

CONSOLIDATED CASES NOS. 35509, 35508, 35510, 35511

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FROM THE CIRCUIT COURT OF LOGAN COUNTY

CABOT OIL AND GAS CORPORATION,
Petitioner below, and the LAWSON HEIRS, INC.,
Intervenor below, Appellees,

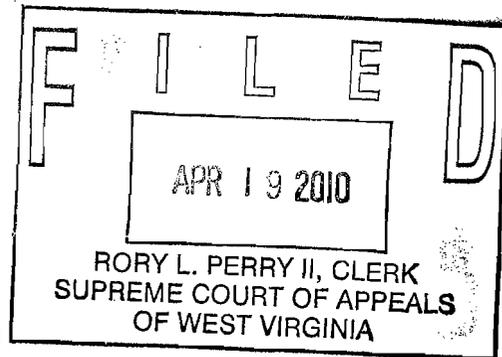
vs.

Civil Action No. 08-C-14

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

and

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



**INITIAL BRIEF OF THE APPELLANTS CORDIE HUDKINS, FRIENDS OF
BLACKWATER, AND THE WEST VIRGINIA HIGHLANDS CONSERVANCY**

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TABLE OF CONTENTS

Introduction3

I. Nature of Proceeding and Ruling in the Lower Tribunal6

II. Statement of the Facts in the Instant Case

1. The WVDEP Secretary's December 12, 2007 Administrative Order6

2. The Circuit Court's June 17, 2009 and October 15, 2009 Orders8

3. The Instant Petition for Appeal10

III. Assignments of Error11

1. The circuit court erred in holding that the provisions of *W.Va. Code, 20-5-2(b)(8)* [2006] do not apply to privately-owned minerals under the surface of state-owned, state park land.

2. The circuit court erred in holding that when the West Virginia Division of Environmental Protection considers applications for well work permits, it is not authorized to consider and give effect to the provisions of *W.Va. Code, 20-5-2(b)(8)* [2006] and the position and actions of the West Virginia Division of Natural Resources, the state agency charged with enforcing the statute.

3. The circuit court erred in requiring the Secretary of the West Virginia Division of Environmental Protection to issue five well work permits in the instant case, because of the existence of a number of unresolved issues regarding the permit applications.

IV. Points and Authorities Relied Upon, Discussion, and Relief Prayed For.

1. Table of Authorities11

2. Discussion

First Assignment of Error: The circuit court erred in holding that the provisions of *W.Va. Code, 20-5-2(b)(8)* [2006] do not apply to privately-owned minerals under the surface of state-owned, state park land.....13

A. The existence of previously-drilled wells on State Park land does not mean that 20-5-2(b)(8) [2006] does not apply to privately-owned minerals.....16

B. The speculative possibility of a "taking" of the Lawson Heirs' mineral estate does not alter the proper interpretation and application of the statute.....18

C. The statute means what it says.....20

Second Assignment of Error: The circuit court erred in holding that when the West Virginia Division of Environmental Protection considers applications for well work permits, it is not authorized to consider and give effect to the provisions of *W.Va. Code, 20-5-2(b)(8) [2006]*.....22

Third Assignment of Error: The circuit court erred in requiring the Secretary of the West Virginia Division of Environmental Protection to issue five well work permits in the instant case, because of the existence of a number of unresolved issues regarding the permit applications.....22

Conclusion25

Introduction

The instant case presents two important questions concerning the powers granted by the Legislature in *W.Va. Code*, 20-5-2(b)(8) [2006] to the Director of the West Virginia Division of Natural Resources ("WVDNR"), with respect to the minerals that lie under state-owned, state park land.

The first question is: does *W.Va. Code*, 20-5-2(b)(8) [2006] apply to privately-owned minerals? The second question is: can state drilling regulators at the West Virginia Department of Environmental Protection ("WVDEP") give effect to actions and positions taken by WVDNR pursuant to *W.Va. Code*, 20-5-2(b)(8) [2006]? The Appellants say the answers to both questions are "yes." The Appellees say that the answers to both are "no."

The Circuit Court of Logan County (whose ruling is under review in the instant case), acting on the basis of an incomplete record and without the WVDNR being in the case -- adopted the Appellees' answers. However, the circuit court was candid about its uncertainty in making that ruling; and the circuit court explicitly asked for review by this Court, because the answers to these questions are so important to all West Virginia state parks. The circuit court stated from the bench: "[The] crux of this case, particularly as it [applies] to every state park, [is] the statutory interpretation. As I said, the Supreme Court will hopefully look at that and tell us what it is." (October 9, 2009 hearing transcript, page 52.)

This Brief is presented to this Court by the appellants Cordie Hudkins, the former Chief of the West Virginia State Park system, under whose stewardship Chief Logan and many other West Virginia state parks have been preserved and enhanced (*see* Hudkins resume, R. 648-655); – and by two nonprofit citizen groups, Friends of Blackwater and the West Virginia Highlands Conservancy (together, the "Hudkins Appellants.") The Hudkins Appellants represent

thousands of citizens who care deeply about Chief Logan State Park and West Virginia's state park system.

Aligned with the Hudkins Appellants in the instant case are the WVDNR, which manages Chief Logan State Park; and the WVDEP, which issues permits for gas well drilling throughout West Virginia. The West Virginia Chapter of the Sierra Club is also an appellant. The unity of viewpoint in the instant case among these otherwise often-disagreeing parties reflects the importance of these issues to all West Virginians.

