

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case Nos. 35508 Et al.

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

v.

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

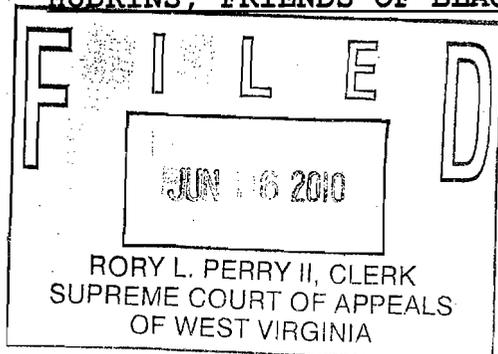
and

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

CA No. 08-C-14

Hon. Roger L. Perry
Chief Judge, Seventh Judicial Circuit

BRIEF OF APPELLEE, LAWSON HEIRS, INC., IN RESPONSE TO BRIEFS
BY APPELLANTS, W.VA. DEPARTMENT OF ENVIRONMENTAL PROTECTION,
SIERRA CLUB, INC., W.VA. DIVISION OF NATURAL RESOURCES, CORDIE
HUDKINS, FRIENDS OF BLACKWATER, AND W.VA. HIGHLANDS CONSERVANCY



LARRY W. GEORGE, ESQ. (WVSB No. 1367)
Law Office of Larry W. George, PLLC
One Bridge Place, Suite 205
10 Hale Street
Charleston, West Virginia 25301
(304) 556-4830

COUNSEL FOR LAWSON HEIRS, INC.
Intervenor Below and Appellee

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I. INTRODUCTION

The Appellee, Lawson Heirs, Inc., an Intervenor below, requests that this Court affirm the June 17, 2009 ruling of the Circuit Court of Logan County which is the subject of this appeal. Lawson Heirs, Inc. is the owner of the oil & gas mineral estate underlying the 3,271 acres comprising Chief Logan State Park in Logan County, West Virginia. The ownership of this oil & gas estate by Lawson Heirs, Inc. ("Lawson Heirs"), and the individual members of the Lawson family as the predecessors of that corporation, reaches back almost two centuries to the 1820's. Drilling and production of this oil & gas started in 1920 and, after the Park's creation in 1960, additional wells were drilled or reworked and gas production has continued to the present day. Lawson Heirs intervened below in support of the relief sought by its Lessee, the Appellee, Cabot Oil & Gas, Inc. ("Cabot"), for the reversal of the decision of the Appellant, West Virginia Department of Environmental Protection ("DEP"), denying Cabot's applications for five (5) oil & gas well work permits to further develop the Lawson Heir's oil & gas underlying Chief Logan State Park.

This case is about whether DEP's erroneous interpretation and ultra virus application of a statute will deprive Lawson Heirs of the enjoyment of its private property rights in the subject oil & gas estate and result in an unconstitutional takings of that property. That statute, W.Va. Code § 20-5-2(b)(8) ("DNR statute"),

which is actually within the purview of the West Virginia Division of Natural Resources, has been erroneously asserted by DEP as a Legislative prohibition against producing privately-owned oil & gas underlying a state park. The Circuit Court correctly interpreted the DNR statute and found that no such statutory prohibition was intended by the Legislature and that the permits should be issued. In its Petition for Appeal, DEP has simply refuted the clear and plain meaning of the DNR statute and, accordingly, the Petition should be denied.

II. PROCEDURAL HISTORY

The Appellee, Lawson Heirs, adopts by reference and relies upon the procedural history set forth in the Response Of Cabot Oil & Gas Corp. To Petitions for Appeal. But to summarize, on November 21, 2007, the Appellee, Petitioner below, Cabot Oil and Gas Corporation, filed five well work permit applications with the DEP Office of Oil & Gas requesting authorization, pursuant to W.Va. Code § 22-6-11, to drill gas wells and perform related work at certain locations within the boundaries of the Chief Logan State Park. The oil and gas estate underlying the State Park at the five proposed well locations is owned by Lawson Heirs.

On December 12, 2007, the DEP issued a final order (hereinafter "DEP final order") by which it denied all five of the aforesaid well work permit applications on the sole and erroneous

grounds that the aforesaid DNR park statute, W.Va. Code § 20-5-2(b)(8), actually administered exclusively by DNR, prohibited the drilling of oil and gas wells into private minerals underlying a State Park. On January 11, 2008, Cabot appealed these permit denials to the Circuit Court of Logan County in the case below and Lawson Heirs promptly intervened therein.

III. JOINDER WITH APPELLEE, CABOT OIL & GAS CORPORATION

Lawson Heirs also joins in the arguments, conclusions and relief set forth by Cabot in its Brief and supplements the same below.

