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NO. 35509  
(Consolidated with Nos. 35508,35510,35511)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CABOT OIL AND GAS CORPORATION,

Petitioner below, Appellee,

v.

RANDY HUFFMAN, CABINET SECRETARY,  
WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, OFFICE  
OF OIL AND GAS,

Respondent below, Appellant,

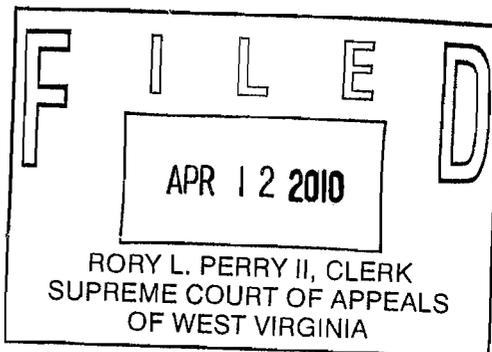
v.

LAWSON HEIRS, INC., SIERRA CLUB, INC.,  
CORDIE HUDKINS, THE WEST VIRGINIA  
HIGHLANDS CONSERVANCY, FRIENDS OF  
BLACKWATER,

Intervenors below, Appellants,

THE WEST VIRGINIA DIVISION OF NATURAL RESOURCES,

Intervenor below, Appellant.



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BRIEF OF APPELLANT  
WEST VIRGINIA DIVISION OF NATURAL RESOURCES

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BRIEF OF APPELLANT  
WEST VIRGINIA DIVISION OF NATURAL RESOURCES

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I.

**KIND OF PROCEEDING AND  
NATURE OF RULING BELOW**

This appeal seeks review of an order of the Circuit Court of Logan County, West Virginia, entered June 17, 2009, wherein the circuit court reversed an Administrative Order issued on

December 12, 2007, by the West Virginia Department of Environmental Protection (“DEP”) Office of Oil and Gas (“OOG”) which denied permits for five (5) gas wells on the grounds of Chief Logan State Park. The parties to the action below were the Lawson Heirs, Inc. (“Heirs”), owners of the mineral rights at issue, Cabot Oil and Gas, Corp. (“Cabot”), the entity with which the Heirs have a drilling contract, and DEP.

On or about September 18, 2009, appellate intervenors Cordie Hudkins (“Hudkins”), Friends of Blackwater (“Friends”), the West Virginia Nature Conservancy (“Conservancy”), and The Sierra Club of W. Va. (“Sierra Club”) filed motions to intervene. After filing said motions but prior to any ruling thereon, appellate intervenors Hudkins, Friends, and the Conservancy moved that your petitioner, the West Virginia Division of Natural Resources (“DNR”), also be made an intervenor.

A hearing was held on the various motions to intervene on October 7, 2009, and while not a party, DNR appeared at the hearing, by counsel, due to the motion naming DNR. Upon hearing argument from other the intervenors and parties, DNR acquiesced to becoming an intervenor after the court appeared to entertain the argument that the court’s June 17, 2009 Order might limit or preclude DNR’s ability to enforce the provision of West Virginia Code § 20-5-2(b)(8). By Order dated October 15, 2009, the circuit court granted intervenor status for appeal purposes only. Said order also extended the time to file a petition for appeal to December 16, 2009.

On December 4, 2009, DNR filed a Motion to Supplement the Record, said supplementation being documents obtained after DNR was joined, which reflect that DNR has not allowed the drilling of new gas wells on state park lands since the passage of the prohibition against mineral exploitation in 1961 now contained in West Virginia Code § 20-5-2(b)(8). This is a critical piece of evidence as the misapprehension that such drilling has occurred permeates the court’s findings

and evidence presented by the Heirs and Cabot. After a hearing on December 11, 2009, the circuit court granted said motion and allowed DNR to supplement the record for appeal.

## II.

### STATEMENT OF FACTS

On November 21, 2007, Cabot filed five (5) well work permit applications with OOG. The applications sought to drill within Chief Logan State Park (“Park”).