W.Va. Code, 20-5-2(b)(8) [2006], which states that: "[T]he [WVDNR] director may not permit. . . the exploitation of minerals . . . for commercial purposes in any state park[.]" *Id.* All of the appellants contend that the Circuit Court of Logan County erred in holding that "W.Va. Code [Sec.] 20-5-2(b)(8) clearly does not apply to minerals not owned by the state." (Circuit Court Order, p.7, par. 8, R. 596.) All of the appellants contend that the provisions of *W.Va. Code, 20-5-2(b)(8) [2006]* must be read and applied -- as they have been for more than fifty years -- to both publicly- *and* privately-owned minerals under state-owned, state park land. Additionally, all of the appellants contend that in the instant case the circuit court erred in holding that even if *W.Va. Code, 20-5-2(b)(8) [2006]* does apply to privately-owned minerals, the WVDEP's Oil and Gas Division may not consider, enforce, or give effect to the WVDNR's actions taken pursuant to the statutory language.

The appellees in the instant case -- the Lawson Heirs, Inc. ("the Lawson Heirs") and Cabot Oil and Gas Corporation, Inc. ("Cabot") have offered a free-wheeling range of arguments in support of their position that *W.Va. Code, 20-5-2(b)(8) [2006]* applies only to publicly-owned minerals -- and that even if the statute does apply to privately-owned minerals, state regulators like the WVDEP may not comply with WVDNR decisions made pursuant to

statute. As will be shown herein, these arguments, in terms of the statute's language and past application, have a weak-to-nonexistent evidentiary and legal basis. The appellees' argument that the application of *W.Va. Code, 20-5-2(b)(8)* [2006] to the Lawson Heirs' minerals would result in a compensable taking of private property for a public benefit is similarly without merit. Even if the Lawson Heirs at some point *might* have a potential takings claim, that claim is entirely premature – and most decidedly has not been and cannot be properly raised in the instant administrative permit review case. As discussed hereinafter, whether the proper application of *W.Va. Code, 20-5-2(b)(8)* [2006] might result in a compensable taking of the Lawson Heirs' mineral estate under Chief Logan State Park would have to be determined in an inverse condemnation proceeding. Before any such proceeding could occur, this Court would first have to establish that *W.Va. Code, 20-5-2(b)(8)* [2006] applies to all minerals, privately-and publicly-owned; and that state regulators like the WVDEP have the duty to give effect to the WVDNR's actions taken pursuant to the statute. Those are the issues before this Court.

In summary, for the reasons set forth herein, this Court should reverse the ruling of the Circuit Court of Logan County, and hold (1) that *W.Va. Code, 20-5-2(b)(8)* [2006] applies to both publicly- and privately-owned minerals under state-owned state park land; (2) that state regulatory agencies like the WVDEP may take into account and give effect to the actions of state agencies like the WVDNR charged with enforcing the statute's provisions; and (3) that the Circuit Court of Logan County's reversal of the WVDEP administrative decision in the instant case must be vacated and the WVDEP decision reinstated.

I. Nature of Proceeding and Ruling in the Lower Tribunal.

The instant appeal arises from an Order entered on June 17, 2009 by the Circuit Court of Logan County, in Case No. 08-C-14, *Cabot Oil and Gas, et al., v. Huffman, et al.* (R. 580-599.) That Order was reaffirmed by the circuit court on October 15, 2009. (R. 873-877.) The Order overturned an Administrative Order that was issued on December 12, 2007 by WVDEP Cabinet Secretary Stephanie R. Timmermeyer on behalf of the WVDEP's Oil and Gas Division. (Administrative Order, R. 30-31.) The Secretary's Order denied five applications for permission to conduct oil and gas drilling and related activities in Chief Logan State Park. *Id.*

II. Statement of Facts.

1. The WVDEP Secretary's December 12, 2007 Administrative Order.

On November 21, 2007, the appellee Cabot Oil and Gas, Inc. ("Cabot"), the Petitioner below, filed applications with the appellant WVDEP's Oil and Gas Division seeking five permits to conduct gas well drilling and related activities within the boundaries of Chief Logan State Park, in Guyan District, Logan County, West Virginia. (WVDEP Administrative Record, R. 24-122.) Cabot's proposed activities include land-clearing, tree-felling, and brush and log removal; heavy equipment and truck use for excavation, earthmoving, grading, hauling stone, and road building; construction of well sites, equipment staging areas, equipment pads, and drilling fluid pits; use of mobile drilling rigs and well fracturing equipment; on-site storage, use, and disposal of deep brine water and fracturing fluids (including toxic chemicals); construction and installation of permanent storage tanks; pipeline construction to connect wells with collector lines; construction of collector lines; and other gas and oil extraction-related activities. *Id.*

On December 12, 2007, the WVDEP Secretary issued an Order denying the permits requested by Cabot. (R. 30-31.) The Secretary's Order concluded the drilling proposed

by Cabot would be "contrary to state law," quoting, *inter alia*, the provisions of *W.Va. Code*, 22-1-6(c)(1) [2007]. That statute requires the Secretary to carry out the WVDEP's "functions in a manner which supplements and complements the environmental policies, programs and procedures of . . . other instrumentalities of this state[.]" *Id.*

The WVDEP Secretary's Order of December 12, 2007 specifically referenced the objection to the proposed drilling activity made to the WVDEP by the Appellant WVDNR. The WVDNR expressed its objection in a December 6, 2007 letter to the Oil and Gas Division. (R. 34-36.) The WVDNR owns and manages the surface land on which Chief Logan State Park is located, as well as the coal estate underlying that surface. *Id.* The WVDNR's letter set forth reasons why the agency objected to granting Cabot's application for permits to conduct drilling-related activity on state-owned land within Chief Logan State Park. As the primary (but not exclusive) authority for its position, the WVDNR referred to *W.Va. Code*, 20-5-2(b)(8) [2006], which states: "[T]he [WVDNR] director may not permit. . . the exploitation of minerals . . . for commercial purposes in any state park[.]"¹ *Id.* The WVDNR letter emphasized that Cabot's proposed drilling and related activities "inherently involve substantial damage to the natural landscape of this publicly owned park":

