunctory in that it was directed to hold the lease sales to meet budgetary obligations mandated by the Governor and the General Assembly, RR 651-682, 688-720. The undisputed record clearly demonstrates that DCNR had grave concerns about additional leasing without having the opportunity to evaluate the impacts of the new shale gas development on the State Forest and advised the Governor of these concerns. RR 151-152

PEDF asks Court to declare that prior to deciding to lease State Forest or Park land for oil and gas extraction, an evaluation of the impacts to public natural resources and measures needed to remedy the unpreventable impacts must be conducted; and to declare that the Governors violated their fiduciary duty to conserve and maintain the public trust under Article I § 27 by failing to conduct any evaluation before making their decisions to lease additional public land.

3. Violations of Constitutional Protections of Conservation and Natural Resources Act

In 1995, the Conservation and Natural Resources Act was enacted to establish DCNR as the trustee under Article I § 27 for Pennsylvania's State Forest and Parks. CNRA specifically authorizes DCNR to continue to lease those public lands for gas and oil extraction (71 P.S. § 1340.302(a)(6)), but does so under the constraints imposed by Article I § 27. *See Belden and Blake Corp., supra*. CNRA

also allows leasing under the proviso that only DCNR can approve a lease, and all the funds from the lease and sale must be administered by DCNR through the Oil and Gas Lease Fund, a fund created by statute giving DCNR sole discretion to use the funds from leasing exclusively for conservation, recreation and flood control projects. 71 P.S. § 1340.304(c).

Under the limitations of Article I § 27, DCNR could not continue to lease State Forest land for oil and gas extraction without the compensating use of the funds from that lease and sale of natural gas to maintain, improve and preserve our State Parks, and to assure the long term health and sustainability of our State Forests. The Governors' requirements to lease over the objections of DCNR for the purpose of generating money for general government spending rather than DCNR's use to conserve and maintain the public natural resources of our State Forests and Parks violate CNRA, and therefore violate Article I § 27.

The second protection under CNRA is that the funds from the lease and sale must be administered by DCNR through a special fund known as the Oil and Gas Lease Fund legislated under the Oil and Gas Lease Fund Act for the exclusive purposes of projects for conservation, recreation and flood control. 71 P.S. § 1340.304(c). (Court Opinion at 143).

Under the limitations of Article I § 27, the Commonwealth could not continue to lease State Forest land for oil and gas extraction without the

compensating use of the funds from that lease and sale of natural gas to maintain, improve and preserve our State Parks, and to assure the long term health and sustainability of our State Forests. 83 A.3d at 957.

By requiring the leasing of more State Forest and Park lands for gas extraction, and then taking both the lease rental payments and royalties from DCNR, the Governors and the General Assembly have deprived DCNR of its ability to deal with the impacts from over 700,000 acres of State Forest and an unknown acreage of State Park land that will be subject to this new large scale industrial shale gas development. DCNR needs several billion dollars to deal with the past, current and future impacts to the public natural resources on these lands and ensure these resources are conserved and maintained for current and future generations.

DCNR needs the money in the Oil and Gas Lease Fund to deal with the backlog of infrastructure projects on State Forest and Park lands estimated to cost up to one billion dollars. RR61. DCNR needs these funds to purchase mineral rights on State Forests and Parks that are severed from the surface rights and not currently owned by the Commonwealth; these purchases are essential to DCNR's ability to protect the integrity of these public lands from excessive industrial development given the advent of this new shale gas extraction, and the cost estimates are in the hundreds of million dollars. RR312. DCNR needs these funds

to treat acid mine drainage on State Forest and Park land from past mining and to plug abandoned oil and gas wells, again estimated to cost hundreds of millions of dollars. RR311. DCNR needs these funds to repair and replace existing dams, some of which are classified as high hazards, again costing hundreds of millions of dollars. RR305-306. DCNR needs these funds to help local communities with conservation and recreation projects to support sustainable tourism and outdoor recreation economies through its Conservation Landscape Initiatives, including the PA Wilds. RR 455.

The Governors' requirements to lease over the objections of DCNR violate the CNRA limitation that only DCNR can lease. The Governor's requirements to transfer the funds to the General Fund from the Oil and Gas Lease Fund to the General Fund violates the exclusive limitations of Oil and Gas Lease Fund Act. Both of these decisions/actions eliminate the constitutional protections of the statutory structure of the CNRA, to allow continued leasing under the protections and limitations of Article I § 27, and therefore violate the public trust provisions of the Amendment.

PEDF asks this Court to declare that neither the Governor nor the General Assembly can alter the statutory protections afforded by CNRA to ensure DCNR conserves and maintains the public natural resources of our State Forests and Parks without providing alternate protections that ensure the constitutional mandates are

met. PEDF further asks that this Court declare that the Governors violated Article I § 27 by failing to comply with the constitutional protections afforded by CNRA.