IV. STATEMENT OF THE FACTS

A. HISTORY OF LAWSON FAMILY OWNERSHIP

Chief Logan State Park is comprised of approximately 3,655 acres almost all of which were previously owned in fee (surface and all mineral) by the Lawson family. Map, Tab 1, Appendix of Documents Submitted by the Intervenor, Lawson Heirs, Inc., to Supplement the Administrative Record Filed by Respondent and Also for the Record of the Case on Behalf of Petitioner and Intervenor (hereinafter "Appendix"). In 1817, Anthony Lawson and his family migrated to America from Stanton, England and were among the first English settlers in what became Logan County. In 1823, the Lawson family started purchasing lands in and around the future State Park

and acquired extensive land holdings. In 1919, the heirs of Anthony Lawson created Lawson Heirs, Inc. to hold title to all their lands in Logan County including those comprising the future Chief Logan State Park.

B. "BARGAIN SALE" GIFT BY THE LAWSON FAMILY OF
THE 3,271 ACRES OF LANDS FOR CHIEF LOGAN STATE PARK

In the Spring of 1960, representatives of Lawson Heirs entered into discussions with the Logan Civic Association, a nonprofit community group in Logan County, which acted on behalf of and as agent for the West Virginia Conservation Commission (predecessor of the West Virginia Division of Natural Resources) to acquire a local state park. The entire transaction conveying the Park's lands to the State was a continuous three-way negotiation among Lawson Heirs, Logan Civic Association and the State Conservation Commission (now DNR) which started in the Spring of 1960 and was completed with the transfer of the subject lands to the State on December 29, 1960.

Following months of negotiations, Lawson Heirs conveyed 3,271 acres of surface land and coal to the Logan Civic Association, at the heavily discounted price of Ninety Thousand Dollars (\$90,000 or \$27.51 per acre) by Deed dated November 18, 1960. Tab 2, Appendix. Five weeks later, by Deed dated December 29, 1960, the Logan Civic Association conveyed the entire 3,271 acre tract to the State of

West Virginia for the benefit of the State Conservation Commission (DNR) which was to manage it as Chief Logan State Park.¹ Tab 3, Appendix.

At a mere Twenty-Seven and 51/100 Dollars per acre (\$27.51/ac.), the negotiated purchase price was a de facto gift by Lawson Heirs to the State and today would be designated as a "bargain sale" under the charitable gift rules of the Internal Revenue Service.²

C. RESERVATION OF THE OIL & GAS ESTATE FROM THE
1960 PARTIAL GIFT OF THE LANDS FOR CHIEF LOGAN STATE PARK

At the time of the 1960 negotiations, the 3,271 acres were subject to existing oil & gas leases with South Penn Oil Company, Hope Natural Gas Company and others and was the site of numerous active oil & gas wells. Tabs 2 [1960 Deed pg. 349], 5, 10-11, 13, Appendix. These outstanding oil & gas leasehold rights were

¹ The State Conservation Commission (DNR) initially designated the 3,271 acres it received from the Lawson family as the "Chief Logan Recreation Area". Tab 25, Appendix. As discussed below, the date on which Chief Logan's status was officially changed from "Recreation Area" to a "State Park" is subject to some doubt.

² The "bargain sale rule" provides that the sale of real estate or other property to a charitable donee (e.g., State of West Virginia) at a discounted price is a charitable gift and deductible against ordinary income in the amount equal to the difference between the actual sale price and the higher fair market value. 26 U.S.C. § 170. IRS Reg. § 1.170.

acknowledged by counsel to the State Conservation Commission, the law firm of Estep, Smith & Eiland (acting as Special Assistant Attorney Generals) and who, on behalf of both the State and Logan Civic Association, negotiated exceptions and reservation of the oil & gas estate with Lawson Heirs. Tabs 10-11, 16-18, Appendix. As a result of these negotiations, the November 18, 1960 Deed reserved to Lawson Heirs the ownership of the oil & gas underlying these lands and the right to use the surface for future drilling with the following provision:

There is excepted and reserved [to Lawson Heirs Inc.]....all oil , and gas....underlying the lands hereby conveyed, with the right to search for, explore, operate for, drill, produce and market oil, gas and gasoline, together with rights of way and servitudes for the laying of pipelines [and other facilities]....and all other rights and privileges necessary and incident to and convenient for the economic operation of the excepted oil and gas.

Tab 2, Appendix: [Pg. 347, Deed by Lawson Heirs Inc., Grantor, to Logan Civic Association, Grantee, D.B. 276, Pg. 342, Logan County Clerk's Office (November 18, 1960)].

