

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 35508

CABOT OIL & GAS CORP., and LAWSON HEIRS, INC.,
Petitioner and Intervenor Below, Appellees

v.

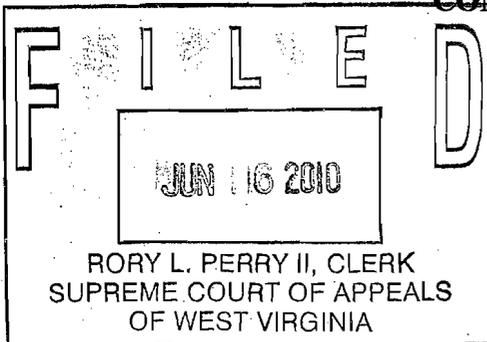
RANDY C. HUFFMAN, Cabinet Secretary,
West Virginia Department of Environmental Protection,
Respondent Below, Appellant,

and

**SIERRA CLUB, INC., WEST VIRGINIA HIGHLANDS CONSERVANCY, FRIENDS
OF BLACKWATER, CORDIE HUDKINS, and WEST VIRGINIA DIVISION OF
NATURAL RESOURCES,**
Intervenors Below, Appellants.

CA No. 08-C-14
Hon. Roger L. Perry
Chief Judge, Seventh Judicial Circuit

**BRIEF OF APPELLEE, CABOT OIL & GAS CORP., IN RESPONSE TO BRIEFS BY
APPELLANTS DEPARTMENT OF ENVIRONMENTAL PROTECTION, SIERRA
CLUB, INC., WEST VIRGINIA DIVISION OF NATURAL RESOURCES, CORDIE
HUDKINS, FRIENDS OF BLACKWATER, AND THE WEST VIRGINIA HIGHLANDS
CONSERVANCY**



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I. INTRODUCTION

This case concerns an attempt by the West Virginia Department of Natural Resources (“DNR”) to renege on a written promise that Lawson Heirs, Inc. (“Lawson Heirs”) and its lessee would be allowed to continue producing gas under land the Lawson Heirs deeded to the State to create Chief Logan State Park. The Circuit Court applied the plain and unambiguous meaning of the statutes applicable to the process for obtaining a permit to drill a natural gas well, and upheld the private property rights of the Lawson Heirs and Cabot Oil & Gas Corp. (“Cabot”) which were expressly reserved by deed.

The jurisdiction over the permitting of natural gas wells has been delegated by the legislature to the West Virginia Department of Environmental Protection (“DEP”), and in particular, the DEP Office of Oil and Gas (“OOG”). Chapter 22, Article 6 of the West Virginia Code sets the procedure for applying for a permit. W.Va. Code §22-6-6(h) unambiguously provides the reasons for which the OOG can approve or deny an application for a well work permit. In the instant case, Cabot, lessee of the Lawson Heirs, applied for permits to drill five new wells to be located within the boundaries of Chief Logan State Park. Cabot already operates wells in the park pursuant to a lease from the Lawson Heirs which pre-dates the creation of the park. The Lawson Heirs owned the minerals underlying the park and expressly reserved the right to drill new wells on the land when they deeded the surface of the land to the State for the creation of Chief Logan State Park.

The DNR, which has been delegated by the legislature the jurisdiction over the management and operation of state parks pursuant to Chapter 20, Article 5 of the West Virginia Code, objected to the permit applications. This objection was filed even though the predecessor agency to the DNR, the West Virginia Conservation Commission, expressly agreed to the terms

of the deed from the Lawson Heirs and negotiated provisions in the deed about the way wells would be drilled in the park so that the wells would interfere as little as reasonably possible with the use of the park.

When considering the applications for the wells, instead of applying the statutory provisions regarding the lawful reasons for which the OOG can deny a well work application, the DEP Cabinet Secretary undertook the unusual step of taking over the OOG permitting process and relying upon W.Va. Code §20-5-2(b)(8) (“the DNR statute”), which grants certain limited rule making powers to the DNR, as a basis for denying Cabot’s well work permit applications.

The DNR statute grants the Director of the DNR the right to promulgate rules for the operation of the parks but limits the DNR’s power by stating the Director “may not permit...the exploitation of minerals...for commercial purposes in any state park[.]” The Secretary of the DEP exceeded the authority delegated by the legislature to the DEP and the OOG by utilizing the DNR rule-making statute as a basis for denying the five well work applications of Cabot.

The Appellants provide no rational support for the notion that the DEP properly denied Cabot’s five well work permits, and no case law is relied upon that allows the DEP the free and undelegated authority to use the DNR statute as a basis to deny permit applications. The Attorney General Opinions (“AG Opinions”) cited by Appellants are factually distinguishable from the current case, as the mineral rights at issue in the AG Opinions dealt with instances where the oil and gas leases, *i.e.*, mineral rights, were “obtained” for lands within the State Park system *after* the enactment of the DNR statutes. In contrast, the Lawson Heirs expressly retained its private property interests in the oil and gas rights underlying the park and expressly reserved the right to use the surface of the park for oil and gas operations in the future. The State contractually agreed to allow future gas well development as a condition to the Lawson Heirs

deeding the surface of the land to the State for the creation of Chief Logan State Park. These private property rights were established and agreed to before the land in dispute became a State Park and prior to the State asserting they have any police power to prohibit the drilling of any wells, without offering any just compensation.

Based upon the denial of the well work applications, Cabot filed an administrative appeal pursuant to W. Va. Code § 22-6-40, to the Circuit Court of Logan County, the Honorable Roger L. Perry presiding. After several rounds of briefing and oral arguments, the Circuit Court properly held that it could not ignore the DEP's clear lack of legislatively-delegated authority to deny the well work permits based on DNR statute, W.Va. Code §20-5-2(b)(8). To do otherwise would result in a precedent that ignores the limited authority granted to state agencies from the legislative branch of government, and would result in an unconstitutional taking without the exercise of the condemnation powers that the agency has been statutorily delegated pursuant to W.Va. Code §22-1-6(d)(5), and which it is entitled to use under W.Va. Code §54-1-1.¹ The Appellants now challenge the Circuit Court's ruling.

II. STATEMENT OF FACTS

On November 21, 2007, Cabot filed five well work permit applications with the OOG pursuant to W.Va. Code §22-6-6. The Lawson Heirs and Cabot intend to continue development of the oil and natural gas owned by the Lawson Heirs which is located within Chief Logan State Park ("the Park"). Cabot has previously obtained permits for, drilled, and currently operates gas wells within the Park and the adjacent Wildlife Management Areas, and an unrelated party operates a gas well at the very entrance to the Park.

¹ The Director of the DNR has similarly been granted the power of condemnation. W. Va. Code § 20-1-7(11)(b).