The prohibitions upon mineral extraction in state parks in the West Virginia Code constitute a legislative recognition of the need for

¹ The WVDNR's letter also cited the provisions of *W.Va. Code*, 22-6-11 [1994] that mandate "[d]enial of a permit request . . . in the event that the proposed well work would result in damage to publicly owned lands or resources." The letter also cited legislative regulations, 58 W. Va. CSR 31-2.1 and 2.2, which state: "No person shall cut, deface, destroy, or drive any object into any tree, shrub, rock, sign, building or other structure or object in a state park . . . No person shall remove any man-made or natural object, material, substance, plant, animal or historical or archeological relic or artifact from a state park . . ." The WVDNR letter also cited *W.Va. Code*, 5A-11-6(d) [2007], which, referring to publicly-owned minerals, states: "Notwithstanding any other provisions of the code to the contrary, nothing herein may be construed to permit extraction of minerals by any method from, on or under any state park . . ." (R. 34-36.)

protection and preservation of natural areas of unique and exceptional scenic and historic significance. The development proposed by the permit applications would have a devastating effect upon the public lands in question, and for that reason, neither the Secretary of the DEP nor the Director of the DNR have authority to permit the same.

After the Secretary issued her Administrative Order, Cabot made no attempt to submit any additional information, documents, or argument to the Secretary; nor did Cabot ask the Secretary to reconsider her Order. Instead, Cabot sought review of the administrative order in the Circuit Court of Logan County.

2. The Circuit Court's June 17, 2009 and October 15, 2009 Orders.

On January 11, 2008, Cabot filed an appeal of the Secretary's Administrative Order in the Circuit Court of Logan County. The Administrative Record, including the WVDNR's objections, was thereafter transmitted to the circuit court. On or around May of 2008, the Lawson Heirs asked the circuit court for leave to intervene in the administrative appeal and to submit additional documentary evidence. (R. 123-125.) The Lawson Heirs are the owners of the gas and oil underlying Chief Logan Park. Cabot Oil and Gas has a lease to extract that gas, and wishes to do so by drilling from state-owned surface land that is part of the Park.² The circuit court granted the Lawson Heirs' intervention, and accepted their documentary evidence. *Id.* No countering documentation was submitted by the WVDEP. On June 17, 2009, the circuit court

² The undisputed record in the instant case shows that in 1960, the Lawson Heirs conveyed the surface of the land in question to a local nonprofit organization, the Logan Civic Association, reserving the gas and oil mineral estate under the land. Shortly thereafter, the Civic Association transferred the land to the West Virginia State Conservation Commission -- to be made into Chief Logan Recreation Area. There is no evidence that Chief Logan State Park's creation was even contemplated in 1960. Nine years later, in 1969, Chief Logan State Park was created, and the land in the Recreation Area was incorporated into the Park at that time. *See* discussion at p. 16 *infra*.

order overturned the WVDEP Secretary's December 12, 2007 Administrative Order (R. 580-599.)

The circuit court's June 17, 2009 Order was based upon on two principal legal conclusions. First, as noted, the circuit court held that the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006] apply only to proposed extraction of state-owned minerals – and do not apply to privately-owned minerals under state-owned state park surface lands. The Order stated: "W.Va. Code [Sec.] 20-5-2(b)(8) clearly does not apply to minerals not owned by the state." (R. 596.) Second, the circuit court held that even if *W.Va. Code*, 20-5-2(b)(8) [2006] did apply to privately-owned minerals, the WVDEP's Oil and Gas Division could not consider, enforce, or give effect to the statute's provisions or the WVDNR's objection based thereon. The Order stated: "There is no statutory, regulatory, or legal precedent which authorizes DEP to use the provisions of W.Va. Code [Sec.] 20-5-2(b)(8) as a basis to deny well work permits." (R. 594.)

On September 18, 2009, after learning of the circuit court's June 17, 2009 Order, Cordie Hudkins, Friends of Blackwater, and the West Virginia Highlands Conservancy filed an motion to intervene in the circuit court. (R. 637-661). Mr. Hudkins served for thirty-five years in the West Virginia State Park system – and ten years as its Chief. He has a long-term, comprehensive familiarity with the policies and practices of the system, including how it has dealt with the issue of privately owned minerals under state-owned, state park land. *Id.* Mr. Hudkins filed an affidavit and documentation challenging the submissions made by the Cabot and Lawson Heirs to the circuit court. *Id.* The Hudkins Appellants asked the circuit court to reconsider its June 17, 2009 order – and to allow further discovery, taking of evidence, and argument. *Id.* They were joined by the West Virginia Chapter of the Sierra Club. (R. 665-728.)

