

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

IN RE: CASE NO. 2009-00064

APPLICANT: EAST KENTUCKY NETWORK, LLC, d/b/a APPALACHIAN
WIRELESS

INTERVENOR: LEE ETTA CUMMINGS

**RESPONSE TO EKN'S MOTION TO STRIKE
PORTIONS OF FRED WEBB'S TESTIMONY**

Comes the Intervenor, Lee Etta Cummings, by counsel, and states the following in response to East Kentucky Network's Motion to Strike portions of Fred Webb's testimony at the hearing in this matter:

Mr. Webb, chief mining engineer with Sapphire Mining, testified at the hearing in this matter that proposed Alternate Site #1 was selected by him because it sits on a solid block of coal that cannot be mined and will provide a more stable base for EKN's tower than the abandoned underground deep mine selected by EKN for location of its tower, especially considering Sapphire's planned mining operations on Ms. Cummings' property. Mr. Webb was available throughout the course of the hearing in this matter to review any maps EKN might have wished to proffer to him for purposes of clarifying the location of the solid block of coal about which he testified. That EKN failed to do so does not undermine Mr. Webb's testimony in any way or cause it to be so suspect that it should be subject to the extraordinary remedy of being stricken from the record. Mr. Webb was very clear and very adamant about the existence of the solid block of coal beneath Alternate Site #1 during his testimony; and his testimony is sufficient for the Commission to make a determination regarding that issue.

Nevertheless, Ms. Cummings attaches an affidavit from Fred Webb in which he reaffirms his testimony regarding the solid block of coal underlying Alternate Site #1 and states that EKN's plotting of Alternate Site #1 on the maps attached to its Motion to Strike does not hit the solid block of coal about which he testified because EKN is mistakenly placing Alternate Site #1 on its maps. Mr. Webb states that the solid block of coal is clearly visible on the maps EKN has submitted with its Motion to Strike. On Exhibit A, the solid block of coal is northeast of where EKN has determined to place Alternate Site #1. As Mr. Webb previously testified, Alternate Site #1 is located on a ridge that straddles the properties of both Ms. Cummings and Mr. Brown. The red arrow in front of the red 52' on EKN's map points to a line that bisects the solid block of coal about which Mr. Webb testified. On the Exhibit C map attached to EKN's Motion, the solid block of coal is clearly visible right above the letters "A1" of the handwritten "Alternate Tower Site #1" placed on that map during Mr. Caudill's testimony at the hearing. Mr. Webb has also identified the solid block of coal and the intended location of Alternate Site #1 by placing a red star on EKN's maps and marking it with "Intended Site of Alt. 1," and those maps are attached to his Affidavit. Ms. Cummings respectfully requests that, in the event the Commission entertains EKN's motion and accepts its tardy proffer of "newly discovered evidence," that the Commission also accept and consider the attached Affidavit of Fred Webb and the maps attached to his Affidavit.

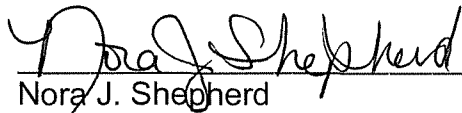
EKN's Motion should be denied. The testimony EKN wishes to strike is testimony EKN solicited and obtained by cross-examination. EKN has known about Mr. Webb's testimony since the date of the hearing and for well over two months; and there is simply no excuse or justification for this 11th hour filing after the record has been

closed for the submission of evidence and after the parties have just fully briefed this matter. Part of EKN's motion to strike consists of unsworn statements regarding Mr. Webb's testimony which it is simply improper for the Commission even to consider. EKN's subsequent filing of an Affidavit from Mr. Caudill is no better since it is self-serving and, apparently, erroneous testimony which has not been tested by cross-examination. It is unfair and prejudicial to Ms. Cummings to allow EKN to attack the record in this manner by filing self-serving documents and trying to cloak them with the label of "evidence" long after the hearing and without sufficient opportunity on the part of her or her witnesses to respond.