This oil & gas reservation was approved in advance of both the November 18, 1960 Deed (Lawson to LCA) and the December 29, 1960 Deed (LCA to State) by officials of the State Conservation Commission upon the recommendation of their counsel who was

negotiating the entire transaction with both Lawson Heirs and the Logan Civic Association.³ Tabs 10-11, 18, Appendix. It is both beyond dispute and undisputed by DNR or DEP that the reservation of the oil & gas estate underlying Chief Logan State Park to Lawson Heirs, and the existing and continued production and future drilling of oil and gas wells, was the mutual intent and expectation of the State and the private parties to the 1960 transaction.

D. ENVIRONMENTAL CONTROLS ON FUTURE OIL &
GAS DRILLING WERE INCLUDED IN THE 1960 DEED
FOR THE PROTECTION OF CHIEF LOGAN STATE PARK

During the 1960 negotiations, concerns were raised by the State Conservation Commission (DNR) about protecting the aesthetics and recreational uses of the Park in the event of additional oil & gas drilling. Tabs 9-10, Appendix. In response, counsel to the Conservation Commission (DNR) negotiated additional protections for the Park which were accepted by the Commission and Lawson Heirs and incorporated into the November 18, 1960 Deed by which Lawson Heirs conveyed these lands to the State's agent, Logan Civic Association.

³ The margin of the draft oil & gas reservation provided by the Conservation Commission's counsel, and recovered from DNR's files during the pendency of this case, contains a note: "Kermit, this is OK. W. Lane". This was a note between Dr. Warden Lane, Director of the Conservation Commission, and Kermit McKeever who was its Assistant Director. Tab 18, Appendix.

The protective provisions included offset distances for oil & gas wells and associated infrastructure from the expected future "riding trails", "overlooks", "lake" and buildings and roads within the Park. Other protective provisions addressed re-vegetation and reclamation of well sites, roads and disturbed surface areas to the satisfaction of the Conservation Commission (DNR). The relevant part of the these protective provisions which were incorporated in the 1960 Deed are as follows:

Subject to the rights of any lessees under the existing oil and gas leases hereinafter mentioned, [Lawson Heirs, Inc.], its successors, assigns and lessees, in exercising or performing any of the rights excepted or reserved shall be limited as follows:

No well shall be drilled, without the consent in writing of the party of the second part, its successors or assigned [i.e., DNR], first had and obtained, within one thousand (1,000) feet of any building or structure, tipple, shaft, air shaft, or lake; within two hundred (200) feet of any existing or projected entry, road, riding trail, haulway, or air course or any mine in operation, any of which is now or may hereafter be constructed upon the premises hereby conveyed; or within the view or site of any overlook that has been developed for public use;

No road, power line, pipe line, or telephone line shall be constructed without the prior written approval, as to location, of the Director of the Conservation Commission of West Virginia [i.e., DNR], or his authorized representative, but such written approval shall not be unreasonably or arbitrarily withheld.....

Where timber is cut,.....the trees shall be trimmed and the branches stacked and piled in accordance with the rules and regulations of the Director of the Conservation Commission of West Virginia.....the rights of way shall be cleared for reseedng.

When in the exercise of any of the rights excepted or reserved it become necessary to expose the mineral soil, such shall be reseeded in a manner that is approved in writing by the Director of the Conservation Commission of West Virginia.....

All abandoned roads shall be treated in the manner approved by the Conservation Commission of West Virginia. [emphasis added]

Tab 2, Appendix. [Pgs. 347-8, Deed by Lawson Heirs Inc., Grantor, to Logan Civic Association, Grantee, D.B. 276, Pg. 342, Logan County Clerk's Office (November 18, 1960)].

These requirements for environmental protection, at a time when the law required very little for oil and gas drilling, manifested part of the contract between Lawson Heirs and the State and also the expectation of both for future oil & gas drilling. As with the above cited oil and gas reservation to Lawson Heirs, the draft of these protective provisions was approved in advance by the Director of the State Conservation Commission upon the recommendation of their assigned Special Assistant Attorney General. Supra at Fn. 3 ["Kermit this is ok. W. Lane"]. Tabs 10-11, 18, Appendix.