The Hudkins Appellants argued that the issues before the circuit court had not been fully and properly considered by the court prior to the entry of the June 17, 2009 order. *Id.* The WVDEP supported these parties' motion to intervene; Cabot and the Lawson Heirs opposed the intervention request. The Hudkins Appellants also asked the circuit court to allow them to assert additional claims for declaratory and equitable relief, and to join the WVDNR as a party. (R. 847-860.) They raised several additional issues, including the applicability of federal statutes governing funds expended for State projects by the federal Land and Water Conservation Fund, 16 U.S.C. Sec. 4601 *et seq.* *Id.*

On October 9, 2009, a hearing was held in the circuit court, at which the WVDNR, which owns and operates Chief Logan State Park, appeared by counsel, and moved the court for leave to intervene. At the conclusion of the hearing, the court granted Intervenor status – for purposes of appeal only -- to the WVDNR, the Hudkins Appellants, and the Sierra Club. (The court made all of the submissions of the Intervenors part of the record, and thus they may be considered on appeal.) On the substance of all of the claims raised by the appellants, the circuit court refused to revisit, reopen, or reconsider its prior order and holdings, or to grant any of the related requested relief – other than a 60-day extension of time for filing an appeal. The court memorialized its rulings in an October 15, 2009 written Order. (R. 873-877.)

3. The Instant Appeal.

This Court granted Petitions for Appeal filed by the WVDNR, WVDEP, the Hudkins Appellants, and the Sierra Club. All of these appellants ask the West Virginia Supreme Court of Appeals to reverse the June 12, 2009 and October 15, 2009 rulings of the Circuit Court of Logan County, and to affirm the WVDEP Secretary's December 12, 2007 Administrative Order. These appellants all take the position that this Court should uphold the settled law of this

State -- that *W.Va. Code*, 20-5-2(b)(8) [2006] is intended to and does apply to all minerals, not just publicly-owned minerals. They also take the position that the WVDEP, when considering applications for oil and gas well drilling permits, is not only authorized but required to give effect to all laws governing mineral extraction from state-owned, state park lands, and the actions of state agencies like the WVDNR charged with applying and enforcing those laws.

III. Assignments of Error

1. The circuit court erred in holding that the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006] do not apply to privately-owned minerals under the surface of state-owned, state park land.

2. The circuit court erred in holding that when the West Virginia Division of Environmental Protection considers applications for well work permits, it is not authorized to consider and give effect to the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006] and the position and actions of the West Virginia Division of Natural Resources, the state agency charged with enforcing the statute.

3. The circuit court erred in requiring the Secretary of the West Virginia Division of Environmental Protection to issue five well work permits in the instant case, because of the existence a number of unresolved issues regarding the permit applications.

IV. Points and Authorities Relied Upon, Discussion of Law, and Relief Prayed For.

1. Table of Authorities.

Statutes and Regulations

W.Va. Code, 20-5-2(b)(8) [2006]..... *passim*
W.Va. Code, 22-1-1 *et seq* 23
W.Va. Code, 22-1-6(c)(1) [2007].....7

<i>W.Va. Code</i> , 22-6-11 [1994].....	7
<i>W.Va. Code</i> , 5A-11-6(d) [2007]	7
16 U.S.C. Sec 4601 <i>et seq.</i>	24
58 W. Va. CSR 31-2.1 and 2.2	7

Cases

<i>Foster v. U.S.</i> , 2 Cl.Ct. 426, 445 (U.S. Claims Ct. 1983).....	21
<i>Maryland Conservation Council, Inc. v. Gilchrist</i> , 808 F.2d 1039 (4th Cir. 1986).	24
<i>Michigan Oil Co. v. Nat. Resources Commission</i> , 71 Mich. App. 667, 249 N.W.2d 135 (1977) 19	
<i>Miller Brothers v. Michigan DNR</i> , 203 Mich. App. 674, 513 N.W.2d 135 (1994).....	19
<i>Mountaineer Disposal Service, Inc. v. Dyer</i> , 156 W.Va. 766, 197 S.E.2d 111 (1973)	23
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986, 1016, 104 S.Ct. 2862, 2880 (1984).....	19
<i>Sierra Club v. Mainella</i> , 459 F. Supp.2d 76 (D.C.D.C. 2006)	20
<i>State ex rel. ACF Industries, Inc. v. Vieweg</i> , 204 W.Va. 525, 514 S.E.2d 176 (1999)	14
<i>State ex rel. Henson v. WVDOT</i> , 203 W.Va. 229, 506 S.E.2d 825 (1998)	18
<i>State ex rel. Rhodes v. WVDOH</i> , 155 W.Va. 735, 187 S.E.2d 218 (1972).....	19
<i>State v. Epperly</i> , 135 W.Va. 877, 65 S.E.2d 488 (1951)	13
<i>Stephenson v. U.S.</i> , 33 Fed. Cl. 63, 72 (1994).....	20
<i>State v. Jarvis</i> , 199 W.Va. 635, 487 S.E.2d 293 (1997).	13
<i>Tarrant County Water Dist. v. Haupt, Inc.</i> , 854 S.W.2d 909 (1993).....	20
<i>Trail Enterprises, Inc. v. City of Houston</i> , 957 S.W.2d 625 (Ct.App. Tex. 1997)	19
<i>Traverse Corporation v. Latimer</i> , 157 W.Va. 855, 205 S.E.2d 133 (1974)	20

Other

Fenster,M., "The Stubborn Incoherence of Regulatory Takings," 28 <i>Stan. Env.L.J.</i> 525 (2009).19	
<i>Mr. Ira S. Latimer</i> , 56 W. Va. Op. Atty. Gen. 318, January 22, 1976.....	14
<i>Thomas E. Huzzey</i> , 59 W. Va. Op. Atty. Gen. 3, 4, July 16, 1980.....	14
<i>West Virginia Constitution</i> , Article 3, Section 9.....	18

2. Discussion.

First assignment of error: the circuit court erred in holding that the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006] do not apply to privately-owned minerals under the surface of state-owned, state park land.