The Lawson Heirs obtained the surface property and mineral rights in question in the 1800s. In 1960, the Lawson Heirs deeded the surface and coal rights to the Logan Civic Association, which was formed to obtain land for the creation of the park and which then transferred the property to the DNR's predecessor, the Conservation Commission of West Virginia. However, the oil and gas rights were *never* transferred to the state. The deed transferring the property to the state clearly bifurcated the estates and stipulated that the right to natural gas drilling and production were reserved to the Lawson Heirs and their lessee, and that the state would neither own those property interests nor have the ability to prohibit their use. Specifically, the deed states as follows:

There is excepted and reserved from this conveyance all oil and gas, or either, within and underlying the lands hereby conveyed, with the right to search for, explore, operate for, drill, produce and market oil, gas and gasoline, together with the rights of way and servitude for the laying of pipe lines, building telephone and telegraph lines, structures, plants, houses, drips, tanks, stations, electric power lines, meters, and regulators, and all other rights and privileges necessary and incident to and convenient for the economic operation of excepted oil and gas, or either, and the rights excepted and reserved and the care of the excepted products.

The excepted rights of way and servitudes may also be used by the party of the first part, its successors, assigns, and lessees, for searching for, exploring, operating for, drilling, producing, and marketing oil, gas, or gasoline from other lands owned or held under lease.

See Deed dated November 18, 1960, of record in the office of the Clerk of the County Commission of Logan County, West Virginia, Deed Book 276, at page 347, Appendix, Exhibit A.²

² Documents contained in the record include various exhibits submitted to the trial court in Intervenor (Lawson Heirs) Appendix of Documents to Supplement the Administrative Record filed May 19, 2008, hereinafter referred to as "Appendix, Exhibit ____."

Other reservations, easements, pipeline rights of way and other surface use rights were also reserved and excepted in the deed, including specific oil and gas leases and rights to which Cabot is now lessee, and specific agreements as to how the gas rights within the Park would be developed in the future.³ See Appendix, *Id.*, Deed Book 276 at pages 348-350.

Currently, there are several operating gas wells located within the Park boundaries and the adjacent Chief Logan Wildlife Management Area; four of those wells are operated by Cabot. The record is also clear that the DEP and DNR have authorized and allowed the development and production of minerals owed by private parties under numerous other state parks. Appendix, Exhibit C, D.

On December 12, 2007, the DEP Cabinet Secretary (not the OOG Director) issued an Order denying all five well work permit applications. In denying the permit applications, the DEP Secretary relied upon grounds which were outside of the statutes administered by the OOG for the permitting of oil & gas wells, W.Va. Code §§22-1-1 *et seq.*, and also outside of the regulations promulgated by that agency for the same purpose, W.Va. C.S.R. § 30-4 (May 10, 2001).

³ References made in Intervenor's Hudkins, Friends of Blackwater, and West Virginia Highlands Conservancy, and Sierra Club's Petitions for Appeal regarding the Lawson's Heirs transfer of other adjoining land to the State in 1998, in which Lawson's Heir's allegedly acknowledged (1) that the predecessor of W.Va. Code, §20-5-2(b)(8) prohibited the WVDNR director from allowing the use of the surface of State-owned State Park land for new mineral extraction and (2) that DNR would not oppose the extraction of minerals in "Wildlife Management Areas" are misleading. The land transferred under the 1998 deed is not what is at issue in this case, and the provisions alluded to in Hudkins Intervenor's and Sierra Club's Petitions are nowhere to be found in the 1960 deed that transferred the surface rights of what later became Chief Logan State Park. The 1960 deed clearly and unambiguously reserves, in Lawson's Heirs, the "right to search for, explore, operate for, drill, produce and market oil, gas and gasoline...within and underlying the lands hereby conveyed." The 1998 deed related to adjacent property where the Lawson Heirs agreed it would not be necessary or appropriate to drill gas wells, so they merely acknowledged they would not reserve the right to drill gas wells on this tract, an acknowledgement which does not exist in the 1960 deed for the land which is the subject of this appeal.

In fact, the sole ground for the denial of the aforesaid permit applications was based on a statute applicable to another agency, the West Virginia Division of Natural Resources (“DNR”), W.Va. Code §20-5-2(b)(8), which states as follows:

(b) The Director of the Division of Natural Resources shall: (8) 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.

There is no statutory, regulatory or legal precedent which authorizes the DEP Secretary to use the provisions of W.Va. Code § 20-5-2(b)(8) as a basis to deny well work permits. The authority vested in the DEP’s OOG is set forth in W.Va. Code §22-6-1 *et seq.* §22-6-6 sets forth the specific legislatively-authorized reasons for which the DEP may deny a well work permit application.

Since the DEP did not deny the permits for any reasons set forth in §22-6-6, nor any of the statutes applicable to OOG permitting authority, Cabot filed an administrative appeal pursuant to W. Va. Code § 22-6-40 and petitioned the Circuit Court of Logan County in an effort to overturn the DEP’s wrongful denial of Cabot’s five well work permit applications. The Lawson Heirs were granted leave to intervene as a Petitioner, and the DNR and the other Appellants were later granted leave to intervene as Respondents.

In a June 17, 2009 Opinion, the Circuit Court concluded that: (1) the DEP lacks the inherent authority under §20-5-2(b)(8) to deny a well work permit; (2) the DNR statute bars only the exploration of minerals owned by the State itself; (3) to hold otherwise would result in the taking of private property rights in derogation of the State constitution; (4) to hold otherwise would also contravene the constitutional proscription against the adoption of statutes impairing

the obligation of contracts; and (5) equity dictates that the permits be granted given the specific reservation of oil and gas development rights in the deed to the State of the surface estate and the agreement by the predecessor to the DNR to allow future gas well drilling. Furthermore, as stated in the Circuit Court's Conclusion of Law and Order, "an administrative agency can exert only such powers as those granted by the legislature and, if such agency exceeds its statutory authority, its action may be nullified by a court..." *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997). Ultimately, the Circuit Court overturned the DEP's denial of Cabot's five well work permits, and ordered the DEP to grant the permits. The Intervenor/Appellants asked the Circuit Court to reconsider its June 17, 2009 Order, and the Circuit Court declined. From that opinion, the Appellant, Randy Huffman, Cabinet Secretary of the West Virginia Department of Environmental Protection, and Interveners/Appellants, Cordie Hudkins, Friends of Blackwater, the West Virginia Highlands Conservancy, the West Virginia Department of Natural Resources, and the Sierra Club, Inc., now appeal.

III. STANDARD OF REVIEW

In reviewing challenges to the findings and conclusions of a circuit court, the West Virginia Supreme Court of Appeals applies a two-prong deferential standard of review. The Court reviews the final order and the ultimate disposition under an abuse of discretion standard, and reviews the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review. Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n.*, 201 W.Va. 108, 492 S.E.2d 167 (1997); *see: State v. Maisey*, 215 W.Va. 582, 600 S.E.2d 294 (2004); *see also: In re Petition of Carter*, 220 W.Va. 33, 640 S.E.2d 96 (2006); *In re Dandy*, 224 W.Va. 105, 680 S.E.2d 120 (2009); *Pauley v. Gilbert*, 206 W.Va. 114, 522 S.E.2d 208 (1999).

This Court has often held that “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Syncor Int’l Corp. v. Palmer*, 208 W.Va. 658, 542 S.E.2d 479 (2001) (citing: Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)). With respect to those issues on appeal related to statutory interpretation and constitutional issues, such are subject to a *de novo* standard of review.