C. The Commonwealth Court Failed to Recognize the Funds from the Leasing and Sale of Public Natural Gas as Part of the Public Trust under Article I § 27

1. Oil and Gas Lease Fund Assets Are Public Trust Assets

a. Under Article I § 27, Public Natural Resources Are the Property of the People, and the Corpus of the Public Trust, Not the Property of the Government

The Commonwealth Court failed to consider that the money in the Oil and Gas Lease Fund is from the conversion of the public natural resources. State Forest and Park lands and the oil and natural gas resources included with the acquisition of these lands are public natural resources that are the common property of the people, including generations yet to come, and are part of the corpus of the public trust under Article I § 27. PEDF's members have a constitutionally protected proprietary interest in the assets of the Oil and Gas Lease Fund.

Neither the Governor nor the General Assembly can take away the constitutionally protected proprietary interests of the people in their State Forest and Park land, including the associated mineral resources, simply by amending the Oil and Gas Lease Act through the Fiscal Code to give control of this money to the General Assembly. Article I § 25 declares the relationship between the people's rights and the government they created, stating: "To guard against transgressions

of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.” The people of the Commonwealth have thus clearly separated the ownership of the public natural resources from the general powers of the Commonwealth government they created by establishing their common proprietary ownership of those resources under Article I of the Constitution.

Under the plain language of Article I § 27, the Commonwealth is not the proprietor of these public lands and resources. Rather, the Commonwealth is the trustee, holding these public natural resources for the rights and benefits of the people to their continued use and enjoyment. This distinction is described in the analysis of Article I § 27 prepared by Robert Broughton in the legislative history of the amendment. RR2274-2275.

The Commonwealth Court erred in finding that the money from leasing and sale of public natural resources is not a part of the public trust.

b. The Duties of the Trustee Mandate that Corpus of the Trust, the Public Natural Resources, Are to be Preserved for the Purpose of the Trust

The Commonwealth Court recognizes that the Commonwealth, as trustee under Article I § 27, "is a fiduciary obligated to comply with the terms of the trust and with standards governing fiduciary conduct." 108 A.3d at 167 (quoting *Robinson Twp.*, 83 A.3d at 957). The Commonwealth Court also recognizes that a

trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person. *Id.* (quoting *In re Estate of Warden*, 2 A.3d 565, 572 (Pa. Super. 2012)). Further, the court recognizes as settled law in Pennsylvania that the pole star in every trust is the settler's intent, which must prevail and be divined by considering the trust document as a whole. *Id.* Finally, with respect to trust assets, the Commonwealth Court recognizes that the primary duty of a trustee is the preservation of those assets and the safety of the trust principal. *Id.*

This Court states in *Robinson Twp.* that a trustee may use trust assets only for purposes authorized by the trust or necessary for the preservation of the trust, and that other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries. 83 A.3d at 978 (citing *Metzger v. Lehigh Valley Trust & Safe Deposit Co.*, 69 A. 1037, 1038 (Pa. 1908)). *See also Lang v. Commonwealth*, 528 A.2d 1335, 1342 (Pa.1987) (trustee has duty of loyalty to administer trust solely in the beneficiary's interests and not his own, citing Restatement (Second) of Trusts § 170)); *In re Hamill's Estate*, 410 A.2d 770, 773 (Pa. 1980) (trustee has duty of impartiality, citing Restatement (Second) of Trusts § 232))."

When the people of Pennsylvania voted overwhelming to amend their constitution to include Article I § 27, they established a fiduciary relationship

between themselves, as the settlor of the trust and the common owner of the trust assets (*i.e.*, the public natural resources of the Commonwealth), and Commonwealth government, as trustee. The Commonwealth, the entity that holds title to the State Park and Forest land, is held to equitable duties to deal with the property for the benefit of the people. The primary duty of the Commonwealth, as trustee, is to preserve those assets and to ensure the safety of the trust principal. The people of Pennsylvania made this duty clear in Article I § 27 by mandating that the Commonwealth conserve and maintain their public natural resources, which are the corpus of the trust. The Commonwealth's use of these public trust assets for non-trust purposes is beyond the scope of the discretion conferred by the people, even where the Commonwealth claims to be acting solely to advance other discrete interests of the people.