E. PERMITTING AND PRODUCTION OF OIL & GAS WELLS
BY LESSEES OF LAWSON HEIRS CONTINUED AFTER THE
CREATION OF CHIEF LOGAN STATE PARK TO THE PRESENT

At the time of the 1960 conveyance of the 3,271 acre tract to the State, the future Park was subject to existing oil & gas leases

to South Penn Oil Company, Hope Natural Gas Company and other producers and was the site of numerous active oil & gas wells. Tabs 10-11, 13, Appendix. Three of these wells, drilled in 1921, 1955 and 1960, are now within the Park and continue in operation to the present day. Map, Tab 1, Appendix. Following the Park's establishment in 1961, the lessees of Lawson Heirs drilled a new oil & gas well in 1965, which also continues in operation to the present day. Further, the 1960 well was again permitted in 1981 and reworked in a manner very similar to drilling a new well.⁴

Both the 1965 well and the 1981 reworked well were permitted after the 1961 enactment of the subject DNR park statute (W.Va. Code § 20-5-2(g)) upon which DEP has relied to deny the subject oil & gas well work permit applications. Today, there are four (4) active wells producing oil and gas which are situated within Chief Logan State Park. Map, Tab 1, Appendix.

⁴ The 1960 well was originally permitted by the W.Va. Department of Mines as API No. 47-045-0779 and completed on November 11, 1960. On May 7, 1981, the Department issued a new permit under a new well number, API No. 47-045-1080, for fracturing and stimulation to increase production of the existing well. The new permit authorized surface work very similar to drilling a new well: road building, operation of drilling equipment and reconditioning of drilling fluids pond, drill pad and surface runoff controls. The permitted work commenced on July 28, 1981 and was completed on September 1, 1981. Supplemental Appendix of Documents Submitted by the Intervenor, Lawson Heirs, Inc., to Supplement the Administrative Record Filed by Respondent and Also for the Record of the Case on Behalf of Petitioner and Intervenor (hereinafter "Supplemental Appendix").

Although referred to as a "State Park" in the 1960 negotiations among Lawson Heirs, LCA and the State Conservation Commission (DNR), and Governor Underwood's dedication of Chief Logan, the Commission initially designated the 3,271 acres it received from the Lawson family as the "Chief Logan Recreation Area". Tabs 7-15, Appendix. The date on which Chief Logan's status was officially changed from "Recreation Area" to a "State Park" has never been established or documented by DNR or any party other party in this case. However, Chief Logan had been designated a "State Park" long before the 1981 rework permit.

V. STANDARD OF REVIEW

The Supreme Court's review of the Circuit Court's decision to statutory interpretation and constitutional issues is subject to a *de novo* standard of review. Syl. Pt. 1, Syncor Intel Corp. v. Palmer, 208 W.Va. 658, 542 S.E.2d 479 (2001); Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). The factual findings of the Circuit Court are subject to a clearly erroneous standard. 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).

VI. ARGUMENTS

A. DEP EXCEEDED ITS STATUTORY AND REGULATORY AUTHORITY AND ITS DENIAL OF THE WELL WORK PERMITS WAS ULTRA VIRUS

The Circuit Court reversed DEP's denial of the five permits on, inter alia, the fundamental grounds that the DNR statute is outside of its regulatory and statutory authority and that such denial was ultra virus. In effect, DEP denied both the procedural and substantive due process rights of Cabot and Lawson Heirs and acted beyond the scope of its statutory authority.

The applicable statutes and regulations clearly define the scope of criteria and factors which DEP may consider in issuing or denying an oil & gas well work permit and it may consider only those factors and issues expressly authorized by statute. State ex rel. Hoover v. Berger, 483 S.E.2d 12 (W.Va., 1996); Francis O. Day Co., Inc. v. West Virginia Reclamation Bd. of Review, 424 S.E.2d 763 (W.Va., 1992); Mountaineer Disposal Service, Inc. V. Dyer, 197 S.E.2d 111 (W.Va., 1973). The DNR parks statute is not among those authorized considerations on the part of DEP.

The contents of an oil and gas well work permit application are determined by W.Va. Code § 20-6-6(c)(1-12) and include, inter alia, details about the identity of the operator/applicant, well

location, type of well, affected coal and surface owners, geology, sediment erosion control and other technical details. Pursuant to W.Va. Code § 20-6-6(c)(13) the application shall include "[a]ny other relevant information which the [DEP Secretary] may require by rule" (emphasis added). The applicable regulations issued by the DEP, 34 C.S.R. 4 (May 10, 2001), provide additional technical details and notices for well work permit applications but make no reference to land use in general, public lands or state parks in particular nor to the DNR statute. The actual application form itself, DEP Form WW-2(B) "Application for Well Work Permit", makes no provision for information about state parks or other public lands.