IV. ARGUMENT

A. THE CIRCUIT COURT PROPERLY HELD THAT THE DEP EXCEEDED ITS STATUTORY AUTHORITY BY RELYING UPON A DNR STATUTE TO DENY CABOT’S WELL WORK PERMIT APPLICATIONS.

The Appellants base their arguments on appeal, in part, on the assertion that the Circuit Court erred in concluding that the DEP lacked the authority to deny Cabot’s five well work permits on any grounds other than those in W.Va. Code §22-6-6(h). However, Appellants’ assignment of error in this respect is based on a flawed construction of the applicable statutes.

1. The statutes applicable to the issuance and denial of a well work permit are clear and unambiguous, and they do not authorize the consideration of a statute applicable only to the DNR.

The Circuit Court held, in part, that the DEP’s Order denying Cabot’s five well work permits did not conform to West Virginia law and that the DEP exceeded its authority. W.Va. Code §22-6-6(h) expressly sets forth the *only* reasons for which the DEP must deny a well work permit application. W.Va. Code §22-6-6(h) states, in part, as follows:

The director [of the OOG] shall deny the issuance of a permit if the director determines that the applicant has committed a substantial violation of a previously issued permit, including the erosion and sediment control plan, or a substantial violation of one or more of the rules promulgated hereunder, and has failed to abate or seek review of the violation within the time prescribed by the director pursuant to the provisions of sections three and four of this article

and the rules promulgated hereunder, which time may not be unreasonable.

W.Va. Code §22-6-6(h). There are no other statutory provisions which allow for the denial of the well work applications. Accordingly, the Circuit Court properly concluded that the DEP Secretary's reliance on the DNR statute was in excess of her statutory authority and jurisdiction, and, therefore, DEP acted upon unlawful procedures.

It is hornbook law that where a statute is clear and unambiguous in expressing legislative intent, the statute is to be applied as written without resorting to rules of interpretation. *Syl. Pt. 2, State ex rel. Underwood v. Silverstein*, 167 W. Va. 121, 278 S.E.2d 886 (1981). In this case, West Virginia law clearly and unambiguously provides, in W.Va. Code §22-6-6(h), the grounds upon which the DEP may deny a well work permit. Since the DEP based its denial on a statute applicable to the DNR (W.Va. Code §20-5-2(b)(8)), rather than applying W.Va. Code § 22-6-6(h), the Circuit Court properly held that the DEP wrongfully denied the permits. As the Circuit Court declared in its Order, there is no statutory, regulatory, or legal precedent which authorizes the DEP to use the provisions of W.Va. Code §20-5-2(b)(8) as a basis to deny well work permits.

Appellants' argument, and the grounds upon which the DEP denied Cabot's well work permits, resorts to an illogical "top-down" rationale of several different statutes. The Appellants contend, consistent with the DEP's Order denying Cabot's five well work permits, that a reading of W.Va. Code § 20-5-2(b)(8) (the DNR Statute), in conjunction with W.Va. Code §§ 22-1-6(c)(1), § 22-6-2(c)(11), and §22-6-6(h), allow the DEP to deny a well work permit on grounds otherwise reserved expressly for the Director of the DNR. *See Brief of Appellant Sierra Club, p. 14*. However, Appellants cannot point to any provisions in these statutes providing that these Code sections are to be cross-referenced, or that gives administrative agencies legislative power or authority to selectively utilize and transfer legislatively delegated powers from one agency to

another. Despite the far-reaching scope of Appellants' rationale, these several different provisions of the West Virginia Code simply are not intended to be read together or otherwise cross-referenced.

For example, Appellants argue that W.Va. Code § 22-1-6(c)(1), which requires the Secretary to carry out the DEP's "functions in a manner which supplements and complements the environmental policies, programs and procedures of...other instrumentalities of this state[.]" provides grounds on which the DEP properly utilized the DNR Statute as a basis for denying Cabot's five well work permits (*See: Initial Brief of the Appellants Cordie Hudkins, Friends of Blackwater, and the West Virginia Highlands Conservancy, p.7*). However, if W.Va. Code § 22-1-6(c)(1) was intended to be read with such broad interpretation, as Appellants contend, it would require the WVDEP Secretary to complement and supplement – and therefore scrupulously consider – every environmental policy, program, or procedure of this state before acting on anything. Clearly, such boundless exercise of legislatively delegated police powers was not the result intended by the legislature. This example of Appellants' far-reaching expansion of the powers of the DEP is inconsistent with the express and reserved grant of powers by clear and unambiguous legislative enactment.

None of the statutes on which the DEP relied in denying Cabot's well work permits provide authority to the DEP to deny permits. Further, there is no express delegation of such authority by W.Va. Code §§ 22-6-2(c)(11), 22-1-6(c)(1), 20-5-2(b)(8), or any other provision of the West Virginia Code. If the legislature had intended to create a wholesale condemnation of all mineral rights underlying state parks, then they should have and could have clearly and expressly done so—and appropriated the funds to do so constitutionally.

2. The intent of the legislature was to limit the powers of the Director of the DNR, not prohibit development of private property rights.

The basic rule of statutory construction is to interpret the statute in accordance with legislative intent. *Newark Ins. Co. v. Brown*, 218 W.Va. 346, 624 S.E.2d 783 (2005). The title of W.Va. Code §20-5-2(b)(8) is "Powers of the director with respect to the section of parks and recreation." It is fundamental that a statute and its title give adequate notice of its purpose and intent to be constitutional. In particular, Section 30 of Article 6 of the Constitution of West Virginia provides:

No act hereafter passed shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed...

W.Va. Const. Art. VI, § 30 (1872). The West Virginia Supreme Court of Appeals has declared that "the clear purpose of this constitutional provision [that no act shall embrace more than one object which shall be expressed in its title] was to avoid having the purpose of a legislative enactment concealed in any way by the failure to state that purpose in the title of the Act." *State ex rel. Dyer v. Sims*, 134 W.Va. 278, 287, 58 S.E.2d 766, 772 (1950). Thus, as mandated by the Constitution of West Virginia, any given statute shall embrace *no more than one object*, which must be expressed in the title. If an object of a particular statute is not expressed in the title thereof, the act is void insofar as it fails to express its purpose. *See: Meisel v. Tri-State Airport Authority*, 135 W.Va. 528, 64 S.E.2d 32 (1951); *Sypolt v. Shaffer*, 130 W.Va. 310, 43 S.E.2d 235 (1947).

Hence, even by simply referencing the title, it is clear that the statute was enacted with the intent to govern the powers of the head of the DNR. Although the legislative history is limited, it appears that the legislature's intent in enacting W.Va. Code §20-5-2(b)(8) was to limit

the powers of the head of the DNR to act independently or outside the specific powers granted by the legislature. In fact, no section of Article 5, Chapter 20 of the West Virginia Code grants DNR any authority over the DEP or well work permit applications. There is nothing in Chapter 20 of the Code, or in the title to the DNR statute at issue, that indicates the legislature intended to take away or condemn privately owned mineral rights underlying state parks without just compensation. Such a broad, significant impact on private mineral rights cannot be gleaned by the inclusion of four words, in Subsection 8, of Section (b), of W. Va. Code § 20-5-2, or the title to that section of the Code.