By taking money derived from the sale of oil and natural gas owned by the people (*i.e.*, money from the sale of a public natural resource that is part of the public trust and continues to be part of the trust) out of the corpus of the trust, and using this money for purposes other than conserving and maintain the people's public natural resources (even other purposes that may benefit the people such as providing more education without raising taxes to pay for it), the Commonwealth violated its fiduciary duty as trustee to preserve the corpus of the public trust, both for the present beneficiaries and those beneficiaries of future generations.

c. Taking Money from the Corpus of the Public Trust Prevents DCNR from Meeting its Duty under Article I § 27

The Court prefaced its conclusion that the General Assembly has discretion to spend the money in the Oil and Gas Lease Fund for any public benefit by stating that, "[i]n the absence of an express direction to the contrary, *so long as the Commonwealth is fulfilling its Article I § 27 obligations*, the source of the funding appropriated to meet those obligations seems to us to be a matter of discretion vested in the general assembly under *Article II, Section I, Article III, Section 24, and Article VIII, Section 13* of the Pennsylvania Constitution." 108 A.3d at 168. The court does not analyze whether the loss of the funds prevents DCNR from fulfilling its Article I § 27 duties.

As discussed above, DCNR has the constitutional duty as trustee under CNRA to conserve and maintain Pennsylvania's State Parks and Forests. CNRA creates a statutory structure to allow DCNR to continue to lease State Forest Lands for gas extraction, but with the explicit mandate that DCNR control the money from the leasing to ensure the leasing is consistent with Article I § 27.

Dr. Grace testified that to lose the rents from the leases and royalties from gas sold from the State Forest means DCNR cannot effectively mitigate the impacts of the gas development and no longer has control to manage the State Forest effectively. *Id.* Dr. Grace stated that DCNR has a list of up to a billion

dollars of State Park and Forest projects that are needed to fulfill its mandate under Article I § 27. RR62; *see also* RR646 (Former Secretary DiBerardinis testimony).

DCNR has entered into leases covering over 388,000 acres of State Forest land (RR856) with the explicit understanding that it would have the funds from these leases (both the rental payments and the royalties from the sale of the extracted oil and gas) to deal with the impacts of the leases, as well as impacts from oil and gas development on over 312,000 acres of State Forest and an estimated 80% of State Park land with severed oil and gas rights.

The Commonwealth Court failed to recognize the critical connection between the Oil and Gas Fund and DCNR fiduciary duties under Article I § 27 to protect the public natural resources of our State Forests and Parks. DCNR made decisions to lease in reliance on its statutory control of the funds from such leasing to carry out its fiduciary duties. PEDF asks this Court, for the reasons discussed above, to declare that the money in the Oil and Gas Lease Fund is a public trust asset over which DCNR must retain control to fulfill its fiduciary duty as trustee under CNRA and Article I § 27 by funding projects to conserve and maintain the public natural resources of our State Forests and Parks.

2. People's Vested Rights in the Oil and Gas Lease Fund (HHAP)

As discussed previously, PEDF requested that the Commonwealth Court declare the Oil and Gas Lease Fund to be a de facto public trust fund under Article

I § 27 that must be used for projects to conserve and maintain our State Parks and State Forests. The Commonwealth Court refused, concluding that the only limit imposed by Article I § 27 is that the funds from conversion of the natural resources be used for a public benefit as decided by the General Assembly.

DCNR and its predecessors have been leasing State Forest land for oil and natural gas extraction since 1947.⁴ RR1040-1044. In 1955, the Oil and Gas Lease Fund was created by statute to give exclusive control over the money from leasing State Forest and Park land to the agency responsible for the management of these lands. 71 P.S. §§ 1331-1333. DCNR and its predecessors have entered into oil and gas lease on over 388,000 acres of State Forest land based on the knowledge that it would have exclusive control over the funds generated by the leases to carry out projects to protect these public lands.

As this Court recently found, reliance on a statutorily created "special fund" for a purpose established by statute can render the fund to be "trust fund" even though the General Assembly had not designated it as such. *HHAP, supra*. In *HHAP*, this Court reviewed a fund created by the Medical Care Availability and

⁴ Prior to 2009, the peak year of annual income from oil and gas leasing occurred in 1954 (over \$55 million when adjusted to current dollars). The annual income oil and gas leasing on State Forest land since 1947 in the DCNR *Shale-Gas Monitoring Report* is not adjusted to current dollars. This limits the ability to accurately compare the historic income values to the present income. For example, the reported income for 1954 is \$6,356,393. This amount in today's dollars is \$55,224,295.

Reduction of Error Act enacted in 2002 (the “MCARE Act”), which requires health care providers to maintain a minimum level of professional liability insurance by making payments that were deposited into the newly created the Medical Care Availability and Reduction of Error Fund (the “MCARE Fund”), which is designated a “special fund” within the state treasury. 40 P.S. § 1303.712(a). The MCARE Fund is administered by the Insurance Department of Pennsylvania. 77 A.3d. at 592.

