

ORDERED that the Senators are hereby granted intervenor status as plaintiffs in this case.

BY THE COURT:

Robert D. Mariani, U.S.D.J.

permission. *See* Fed.R.Civ.P. 24(b)(1)(B). In support of their Motion to Intervene (the “Motion”), the Senators submit a pleading, fashioned as a Proposed Complaint (Exhibit A), setting out “the claim[s] . . . for which intervention is sought.” Fed. R. Civ. P. 24(c). The Senators further assert the following in support of the Motion:

I. INTRODUCTION

1. This is an action concerning the authority of Defendant Delaware River Basin Commission (the “Commission”) to institute a moratorium on high-volume hydraulic fracturing (“fracking”) within the Delaware River Basin (the “Basin”), which encompasses over 6,000 square miles of sovereign territory under the jurisdiction and purview of the Commonwealth.

2. Specifically, the central issue in this matter is the proper interpretation of Section 3.8 of the Compact, which grants the Commission oversight over “project[s] having a substantial effect on the water resources” of the Delaware River Basin (the “Basin”).

3. Plaintiff Wayne Land and Mineral Group, LLC (“Wayne Land”) commenced this action in May 2016, seeking a declaration from this Court that the Commission lacks jurisdiction to prohibit the construction of gas well pads and other related facilities on property Wayne Land owns within the Basin. *See* Pl.’s Compl., ECF No. 1.

4. In response, the Commission filed a motion seeking dismissal for failure to state a claim under Rule 12(b)(6), which this Court ultimately granted, accepting the Commission's argument that Wayne Land's proposed activity constituted a "project" under the plain language of Section 3.8 of the Compact, which is properly be subject to the Commission's oversight.¹

5. On appeal, the Third Circuit Court of Appeals reversed in part, affirmed in part, and remanded for further proceedings. Specifically, in an Opinion and Order issued on July 3, 2018, the three-judge panel found the Compact ambiguous in its material aspects and, thus, held that the District Court erred in dismissing the action based upon a plain language analysis. *See Wayne Land & Mineral Grp. LLC v. Delaware River Basin Comm'n*, 894 F.3d 509, 515 (3d Cir. 2018). Consequently, the Court of Appeals remanded the matter "for additional fact-finding on the intent of the Compact's drafters." *Id.* at 522. In discerning that intent, the appellate court directed the District Court to "evaluate in the first instance how other interstate compacts, the parties' course of performance, and the negotiation and legislative history of the Compact, among other evidence, bear on the question of intent." *Id.* at 534

¹ While that motion was pending, the Senators unsuccessfully sought to intervene. However, because the Senators' renewed Motion to Intervene is based on grounds that were not – and, indeed, could not have been – previously asserted, that prior denial is not informative, let alone dispositive.

6. After this Court re-opened the action, the parties submitted their Joint Case Management Plan and, on August 27, 2018, this Court entered a Case Management Order, setting, *inter alia*, September 17, 2018 as the deadline for Motions to join additional parties.

II. THE SENATORS

7. The Pennsylvania Senate is one of two chambers of the Pennsylvania General Assembly vested with the exclusive legislative authority of the Commonwealth of Pennsylvania.

8. All interstate compacts to which the Commonwealth is a party, including the one presently at issue, are approved by the Pennsylvania General Assembly in accordance with ordinary legislative procedure.

9. Senator Scarnati is an elected member of the Pennsylvania Senate who represents the 25th Senatorial District and is also the President *Pro Tempore* of the Pennsylvania Senate.

10. Senator Baker is an elected member of the Pennsylvania Senate who represents the 20th Senatorial District, consisting of approximately 2,581 square miles, of which more than half is located within the Basin.

11. Senator Yaw is an elected member of the Pennsylvania Senate who represents the 23rd Senatorial District. Senator Yaw is also the chairman of the Senate Environmental Resources and Energy Committee.

12. In addition to its core legislative functions, as one of the General Assembly's two subparts, the Pennsylvania Senate is also a trustee of the Commonwealth's natural resources (the "Trust"). *See Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 931 n.23 (Pa. 2017) (hereinafter, *PEDF*).

13. As trustee, the Pennsylvania Senate and all individual Senators owe certain fiduciary duties to the Trust's beneficiaries – *i.e.*, the citizens of Pennsylvania – and must oversee and manage the corpus of the Trust – *i.e.*, the natural resources – in the best interest of the beneficiaries. *See generally id.* 931-932

III. GROUNDS FOR INTERVENTION AS OF RIGHT

14. The Motion should be granted because the Senators have a right to intervene in this case.

15. Under Rule 24(a)(2), a proposed intervenor can intervene as a matter of right if: (i) the application for intervention is timely; (ii) the proposed intervenor has a sufficient interest in the litigation; (iii) the interest may be affected or impaired by the disposition of the action; and (iv) the interest is not adequately represented by an existing party in the litigation.

