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Marcellus Watch: Bullies and superheroes in the fracking battle

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It's chilling to watch private industry seize the reins of government and steer it down a dark and dangerous back alley of self-interest. But it happens. That's why we need real-world superheroes like Helen and David Slottje. They help us sort out right versus wrong.

Helen and David live in Ithaca. They are lawyers who are married to each other. They are probably underpaid in money but well rewarded in gratitude from those who have bothered to acquaint themselves with the natural gas industry's efforts to manipulate the legal landscape in New York State.

A few years ago, that industry began an aggressive push to gain land rights in the Southern Tier so it could begin fracking the gas-rich Marcellus shale. Landmen working for companies like Chesapeake Energy fanned out across the region to peddle lease deals to naively expectant landowners.

Lease-granting landowners – many of whom were also local politicians – readily bought in to the industry promise that a fracking boom would mean an economic boom for upstate New York (on top of personal riches for them). Many organized into coalitions, which served as uncritical local lobbies for the industry's agenda.

Meanwhile, gas industry agents had been working in Albany, corralling state senators and reinforcing old loyalties at the state Department of Environmental Conservation in a bid to build a broad legal foundation for widespread fracking.

Three of its key legal principles would be:

- The landowner has a basic right to exploit his or her privately-owned gas resources, and that right supersedes others' rights to be protected from damage caused by fracking activities.
- State bureaucrats at the DEC have the final say over where a gas well can be drilled, superseding all powers of local governments.
- DEC bureaucrats may grant a gas company the authority to drill on property that hasn't been leased, even if the property owner is adamantly opposed.

Together, the three principles amounted to an extremely aggressive legal agenda aimed at stripping rights from anyone opposed to the gas industry's drilling schedule. That includes landowners who fear the environmental risks of fracking and those who simply want to wait to try to frack later at a better price.

For quite a while, fracking's legal foundation seemed firm enough. Gas drillers held – and still hold – virtual veto power over proposed state legislation on fracking through a majority in the Republican-controlled Senate. And drillers have a long history of successfully manipulating the DEC.

For example, when a lobbyist for Chesapeake drafted legislation to empower drillers to trespass on the property of unwilling landowners, the DEC vouched for it and helped ram it through the Legislature without debate. That was the state's notorious 2005 compulsory integration statute. It stands to this day, waiting to be applied broadly if a fracking boom ever comes.

Obviously, when the government acts like that – as willing servant to a private interest with an improper agenda – we need our superheroes to intervene.

By 2010, evidence was piling up from fracking operations in Pennsylvania that fracking was dangerous to the environment and human health, and New York State wasn't rushing to allow it. Several municipalities in the Southern Tier began exploring the possibility of holding off fracking with a local moratorium, or even a permanent ban.

The industry responded with threats to sue any city, town or village that dared try. Many local boards feared an avalanche of legal bills and did what little kids usually do when confronted by a schoolyard bully: they slunk away.

But the Town of Dryden stood up to the industry's legal threats and banned fracking within its borders. As expected, the industry huffed and puffed and filed suit and promised to roll to victory in court.

To do so, they needed to roll over the Slottjes too. But the Slottjes had read the law. All of it. They'd developed a legal theory, which

Dryden adopted, that said the DEC lacked the authority to supersede municipal zoning powers that gave towns the right to ban unwanted activities. So the law gave the DEC authority to say how to drill, and local boards got to say where to drill.

Drillers and their PR flunkies were apoplectic. In court, they trotted out a former high-ranking DEC official who testified that a 1981 state law gave his agency authority that supersedes all local zoning powers. Nice try.

The court sided with Dryden and the Slottjes. In a huff, industry appealed. In May, the industry lost that appeal 4-0. The drillers haven't yet exhausted all their appeal options, but like a bully who's been poked in the eye, their hunger for confrontation has abated considerably.

Meanwhile, Helen and David Slottje are already gearing up for the next legal scrap with industry.

If and when the DEC grants the first permits to allow gas companies to drill horizontally under the properties of unwilling landowners and to frack under their homes with unspecified chemicals, the Slottjes will be ready expose the state's disgraceful compulsory integration statute to the light of day in open court.

"We are rock solid certain it is unconstitutional in horizontal drilling of shale formations," David Slottje told a small group in H last week.

Once again, the bully is put on notice.

- Peter Mantius is a freelance journalist who resides in Schuyler County and follows Marcellus Shale gas drilling issues. He is a longtime former reporter at the Atlanta Journal-Constitution and editor of two business weeklies in the Northeast. This is an op column.

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