The Hudkins Appellants submit to this Court that the language of *W.Va. Code*, 20-5-2(b)(8) [2006] is clear and unambiguous in its application to all minerals. Additionally, even if any degree of ambiguity were to be assumed *arguendo* to exist, settled law requires this Court to defer to the reasonable, well-documented, and longstanding application and interpretation of the statute by the state agencies charged with its implementation.

W.Va. Code, 20-5-2(b)(8) [2006], states in relevant part: "[T]he [WVDNR] director may not permit . . . the exploitation of *minerals* . . . for commercial purposes in any state park[.]" (emphasis added). Notably absent from this statutory language (as well as from the language of predecessor versions of the statute) is the modification of the word "minerals" by any limiting words or terms – including the words "state-owned or "publicly-owned."

“A statutory provision which is clear and unambiguous and plainly expresses 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).” Syllabus Point 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997). The clear and unambiguous language of *W.Va. Code*, 20-5-2(b)(8) [2006] applies to all "minerals," and does not grant an exception or exemption to privately-owned minerals.

Moreover, even if one were to assume *arguendo* that there existed some uncertainty as to what categories of minerals are covered by *W.Va. Code*, 20-5-2(b)(2006], any such uncertainty must be resolved in favor of the reasonable interpretation of the law that has been adopted by the agency charged with the statute's application. As this Court stated in *State*

ex rel. ACF Industries, Inc. v. Vieweg, 204 W.Va. 525, 534-535, 514 S.E.2d 176, 185 - 186

(1999):

When a governmental official or administrative agency has exerted its authority by interpreting an unclear statutory provision that it has the duty to implement and execute, this Court historically has extended great deference to such an interpretation, insofar as it comports with accepted notions of legislative intent and statutory construction.

“Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.” Syllabus point 7, *Evans v. Hutchinson*, [158] W.Va. [359], 214 S.E.2d 453 (1975).

The Hudkins Appellants presented the circuit court with copies of two West Virginia Attorney General opinions that discussed prior versions of *W.Va. Code*, 20-5-2(b)(8) [2006]). *Mr. Ira S. Latimer*, 56 W. Va. Op. Atty. Gen. 318, January 22, 1976; and *Thomas E. Huzzey*, 59 W. Va. Op. Atty. Gen. 3, 4, July 16, 1980. (R. 656-663.) Both decisions reflect the premise that statutory provisions apply to privately owned minerals. (For example, in the *Huzzey* opinion, the Attorney General states: "We conclude with the conclusion that the mineral owner may not enter on upon the surface of the park for the purpose of oil and gas drilling, because we are of the opinion that the State through the police power has legislated against commercial exploitation of minerals on State park property" *Id.*, p. 3. (R. 656-663.)

The Hudkins Appellants also presented to the circuit court independent corroboration of the longstanding WVDNR interpretation of the statute -- in three letters from three prior Directors of the WVDNR. Dr. Will Hertig, former WVDNR Director, stated in a September 24, 2009 letter that during his tenure, all requests to drill for privately-owned gas

from state-owned state park land were "summarily dismissed." (R. 792-793). Former WVDNR Director Ira Latimer said in a September 27, 2009 letter that the agency routinely denied permission to drill for private gas from state park property. (R. 794.) In a September 30, 2009 letter, former Director David Callaghan said the same. (R. 795.)

The Hudkins Appellants also pointed out to the circuit court that the Lawson Heirs' had acknowledged, in a 1998 deed, that the then-applicable codification of *W.Va. Code*, 20-5-2(b)(8) [2006] applied to private minerals lying under State Parks: "Lawson hereby acknowledges that. . . the lands that is [sic] to be deeded to DNR and that is then to be made a functioning part of Chief Logan State Park *may not be disturbed for any new extraction of minerals . . . all as per WV Code Chapter 20-5-2(g).*" (Pars. 6 and 7, R. 665, emphasis added.)³

Thus, *W.Va. Code*, 20-5-2(b)(8) [2006] clearly applies to all minerals – both because of its unambiguous language, and because of the consistent interpretation and application of that language over fifty years by the agency charged with its enforcement.

A. The existence of previously-drilled gas wells on some state-owned state park land does not mean that *W.Va. Code*, 20-5-2(b)(8) [2006] only applies to publicly-owned minerals.

In the court below, Cabot and the Lawson Heirs challenged the WVDNR's and WVDEP's application of *W.Va. Code*, 20-5-2(b)(8) [2006] to privately-owned minerals by pointing to gas wells (in many cases, inactive, plugged, and abandoned) on state-owned, state

³It is reasonable to inquire why and how the circuit court's Order reached these patently erroneous conclusions. Unfortunately, the answer is obscured by an inadequate (and inaccurate) record developed before the circuit court. Due to the odd posture of the instant case, misleading, inaccurate, and incomplete submissions by Cabot and by the Lawson Heirs were unopposed prior to the circuit court's ruling. For example, Cabot submitted to the circuit court that "the State and DNR *have 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." (Cabot Brief in Support of Petition, Section II, p. 8, R. 446, emphasis added.) As the Attorney General opinions and WVDNR Director letters referenced above unequivocally show, this submission, like many others, was demonstrably and entirely erroneous.

park land – some of which have extracted or are extracting privately-owned gas. Cabot and the Lawson Heirs argued that the State has therefore recognized that *W.Va. Code*, 20-5-2(b)(8) [2006] or its predecessor versions do not apply to privately owned minerals.

However, what Cabot and the Lawson Heirs avoided telling the circuit court was the wells in question had been initially drilled *before* – in some cases, many decades before -- the date when ownership of the surface land was incorporated into a state park. (*See* Hudkins Affidavit, R. 644; *see* also Brief of WVDNR and materials cited therein).