16. Because the Senators satisfy the foregoing settled criteria, this Court should grant the Motion.

17. Specifically, as set forth below: (a) the Motion is timely; (b) the Senators have a significant protectable interest in the outcome of this litigation – the existence of which, notably, came into sharpened focus after this Court’s initial disposition of this matter; (c) the interests asserted by the Senators could be substantially impaired if they are not permitted to intervene; and (d) those interest are not adequately represented by the existing parties.

18. Pursuant to this Court’s rules, the Senators will submit a brief in support of the present Motion forthwith, discussing each factor in detail. *See* L.R. 7.5 (“Within fourteen (14) days after the filing of any motion, the party filing the motion shall file a brief in support of the motion.”).

A. The Motion is timely

19. The Senators’ application is timely, as this action is still in its early stages. In fact, the Motion comes within the deadline set by this Court for joinder of additional parties.

20. Allowing the Senators to intervene at this time will not cause any delay, as the Senators are prepared to adhere to the timetable set by this Court. Indeed, far from causing prejudice or delay, the Senators’ involvement this action will assist the parties and this Court in discerning legislative intent.

B. The Senators have a substantial protectable interest.

21. As set forth in the Senators' proposed Complaint, *see* Ex. A, the Commission's interpretation of the Compact: (a) usurps the legislative authority vested in the Senators in direct contravention of the Compact; and (b) to the extent its interpretation is supportable under the Compact, the moratorium is a regulatory taking of property without just compensation, relative to which the Senators have fiduciary duties as trustees.

22. First, the authority the Commission purports to exercise was not ceded to it by the Compact and the Senators have a substantial interest in ensuring an interpretation of the Compact consistent with the intent to retain that power.

23. Moreover, while this Court's initial decision to rely on a plain-language interpretation of the Compact's disputed provisions may have derogated from the utility of legislative involvement in the action, the Third Circuit's directive to this Court brings the interests of the Senators into renewed focus.

24. Specifically, the Third Circuit has instructed this Court to: (a) discern the intent of the parties to the Compact (as it would in any other contractual setting) by looking to the intent of the respective legislatures in executing the Compact; (b) determine the course of performance under the Compact; and (c) consider the legislative history and negotiations preceding other interstate agreements, as well as the course of performance under them.

25. Furthermore, in the passages of the Joint Case Management Plan concerning the scope of discovery and describing the extent of factual disagreements between the parties, the Commission specifically highlighted and recognized the legislature's involvement in developing and executing the Compact as a central issue in this action.

26. As such, the Compact is a quintessential creature of the legislature.

27. It further follows that the Senators are in privity of contract under the Compact and, thus, must be permitted to participate in this action to the same extent as any contracting party is permitted in an ordinary contractual dispute.

28. In this regard, the justification for permitting input from a party to a contract is augmented where, as here, a court is tasked with resolving an ambiguity in the terms of a contract by gleaning the intent of the parties to it.

29. In fact, the Third Circuit also recognized that an adequate treatment of the extent of the Commission's interference with the Commonwealth's legislative authority was conspicuously absent from the competing arguments presented by the current parties to this action. *See Wayne Land & Mineral Grp. LLC* 894 F.3d at 534 (noting that the parties' "interpretation does not effectively address the legislative amici's argument that the Compact contains no clear indication that Pennsylvania intended to cede its sovereign power so extensively to the Commission").

30. Second, the Senators must be permitted to intervene to fulfil their fiduciary duties as trustees of the state's natural resources. Although these trustee duties were extant at the time the Compact was executed and when this matter was initiated in 2016, while the action was pending on appeal to the Third Circuit, the Pennsylvania Supreme Court clarified that the Senators' trustee obligations are implicated under the present circumstances. *See generally PEDF*, 161 A.3d at 930-32.

31. In sum, the Senators seek to intervene as plaintiffs in this action to: (a) protect the General Assembly's authority and legislative prerogative that was not ceded under the Compact and to ensure that the parties' intent is adequately represented; and (b) protect the arrogation of the trust's corpus, over which the Senators have fiduciary obligations.