On December 12, 2007, OOG issued an Order denying all five (5) well permit applications. The basis for the denial was language contained in West Virginia Code § 20-5-2(b)(8) which reads:

(8) The Director of Division of Natural Resources shall: . . . Propose rules for legislative approval in accordance with the provisions of article three, chapter twenty nine-a of this code to control the uses of parks: *Provided, That the director may not permit public hunting, except as otherwise provided in this section, the exploitation of minerals or the harvesting of timber for commercial purposes in any state park.*

(Emphasis supplied.)

The record reflects that the circuit court, in reversing the Order of the OOG, adopted *in toto* “Cabot Oil & Gas Corporation's and Lawson Heir Inc.'s Proposed Findings of Fact and Conclusions of Law and Orders.” DNR respectfully takes the position that the circuit court’s order is not and cannot be binding upon DNR as DNR was not a party to the underlying action and that certain highly significant facts adopted by the circuit court and necessary to its ultimate conclusion are incorrect or not fully developed.

### III.

#### ASSIGNMENTS OF ERROR

**A. THE “FACT” PRIMARILY RELIED UPON BY THE CIRCUIT COURT IN SUPPORT OF ITS JUNE 7, 2009 ORDER IS WRONG AS DNR HAS NOT ALLOWED NEW DRILLING ON STATE PARK LANDS.**

The Heirs and Cabot presented evidence and the circuit court found that DNR allows drilling in at least nine (9) state parks.

The circuit court found that “the record is clear that the DEP and DNR have authorized and allowed the development of minerals owned by private parties under numerous other state parks.” Such is not, nor has it ever been, the case since 1961 when the prohibition now contained in W. Va. Code § 20-5-2(b)(8) was originally enacted.

As is clearly set forth in the documents accompanying DNR’s Motion to Supplement the Record, DNR has NOT allowed the drilling of new gas wells on park property under its control since the passage of the language now contained in W. Va. Code § 20-5-2(b)(8). As is evidenced in the affidavit and maps accompanying DNR’s Motion to Supplement the Record, DNR has allowed the reworking of existing wells which pre-date park designation or the statutory prohibition (Beech Fork, Chief Logan, North Bend, Tomlinson Run, Twin Falls, Valley Falls and Watters Smith State Parks). One well was drilled in 1972 on land that is now Cedar Creek State Park during a period when the ownership of the property where the well was drilled was the subject of a boundary dispute. DNR did not permit or authorize this drilling.

Part of the confusion over this question may arise due to the fact that drilling is allowed in Wildlife Management Areas which are sometimes adjacent to park lands (Beech Fork, Chief Logan and Stonewall Jackson State Parks) and the circumstance at Stonewall Jackson State Park which is

composed of land leased from the U.S. Army Corps of Engineers. The Corps lease with the DNR expressly states that the lease to West Virginia is “subject to mineral interests,” although no new wells have been drilled there since the final long-term lease went into effect on June 30, 1994. Additionally, there are wells operating on what is now park land which were drilled before those parcels became park land (Watters Smith State Park).

The language binding the DNR is clear and unambiguous. “[T]he director may not permit . . . the exploration of minerals or the harvesting of timber for commercial purposes in any state park.” W. Va. Code § 20-5-2(b)(8).

“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

“A statutory provision which is clear and unambiguous and plainly expressed the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). Syl. Pt. 1, *Sowa v. Huffman*, 191 W. Va. 105, 443 S.E.2d 262 (1994).