With particular respect to Chief Logan State Park, the land that was acquired in 1960 by the Logan Civic Association and subsequently transferred to the State Conservation Commission was used to create Chief Logan Recreation Area --- *not* Chief Logan State Park. Chief Logan State Park was not created until 1969. The State has *never* acquiesced to the drilling of new gas wells on the surface of land that is part of Chief Logan State Park. In fact, Mr. Hudkins explained to the circuit court that in a subsequent 1998 land transfer, some of the land acquired by the State from the Lawson Heirs was placed in a Wildlife Management Area precisely so that gas wells could be drilled thereon. (R. 645.)

As shown previously, the record in the instant case demonstrates that the State of West Virginia has consistently interpreted and applied *W.Va. Code*, §20-5-2(b)(8) [2006] and its predecessors as mandating the denial of permission to create new oil and gas wells on the surface of state-owned, state park land – going so far on occasion as to place land into Recreation or Wildlife Management Area status, in order to allow such drilling to go forward. The State has acquiesced in the continued removal of gas from existing wells, first drilled *before* the surface of the land was incorporated into state-owned, state park land. Such a policy and practice reasonably applies the statutory command as operating prospectively: "The Director may not

permit . . . exploitation" – by "grandfathering" previously permitted, pre-park wells, while preventing the Director from approving of new permits seeking to use the surface of state-owned state park land for the exploitation of privately- or publicly-owned minerals. As the Brief of the WVDNR shows, this policy has been consistent for fifty years.

As previously noted, the Lawson Heirs acknowledged in 1998 their *clear understanding* that the provisions and restrictions codified at *W.Va. Code, 20-5-2(b)(8) [2006]* apply to privately and publicly-owned minerals. That acknowledgement appears in a conveyance by the Heirs of additional acreage to the State of West Virginia, a portion of which was to become part of Chief Logan State Park -- and another portion of which was to become part of an adjoining Wildlife Management area, in order that gas wells could be drilled thereon. In the 1998 deed of conveyance, the Lawson Heirs retained the mineral estate under the land that was to be made part of Chief Logan State Park, stating:

Lawson hereby acknowledges that the . . . the lands that is [sic] to be deeded to DNR and that is then to be made a functioning part of Chief Logan State Park *may not be disturbed for any new extraction of minerals . . . all as per WV Code Chapter 20-5-2(g).*

(R. 665, emphasis added).

Thus, the Lawson Heirs have admitted to the applicability of the provisions now codified at *W.Va. Code, 20-5-2(b)(8)* to privately- and publicly-owned minerals. While the Lawson Heirs have stated that this acknowledgment came as the result of a "negotiation," they fail to explain the significance of that alleged fact. The relevant fact is that the Lawson Heirs are on record, in writing, in a deed, *unequivocally acknowledging to the State of West Virginia stating that the provisions of law currently embodied in W.Va. Code, 20-5-2(b)(8) [2006] apply*

to privately-owned minerals under Chief Logan State Park. This admission, purely and simply, defeats the Heirs' subsequent claim to the contrary in the instant case.

B. The speculative possibility of a "taking" of the Lawson Heirs' mineral estate does not alter the proper interpretation and application of *W.Va. Code, 20-5-2(b)(8)* [2006].

Cabot and the Lawson Heirs argue that in order to avoid a "taking" of their private property for public use, *W.Va. Code, 20-5-2(b)(8)* [2006] must be interpreted as not applying to privately-owned minerals. This argument is entirely specious and erroneous.⁴ Even if a compensable "taking" *might* at some point be determined to have occurred in connection with the Lawson Heirs' mineral estate lying under Chief Logan State Park, such a possible determination has no bearing on the meaning and application of *W.Va. Code, 20-5-2(b)(8)* [2006] and the correct result in the instant case.

Many laws, even when applied in the strictest accord with the legislative intent, nevertheless result in compensable "takings" of private property for public use. The laws governing the establishment and maintenance of public highways are one obvious example. *See, e.g., State ex rel. Rhodes v. WVDOH*, 155 W.Va. 735, 187 S.E.2d 218 (1972) (lawful highway construction caused "taking"). In such cases, a final legal determination that there has been a "taking" simply means that the owner of the "taken" property must be awarded "just compensation" for his loss. *Id. West Virginia Constitution*, Article 3, Section 9. The fact that statutorily-authorized governmental activity results in a compensable taking does not mean that

⁴The Lawson Heirs also invoked due process and equal protection principles. But those claims, and the circuit court's Order's conclusions based thereon, are meritless. Due process is satisfied - if a compensable taking is found -- if there is a mechanism to obtain just compensation, which an inverse condemnation action would provide. *See note 10*. Equal protection is not implicated because the statute applies to all mineral estates under all state-owned state park lands.

the authorizing statute must be "re-interpreted," or its clear application prohibited. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S.Ct. 2862, 2880 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.")

In West Virginia, the proper mechanism for raising the issue of a possible "taking," and seeking just compensation therefore, is a mandamus action asserting a claim of inverse condemnation. *State ex rel. Rhodes v. WVDOH*, 155 W.Va. 735, 187 S.E.2d 218 (1972). Whether a governmental action constitutes a taking, especially where the claim is a "regulatory taking" where the title to the property interest in question is not acquired by the government, is a complex, multi-factorial, fact-driven inquiry. *See generally*, Mark Fenster, "The Stubborn Incoherence of Regulatory Takings," 28 *Stanford Environmental Law Journal* 525 (2009).