C. The interests asserted by the senators will be affected or impaired by a disposition

32. The Senators' interests will be affected by the disposition of this action because the Court's ruling will necessarily turn on the legislature's intent as a party to a contract. Moreover, the Court's assessment of that intent and the attendant circumstances of the Compact's execution will also affect other interstate agreements which the General Assembly has approved, or may contemplate approving in the future.

33. Furthermore, an adverse ruling in this case will not only impact Wayne Land but will also divest the General Assembly of its fiduciary duties outlined above and in the proposed complaint. *See* Ex. A.

D. The Senators Interests are not adequately represented.

34. Wayne Land does not adequately represent the Senators' interests because it was not a party to the Compact and, instead, is most closely akin to a third-party beneficiary to a contract.

35. Furthermore, Wayne Land does not represent the interests of the Trust and, even if it chose to, unlike the Senators, it would not be bound by the fiduciary duties that the Senators must exercise.

36. Accordingly, the Senators are entitled to intervene in this action as a matter of right under Federal Rule of Civil Procedure 24(a)(2).

IV. GROUNDS FOR INTERVENTION BY PERMISSION.

37. In the alternative, this Court should grant the Motion pursuant to its discretionary authority over permissive interventions.

38. Specifically, pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), a court may permit a timely applicant to intervene if the applicant has a claim or defense that shares a common question of law or fact with the action. *See* F.R.C.P. 24(b)(1)(B).

39. As set forth above, the Senators' request to intervene is timely.

40. In addition, the Senators' claims and Wayne Land's claim both deal with the basic issue of the Commission's authority to review and approve certain activities in the Basin – *i.e.*, what constitutes a “project” under Section 3.8 of the Compact.

41. Thus, there are common questions of fact and law shared by this action and the issues raised by the Senators. In fact, the Senators are best situated to present the most developed exposition of the central factual and legal questions identified by the Third Circuit's decision.

42. In considering whether to exercise its discretion to allow permissive intervention, a court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. *See* F.R.C.P. 24(b)(3).

43. Permitting the Senators to intervene will not unduly delay or prejudice the adjudication of the parties' rights; rather, as explained above it will facilitate a just and speedy resolution of this dispute.

44. In sum, the Senators should be permitted to intervene not only to vindicate the interests set forth above and in the proposed complaint, but also because their involvement will benefit this Court and the parties.

45. Accordingly, the Senators should be permitted to intervene in this matter under Federal Rule of Civil Procedure 24(b)(1).

WHEREFORE, the Senators respectfully request that the Court grant the Motion and permit them to intervene as parties plaintiff in this action.

Respectfully submitted,

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*Counsel for Proposed Intervenors Senators
Joseph Scarnati, Lisa Baker and Gene Yaw*

Dated: September 17, 2018

CERTIFICATE OF CONCURRENCE/NONCONCURRENCE

Pursuant to Local Rule 7.1, I hereby certify that on September 17, 2018, I sought the concurrence of Plaintiff Wayne Land and Mineral Group, LLC with Senators Joseph B. Scarnati, Lisa Baker and Gene Yaw's Motion to Intervene (the "Motion"). Plaintiff concurs. I further certify that on September 17, 2018, I sought the concurrences of Defendant Delaware River Basin Commission and Intervenor-Defendants Delaware Riverkeeper Network and Maya K. Van Rossum, the Delaware Riverkeeper with the Motion. Defendant and Intervenor-Defendants do not concur.

Respectfully submitted,

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Dated: September 17, 2018

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EXHIBIT “A”

[PROPOSED] COMPLAINT

Senators Joseph B. Scarnati, Lisa Baker and Gene Yaw (the “Senators”), in their official capacities as members of the General Assembly of the Commonwealth of Pennsylvania and their concomitant capacities as trustees of its natural resources, submit this Complaint and aver as follows:

PRELIMINARY STATEMENT

1. This is an action concerning the authority of Defendant Delaware River Basin Commission (the “Commission”) to institute a moratorium on high-volume hydraulic fracturing (“fracking”) within the Delaware River Basin (the “Basin”), which encompasses over 6,000 square miles of sovereign territory under the jurisdiction and purview of the Commonwealth.

2. The Senators seek a declaration from this Court that the Delaware River Basin Compact (the “Compact”), which is the exclusive source of the Commission’s authority, does not confer jurisdiction on the Commission to implement or otherwise enforce the moratorium.

3. Alternatively, the Senators seek a declaration that, to the extent it is a result of a valid exercise of authority conferred on the Commission by the Compact, the moratorium constitutes a regulatory taking without just compensation under the Fifth Amendment to the United States Constitution.