Ms. Cummings respectfully requests that the Commission deny EKN's motion and that it strike EKN's motion to strike and the attached exhibits and its Notice of Filing and the Affidavit of J.W. Caudill from the record in this matter.

SWORD, FLOYD & MOODY, PLLC

BY:



Nora J. Shepherd
Counsel for Intervenor


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P. O. Box 300
Richmond, KY 40476-0300
859-623-3728
859-623-4224 fax

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **RESPONSE TO EKN'S MOTION TO STRIKE PORTIONS OF FRED WEBB'S TESTIMONY** was served upon the following on this the ^{18th}~~17th~~ day of December, 2009:

William S. Kendrick
P. O. Box 268
Prestonsburg, KY 41653
Counsel for Applicant

Allyson Honaker
Counsel for Public Service Commission
211 Sower Blvd
Frankfort, KY 40602



Nora J. Shepherd

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

IN RE: CASE NO. 2009-00064

APPLICANT: EAST KENTUCKY NETWORK, LLC, d/b/a APPALACHIAN
WIRELESS

INTERVENOR: LEE ETTA CUMMINGS

AFFIDAVIT OF FRED WEBB

Affiant, after first being duly sworn, states the following:

My name is Fred Webb. I am chief engineer for Sapphire Mining. I previously testified in regards to this Public Service Commission matter on October 6, 2009.

At the hearing, I testified as follows:

Q [By Kendrick, counsel for EKN] You've been present throughout this proceeding today and you heard J.W. Caudill testify with respect to the exhibit map that was put in the record here today; is that correct?

A That's correct.

Q And do you have any problem with anything that he testified about there?

A Well, I'd like to clarify one thing. The Alternate Site No. 1--there's a solid block of coal in that No. 4 seam in that abandoned mine that's directly under Alternate Site No. 1. It's about a 150 foot block. That's part of why we suggested Alternate No. 1. The Whitesburg seam has not been undermined under that block. The problem with -- the first maps we submitted were on a small scale and that dot was about 200 foot in diameter, and, when you put it on a larger scale map, it just covered deep mines, but the point we intended -- and, if you look carefully at the center of that dot, it does hit in a solid block of coal in that old deep mine.

Q So, if I understand your testimony, you're saying it's better to locate the tower on Alternate Site No. 1 where there remains some recoverable coal reserves in the Hazard #4 seam. Is that what you're telling us?

A Well, this block of coal in the Hazard No. 4 seam is inaccessible. It's surrounded by old deep mine works.

Q So it's inaccessible? You can't mine it anyway?

A No.

Q Not because of the tower but because it's inaccessible?

A The block that the tower will be sitting on is inaccessible.¹

....

Q [By Ms. Honaker, counsel for the Commission] And you were testifying about Alternate Site No. 1 that there's, apparently, I think you said, a 150-foot block of coal that was inaccessible; is that correct?

A Yes. There's a solid block of coal underneath.

Q In the Whitesburg seam? Is that what you said?

A Well, the Whitesburg hasn't been mined under Alternate No. 1. The solid block is in Hazard No. 4, which is over top of the Whitesburg, but it's underlying Alternate No. 1.

Q Okay, and you said that was inaccessible?

A Yes.

Q Why -- how is that inaccessible?

A The deep mine almost wraps around it. It's in such a form that it wouldn't be touched.

Q Okay.

A MSHA wouldn't allow us to deep mine that close to an abandoned mine.

Q Okay, and you would have to deep min in order to get that remaining block of coal?

A Right.

Q And so do you think that that would provide more support for the tower in order for your blasting operations and different things to be around that

¹ Transcript of Evidence, pp. 88-90.

tower? Do you think that that would be more of a support for the tower than the proposed site...

A Yes.²

I hereby reaffirm all of this testimony as true and accurate.

I have reviewed East Kentucky Network's motion to strike my testimony, the maps attached to their motion and the affidavit of J.W. Caudill. Nothing contained in the motion, maps or affidavit has provided me with any reason to change my testimony at the hearing in this matter.