Furthermore, the DNR itself clearly expresses that “[w]hatever this Court may decide as to whether or not DEP can properly use [the DNR Statute] 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.” *See, Brief of Appellant West Virginia Division of Natural Resources, p. 7.* Hence, the DNR itself – the entity for which the legislature has intended W.Va. Code § 20-5-2(b)(8) to apply – clearly expresses the opinion that DEP has “no privity, however defined” with DNR. Therefore, it seems that not even the DNR agrees with DEP’s and the Intervenors’/Appellants’ contention that the DEP may rely on the DNR Statute as grounds upon which it may deny a permit.

3. Even if the DNR statute could be considered, it does not give the DEP or the DNR the power to veto permits for the development of minerals not owned by the State.

The DNR statute, W.Va. Code §20-5-2(b)(8), grants the Director of the Division of Natural Resources certain express powers to promulgate rules for the operation of state parks, but “may not permit...the exploitation of minerals...for commercial purposes in any state park[.]” Clearly, this provision is not meant to apply to minerals not owned by the state. To apply it otherwise would deprive the mineral owners of their private property rights without just

compensation and would be blatantly unconstitutional. In addition, the state and the DNR's predecessor, the Conservation Commission, previously and expressly recognized the Lawson Heirs' right to drill and produce oil and natural gas in the Park as such rights were expressly set forth in the deed of the surface and coal rights to the Logan Civic Association. Appendix, Exhibits A, B. If the State, the DEP and DNR now wish to renege on the specific contractual rights and promises agreed to and set forth in the deed and refuse to allow the Lawson Heirs to develop the mineral estate rights, then, without conceding that the DEP has authority to use a DNR statute, the DNR must initiate assessment or condemnation proceedings pursuant to W.Va. Code §22-1A-3.⁴ Either the permits must be issued and the Lawson Heirs be allowed the benefit of the bargain they made, or the DNR must initiate condemnation proceedings and pay for the taking of private property. It must be one or the other; the State, via the DEP and DNR's action, cannot renege on the contractual deal and not pay, without violating clear constitutional prohibitions.

There is nothing in the scant legislative history, case law, or other relevant statutes, which would indicate that the DEP correctly interpreted §20-5-2(b)(8) as giving the DNR unfettered veto power of all mineral development in state parks, even if the oil and gas is not owned or controlled by the state. In fact, the record indicates the opposite: the State (and DNR itself) has never attempted to restrict the development of the oil and gas rights in state parks where the State is not the owner of the oil and gas. Appendix, Exhibits C, D.

In Chief Logan, the DEP has previously issued permits to operators, including Cabot, for gas wells which exist and are producing to this day. In 1981, Cabot sought to re-work and develop different gas formations in an existing well and the DEP granted a new well work permit

⁴ W.Va. Code § 22-1A-3 is part of the "Private Real Property Protection Act." The legislature has clearly declared that the DEP cannot take state actions affecting private real property interests and ignore the constitutional requirement to pay just compensation. See W.Va. Code § 22-1A-2.

and issued a new "API" or permit number for the new work to Cabot. See DNR Supplemental Filing; Well API #4704501080, formerly permitted as API #4704500779. The affidavits of former DNR Commissioners are clearly erroneous in their statements that the DEP and DNR have never previously allowed operations in the parks subsequent to enactment of the DNR statute.

It is a well-established rule of statutory construction that when a statute is susceptible of two constructions – one of which is, and the other of which is not, violative of a constitutional provision – the statute will be given that construction which sustains its constitutionality. *Bennett v. Bennett*, 135 W.Va. 3, 62 S.E.2d 273 (1950); *Walter Butler Building Co. v. Soto*, 142 W.Va. 616, 97 S.E.2d 275 (1957); *Board of Education of Wyoming County v. Board of Public Works*, 144 W.Va. 593, 109 S.E.2d 552 (1959); see: *Underwood Typewriter Co. v. Piggot*, 60 W.Va. 532, 55 S.E. 664 (whenever an act of the Legislature can be so construed and applied as to avoid conflict with a constitutional provision, and give it the force of law, such construction will be adopted); *State v. Rutherford*, 223 W.Va. 1, 672 S.E.2d 137 (2008) (every reasonable construction must be resorted to by courts in order to sustain constitutionality of a legislative enactment, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment); see also: *Bayer MaterialScience, LLC, v. State Tax Com'r*, 223 W.Va. 38, 672 S.E.2d 174 (2008); *In re FELA Asbestos Cases*, 222 W.Va. 512, 665 S.E.2d 687 (2008); *State ex rel. Riley v. Rudloff*, 212 W.Va. 767, 575 S.E.2d 377 (2002); *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994).

In this case, the contentions and arguments made by Appellants with respect to the construction of W.Va. Code § 20-5-2(b)(8), if accepted by the Court, would result in an unconstitutional taking, the impairment of the obligation of a contract, and other results clearly in

violation of the Constitution. Pursuant to the longstanding rules of statutory construction, this Court must construe the statute so as to avoid conflict with the Constitution, and therefore must reject Appellants' statutory interpretations.

The only legally permissible interpretation of the DNR statute is quite simple: the statute was intended by the legislature as a curb on the power of the Director of the DNR, acting on his or her own authority, to allow wholesale development of state owned minerals or timber rights. This should be no surprise since it makes sense that the legislature would want to preserve unto itself the power and authority to grant any rights to development of state-owned minerals in state parks. This limit on the rule making and permitting powers of the Director of the DNR does not apply, however, if the State does not own or control the minerals, and the State and DNR by prior deed has contractually agreed to allow future development of the oil and gas rights. See, W.Va. Code § 22-1A-2.

Appellants erroneously contend that the DNR Statute applies to all minerals; not just minerals owned by the State, but privately-owned minerals as well. Therefore, Appellants argue, the DEP and OOG rightfully denied Cabot's permits pursuant to W.Va. Code § 20-5-2(b)(8). To support this argument, Appellants refer to the language of the DNR Statute and aver, "notably absent from this statutory language is the modification of the word 'minerals' by any limiting words." See: *Initial Brief of the Appellants Cordie Hudkins, Friends of Blackwater, and the West Virginia Highlands Conservancy*, p. 13. In this respect, Appellants argue that the lack of a modification of the word "minerals" somehow implies that the DNR Statute applies to all minerals; privately and publicly-owned alike. However, Appellants' argument in this respect is based on flawed logic. One cannot imply the absence of a limitation simply by lack of a modifier; you cannot imply what a statute is purporting to "say" by noticing only what it does

not. The absence of the phrase “publicly-owned minerals” is equally as compelling as the absence of the phrase “privately-owned minerals.” Simply put, the absence of a modification of the word “minerals” in the DNR Statute is inapposite when considered in light of the legislative intent behind the statute, which is to limit the powers of the head of the *DNR*.