Under the MCARE Act, Pennsylvania physicians, hospitals, and certain other health care providers, as a condition of practicing in Pennsylvania, are required to purchase medical professional liability insurance in the amount of \$500,000 per occurrence or claim, and to participate in the MCARE Fund. The MCARE Fund provides a secondary layer of liability coverage to providers by paying, subject to the Fund’s liability limits, damages awarded in medical malpractice actions in excess of the required minimum level of professional liability coverage. *Id.*

Similar to this case, *HHAP* involved a challenge to the Governor’s authorization of the transfer of \$100 million from the MCARE Fund to the General Fund through amendments to the Fiscal Code. *Id.* at 593. Several health care providers filed a petition for declaratory judgment seeking a declaration that the Fiscal Code amendments were unconstitutional. *Id.* at 593-594. This Court in its

review of the case looked to the fact that the assessment program was never intended as a general revenue mechanism to raise tax revenue; and that a rational relationship existed between the monies paid in and their mandated use to satisfy claims against the health care providers under the MCARE Act. *Id.* at 603.

This Court examined the fact that the legislative scheme under the MCARE Act lead health care providers to rely on the program as established to make major decisions regarding their practices. These facts “elevated” the MCARE Fund above the status of standard budgeting allocations. *Id.* On that basis, this Court determined that the MCARE Fund, although labeled a “special fund”, is “in the nature of a trust fund whose monies are held for the purpose intended by the statute”, *id.* at 604 (citing *Daugherty v. Riley*, 34 P. 2d 1005, 1010 (Cal. 1934)); and that the health care providers had a vested right to have the money utilized in the manner directed by the statute. *Id.* (citing *Konidaris v. Portnoff Law Associates*, 953 A. 2d 1231, 1242 (Pa. 2008); *accord Bible v. Department of Labor and Industry*, 696 A.2d 1149, 1156 (Pa. 1997)).

The legislative scheme initiated under CNRA, and consistently applied until the actions challenged by PEDF beginning in 2009, established a direct relationship between leasing State Forest and Park lands for oil and natural gas production, and use of the money generated by that leasing and production. This legislative scheme allows DCNR to continue leasing of these public lands provided

DCNR has exclusive control over the money from leasing. DCNR and its predecessors made leasing decisions with the knowledge they would have exclusive control over that funds from these leases, both rental payments and royalties, to carry out conservation, recreation and flood control projects and acquire additional public lands to deal with the impacts from the leases, and to sustain and improve both State Forest and Parks. With the passage of CNRA in 1995 and the imposition of fiduciary duties under Article I § 27 on DCNR's leasing, the importance of this legislative scheme was heightened. Given this constitutional overlay, the Oil and Gas Lease Fund is "elevated" above the status of standard budgeting allocations to an even greater extent than the MCARE Fund.

If the General Assembly and the Governor wanted to create a new statutory framework for use of money generated by future DCNR leasing, they could do so. But any such amendments must meet the requirements and limitations of Article I § 27.

The Commonwealth Court attempts to distinguish *HHAP* in this case by stating the citizens of the Commonwealth are not compelled to pay their "personal property" into the Oil and Gas Lease Fund with a promised benefit. The court contends that Article I § 27 places the people's "common property" in the hands of the Commonwealth as trustee, with the Commonwealth's only obligation being to conserve and maintain that property for their collective benefit. 108 A.3d at 169, n.

49. The court fails to recognize the money itself is part of the public trust and concludes that the General Assembly is free to do what it wants with the money.

Id.

In the MCARE Fund case, in response to an argument from the Pennsylvania Senate, as amicus, that the General Assembly must be free to re-appropriate funds to meet changing public needs, this Court stated “*If the Constitution precluded it from doing so, the severity of the fiscal crisis is immaterial, as the Senate acknowledges.*” *HHAP*, 77 A.3d at 604, n. 19 (emphasis added by Court). This Court observed that courts have recognized that legislative bodies retain authority to control the fate of special funds in order to serve the changing needs of government, so long as doing so would not contravene a specific constitutional provision or breach a contractual obligation. *Id.*

The Commonwealth Court erred in its analysis of the status of Oil and Gas Lease Fund, including application of this Court's precedent in *HHAP*. PEDF asks this Court to declare that the Oil and Gas Lease Fund is a de facto trust fund that must be used for trust purposes, not for any purpose determined by the General Assembly to be a public benefit.

D. Section 1602-E of the Fiscal Code Violates Article I § 27

Section 1602-E of the Fiscal Code removes DCNR's exclusive control over royalty payments deposited into the Oil and Gas Lease Fund and directs that this

money now be appropriated as part of annual appropriation process controlled by the General Assembly and the Governor. The provision provides:

Section 1602-E. Appropriations. Notwithstanding any other provision of law [*i.e.*, the Oil and Gas Lease Fund Act] and except as provided in section 1603-E, no money in the [Oil and Gas Lease] Fund from royalties may be expended unless appropriated or transferred to the General Fund by the General Assembly from the fund. In making appropriations, the General Assembly shall consider the adoption of an allocation to municipalities impacted by a Marcellus well.