The solid block of coal that underlies Alternate Site #1 and about which I testified at the hearing in this matter is clearly visible on the maps submitted by East Kentucky Network with its motion. On the Exhibit A map, the solid block of coal is located just to the northeast of where East Kentucky Network has placed the location of Alternate Site #1. The solid block of coal is located in the area of a red arrow labeled "52'," and the red arrow points to a line that bisects the solid block of coal. This is the area in which I intended to place Alternate Site #1, and East Kentucky Network's placement of Alternate Site #1 is incorrect on that map. On the Exhibit C map, East Kentucky Network has, again, misplaced Alternate Site #1. Alternate Site #1 and the solid block of coal is located just north of the "A1" in the handwritten "Alternate Tower Site #1" on that map.

I have outlined the location of the solid block of coal on both of EKN's maps, the attached Exhibit A and Exhibit C, ~~in blue ink and have placed my initials next to my addition to those maps~~ with a red star and the label "intended site of Alt. 1."

Further Affiant sayeth naught this 17 day of December, 2009.

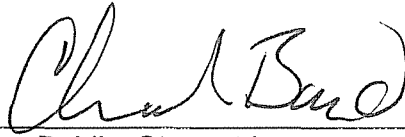

Fred Webb

STATE OF KENTUCKY)

COUNTY OF LEWIS)

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED by the Affiant, Fred Webb, on this the 17 day of December, 2009.

² Transcript of Evidence, pp. 106-07.



Notary Public, State at Large

My commission expires 8-27-12.

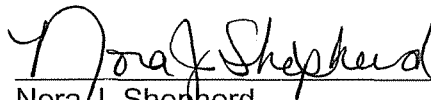
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Affidavit of Fred**

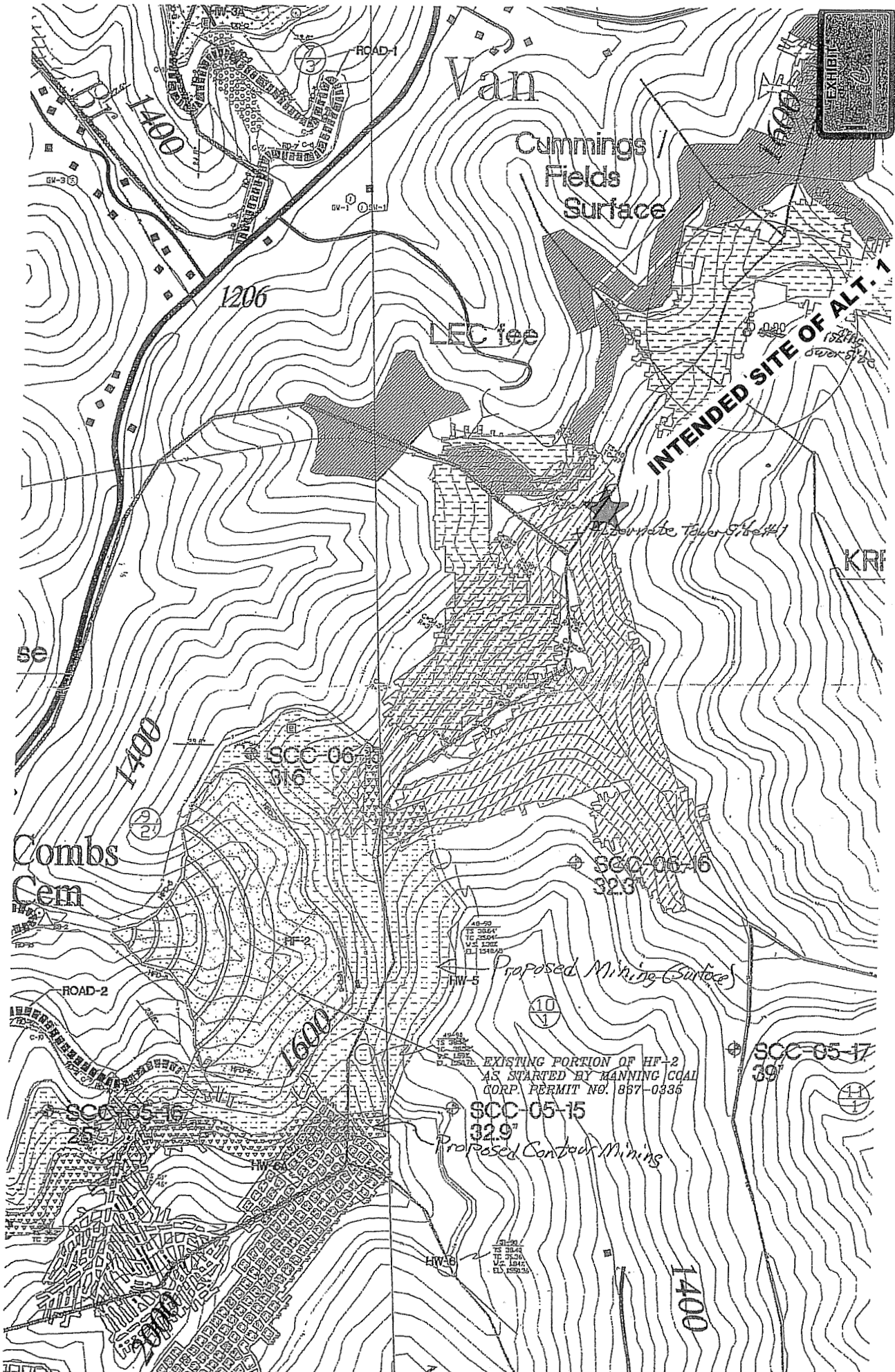
Webb was served upon the following on this the 18th day of December, 2009:

William S. Kendrick
P. O. Box 268
Prestonsburg, KY 41653
Counsel for Applicant

Allyson Honaker
Counsel for Public Service Commission
211 Sower Blvd
Frankfort, KY 40602



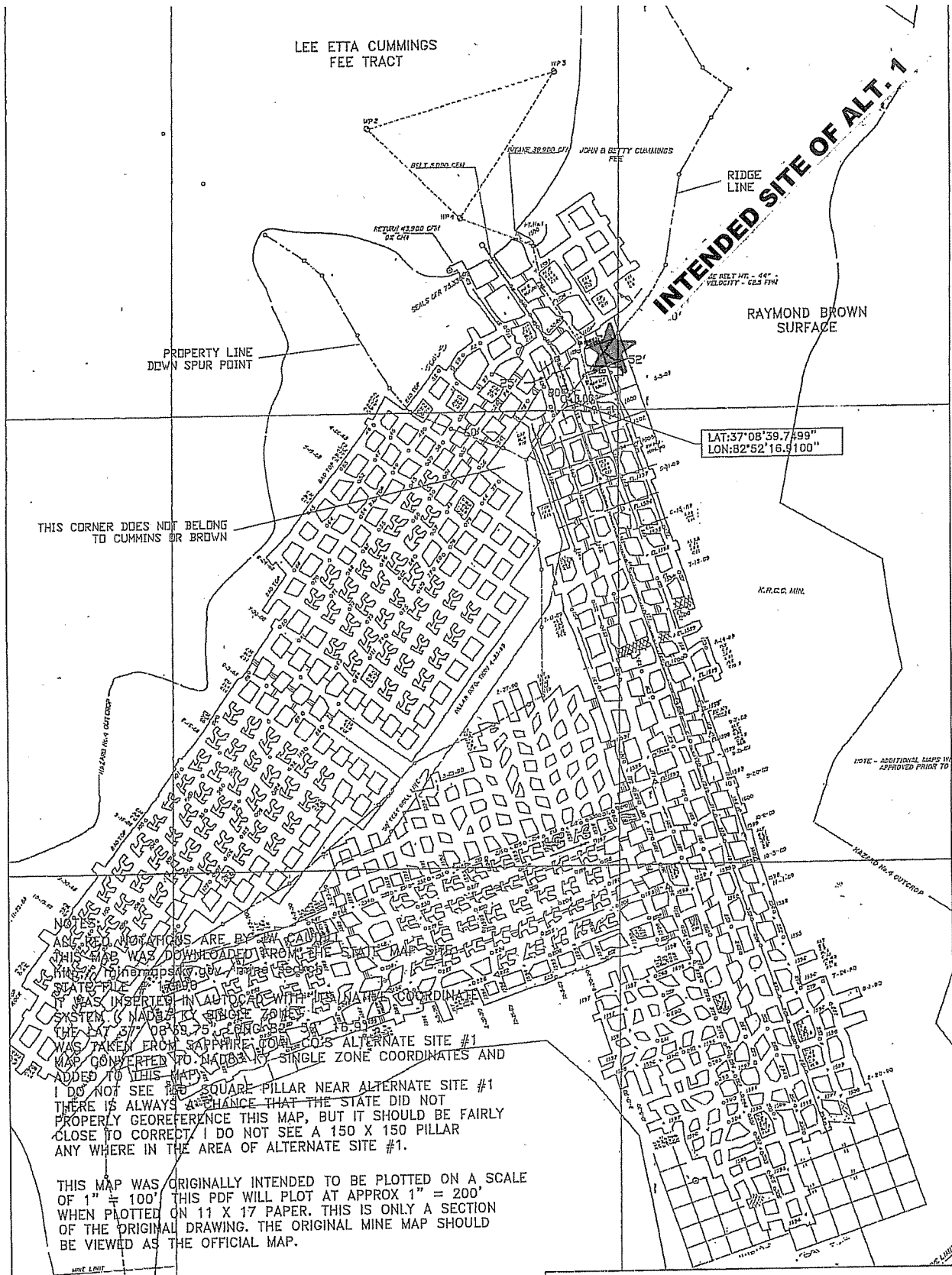
Nora J. Shepherd
Counsel for Intervenor



EXISTING PORTION OF HF-2
AS STARTED BY MANNING COAL
CORP. PERMIT NO. 867-0335

Proposed Contour Mining

HW-10
U.S. 1042
D.V. 12223



THIS CORNER DOES NOT BELONG TO CUMMINGS OR BROWN

LAT:37°08'39.7499"
 LON:82°52'16.9100"

NO LEGAL NOTATIONS ARE BY JOHN CUMMINGS
 THIS MAP WAS DOWNLOADED FROM THE STATE MAP SYSTEM
 IT WAS INSERTED IN AUTOCAD WITH THE NAME SINGLE COORDINATE
 SYSTEM (MADE BY SINGLE ZONES) ON THE DATE 3/7/09
 WAS TAKEN FROM SAPPRIRE COAL CO'S ALTERNATE SITE #1
 MAP CONVERTED TO NAD83 BY SINGLE ZONE COORDINATES AND
 ADDED TO THIS MAP