4. Appellants arguments are irreconcilable with Constitutional protection of private property rights. If the DNR is “prohibited by law” from permitting the exploitation of minerals in state parks, then why does the DNR continue to allow the operation and production of wells in virtually every state park?

In their briefs, Appellants consistently argue that the DNR is “prohibited by law” (i.e. W.Va. Code §20-5-2(b)(8)) from allowing the exploitation of minerals in state parks and has never allowed such. If that interpretation of the applicable statutes is correct, then how can the Appellants explain the fact that the DNR currently permits the operation and production of gas from wells in virtually every West Virginia state park? The Appellants seek to avoid this logical inconsistency by alleging they have not allowed “new” wells to be drilled since enactment of the DNR statute; but this logic fails because the DNR statute makes no distinction between existing or new wells. Thus, while it is understandable that the DNR and former Directors may believe they have not “permitted exploitation,” the undisputed fact is that gas is produced daily from natural gas wells in virtually every state park where there is private ownership of the mineral rights underlying the parks. The DNR has permitted/allowed this “exploitation” to continue unabated for over fifty years and it has apparently not interfered with any public use and enjoyment of our parks, as our parks are universally recognized for their outstanding recreational opportunities that co-exist with natural gas well operations.

There are active gas wells in Stonewall Jackson Lake State Park, Watters Smith Memorial State Park, Chief Logan State Park, Twin Falls Resort State Park, North Bend State Park, and Tomlinson Run State Park. Appendix, Exhibits C, D. In fact, of these active wells,

several have been worked or re-worked after the surface rights were acquired by the State; including wells in Watters Smith State Park and Twin Falls State Park. Appendix, Exhibits C, D. Other state parks which currently have, or historically have had, active gas wells within their boundaries include: Beech Fork Lake State Park, Cedar Creek State Park, and Valley Falls State Park. Appendix, Exhibits C, D. If Appellants' rationale and interpretation that §20-5-2(b)(8) does "not permit...the exploitation of minerals...for commercial purposes in any state park" is correct, then the DNR would be required to plug and abandon every operational well existing in any West Virginia state park; this would include all wells currently in operation in state parks from which the State of West Virginia derives an economic benefit. It is clear the legislature never intended to give the DNR such broad rights. The Appellants' construction of the statute just does not merge with reality. If anything, the Appellants' argument would be more appropriately addressed to the legislature rather than the courts. If DNR and DEP believe the statute is intended to prohibit any drilling or operations in state parks, then the legislature should be asked to clearly and explicitly so declare and subsequently appropriate the funds necessary to take private property by condemnation.

B. THE CIRCUIT COURT PROPERLY HELD THAT THE DEP'S DENIAL OF CABOT'S WELL WORK PERMITS, IF UPHELD, WOULD RESULT IN AN UNAUTHORIZED AND UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION AND THE DNR STATUTE WOULD BE A LAW IMPAIRING THE OBLIGATIONS OF CONTRACTS.

A common flaw in the briefs and affidavits submitted by the Appellants (other than Sierra Club) is the refusal to admit the obvious-- the DEP's denial of Cabot's five well work permits based on the DNR statute, if upheld, would constitute an unconstitutional taking of private property without just compensation. The Sierra Club is the only Appellant willing to acknowledge that the permit denial by the DEP, if upheld, would clearly be an unconstitutional

taking; but Sierra Club creatively argues that there is no "taking" because Cabot does not have to disturb the surface of Chief Logan State Park in order to extract the minerals (*See: Petition for Appeal of Sierra Club, Inc.*, p. 13). Further, Appellants also argue that since Cabot and/or the Lawson Heirs have not filed an inverse condemnation proceeding, the Respondents have somehow conceded that there is no unconstitutional taking in this case. These arguments, however, are categorically unsupported by any facts of record in this case and/or applicable law.

1. This case is about private property ownership rights and DNR's attempted taking of private property.

The straightforward facts of this case reveal that the Lawson Heirs and Cabot have continuously operated gas wells, maintained gas wells and utilized the surface of Chief Logan to do so openly, obviously and continuously since the Lawson Heirs deeded the surface for the creation of Chief Logan State Park in 1960. Cabot and Lawson Heirs had no need to file any inverse condemnation action or take any action, as they have been permitted to continuously produce minerals and operate in the park since the formation of the park. The issue is the effort of the DNR to now prevent the continued use of the Lawson Heirs' private property rights and permit the DEP's wrongful obstruction of those rights. Article III, Section 10 of the *Constitution of West Virginia* provides that "no person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." This clause has been interpreted to be both a due process and an equal protection clause, and the protections are co-extensive or broader than those of the Fourteenth Amendment to the United States Constitution. *Payne v. Gundy*, 196 W.Va. 82, 468 S.E.2d 335 (1996).

Where economic rights are concerned, the Supreme Court of Appeals looks to see whether the challenged action or classification is a rational one based on social, economic, historic or geographic factors; whether it bears a reasonable relationship to a proper

governmental purpose; and whether all persons within the class were treated equally. *Gibson v. West Virginia Department of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991).

In the instant case, it is clear that the interpretation of the DEP permitting statute (W.Va. Code §22-1-6(c)(1)) and the DNR statute relied upon by the DEP (W.Va. Code §20-5-2(b)(8)), cannot withstand scrutiny under due process or equal protection grounds. There is no question that there is a taking of property involved if the permit denials are upheld. Appellants argue that a statute enacted after a contract was made with the State to deed the surface to the State but expressly reserving the oil and gas rights and expressly reserving the right to use the surface to develop the mineral in the future, should be interpreted to allow the State to renege on the deal without any payment of just compensation. There is no rational basis to allow such a conclusion, particularly in light of the numerous other instances in which the State has recognized that the owners of the oil and gas underlying state parks are allowed on a daily basis to develop the mineral rights. It further does not pass any test of rationality or equal protection, given that there are already wells operating and existing in Chief Logan State Park itself pursuant to legal and valid permits issued by DEP to Cabot. Furthermore, given the numerous wells located in other state parks, the treatment of Lawson Heirs and Cabot in this case is not equal to that granted to other oil and gas operators in the other state parks.

Appellants argue that because Cabot and/or Lawson Heirs have not undertaken an inverse condemnation proceeding yet, they are somehow prohibited from asserting any argument that a reversal of the Circuit Court's order would result in an unconstitutional taking. Specifically, Appellants state, "for more than fifty years the Lawson Heirs have been on notice of the provisions of W.Va. Code §20-5-2(b)(8) and its predecessors, and have taken no action to question or challenge those provisions as they apply to their mineral estate." See *Initial Brief of*

the Appellants Cordie Hudkins, Friends of Blackwater, and the West Virginia Highlands Conservancy, p. 19. Appellants erroneously suggest that Cabot and/or Lawson Heirs have therefore “slept on their rights,” and are prohibited from asserting a “takings” claim now. Appellants provide no authority in support of this argument; it is simply a far-reaching statement unsupported by applicable law. Simply because Cabot and/or Lawson Heirs have not engaged in any type of inverse condemnation proceeding in speculative anticipation of the DEP denying well work permits, they are not in any way estopped or prohibited from raising that issue now. Lawson and Cabot were not denied their property rights until DEP denied the five well work permits at issue, so there was no basis to file an inverse condemnation action.