72 P.S. § 1602-E. The Commonwealth Court errs by recasting PEDF's challenge to this provision as an inquiry into the motives of the General Assembly in passing the Fiscal Code amendments rather than a constitutional challenge under Article I § 27. 108 A.3d at 160.

PEDF is not inquiring into the General Assembly's motives in passing these amendments. PEDF asked the Commonwealth Court to declare that removal of DCNR's exclusive control over the Oil and Gas Lease Fund violates Article I § 27 because DCNR's control over this money is essential if it is to fulfill its fiduciary duties under CNRA and Article I § 27 to conserve and maintain the public natural resources of our State Forests and Parks.

The Commonwealth Court observed that since the General Assembly had the constitutional authority to vest within DCNR the discretion to use monies in the Oil and Gas Lease Fund in 1955, the General Assembly has constitutional authority to reassert control over the spending from this fund. *Id.* This argument

ignores the interrelationship between CNRA and Article I § 27, and DCNR's mandate to decide when and why to lease State Forest and Park land for oil and gas development, and how to use the lease funds to fulfill its duties as trustee under Article I § 27.

The Commonwealth Court ignored the undisputed fact that the funds in Oil and Gas Lease Fund are rental payments and royalties received under the terms of DCNR leases for oil and gas extraction on over 388,000 acres of State Forest land. RR856. The Court ignored the fact that these public natural resources are the common property of the people and are part of the corpus of the public trust under Article I § 27, and the fact that the Commonwealth as trustee has the duty to conserve and maintain these public natural resources for the benefit of current and future generations.

The Commonwealth Court ignored the undisputed fact that DCNR entered into all the existing leases with the knowledge that it would have exclusive control over the money generated by the leases to carry out conservation and recreation projects on State Forests and Parks to conserve and maintain these public natural resources.

The Commonwealth ignored the undisputed facts that DCNR needed the money from the leases, not only to deal with the impacts from the existing leases, but to deal with the impacts on the over 700,000 acres of State Forest land

currently subject to shale gas development and the estimated 80% of State Parks that could be subject to such development. As discussed above, DCNR has a backlog of projects necessary to conserve and maintain our State Forests and Parks that are estimated to cost several billion dollars.

The Commonwealth Court acknowledged that how the General Assembly exercises its control over the royalty funds in the Oil and Gas Lease Fund is tempered by the Declaration of Rights in the Pennsylvania Constitution, including Article I § 27. *Id.* (citing *Robinson Twp.*, 83 A.3d at 947-48). The court concludes, however, that the plain language of Section 1602-E does not infringe upon these rights or reflect a failure by the General Assembly to act consistent with its trustee obligations under Article I § 27. *Id.* at 161.

In reaching this conclusion, the Commonwealth Court did not consider the fact that the royalties deposited into the Oil and Gas Lease Fund are generated by existing leases that DCNR entered into under the statutory framework of CNRA, which at the time vested exclusive control of these royalties in DCNR to carry out projects to conserve and maintain the public natural resources of the State Forests and Parks under Article I § 27.

By ignoring the constitutional origins of the money in the Oil and Gas Lease Fund, and DCNR's need and reliance on these funds, and by undermining the fundamental principles upon which the prior leases were made, the Governor

violated his duty as trustee in signing Section 1602-E of the Fiscal Code into law. Further, Section 1602-E itself violates Article I § 27 and must be declared unconstitutional. PEDF requests that this Court make these declarations.

E. Section 1603-E of the Fiscal Code Violates Article I § 27

Section 1603-E of the Fiscal Code limits the amount of royalty money appropriated annually to DCNR to up to \$50 million dollars if sufficient funds are available, and requires DCNR to give preference to use these appropriated funds "to the operation and maintenance of State parks and forests." 72 P.S. § 1603-E. The Commonwealth Court again recasts PEDF's challenge as questioning the adequacy of the legislatively-established funding level for DCNR, and then concludes that PEDF presented no evidence that the current funding appropriated to DCNR from all sources is inadequate. *Id.* at 166.

PEDF did not ask the Commonwealth Court to determine whether DCNR's funding is adequate. PEDF asked the Commonwealth Court to declare Section 1603-E unconstitutional, and that the Governor violated his duty as trustee by not evaluating the effects of the provision.

Like Section 1602-E, this provision removes control of the Oil and Gas Lease Fund from DCNR and undermines the statutory framework established by CNRA to allow DCNR to fulfill its fiduciary duties under Article I § 27. DCNR is

now dependent on the allotments of the Governor and General Assembly in parsing out the Oil and Gas Leases Funds for projects.

By limiting the funds available to DCNR and then redirecting the use of those funds to DCNR operations previously covered by General Fund appropriations, Section 1603-E virtually eliminates DCNR's ability to use the Oil and Gas Lease Fund to carry out projects to conserve and maintain the public natural resources of our State Forests and Parks by requiring DCNR to rely on the \$50 Million annual payment from Oil and Gas Lease Fund for its annual operations. A direct conflict results. DCNR becomes dependent on leasing to pay its own staff, thus hampering its ability to carry out its fiduciary duties in an impartial manner.