JURISDICTION AND VENUE

4. This action arises under an interstate compact and, hence, raises a federal question over which this Court has jurisdiction pursuant to 28 U.S.C. § 1331.

5. Venue is proper in the Middle District of Pennsylvania under 28 U.S.C. § 1391(b).

PARTIES

6. The Pennsylvania Senate is one of the two chambers of the Pennsylvania General Assembly vested with the exclusive legislative authority of the Commonwealth.

7. All interstate agreements to which the Commonwealth is a party, including the Compact, are approved by the Pennsylvania General Assembly in accordance with ordinary legislative procedure.

8. Senator Scarnati is an elected member of the Pennsylvania Senate who represents the 25th Senatorial District. Senator Scarnati is also President *Pro Tempore* of the Pennsylvania Senate.

9. Senator Baker is an elected member of the Pennsylvania Senate who represents the 20th Senatorial District, spanning approximately 2,581 square miles, of which approximately half is located within the Basin.

10. Senator Yaw is an elected member of the Pennsylvania Senate who represents the 23rd Senatorial District. Senator Yaw is also the chairman of the Senate Environmental Resources and Energy Committee.

11. In addition to its core legislative functions, as one of the General Assembly's two subparts, the Pennsylvania Senate and its members are also trustees of the Commonwealth's natural resources (the "Trust").

12. As trustees, the Senators owe certain fiduciary duties to the Trust's beneficiaries (the citizens of Pennsylvania), and must oversee and manage the corpus of the Trust – *i.e.*, the natural resources and all funds intended to further the Trust's purpose – in the best interest of the beneficiaries.

13. The Commission is an interstate agency created by the Compact and authorized by that agreement to regulate certain enumerated matters within the Basin.

BACKGROUND

14. In 1961, the Commonwealth of Pennsylvania and the States of Delaware, New Jersey, and New York (the "Member States"), upon the enactment of concurrent legislation by their respective legislatures and the United States Congress executed the Compact.

15. By its terms, the Compact is based on the mutual findings and expressed purpose of the Member States' respective state legislatures, including

that of the General Assembly. *See* Compact at § 1.3 (announcing “[t]he legislative bodies of the respective signatory parties hereby find and declare[.]”); *see also generally* 32 P.S. § 815.101 (corresponding legislation reflecting adoption of the Compact by the General Assembly).

16. The purpose of the Compact, as a general matter, was to facilitate a unified approach for the management of the water resources of the Basin. *See* Compact at § 1.3 (titled “Purpose and Findings”).

17. The Basin consists of 13,539 square miles, 50.3 percent of which (6,422 square miles) is located in the Commonwealth of Pennsylvania; approximately 5.53 million people reside within the Pennsylvania portion of the Basin.

18. A substantial part of the Commonwealth is also situated within the Marcellus Shale Formation (the “Formation”), which holds significant reserves of natural gas.

19. According to the United States Geological Survey, an agency housed within the United States Department of Interior, approximately 2,338 square miles of Pennsylvania territory that is encompassed by the Basin is part of the Formation. That swath of land holds an estimated \$40 billion in natural gas reserves.

20. A substantial portion of the land within the Basin, including twenty-three state parks and several forests, are owned and/or operated by the Commonwealth.

21. As trustees of the Commonwealth's natural resources, the Senators' owe certain fiduciary obligations to protect the corpus of the Trust – which plainly includes the aforementioned parcels within the Formation – and to manage it in the best interest of the Commonwealth's citizens, who are the trust's beneficiaries.

22. In a valid exercise of its legislative authority and in furtherance of these trustee obligations, the Pennsylvania General Assembly has enacted a comprehensive set of guidelines relating to natural gas drilling in the Formation. *See* 58 Pa.C.S. §§ 3201, *et seq.*

23. The General Assembly has also enacted legislation enabling the Commonwealth to execute leases “for the mining or removal of any valuable minerals” from State-owned land, provided, however, that it is in the best interest of the Commonwealth. *See, e.g.* 71 P.S. §§ 1340.302(a)(6) & 1340.303(a)(9).

24. All monies collected from such leases are deposited in the Oil and Gas Lease Fund, (the “Lease Fund”), which, in turn, is appropriate for the benefit of the Trust, or in furtherance of its purpose. *See* 72 P.S. § 1601.2-E.

25. In addition, the General Assembly has imposed fees for the construction and/or use of unconventional gas wells, *see* 58 Pa.C.S. §§ 2301, *et*

seq., which are deposited in the Unconventional Gas Well Fund and are similarly allocated for specific initiatives for the benefit of the Trust. *See id.* § 2314.