2. “Horizontal drilling techniques” are speculative and not feasible in this instance.

Appellants aver that the DEP’s denial of Cabot’s five well work permits does not prevent Cabot or the Lawson Heirs from extracting the minerals underlying Chief Logan State Park. Rather, Appellants argue that Cabot and the Lawson Heirs have a simple remedy: employ “horizontal drilling” methods from drill pads outside of Chief Logan State Park. (*See: Petition for Appeal of Sierra Club, Inc., p. 7; Initial Brief of the Appellants Cordie Hudkins, Friends of Blackwater, and the West Virginia Highlands Conservancy, p. 20*). In fact, Appellants applaud Cabot’s success with previous horizontal drilling projects. *Id.* Appellants’ arguments, however, are not based on any facts of record in this matter, are wholly speculative and simply inapplicable.

Unfortunately, horizontal drilling is a technique that is technologically not appropriate or economical for all gas wells and is dependent on ownership of specific locations, geologic conditions, and control of tracts of land which allow for the use of the technique. Cabot does not own or have under lease all the property surrounding Chief Logan State Park, and is not required

by its lease to engage in horizontal drilling at great expense and risk, so Appellants' speculation that horizontal drilling could be used to extract the gas under Chief Logan is completely unsupported by any competent scientific, technical or economic analysis or record before the Court. Further, as a practical matter, any "horizontal" drilling would require use of lands outside the park. Is Cabot supposed to trespass upon the property of another or impose the burdens of surface use on other private property owners? The Appellants' position is entirely speculative and callously disregards the property rights of the adjoining surface owners. Therefore, Appellants' argument that the denial of Cabot's five well work permits should be reinstated since the Cabot and Lawson Heirs may employ horizontal drilling techniques to extract the minerals at issue is unsupported by facts and promotes an unrealistic, uneconomical (and unlawful) alternative.

3. If the Circuit Court's Order is disturbed, the result would be an unconstitutional taking of private property.

The interpretation relied upon by the DEP also violates Article III, Section 9 of the *Constitution of West Virginia*, which provides "[p]rivate property shall not be taken or damaged for public use without just compensation; ... and when private property is taken...for public use,...the compensation of the owner shall be ascertained in such manner, and as may be prescribed by general law, and ...shall be ascertained by an impartial jury of twelve freeholders."

In the present case, there is no question that if the DEP permit denial is reinstated, both the Lawson Heirs and Cabot will be deprived of substantial private property rights without due process, and without just compensation being offered.⁵ The DEP permit denial, if allowed by this Court, would constitute an inverse condemnation or regulatory taking since it clearly would prohibit the development of the oil and gas estate and would take away substantial private

⁵ Only the Sierra Club is willing to acknowledge this undeniable fact. See Petition Appeal of Sierra Club, at p. 13.

property rights which were expressly agreed to and recognized by the State in the deed to the surface rights which ultimately became Chief Logan State Park. *See: Syl. Pt.5 Retail Designs, Inc. v. West Virginia Division of Highways*, 213 W.Va. 494, 583 S.E.2d 449 (2003) (anything done by a state or its delegated agent, which substantially interferes with the beneficial use of land, depriving the owner of lawful dominion over it or any part of it...is the taking of private property without compensation inhibited by the Constitution); *Fruth v. Board of Affairs*, 75 W.Va. 456, 84 S.E. 105 (1915), *overruled on other grounds by Farley v. Graney*, 146 W.Va. 22, 119 S.E.2d 833 (1960); *see also: Stover v. Milam*, 210 W.Va. 336, 557 S.E.2d 390 (2001).

There is no dispute that no compensation has been given or offered, and the interpretation offered by DEP and DNR would expose the State to an enormous liability for substantial natural gas reserves and rights which number into at least the tens of millions of dollars. It is highly unlikely that the Legislature intended that the Director of the DNR could, by exercise of a right of objection or veto power which does not seem applicable in the instant case, expose the State to such substantial liability. Therefore, it is clear that the interpretation offered by the DEP for denying the well work permits is illogical, unconstitutional, and is not an intended consequence of the Legislature's acts. As such, the interpretations offered by DEP and DNR are erroneous and inapplicable in light of this Court's duty to apply the statute as the Legislature intended. *Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 207 S.E.2d 897 (1974) (generally, courts may only construe a statute to effectuate legislative intent); *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968); *see also: State v. Boatright*, 184 W.Va. 27, 399 S.E.2d 57 (1990).

4. The DEP's denial of Cabot's well work permits is, in effect, an unconstitutional impairment upon the obligation of a contract.

The Circuit Court also correctly concluded that DEP's interpretation of the DEP permitting statute and the DNR statute also violates Article III, Section 4 of the *Constitution of*

West Virginia, which provides that no bill or law impairing the obligation of a contract shall be passed by the Legislature. In the present case, if the Court were to uphold the interpretation offered by the Appellants, the result would be a law that effectively impairs the terms of the 1960 deed that conveyed only the surface estate. The DEP application of the DNR statute would then mean the DNR statute is a law impairing the obligation of the deeds and property rights reserved by the Lawson Heirs and leased to Cabot.

It is the general rule that the obligation of a contract is measured by the standard of the laws enforced at the time it was entered into and that the performance of the contract is being regulated by the terms and rules which the laws prescribe. *Devon Corp. v. Miller*, 167 W. Va. 362, 280 S.E.2d 108 (1981), *cert. denied*, 455 U.S. 993 (1982). While this constitutional prohibition is clear, it has been recognized that it must be accommodated to fit the inherent police power of the State to safeguard the vital interest of the public. In determining whether a contract clause violation occurred, there is a three step test. See *Shell v. Metropolitan Life Ins. Co.*, 181 W. Va. 16 380 S.E.2d 183 (1989). The initial inquiry is whether the statute has substantially impaired the substantive rights of a party. *Id.* In this case that is clearly apparent. If the DEP's Order is upheld, the Lawson Heirs and Cabot would simply be unable to realize the benefit of their bargain.

The second requirement is that if a substantial impairment is shown, there must be a significant and legitimate public purpose behind the legislation. *Id.* In the instant case, there is no basis to believe that there is a legitimate public purpose in denying the Lawson Heirs and Cabot the right to continue and expand operations, which are not being denied to other parties who operate gas wells in state parks. Further, there are operating wells in the park which cause no offense to the public, and there were wells in existence at the time of the initial grant and deed

of the property to the Logan Civic Association. Thus, it is clear that there can be no significant and legitimate purpose in preventing drilling of gas wells now when the park was created with gas wells in it and the express agreement that additional gas wells could be drilled in the Park in the future.

The third component, if a legitimate public purpose is demonstrated, requires the Court to determine whether the adjustment of the rights of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose. *Id.* Again, in the instant case, this test cannot be satisfied under any stretch of the imagination. The permit denials are not a matter of a reasonable condition being imposed, but a case of a complete denial of valuable property rights.