The General Assembly and the Governor have an affirmative duty under Article I § 27 to pass legislation to implement its mandates, not undermines them. Section 1603-E clearly undermines DCNR's ability to fulfill its fiduciary duty to conserve and maintain the public natural resources of our State Forests and Parks.

The Governor signed into law Section 1603-E without any consideration of his duty as trustee under Article I § 27; without any consideration of DCNR's needs to control the Funds from oil and gas leases to meet its constitutional and statutory mandates to conserve and maintain the public natural resources of the

State Forests and Parks; and without any consideration of the conflicts of interest imposed on DCNR.

For these reasons, the Governor violated his duty under Article I § 27 by signing into law Section 1603-E of the Fiscal Code; and Section 1603-E violates Article I § 27. PEDF asks this Court to make these declarations.

F. Oil and Gas Lease Fund Transfers Violate Article I § 27

Since 2009, Governors Rendell and Corbett have signed into law various provisions in General Appropriation Acts, Fiscal Code amendments, and other legislation (Act 13 of 2012) that either directly transfers money from the Oil and Gas Lease Fund to another fund (*i.e.*, the General Fund or the Marcellus Legacy), or indirectly transfers money to the General Fund by requiring DCNR to fund its annual operating expenses with the Oil and Gas Lease Fund rather than General Fund appropriations. These direct or indirect transfers include the following:

Oil and Gas Lease Fund Amount	Use	Authority	Source
\$143,000,000 (FY 2009-10)	General Fund	General Appropriation Act (GAA) of 2009 (§ 1912)	2008 Lease Sale Bonus Bids
\$60,000,000 (FY 2009-10)	General Fund	72 P.S. § 1604-E	Jan 2010 Lease Sale Bonus Bids
\$180,000,000 (FY 2010-11)	General Fund	72 P.S. § 1605-E(a)	Jan/May 2010 Lease Sale Bonus Bids

Oil and Gas Lease Fund Amount	Use	Authority	Source
\$50,000,000 annually	Marcellus Legacy Fund	58 Pa.C.S. § 2505(b)	Rents/Royalties DCNR Leases
\$59,805,000 ⁵ (FY 2011-12)	DCNR Operations	GGA of 2011 (§ 1601) 72 P.S. § 1603-E	Rents/Royalties DCNR Leases
\$67,823,000 ⁶ (FY 2012-13)	DCNR Operations	GGA of 2012 (§ 1601) 72 P.S. § 1603-E	Rents/Royalties DCNR Leases
\$115,781,000 ⁷ (FY 2013-14)	DCNR Operations	GGA of 2013 (§ 1601) 72 P.S. § 1603-E 71 P.S. § 1331	Rents/Royalties DCNR Leases
\$95,000,000 (FY 2014-15)	General Fund	72 P.S. § 1605-E(b)	2014 Lease Sale Bonus Bids ⁸
\$122,546,000 (FY 2014-15)	DCNR Operations	GGA of 2014 (§ 1601) 72 P.S. § 1603-E 71 P.S. § 1331	Rents/Royalties DCNR Leases

As discussed above Section C above, the Commonwealth Court concludes that the Oil and Gas Lease Fund is not a public trust fund and that the only constraint on use of its money in this fund is the general requirement that the

⁵ \$65,000,000 was appropriated, but this amount was actually expended in FY2011-12 (RR753).

⁶ \$69,511,000 was appropriated, but this amount was actually expended in FY2012-12 (RR807).

⁷ \$106,546,000 was appropriated, but this amount was listed as available during FY2013-14 (RR807); the additional funds may be rental payments that continue to be available to DCNR under the Oil and Gas Lease Fund Act

⁸ This lease sale did not occur because Governor Wolf reestablished the moratorium on leasing on January 29, 2015 (Executive Order 2015-03).

money be used "for the benefit of all the people". 108 A.3d at 168. The court also concludes that the General Assembly has the discretion to decide the appropriate public benefit for which this money can be used. *Id.*

The direct and indirect transfers from the Oil and Gas Lease Fund authorized by the Governor and the General Assembly have left virtually no money in this fund for DCNR to carry out its fiduciary duties under Article I § 27 to prevent and remedy the harm from the large scale industrial shale gas development occurring on the State Forest. This activity will continue to expand and the degradation of our public natural resources will continue to increase. DCNR has several billion dollars in necessary projects that it could implement to remedy this harm, but it has no money to do so.