 I DO NOT SEE THE SQUARE PILLAR NEAR ALTERNATE SITE #1
 THERE IS ALWAYS A CHANCE THAT THE STATE DID NOT
 PROPERLY GEOREFERENCE THIS MAP, BUT IT SHOULD BE FAIRLY
 CLOSE TO CORRECT. I DO NOT SEE A 150 X 150 PILLAR
 ANY WHERE IN THE AREA OF ALTERNATE SITE #1.

THIS MAP WAS ORIGINALLY INTENDED TO BE PLOTTED ON A SCALE
 OF 1" = 100'. THIS PDF WILL PLOT AT APPROX 1" = 200'
 WHEN PLOTTED ON 11 X 17 PAPER. THIS IS ONLY A SECTION
 OF THE ORIGINAL DRAWING. THE ORIGINAL MINE MAP SHOULD
 BE VIEWED AS THE OFFICIAL MAP.

APPALACHIAN WIRELESS

| | | |
|---------------------------|-------------------------|--|
| DRAWN JWC | DATE 12/10/09 | W & P COAL CO MINE #2 UNDERGROUND MINE MAP HAZARD #4 SEAM MAP DATED 11/19/90 |
| APPROVED | DATE | |
| SCALE 1" = 200' | SHEET 1 OF 1 | PROJECT NO. DRYFORK/17190B |