C. CABOT'S PERMIT APPLICATIONS WERE NOT FOR MARCELLUS SHALE WELLS, SO APPELLANTS' CONCERNS REGARDING TECHNIQUES COMMONLY USED IN MARCELLUS SHALE DRILLING ARE IRRELEVANT.

A significant portion of Appellants' arguments pertain to the alleged dangers and hazards associated with Marcellus Shale drilling. These arguments are based entirely on speculation and unsupported assertions. Many of Appellants' concerns addressed in their briefs are simply irrelevant and provide nothing more than an incomplete record of assumptions and conjecture.

1. Arguments related to Marcellus wells are speculative and irrelevant.

Appellants discuss in their briefs – in very lengthy detail – some apprehension about the drilling methods to be employed by Cabot with respect to the extraction of the minerals at issue. Specifically, Appellants suggest that Cabot intends to drill “Marcellus Shale,” which Appellants allege brings about many environmental hazards. (*See: Petition for Appeal of Sierra Club, Inc.*, p. 9; *Brief of Appellant Sierra Club, Inc.*, pp. 5-10). The record, however, is quite clear: the five applications under review are not for drilling Marcellus Shale wells, and the alleged issues

related to the Marcellus wells were not matters reviewed or relied upon by the DEP as a basis to deny the permits. *see*: In re: Well Work Permit Applications for Chief Logan #21; Chief Logan #22; Chief Logan #23; Chief Logan #24; and Chief Logan #30 (DEP Order, December 12, 2007). The Appellants' efforts to draw this Court's attention to this case and sensationalize this appeal by arguing about matters wholly unrelated to this appeal are without merit. Without conceding Appellants' allegations of the environmental hazards associated with Marcellus Shale drilling, it is enough to dismiss Appellants' concern by affirming that the five well work applications in issue do not seek permits using the techniques complained of related to Marcellus wells.

2. Reclamation of the proposed drilling sites would repair any disturbance to the surface of Chief Logan State Park and the deed from the Lawson Heirs to the State contains express limits on how and where wells can be drilled in the park.

Part of Appellants' argument to overturn the Circuit Court's Order, and to reinstate the DEP's denial of Cabot's well work permits, is based on a concern that Cabot's extraction of the minerals at issue will cause irreparable harm to the grounds of Chief Logan State Park. (*See: Petition for Appeal to the West Virginia Supreme Court of Appeals by the Intervenors Cordie Hudkins, Friends of Blackwater, and the West Virginia Highlands Conservancy*, p. 25; *Brief of Appellant Sierra Club*, p.3). Appellants argue that this allegedly irreparable damage will forever prevent citizens of our state and others from enjoying Chief Logan State Park. Once again, Appellants' argument is based on erroneous speculation unsupported by the record.⁶

⁶ A visitor to Chief Logan will pass within fifty yards of a gas well when entering the park, and Cabot has an operating gas well directly above the fishing lake at the park, and another gas well less than 100 yards from the nature trail and wildlife enclosure at the park. The DNR website for Chief Logan State Park includes a map, copy attached hereto as Addendum, which shows the proximity of the gas wells to the park entrance, lake and wildlife exhibit. The fishermen, the visitors to the wildlife enclosure and the inhabitants thereof, including a magnificent black bear, have not been irreparably harmed by the existence of these wells to date.

The law requires reclamation of any drilling site used to extract minerals such as those at issue in this case. *See*: W.Va. Code §22-6-23. The purpose of this reclamation is to minimize surface disturbance and prevent any erosion or adverse effects. *See*: W.Va. Code § 22-6-6(d); W.Va. C.S.R. §§ 35-4-13,16. The Deed to the State from the Lawson Heirs shows that DNR's predecessor, the Conservation Commission, negotiated provisions to limit or curtail surface disturbance or adverse use of the park. *See*: Appendix, Exhibit A ("No well shall be drilled...within 200 feet of any existing or projected entry, road...or within the view or site of any overlook that has been developed for public use."). Therefore, Appellants assertion that the surface land of Chief Logan State Park would be permanently damaged is speculative and unsupported. Limits on surface use were negotiated and built into the deed, and existing laws and regulations are in place to minimize any adverse impact.

Although the surface of Chief Logan will be disturbed during the drilling process, such disturbance will be temporary, and will not prevent anyone from enjoying the park. Any averments that the denial of the well work permits should be upheld by necessity in order to preserve the surface land of Chief Logan State Park are simply wrong, misleading, and unfounded, and ignore the factual record which shows that people utilize our state parks where gas wells exist and operate every day. The Appendix of Exhibits in the record includes records from the West Virginia Geological Survey and maps showing the extensive number of gas wells throughout state parks in West Virginia, including the wells in Chief Logan, and there is no evidence of record establishing any irreparable harm associated with the co-existence of these wells and public use of the land. The DEP and DNR also allowed the re-working of a well in the Park in 1981, without any "irreparable harm" apparently occurring. The hysteria contained in the affidavits provided by Appellants is simply not supported by the facts.

D. THE CIRCUIT COURT PROPERLY HELD THAT UPHOLDING THE DEP'S ORDER WOULD BE UNJUST AND INEQUITABLE GIVEN THE EXPRESS AGREEMENT BY THE STATE, WHEN ACCEPTING THE SURFACE RIGHTS FOR THE PARK, TO ALLOW THE LAWSON HEIRS THE RIGHT TO DEVELOP THE OIL AND GAS RIGHTS AND USE THE SURFACE FOR THAT PURPOSE IN THE FUTURE.

It is axiomatic that the courts in this State are generally intended to apply laws, and also see that the laws are applied in a just and equitable fashion. Furthermore, courts will apply principles of equitable estoppel to prevent a litigant from asserting a claim or defense against a party who has detrimentally and reasonably relied upon the actions of the other. *Martin v. Wetzel County Bd. Of Ed.*, 212 W. Va. 215, 569 S.E.2d 462 (2002). Where the parties in a deed clearly and unambiguously recited their agreement with respect to the mineral rights of the parties, the equitable principle of "estoppel by deed" requires the court to prevent a litigant from taking a contrary position as to rights of the parties. *See: Roberts v. Huntington Development & Gas*, 89 W. Va. 384, 109 S.E. 348 (1921).

In the present case, it is incomprehensible to think that the DNR and the State of West Virginia could have made a deal with the Lawson Heirs back in 1960, by which the Lawson Heirs generously deeded to the Logan Civic Association and the people of West Virginia the surface property for a public park and the coal rights, in exchange for the express right to develop and continue development of the oil and gas estate underlying the property, yet the State would turn around 48 years later and attempt to deny well work applications, and thus refuse to live up to this deal.⁷ Moreover, the State has for many years allowed the production of oil and gas under state parks, and in fact has received royalties or free gas rights for the development of oil and gas under state parks. See Appendix, Exhibits C, D; North Bend State Park

⁷ The DNR's efforts to now renege on the deal made by their predecessor, the Conservation Commission, and have the DEP deny the well work applications, sadly exemplifies the old adage that apparently "no good deed goes unpunished."

payments/free gas rights. Cabot and the Lawson Heirs can think of no more unjust or inequitable circumstance than to allow, through an objection filed by the Director of DNR on an erroneous interpretation of a statute, the denial of valuable property rights in violation of numerous provisions of the West Virginia Constitution.