The Commonwealth Court's failure to recognize that the Oil and Gas Lease Fund is a public trust fund, and its sanction of the above transfers without any consideration of DCNR's fiduciary duties under CNRA and Article I § 27, is a failure of the court itself to recognize its own Article I § 27 obligations. The Commonwealth Court also errs by attempting to construe the constitutionality of the Fiscal Code transfers Sections 1604-E and 1605-E separate and apart from the requirements of Sections 1602-E and 1601-E. Additionally, the General Assembly and the Governor expanded Section 1601-E in an effort to usurp judicial review of

its actions related to leasing, which the Commonwealth Court recognizes, but fails to declare unconstitutional. *Id.* at 170.

PEDF asks this Court to declare that Governors Rendell and Corbett violated their fiduciary duty as trustee under Article I § 27 by proposing, negotiating and approving these transfers. In addition, PEDF asks this Court to declare the legislative provisions authorizing these transfers and improper uses of the Oil and Gas Lease Fund to be unconstitutional.

G. Standing/Justiciability

Pursuant to the Declaratory Judgments Act, 42 .C.S. §§ 7531-7541, PEDF asked the Commonwealth Court to declare the rights of its members and the fiduciary duties of the Governor as trustee under Article I § 27 with respect to leasing of State Forests and Parks for oil and gas extraction for the sole purpose of generating funds from both the leasing and the sale of natural gas and oil for purposes other than conserving and maintaining the State Forests and Parks.

The Commonwealth Court acknowledged that "a decision to lease Commonwealth property protected by the Constitution and held in trust for the benefit of all current and future Pennsylvanians is an appropriate subject of judicial scrutiny." *Id.* at 155. The court fails, however, to provide that judicial scrutiny.⁹

⁹ As an initial matter, this statement signals the Commonwealth Court's fundamental misunderstanding as to the nature of Article I § 27. The leasing of State Forest and Park land is not the leasing of "Commonwealth property," but

This Court has stated in *Robinson Twp.* that “[a] legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizen’s rights or the government has failed in its trustee obligations, or upon both theories ...” 83 A.3d at 950. In this case, the government failed to carry out its trustee duties. Yet the Commonwealth Court dismissed all of PEDF's requests for declarations related to the fiduciary duty of the Governor under Article I § 27 and whether he fulfilled that duty in his actions and decisions that lead to requiring leasing of our State Forest and Parks for natural gas extraction in 2009, 2010 and 2014, and his actions and decisions from 2009 to 2014 to take both the lease money and royalties from all existing leases away from DCNR and away from conserving and maintaining the public natural resources.

The Commonwealth Court dismissed all consideration of the harm caused by the Governor’s action to our State Forests and Parks, to DCNR’s ability to meet its constitutional and statutory duty to our public natural resources, and to the people who own those resources, and for whose benefit the Commonwealth has the duty as trustee to protect and conserve those resources.

The Court dismissed all the uncontested hearing and affidavit testimony of the harm from the actions of the Governors. The court summarily dismissed these

rather the leasing of the common property of all the people of Pennsylvania, including generations yet to come. PEDF's members, along with all Pennsylvanians, own the property being leased.

critical factors, asserting that "resolution of these and similar questions are not necessary or appropriate under the Declaratory Judgments Act, as they do not go to the heart of a particular and concrete dispute between PEDF and the Commonwealth Respondents." 108 A.3d at 155.

The Commonwealth Court describes the standard for considering a declaratory judgment action as follows:

The purpose of the Declaratory Judgments Act is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." 42 Pa.C.S. § 7541(a). An action under the Declaratory Judgments Act "must allege an interest by the party seeking relief which is direct, substantial and present, ... and must demonstrate the existence of an actual controversy related to the invasion or threatened invasion of one's legal rights." *Bowen v. Mount Joy Twp.*, 644 A.2d 818, 821 (Pa. Cmwlth. 1994) (quoting *Pa. Institutional Health Servs., Inc. v. Dep't of Corr.*, 631 A.2d 767, 771 (Pa. Cmwlth. 1993)), *appeal denied*, 652 A.2d 1326 (Pa. 1994). Granting or denying an action for a declaratory judgment is committed to the sound discretion of a court of original jurisdiction. *Gulnac by Gulnac v. S. Butler Cnty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991).

Id. at 153.

The Declaratory Judgments Act ("DJA") specifically provides for the declaration of rights or legal relations by **any person interested in the administration of a trust, and to direct administrators or trustees to do or to abstain from doing any particular act in their fiduciary capacity; or to determine any question arising in the administration of a trust.** 42 Pa .C.S. § 7535.

The scope of the DJA is that courts of record shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. 42 Pa. C.S. § 7532.

The court may refuse to render or enter declaratory judgment where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy, but the existence of an alternative remedy shall not be ground for the refusal to proceed. 42 Pa. C.S. § 7537.

PEDF has established that the governors' actions have caused and continue to cause harm, by the large-scale industrial shale gas extraction to Pennsylvania's State Forests and Parks, to DCNR's ability to conserve and maintain the natural resources, and to PEDF's members' use and enjoyment of those resources.