In such proceedings, courts have held that the exercise of the state's police power to ban drilling on protected public lands does not necessarily constitute a "taking." *See Michigan Oil Co. v. Natural Resources Commission*, 71 Mich. App. 667, 249 N.W.2d 135 (1977). Moreover, a mineral owner's takings claim may be barred by the passage of time – pursuant to the operation of the applicable statute of limitations, or the doctrine of laches. *See Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625 (Ct.App. Tex. 1997) (takings claim by mineral owner who waited until more than ten years from enactment of ordinance barring drilling in city's watershed was barred by statute of limitations).

In the instant case, for more than fifty years the Lawson Heirs have been on notice of the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006] and its predecessors, and have taken no action to question or challenge those provisions as they apply to their mineral estate. In the

meanwhile, the State of West Virginia has spent large sums of public funds creating and improving Chief Logan State Park. The Lawson Heirs' inaction during this extended period may affect the validity of any potential "takings" claim. *See State ex rel. Henson v. WV DOT*, 203 W.Va. 229, 506 S.E.2d 825 (1998) (landowners did not bring inverse condemnation action within reasonable time after they knew of their alleged injuries.) These facts, and their legal significance, would have to be explored in an inverse condemnation proceeding.

Moreover, a mineral estate owner can only make a successful takings claim if there is no reasonable method of accessing the mineral estate -- *even if alternative access methods are more costly*. *See Tarrant County Water Dist. v. Haupt, Inc.*, 854 S.W.2d 909 (1993) (mere diminution of value of mineral estate due to restricted access to mineral estate was not a taking). The mineral estate owner must "prove that the government's action denied *all* 'economically viable use' of the *entire* mineral estate[.]" *Stephenson v. U.S.*, 33 Fed. Cl. 63, 72 (1994) (emphasis added). Thus, requiring a mineral estate owner to utilize directional drilling or other less intrusive methods, even if such a requirement adds to the cost of mineral extraction or limits the amount of extraction, does not constitute a taking. *See id.*; *see Sierra Club v. Mainella*, 459 F. Supp.2d 76 (D.C.D.C. 2006). *Compare Traverse Corporation v. Latimer*, 157 W.Va. 855, 205 S.E.2d 133 (1974) (driller could access some of the minerals under a state park from adjoining property). In the instant case, if the Cabot Heirs could access a significant portion of their mineral estate from outside Chief Logan State Park, for example by the use of directional or horizontal drilling, no "taking" would likely be found.

Importantly, it should also be noted that the measure of damages for a regulatory taking -- that prohibits a party from accessing any portion of their mineral estate -- is limited to the fair market rental value of the mineral estate, because the prohibition on access has a more

limited legal effect than acquiring legal ownership of the minerals by eminent domain. *See Miller Brothers v. Michigan DNR*, 203 Mich. App. 674, 513 N.W.2d 217 (1994) (mineral owner was indefinitely but not permanently deprived of access to minerals; just compensation was therefore the fair market rental value of mineral estate.) *Cf. also Foster v. U.S.*, 2 Cl.Ct. 426, 445 (U.S. Claims Ct. 1983) ("As a general rule, there is no compensation for frustrated contracts or for loss of future income. The sovereign must pay only for what it takes, not for opportunities the owner loses.")

In summary, whether the WVDEP's and WVDNR's correct application of *W.Va. Code*, 20-5-2(b)(8) [2006] to the Lawson Heirs' mineral estate would constitute a compensable taking for public use -- and if so, what measure of just compensation would be due to the Lawson Heirs -- is a fact-based question that could not be decided on the present record, or in a WVDEP administrative proceeding to consider a well permit request. Most importantly, this unresolved and at the moment entirely speculative question *has no bearing whatsoever on the question of whether W.Va. Code*, 20-5-2(b)(8) [2006] *applies to privately-owned minerals under state-owned, state park land.*

C. *W.Va. Code*, 20-5-2(b)(8) [2006] means what it says.

The people of West Virginia have invested many, many millions of dollars in their state parks. Their Legislators have not chosen to allow the surface of those parks to open to the unfettered, unrestricted exploitation of privately-owned minerals under those parks. The provisions of *W.Va. Code*, 20-5-2(b)(8) [2006] are meant to protect these public lands that are held in trust for today's West Virginians -- and for future generations. This Court should uphold the interpretation of *W.Va. Code*, 20-5-2(b)(8) [2006] that has been consistently applied for

decades. The circuit court erred in reversing the decision of the WVDEP Secretary when he ruled that it would be unlawful to approve Cabot's well drilling permit applications.

Second Assignment of Error: The circuit court erred in holding that when the West Virginia Division of Environmental Protection considers applications for well work permits, it is not authorized to consider and give effect to the provisions of *W.Va. Code, 20-5-2(b)(8)* [2006] and the actions of the West Virginia Department of Natural Resources, the state agency charged with enforcing the statute.

The Hudkins Appellants respectfully and appreciatively adopt by reference the arguments and reasoning presented to this Court on this issue by the WVDEP, the WVDNR, and the West Virginia Sierra Club, as if fully set forth herein.

Third Assignment of Error: The circuit court erred in requiring the Secretary of the West Virginia Division of Environmental Protection to issue five well work permits in the instant case, because of the existence a number of unresolved issues regarding the permit applications.