The same statute and related regulatory authority do not contemplate that DEP may make a permitting decision based on the DNR statute and no such action is authorized. The DEP exceeded its authority and jurisdiction in relying upon the DNR statute and its denial of the subject permit applications was ultra virus. In the alternative, if DNR believes that the subject DNR park statute prohibits the proposed wells, then it can bring an action for injunctive relief to that end. But regardless of what action DNR has failed to take, or may take in the future, the Circuit Court found that DEP did not have the authority to deny the permit applications and its decision was reversed.

B. DEP'S ACTION WAS AN UNCONSTITUTIONAL TAKINGS OF
LAWSON HEIRS' OIL & GAS ESTATE UNDERLYING CHIEF LOGAN STATE
PARK AND, IF UPHELD, WOULD ENTITLE LAWSON HEIRS TO COMPENSATION

The Circuit Court found that DEP's denial of the well work permits to Cabot, on the grounds of protecting scenic and recreational values represented an unconstitutional takings of both Cabot and Lawson Heirs' private property. Such action, had it not been reversed by the Circuit Court, would have been an inverse condemnation of Lawson Heirs' mineral property for which the State could be compelled in mandamus to pay compensation at fair market value. See, Shaffer v. West Virginia Dept. of Transp., 208 W.Va. 673, 542 S.E.2d 836 (2000); State ex rel. Henson v. West Virginia Dept. of Transp., 203 W.Va. 229, 506 S.E.2d 825 (1998); Orlandi v. Miller, 192 W.Va. 144, 451 S.E.2d 445 (1994).

There is ample precedent in other states that the denial by a state of the right to drill and produce privately-owned oil & gas underlying state parks and state forests, on the grounds of protecting scenic and/or recreational values, manifests an unconstitutional takings of private property requiring fair compensation. E.g., Beldon & Blake Corp. v. Penn. Dept. of Natural Resources, 25 M.D. 2006, Comm. Ct. Of Penn. (2007) [Gas driller allowed access to drill gas wells on state Park over objections of Penn. Dept. Of Conservation and Natural Resources that scenic and recreational values would be impaired]; Miller Bros. v. Department

of Natural Resources, 203 Mich.App. 674, 513 N.W.2d 217 (1994) [Mich. Dept. of Natural Resources denied the owner of the oil & gas estate underlying a 4,500 acre state park its rights to drill thereon on the grounds of protecting scenic and recreation values and the agency was compelled to pay Ninety Million Dollars (\$90,000,000) in compensation to the owner].

C. PROPER CONSTRUCTION OF STATUTE CITED BY DEP DOES NOT PROHIBIT THE DEVELOPMENT AND PRODUCTION OF PRIVATELY-OWNED MINERALS UNDERLYING A STATE PARK

In this case, the Circuit Court was called upon to construe the DNR parks statute, originally enacted in 1961 and revised in 1995, upon which DEP relied to deny the well work permits. The Court's purpose in construing a statute is to ascertain and enforce the intent of the Legislature by relying upon the established rules of statutory construction. Farley v. Buckalew, 494 S.E.2d 454 (W.Va., 1992); State ex rel. Fetters v. Hott, 318 S.E.2d 446 (W.Va., 1984); Smith v. State Workmen's Compensation Com'r, 219 S.E.2d 361 (W.Va., 1975); Click v. Click, 127 S.E. 194 (W.Va., 1925).

In the instant case, the Circuit Court ruled that the Legislature, in enacting the DNR statute relied upon by DEP to deny these well work permits, did not intend to require the denial of

those permits which would have resulted in a takings of the private property of the Lawson Heirs.

Ironically, as discussed below, DEP did not cite the statute enacted in 1965 which actually controls the development of both publicly and privately owned minerals underlying state parks. Instead, DEP ignored the controlling statute which acknowledges the rights of Lawson Heirs to produce their oil and gas estate.

In denying the subject well work permit applications, the DEP relied exclusively upon a proviso in the DNR statute (W.Va. Code § 20-5-2(b)(8)) and an erroneous interpretation that this proviso prohibits the development and production of privately-owned minerals underlying state parks. Instead, that proviso is part of a provision which, being a part of the section (W.Va. Code § 20-5-2) establishes the general powers and duties of the DNR Director in respect to state parks, manifests both a Legislative delegation of rulemaking authority to the DNR Director and a mandatory duty to promulgate certain regulations in regard to state parks. The subject proviso does not control the development of privately-owned minerals, but instead, limits the rulemaking powers of the Director of DNR by prohibiting his issuance of regulations for the sale or leasing of publicly-owned minerals at state parks. The subject DNR statute, including the proviso, is 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. (Emphasis added)

W.Va. Code § 20-5-2(b)(8).