Furthermore, this Supreme Court has unambiguously stated and affirmed that “the owner of the minerals underlying land possesses as incident to this ownership the right to use the surface in such manner and with such means as would be fairly and necessary for the enjoyment of the mineral estate.” *Adkins v. United Fuel Gas Co.*, 134 W.Va. 719, 61 S.E. 2d 633, 634 (1950) (quoting Syl. Pt. 1, *Squires v. Lafferty*, 95 W.Va. 307, 121 S.E. 90 (1924)). It is also generally recognized that where there has been a severance of the mineral estate and the deed gives the grantee the right to utilize the surface, such surface use must be for purposes reasonably necessary to the extraction of the minerals. Syl. Pt. 2, *Buffalo Mining Co., v. Martin*, 165 W.Va. 10, 14, 267 S.E.2d 721, 723 (1980) (citing *Adkins, supra*; *Squires, supra*; *Porter v. Mack Manufacturing Co.*, 65 W.Va. 636, 64 S.E. 853 (1909)).

As a general rule, where title to the surface is severed from the title to the minerals, the right to access the minerals which may cause some temporary damage to the surface, must be expressly recognized in order to exist. *Phillips v. Fox*, 193 W.Va. 657, 651, 458 S.E.2d 327,331 (FN.8) (1995) (citations omitted). As the *Phillips* decision demonstrates, even the right to surface mine can be expressly conveyed where the mineral and surface estates have been bifurcated. Cabot is not seeking to surface mine on the surface of lands within Chief Logan State Park, but rather to exercise the limited oil and gas development rights that were expressly reserved and agreed to by the State in the 1960 deed. The DNR and DEP therefore lack the

statutory authority under both W.Va. Code §20-5-2(b)(8) and §22-6-6 to deny the Lawson Heirs and Cabot their lawful, and expressly conveyed, rights to the mineral estate.

V. CONCLUSION

The Circuit Court studiously and carefully analyzed the competing rights at stake and concluded that regardless of emotion and speculative fears, the Constitution and laws of this State did not allow the DEP and DNR to take private property rights or deny the well work applications. The Circuit Court Order is clear, proper and well reasoned, and this Court should affirm the Circuit Court's ruling.

CABOT OIL & GAS CORPORATION

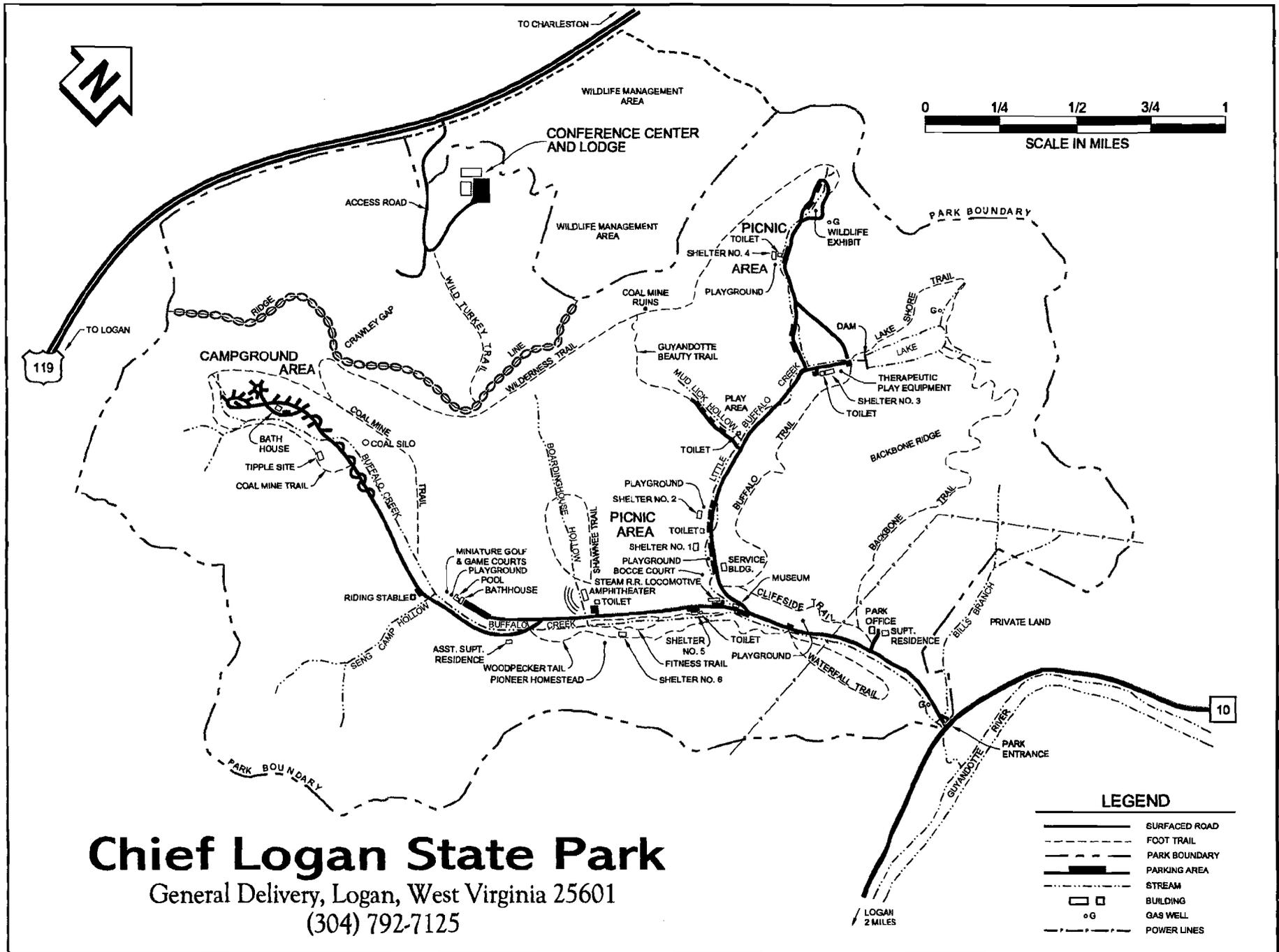
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ADDENDUM



CERTIFICATE OF SERVICE

I, Timothy M. Miller, counsel for Cabot Oil & Gas Corporation, do hereby certify that service of the foregoing **BRIEF OF APPELLEE, CABOT OIL & GAS CORP., IN RESPONSE TO BRIEFS BY APPELLANTS DEPARTMENT OF ENVIRONMENTAL PROTECTION, SIERRA CLUB, INC., WEST VIRGINIA DIVISION OF NATURAL RESOURCES, CORDIE HUDKINS, FRIENDS OF BLACKWATER, AND THE WEST VIRGINIA HIGHLANDS CONSERVANCY** has been made this 16th day of June, 2010, by depositing a true and exact copy thereof in the U.S. mail, postage prepaid, addressed as follows:

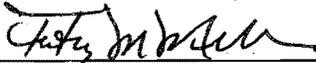
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