There were and are present in the instant case a number of additional unresolved issues and errors that prohibited the circuit court from overturning the Secretary's Order and requiring that Cabot's well work permit applications be approved. If the West Virginia Supreme Court decides that *W.Va. Code, 20-5-2(b)(8)* [2006] applies to privately-owned minerals, and that the circuit court erred in reversing the WVDEP for that reason, it is unnecessary to reach these issues to decide the instant appeal. However, if this Court does not decide these issues, reversal and/or remand is nevertheless required based on the circuit court's errors with respect to these additional issues.

The first of these issues is whether the rights of the WVDNR and the members of the public for whom the WVDNR manages Chief Logan State Park – rights that arise under real estate deeds and titles as well as statutes – may be properly adjudicated in the administrative well work permit application process, or in a subsequent court review of that administrative process.

Nowhere in the statutes and regulations governing the powers of the WVDEP can the Hudkins Appellants identify any authority allowing the WVDEP to consider -- much less adjudicate -- the respective rights of a surface owner (WVDNR) *versus* a mineral owner (the Lawson Heirs) (which are based on deeds, etc.) in an administrative proceeding regarding a well work permit application. *See generally W.Va. Code, 22-1-1 et seq.* Yet, that is exactly what the Lawson Heirs and Cabot asked the WVDEP and the circuit court to do; and that is what the court did.

It is axiomatic that the scope of an agency's decisional jurisdiction, and the consequent scope of a reviewing court's jurisdiction, is limited to those issues that are assigned by statute. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syllabus Point 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W.Va. 766, 197 S.E.2d 111 (1973).

Therefore, despite having no jurisdiction to engage in such determinations, the circuit court's Order purported to determine rights arising under deeds involving the Lawson Heirs and the WVDNR. Notably, the circuit court acted without these issues having been presented to the WVDEP in the first instance -- and then, without the WVDNR being a party to the proceedings. It is hard to imagine a more unorthodox (and unauthorized) exercise of jurisdiction by a court reviewing an administrative agency decision than what occurred in the instant case. It was error for the circuit court in the context of an administrative appeal alleging

issues that WVDEP had no power to adjudicate administratively, to have entered its June 17, 2009 Order.

A second issue is the lack of prior approval for the proposed drilling and drilling-related activity by the United States Secretary of the Interior. Such approval is required for any non-outdoor-recreational commercial development of real property that has been purchased or maintained using funds from the federal Land and Water Conservation Fund:

(3) No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.: Provided, That wetland areas and interests therein as identified in the wetlands provisions of the comprehensive plan and proposed to be acquired as suitable replacement property within that same State that is otherwise acceptable to the Secretary, acting through the Director of the National Park Service, shall be considered to be of reasonably equivalent usefulness with the property proposed for conversion. 16 U.S.C. § 4601-8(f)(3)

Mr. Hudkins submitted documents establishing the use of LWCF Funds for Chief Logan State Park (R. 796-799), and in his Affidavit averred that sanctions for a violation of the LWCF include the possible imposition upon the State of severe financial penalties. Neither of these submissions has been controverted. Gas well drilling and road-building, etc. within Chief Logan State Park would be a "conversion" of the drilling sites and associated roadways, etc. to something other than "public outdoor recreational uses." No gas well drilling may be permitted in Chief Logan State Park without the approval of the Secretary of the Interior. Additionally, a LWCF conversion is a major federal action for National Environmental Policy Act, 42 U.S.C. 4332 *et seq.* ("NEPA") purposes, *see Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d

1039 (4th Cir. 1986). Such an action triggers the duty by the Secretary of the Interior to do a prior environmental review of the proposed action, and thereafter perform either a full Environmental Impact Study, or make a finding of no significant impact, *id.*, *citing* 40 C.F.R. 1500-1508. Once the Hudkins Appellants raised these issue relating to the LWCF, it was error for the circuit court to enter an order requiring the WVDEP Secretary to issue the well work permits in question -- without ascertaining whether the requirements of the LWCF had been fulfilled.

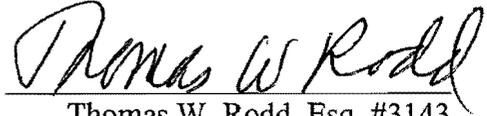
There is a third issue in the instant case -- the apparent fact that Cabot has made plans for drilling up to fifty wells in Chief Logan State Park. This fact was asserted by affidavit below, and was not contradicted by either Cabot or the Lawson Heirs. (Hudkins Affidavit, Par. 6, R. 645.) Cabot's counsel has acknowledged the existence of a map reflecting such plans, but refused to provide a copy. While Cabot made broad (and irrelevant) assertions in its briefing to the circuit court about the supposed benefits of drilling to Chief Logan State Park, Cabot has been unwilling to reveal its actual plans. In the absence of clear information and the development of the record on this issue, it is clear that the circuit court's refusal to reconsider its June 17, 2009 Order was error.

Conclusion

The Legislature, recognizing that West Virginians want and need their state parks as oases of peace and undisturbed nature, has spoken reasonably, clearly, and authoritatively to ensure that result. This Court should uphold the Legislative decision.

Respectfully Submitted,

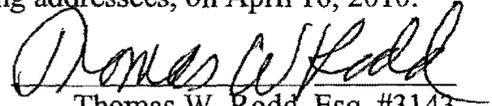
Intervenors Cordie O. Hudkins, Friends of Blackwater,
and the West Virginia Highlands Conservancy, by counsel

A handwritten signature in black ink that reads "Thomas W. Rodd". The signature is written in a cursive style with a horizontal line underneath the name.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the attached "INITIAL BRIEF OF THE APPELLANTS CORDIE HUDKINS, FRIENDS OF BLACKWATER, AND THE WEST VIRGINIA HIGHLANDS CONSERVANCY" to the following addressees, on April 16, 2010.



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