This "exploitation of minerals" proviso, incorporated in 1995 into the Legislative grant of rulemaking powers to the DNR Director, was originally enacted in 1961. This occurred just three months after the Lawson Heirs' gift of Chief Logan to the State and the 1960 Deeds.⁵ Infra. In the 1961 regular session, the Legislature passed Senate Bill No. 23 (1961 DNR legislation) which reorganized the Commission and other programs into DNR and, inter alia, vested its Director with generic authority to promulgate regulations, but which rulemaking provision made no specific reference to the state park system nor to hunting, timbering or the

⁵ At the time of the 1960 Deeds between Lawson Heirs and the State, the statutory language merely noted that state parks were for the "purpose of preserving scenic or historical values or natural wonders, or providing public recreation". W.Va. Code § 20-1A-7(10)(b) [1955].

"exploitation of minerals" therein.⁶ W.Va. Acts, Ch. 133 [1961].
W.Va. Code § 20-1-7 (29) [1961].

Instead, the "exploitation of minerals" clause was first included in that provision of the 1961 DNR legislation which established the general goals and purposes of the state park system. W.Va. Acts, Ch. 133, pgs. 565, 637 (March 8, 1961). That provision, as originally enacted in 1961, provided as follows:

The purpose of such [state park] system shall be to promote conservation by preserving and protecting natural areas of unique or exceptional scenic, scientific, cultural, archaeological or historic significance, and to provide outdoor recreation opportunities....In accomplishing such purposes, the director shall, insofar as is practical, maintain in their natural condition lands that are acquired for and designated as state parks, and shall not permit public hunting, the exploitation of minerals or harvesting of timber thereon for commercial purposes [emphasis added].⁷

This provision expressly acknowledged that there were practical limitations ("insofar as is practical"), such as privately-owned mineral estates, upon DNR's capacity to preserve the pristine aesthetic values of the parks. This provision, albeit

⁶ "In addition to all other powers....the Director is hereby authorized and empowered to:....(29) Promulgate rules and regulations to implement and make effective the powers and duties vested in him by the provisions of this chapter and take such other steps as may be necessary in his discretion for the proper and effective enforcement of the provisions of this chapter." W.Va. Code § 20-1-7 (29) [1961].

⁷ Originally enacted as W.Va. Code § 20-4-3 (1961).

recodified on occasion over the next thirty-five years, remained unchanged in substance. It was repealed in 1995 in the same legislation which transferred the state park system from the Division of Tourism and Parks back⁸ to DNR with the "exploitation of minerals" clause transposed into the proviso of the new rulemaking provision of the DNR parks statute. W.Va. Acts, Ch. 192 (1995).⁹ This is the provision now relied upon by DEP to deny the well work permits.

The "insofar as is practical" language of the 1961 statute, its subsequent repeal in 1995 and the enactment of the rulemaking provision of the DNR parks statute with its "exploitation of minerals" proviso, all manifest the Legislature's acknowledgment that the State cannot and will not engage in a takings of private mineral estates and associated surface rights in parks.

As further support for the Legislature's forbearance from a statutory takings of the Lawson's property, one can and should look to the 1995 legislation's "title" which is required by Article VI,

⁸ The state park system was transferred in 1985 from DNR to the former Department of Commerce, later the Division of Tourism and Parks, and remained there until 1995 when it was transferred back to DNR. W.Va. Acts, Ch. 41 (1985).

⁹ Enacted as W.Va. Code § 20-5-2(g), this provision was recodified in 2004 and continues to the present as W.Va. Code § 20-5-2(b)(8). W.Va. Acts, Ch. 188 (2004).

Section 30 of the Constitution of West Virginia.¹⁰ A bill's title is required to give specific and detailed notice of the contents of an act so that Legislators and the public are informed of its purpose and to prevent any attempt to surreptitiously insert matters which, if known, might fail to gain consent of the majority of the Legislature. E.g., McCoy v. VanKirk, 201 W.Va. 718, 500 S.E.2d. 534 (1997); Appalachian Power Co. v. State Tax Dept. of West Virginia; 195 W.Va. 573, 466 S.E.2d 424 (1995); State ex rel. Lambert v. County Com'n. Of Boone County, 192 W.Va. 448, 452 S.E.2d 906 (1994); State ex rel. Walton v. Casey, 179 W.Va. 485, 370 S.E.2d 141 (1988). To comply with this Constitutional requirement, the Legislature has adopted rules and drafting standards which require that legislation with provisions affecting substantial private rights, such as real property and condemnation, must be expressly acknowledged in the bill's title.¹¹

¹⁰ "No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title." W.Va. Const. Art. 6, § 30.