**B. THE CIRCUIT COURT'S ORDER OF JUNE 17, 2004, SHOULD HAVE NO FORCE OR EFFECT ON DNR'S STATUTORY AUTHORITY AND RESPONSIBILITIES.**

As noted hereinbefore DNR was not a party to the administrative matter or the appeal in the circuit court; DNR only became involved for appeal purposes after the entry of the June 17, 2009 final order. As mentioned hereinbefore DNR’s willingness to be joined in this matter as an intervenor on appeal is based solely upon a concern that failure to intervene might prejudice DNR

enforcement of W. Va. Code § 20-5-2(b)(8). This possibility was raised repeatedly by counsel for Mr. Hudkins, *et al.* at the hearing held October 9, 2009, and appeared, to hold at least some possible attraction for the Circuit Court. Hence, DNR's reluctant agreement to be made an intervenor.

DNR respectfully submits that a number of solid legal arguments militate against the position that DNR is in any way limited in its enforcement of W. Va. Code § 20-5-2(b)(8) by the court's final order of June 17, 2009.

First, DNR was not a party to the case until after the entry of the final order, nor was DEP representing DNR's interest in that action. The sole issue before the circuit court was the legality of DEP using the provision of West Virginia Code § 20-5-2(b)(8) as the basis for denying the drilling permits. The appeal of DEP's denial of the permits was before the circuit court pursuant to the provisions of the State Administrative Procedures Act, W. Va. Code § 29A-1-1 *et seq.* DNR's only involvement in the underlying action was to provide the letter of December 6, 2007, stating its intention to enforce the prohibition contained in W. Va. Code § 20-5-2(b)(8) should DEP grant drilling permits.

Second, the circuit court's primary, if not sole, basis for reversing DEP's decision is obviously inapplicable to DNR. Should this Court find that DEP's invocation of West Virginia Code § 20-5-2(b)(8) is *ultra vires* such position cannot legally or logically be applied to DNR.

DNR respectfully submits that this court should unequivocally hold that the circuit court's Order of June 17, 2009, has no force or effect as to DNR.

The concern of counsel for Mr. Hudkins, *et al.*, that DNR would be somehow estopped from enforcement of W. Va. Code § 20-5-2(b)(8) or that *res judicata* or some heretofore unknown form

of issue estoppel is applicable is unfounded upon a review of this court's prior decisions. In Syllabus point 4 of *Blake v. CAMC*, 201 W. Va. 469, 498 S.E.2d 41 (1997), this Court held that:

Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication the merits in the prior action by the court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

DNR was, obviously, not a party to the action below nor can DNR be said, by any definition of the term, to be in privity with DEP. This Court defined “privity” in the case *Cater v. Taylor*, 120 W. Va. 93, 196 S.E. 558 (1938), as follows: “[p]rivity, in a legal sense, ordinarily denotes mutual or successive relationship to the same rights or property.” As to collateral estoppel this Court has held consistently that:

[c]ollateral estoppel will bar a claim if four conditions are met: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

(Emphasis supplied.) *Horkulic v. Galloway*, 222 W. Va. 450, 665 S.E.2d 284 (2008), *in accord*, *Brooks v. Galen of W. Va., Inc.*, 220 W. Va. 669, 649 S.E.2d 274 (2007). Any other view would constitute a denial of due process. *Horkulic, supra*. Whatever this Court may decide as to whether or not DEP can properly use West Virginia Code § 20-5-2(b)(8) as a basis for permit denial, it is clear that no privity, however defined, exists between DEP and DNR on the facts of this case.

The lack of any type of connection, much less privity of interest, is further exemplified by the incorrect information supplied to the circuit court and uncontested by DEP that DNR allows

drilling of new wells on park property under its ownership and control. Had DNR been a party below the fundamental misconception that DNR has been permitting drilling in State parks would have been dispelled.

DNR also believes it is crucial for this Court to understand that while the prohibition contained in West Virginia Code § 20-5-2(b)(8) has been set forth in that section since a 1995 redraft of environmental law, the prohibition has been in effect since the 1961 regular session enacted West Virginia Code § 20-4-3, which required the Director of Natural Resources “. . . insofar as practical, maintain in their natural condition lands that are acquired for an designated as state parks, and shall not permit public hunting, the exploitation of the minerals or harvesting of timber thereon for commercial purposes.” (Emphasis supplied.)