26. Since 2010, the Commission has categorically prohibited fracking within the Basin, purporting to rely on its authority under the Compact to regulate “projects” that have “a substantial effect on the water resources of the [B]asin.” Compact, at § 3.8. The Commission has described its actions in this respect as a *de facto* moratorium.

27. In enforcing the moratorium, the Commission has attempted to exercise legislative authority vested the General Assembly and subject over five million citizens of the Commonwealth residing in the Basin to its dictates, rather than the comprehensive statutory scheme enacted by their duly elected Senators.

28. Furthermore, because the moratorium is indiscriminately applied throughout the Basin, including to property owned by the Commonwealth, it amounts to an appropriation of the corpus of the Trust.

COUNT I – VIOLAITION OF THE TERMS OF THE COMPACT

29. The Senators incorporate the foregoing paragraphs as if fully set forth herein.

30. Because all intestate agreements, including the Compact, are treated as contracts between the various signatory states, all disputes relating to their terms are judicially assessed under settled principles of contract law.

31. Applying this precept, the Compact is a binding contract between the Member States, which became operative after concurrent legislative enactments by their respective state legislatures. *See* 32 P.S. § 815.101(1.3); *accord* Compact, art. I, Sec. 1.3.

32. Furthermore, the Compact expressly outlines the factual findings of the *state legislature* of each Member States – including the Pennsylvania General Assembly – and makes it clear that its terms represent the policy judgment of the respective legislative bodies.

33. Given that the Compact was a quintessential legislative creation, the Senators stand in privity of contract in this action; as such, they may maintain such claims and advance such argument, as any party to a contract ordinarily may.

34. The moratorium violates the terms of the Compact because it exceeds the scope of authority ceded to the Commission under the Compact and improperly arrogated legislative power retained by the state legislatures.

35. Furthermore, insofar as the Compact is materially ambiguous relative to the Commission's authority to enforce a moratorium on fracking, the rules of construction clearly demonstrate that the Commission's proposed interpretation is inconsistent with the intent of the parties – *i.e.*, legislative intent – and course of performance.

36. As such, the Senators respectfully request that this Court declare that the Commission lack authority to institute a *de facto* moratorium within the Basin.

COUNT II (REGULATORY TAKING IN VIOLATION OF THE FIFTH AMENDMENT)

37. The Senators incorporate the foregoing paragraphs as if fully set forth herein.

38. The Fifth Amendment to the United States Constitution provides that private property shall not “be taken for public use, without just compensation.” U.S. Const. amend. V (the “Takings Clause”).

39. The Takings Clause applies not only to a physical taking of property, but also to governmental regulations that substantially diminish the economic value of land or significantly hamper its economically beneficial use.

40. As a preliminary matter – and apart from the fact that the Commission’s interpretation of the Compact is untenable under ordinary principles of contractual construction – the moratorium is not reasonably necessary to effectuate the Commission’s purpose, as set forth in the Compact.

41. To the extent the challenged conduct is found to be a valid exercise of authority granted to the Commission by the Compact, the moratorium constitutes a regulatory taking without just compensation of privately-owned land within the Formation that is encompassed by the Basin.

42. Furthermore, because that moratorium extends beyond privately-owned property and prohibits the Commonwealth from executing leases for the extraction of natural gas from state-owned land within the Basin, it also constitutes a regulatory taking without just compensation of publicly-owned land held in trust for the benefit of the citizens of the Commonwealth.

43. Accordingly, to the extent this Court finds that the *de facto* moratorium is within the ambit of authority transferred to the Commission under the Compact, the Senators respectfully request that this Court declare it an unconstitutional regulatory taking under the Fifth Amendment and, in consequence, enter an order: (a) invalidating the moratorium and enjoining the Commission from enforcing it; or, in the alternative (b) directing the Commission to afford just compensation for the diminution of the economic value of the property it has appropriated.

CONCLUSION

44. For the foregoing reasons, the Senators respectfully request that this Court invalidate the *de facto* moratorium and enjoin its further enforcement, or in the alternative, order the Commission to provide just compensation for the deprivation of the economic value of the property in question.

Respectfully submitted,

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Dated: September 17, 2018

*Counsel for Proposed Intervenors Senators
Joseph Scarnati, Lisa Baker and Gene Yaw*

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2018, I served all parties by filing the foregoing on the Court's ECF filing system.

Respectfully submitted,

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