¹¹ "In view of Section 30, Article VI of the West Virginia Constitution and various decisions of the West Virginia Supreme Court of Appeals [t]here should be some reference in the title to provisions which have far-reaching implications...it is essential that the title contain references to criminal offenses and penalties, and it should contain references to the suspension or revocation of a license or other right, privilege, etc., the exercise of the right of eminent domain,...." (emphasis added). Office of Legislative Services, WEST VIRGINIA LEGISLATURE BILL DRAFTING MANUAL, Part One, Sect. I (Bill Titles), pg. 7 (revised 2006).

In the 1995 legislation (Senate Bill No. 33), the title includes no such reference whatsoever to taking, diminishing, condemning or otherwise adversely affecting the property rights of the owners of private minerals underlying state parks. Enrolled Committee Substitute for Senate Bill Number 33, pgs. 1-2 (1995).¹² Clearly the Legislature did not intend the proviso in the 1995 DNR parks statute to diminish the property rights of private mineral estates underlying state parks.

Despite the Legislature's intentions, DEP has attempted to use that proviso in the 1995 DNR parks statute to bar the further development of the Lawson Heirs' oil & gas estate, but the proviso is not controlling in regard to any person's conduct within a state park. Instead, it merely limits the Director's rulemaking powers to prohibit him from authorizing hunting, timbering or the "exploitation of minerals" (i.e., publicly-owned minerals) at state

¹² In relevant parts, the title of the 1995 legislation provided: "AN ACT to amend chapter twenty of said code by adding thereto a new article, designated article five, all relating to recodifying the laws relating to the tourism functions of the former division of tourism and parks and the transfer by executive order of state parks, state recreation areas and wildlife recreation areas to the division of natural resources;....requiring legislative rules and permitting procedural rules for application forms and instructions;.... recodifying provisions relating to state parks and recreation areas within the division of natural resources; jurisdiction of section of parks and recreation and appointment of chief.... continuation of operation and protection of various parks and recreation areas within the parks and recreation section....". Enrolled Committee Substitute for Senate Bill Number 33, pgs. 1-2 (Passed March 11, 1995).

parks in the course of promulgating regulations. The above cited DNR statute is a "rulemaking" statute - it tells the DNR Director what regulations he can and cannot promulgate and nothing more. The very structure and purpose of this proviso and the rules of statutory construction require this conclusion.

Under the established rules of statutory construction, the purpose of a proviso in a West Virginia statute is to qualify and restrain the meaning of the terms of the main clause of the statute. State ex rel. Browne v. Hechler, 197 W.Va. 612, 476 S.E.2d 559 (1996) ["The function of a proviso in a statute is to modify, restrain, or conditionally qualify the preceding subject to which it refers.", citing Syl. pt. 2, State v. Ellsworth, 175 W.Va. 64, 331 S.E.2d 503 (1985)]; State v. Cunningham, 90 W.Va. 806, 111 S.E. 835 (1922). This is also the general rule of statutory construction as to the effects of provisos. 73 Am.Jur. 2nd Statutes, §§ 216-219.

Instead, all three of the specific activities detailed in the 1995 proviso, hunting, timbering and the "exploitation of minerals", are governed by other specific and controlling statutes applicable to the general public. Hunting in a state park is generally prohibited by another statute, W.Va. Code § 20-2-58, but in an exception not acknowledged in the proviso of the 1995 DNR parks statute, the Legislature has authorized the DNR Director to permit limited hunting of whitetail deer in state parks when deemed

necessary to protect the parks' "ecological integrity". W.Va. Code § 20-5-2(b)(15). The sale of timber in a state park by the DNR Director is generally prohibited pursuant to W.Va. Code § 20-2-7(13), but in another exception, the DNR Director can sell the timber in a state park that has been removed in the course of facility construction. W.Va. Code § 20-5-2(b)(7). But no statute of general application bars the development and production of privately-owned minerals in a state park.

DNR's own regulations reflect these statutory realities. But if the DEP position is correct, i.e., that the 1995 DNR parks statute bars "exploitation" of privately-owned minerals underlying parks, then the mandatory provision that DNR "shall....propose rules.... to control the uses of parks" preceding the proviso would have required the DNR Director to issue regulations to that effect. No such regulations exist. Pursuant to the subject statutory provision, DNR has issued extensive rules governing the "uses of parks". Those regulations ban hunting in state parks. 58 C.S.R. 31, ¶ 2.4. They also ban the cutting of trees in state parks. 58 C.S.R. 31, ¶ 2.1. But there is no reference of any nature in the DNR's regulations to the production or "exploitation" of minerals or any prohibition thereon.

This statutory and regulatory scheme is consistent with the statutory provision discussed below which actually controls development of minerals under state parks. This is the provision

which DEP did not cite - because it acknowledges the private property rights of the Lawson Heirs to develop their oil and gas estate.