The transfer of the property at issue in this case occurred in 1960 and the property has been a part of Chief Logan State Park since 1969. To DNR’s knowledge no attempt to assert a right to drill in the park was made until 2007.

#### IV.

#### STANDARD OF REVIEW

“In cases where the circuit court has amended the result before the administrative agency, [the Supreme Court of Appeals] reviews the Final Order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.” Syl. Pt. 1, *Helton v. REM Community Options, Inc.*, 218 W. Va. 165, 624 S.E.2d 512 (2005) (citing Syl. Pt. 2, *Muscatel v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)).

V.

**DISCUSSION, POINTS OF AUTHORITY**

This Court has held that its review of a circuit court's decision related to an agency action under the State Administrative Procedures Act, W. Va. Code § 29A-1-1 *et seq.*, is bound by the provisions of W. Va. Code § 29A-5-4. *Wheeling-Pittsburgh Steel Corporation v. Rowling*, 205 W. Va. 286, 517 S.E.2d 763 (1999). Among the standards set forth in West Virginia Code § 29A-5-4 are subdivisions (g) (1) and (5) which state respectively that an administrative decision may be reversed, vacated or remanded where administrative findings, inferences, conclusions or statutory provisions are: (1) “[i]n violation of constitutional or statutory provisions” or (5) “[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record.”

DNR submits that DEP was acknowledging and following the provisions of W. Va. Code § 20-5-2(b)(8) in its decision and that the circuit court’s finding that DNR allows drilling of new wells on state park lands is “clearly wrong.”

The facts of this case unquestionably raise complex and multitudinous issues which must be addressed. While some of the issues are justiciable there are significant public policy questions perhaps which could be better addressed by the legislative branch.

The record in this case, the evidence upon which the circuit court decided, is incorrect on at least one critical point. As to other issues: the possible “taking” question, numerous possible defenses thereto, the applicability of any statutes of limitation or repose as well as equitable principles such as laches, all need to be fully and squarely addressed to be fair to all affected persons and the State itself. DNR would note that as the record below raises more questions than it answers

and the fact that a, if not the, pillar upon which the June 17, 2009 Order is based is categorically incorrect argues for the reversal of the circuit court.

VI.

**CONCLUSION**

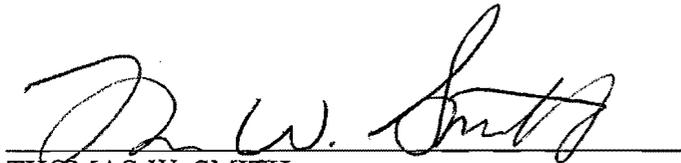
WHEREFORE, based upon the foregoing and for such reasons as may appear to the Court, DNR prays that this Court affirmatively rule that the Circuit Court of Logan County's Final Order of June 17, 2009, has no force or effect as to DNR.

Respectfully submitted,

WEST VIRGINIA DIVISION OF  
NATURAL RESOURCES,

*By Counsel,*

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**CERTIFICATE OF SERVICE**

I, Thomas W. Smith, Managing Deputy Attorney General, do hereby certify that I served the foregoing "Brief of Appellant West Virginia Division of Natural Resources" upon the parties hereto by depositing true copies thereof in the regular United States mail, postage prepaid, this 12th day of April, 2010, addressed as follows:

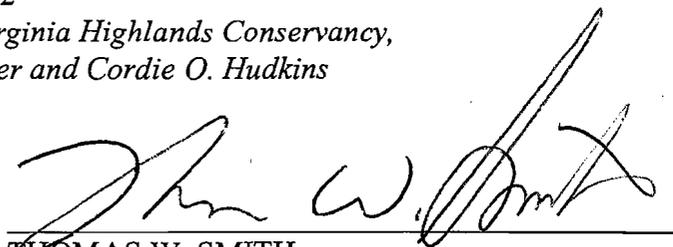
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