PEDF's members have established, through 14 affidavits and testimony of two of its members at the hearing before the Commonwealth Court, that they have a direct, substantial and present interest in the State Forests that have been leased by DCNR at the Governor's direction for oil and gas extraction. RR356-395, 471-528. PEDF has established that its members have a direct, substantial and present interest in the loss of the money from the leasing and royalties. That money is still part of the property of the people, and still part of the corpus of the public trust.

Further, PEDF has established that DCNR needs that money, relied on the money when the leases were entered into, not only to remedy the harm from the

gas extraction process, but to meet all of its obligations under Article I § 27 and the Conservation and Natural Resources Act to conserve and maintain our State Forests and Parks. RR126-132.

As this Court observed in *Robinson Twp.*, standing, ripeness, and political questions give body to the general notions of case or controversy and justiciability, which in Pennsylvania have no constitutional predicate, do not involve a court's jurisdiction, and are regarded instead as prudential concerns implicating courts' self-imposed limitations. Issues of justiciability is a threshold matter generally resolved before addressing the merits of the parties' dispute and are issues of law over which this Court's standard of review is *de novo* and the scope of review is plenary. 83 A.3d at 916-917.

This Court further observed that "considerable overlap exists between the doctrines of standing and ripeness, especially where the contentions regarding lack of justiciability are focused on arguments that the interest asserted by the petitioner is speculative, not concrete, or would require the court to offer an advisory opinion. In this sense, a challenge that a petitioner's interest in the outcome of the litigation is hypothetical may be pled either as determinative of standing or restyled as a ripeness concern although the allegations are essentially the same. Standing and ripeness are distinct concepts insofar as ripeness also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial

resolution of the dispute. *Id.* (citations omitted). When determining whether a declaratory judgment matter is ripe for judicial review, a court generally considers whether the issues are adequately developed and the hardships the parties will suffer if review is delayed. *Bayada Nurses, Inc. v. Commonwealth*, 8 A.3d 866, 874 (Pa. 2010). This Court has consistently held that “we will not raise standing claims *sua sponte*”. *Rendell v. Pa. State Ethics Comm’n*, 983 A.2d 708, 717-718 (Pa. 2009).

The issues raised by PEDF in this case are not speculative or hypothetical. The Governor has required DCNR to lease 70,000 acres of State Forest land for gas extraction and sale of natural gas and oil, even though DCNR had decided that no further leases should be entered into until evaluations were made on the impacts from the existing leases on 660,000 acres of State Forest land. The leases required by Governor Rendell resulted in industrial development on State Forests that has harmed the State Forest and Parks in many different ways. Additionally, Governor Rendell took \$383 million from the bonus money from leasing State Forest land¹⁰ for purposes other than projects to enhance our State Forests and Parks without evaluating the harm to the public resources or evaluating the amount of money that

¹⁰ The Commonwealth Court mistakenly stated that DCNR got all the “bonus” lease money, and only the royalties went to funds outside of the public trust. Section 1602-E specifically states that only the money from royalties would be controlled by the General Assembly. But the General Appropriations Act of 2009 and Sections 1604-E and 1605-E required transferring the bonus monies from the 2009-10 leases.

would be needed to remedy the harm caused by the large-scale industrial shale gas development that was going to occur on 700,000 acres of State Forest and 80% of our State Parks.

Governor Corbett decided to use money from State Forest leasing to pay DCNR's annual operating expenses in place of General Fund revenue, again without consulting DCNR or evaluating the impacts to DCNR from the loss of the Oil and Gas Lease fund money, and from the conflicts imposed on DCNR from having to depend on gas money for salaries and expenses.

Governor Corbett proposed additional leasing of State Forest and Park land in 2014 to raise money for the General Fund, and, but for his agreement with PEDF to not lease until the Commonwealth Court issued its opinion in this case would have directed DCNR to proceed with such leasing.

Governor Corbett made no evaluation of the harm from the additional leasing and from the loss of the money to DCNR before making his decisions.

The PEDF has clearly established an interest which is direct and substantial and present. An actual controversy has been alleged and proven. This Court's standard of review is de novo, and the scope of review is plenary.

PEDF requests that this Court find that the Commonwealth Court erred in stating that PEDF raised questions that do not go to the heart of a particular and

concrete dispute between PEDF and the Commonwealth Respondents; and declare that that PEDF has established justiciable claims.

VIII. CONCLUSION

For the reasons set forth above, PEDF respectfully requests that this Honorable Court reverse the Commonwealth Court's order denying PEDF's requests for declaratory relief and grant PEDF's requests for summary relief.

John E. Childe
Attorney for PEDF
I.D. No. 19221
1847 Center Street
Camp Hill, Pa. 17011
717-743-9811
childeje@aol.com