D. CONTROLLING STATUTE ACKNOWLEDGES THE RIGHT TO DEVELOP AND PRODUCE PRIVATELY-OWNED MINERALS UNDERLYING A STATE PARK

While attempting to rely on the DNR parks statute to deny the well work permits, another statute not cited by DEP actually controls the development of State-owned and privately-owned minerals underlying state parks and acknowledges the rights of Lawson Heirs to produce its oil and gas estate underlying Chief Logan State Park. In 1965, the Legislature originally enacted the first of these statutes, W.Va. Code § 20-1-7(14), to prohibit the development of publicly-owned minerals at state parks:

The director is hereby authorized and empowered to (14) Sell or lease, with the approval in writing of the Governor, coal, oil, gas, sand, gravel and any other minerals that may be found in the lands under the jurisdiction and control of the director, except those lands that are designated as state parks.¹³ [emphasis added]

¹³ This statute was originally codified as W.Va. Code § 20-1-7(15) in 1965, but was subsequently recodified as subparagraph (14) of the same section. Otherwise, it remains unrevised since its enactment in 1965. W.Va. Acts, Ch. 111 (1965).

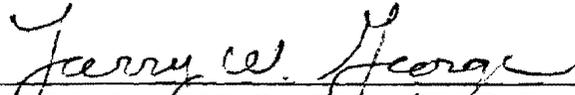
This provision (hereinafter "1965 DNR mineral statute") clearly does not prohibit the development and production of privately-owned oil and gas (or other minerals) underlying a Park since no "sale" or "lease" is necessary on the part of the DNR Director as the State would not own the private mineral estate in question. Indeed, the "sale" or "lease" is executed and consummated by the owner of the private mineral estate, in the instant case, the Lawson Heirs' execution of their oil & gas lease with Cabot in 2003. Tab 6, Appendix.

VII. CONCLUSION

The Circuit Court carefully reviewed the issues herein and issued a well reasoned and comprehensive decision which answered the essential question of statutory construction in the case: the Legislature, in enacting the DNR statute relied upon by DEP to deny these well work permits, did not intend to cause a takings of the private property of the Lawson Heirs by denying them the right to drill and produce its oil & gas underlying Chief Logan State Park. As the Circuit Court found, to do otherwise would be a takings of private property, a violation of Federal and State Constitutional provisions and a breach of contract (the 1960 Deeds) on the part of the State. Accordingly, the Appellee, Lawson Heirs, Inc., an Intervenor below, requests that this Court affirm the June 17, 2009 ruling of the Circuit Court of Logan County.

Submitted this 16th day of June 2010.

LAWSON HEIRS, INC.
Appellee, Intervenor below,
by Counsel;



LARRY W. GEORGE, ESQ. (WVSB No. 1367)
Law Office of Larry W. George, PLLC
One Bridge Place, Suite 205
10 Hale Street
Charleston, W.Va. 25301
(304) 556-4830

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of January 2010 that true and correct copies of the foregoing BRIEF OF APPELLEE, LAWSON HEIRS, INC., IN RESPONSE TO BRIEFS BY APPELLANTS, W.VA. DEPARTMENT OF ENVIRONMENTAL PROTECTION, SIERRA CLUB, INC., W.VA. DIVISION OF NATURAL RESOURCES, CORDIE HUDKINS, FRIENDS OF BLACKWATER, AND W.VA. HIGHLANDS CONSERVANCY, were served upon counsel of record by U.S. Mail, postage prepaid, as follows:

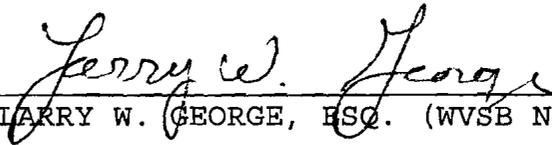
Timothy M. Miller, Esq.
Robinson & McElwee, PLLC
400 Fifth Third Center
700 Virginia Street, East
Charleston, WV 25301

William DePaulo, Esquire
179 Summers Street
Charleston West Virginia 25301-
2163

Raymond S. Franks, II, Esq.
General Counsel
West Virginia Department of
Environmental Protection
601 57th Street, SE
Charleston, WV 25304-2345

Thomas W. Rodd, Esq.
The Calwell Practice, PLLC
500 Randolph Street
Charleston, WV 25302

Thomas W. Smith, Esq.
Deputy Attorney General
Office of the Attorney General
State Capitol Building
Charleston, WV 25305


JERRY W. GEORGE, ESQ. (WVSB No. 1367)