

**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,

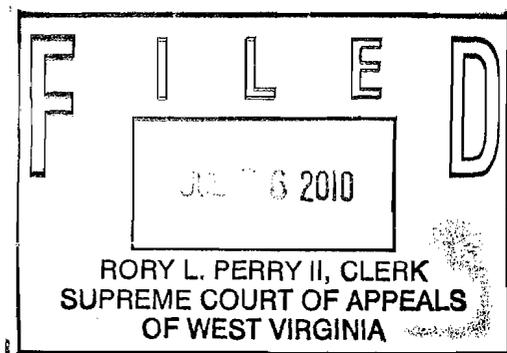
vs.

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.



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

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I. Introduction

The Appellees -- the Lawson Heirs and Cabot Oil and Gas (hereinafter "the Heirs" and "Cabot") -- improperly seek to overturn the clearly legislated, longstanding, and well-established authority of the State of West Virginia to manage State-owned State Park land for the benefit of the public by disallowing the issuance of new permits for the extraction of privately-owned minerals from such land. The limited-record administrative agency action involved in the instant appeal is not the proper forum for any "takings" claims that may be made by the Lawson Heirs and Cabot as a result of the State's exercise of this clearly-established authority. The Heirs and Cabot have other forums available to assert those claims.

This Court should therefore reverse the Circuit Court of Logan County's June 17, 2009 (R. 580-599) and October 15, 2009 (R. 873-877) Orders overturning the WVDEP's denial of five well work permits, and hold:

(1) that the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006] apply to privately-owned minerals under the surface of State-owned, State Park land; and

(2) that when the West Virginia Division of Environmental Protection ("WVDEP") considers applications for well work permits, it is authorized to consider and give effect to the position of the West Virginia Department of Natural Resources ("WVDNR") pursuant to the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006]; and

(3) that the proper forum for claiming an uncompensated "taking" of private property for public use is an inverse condemnation mandamus suit brought by the person alleging the taking.

This Court should also make it clear that the allegations by the Heirs and Cabot in the instant case do not necessarily establish the occurrence of a compensable "taking"; and that in

a proceeding in which the issue is whether government action constitutes a “taking” for which just compensation is due, the court must develop a full record on all of the issues involved, and weigh a wide range of factors. On this important point, the Hudkins Appellants respectfully direct this Court to the discussion in their Initial Brief at pages 18-21.

II. Response to Unsupported Factual Assertions by the Appellees

The Heirs and Cabot make a number of unsourced, unsupported, and erroneous factual assertions in their Response Briefs. For example, the Heirs assert that the State of West Virginia obtained the land that eventually became part of Chief Logan State Park in a “bargain sale.” (Heirs’ Brief, pp. 7-8). In fact, as described in Appellant Cordie Hudkins’ Affidavit (R. 637-661), when the land that makes up what is now Chief Logan State Park was originally purchased from the Heirs in 1960, it was *not intended* to be a State Park because of the highly degraded condition of the land, which had suffered severe environmental ravages from the Heirs’ mining activities. A new category was established, a “State Recreation Area,” that carried no particular rules and regulations other than a mandate to build recreational facilities for public use and for the Area to be managed by the State Park system.

Then, a decade-long effort began the work of transforming the barren hellhole that the Lawson Heirs had created into to the peaceful oasis of natural beauty and diversity that is now Chief Logan State Park. Hundreds of unemployed miners were put to work to develop recreational facilities and reclaim the land. These employees were paid by Federal funds, under a program called “STEP.” These unemployed miners worked miracles in the reclamation process. As a result, the Recreation Area was heavily visited; and, in 1969, the Chief Logan Recreation Area was upgraded to State Park status. *See* “Where People and Nature Meet - A

History of the West Virginia State Parks," Pictorial Histories Publishing Company, Charleston WV, 1988. Two pictures on page 88 of this book show the utter devastation of the landscape that the State of West Virginia took off the Heirs' hands. One picture's caption reads: "Water pollution and mine spoils at their worst as a result of the mining barons' methods before 1980." (Some "bargain sale!"). Even after Chief Logan State Park was created in 1969, a burning gob pile remained above the swimming pool -- until the 1980s, when the Appellant Hudkins had the Division of Reclamation, the forerunner of the WVDEP, use abandoned mine land funds to extinguish the gob pile and reclaim the land. Until that time, the hollow in which the office, swimming pool, and other recreation facilities were located, was filled with an acrid stench and smoke from the burning gob piles. (What a "bargain," Lawson Heirs! Thanks ever so much!) This discussion of just one of the unsupported, conclusory, and erroneous assertions made by the Heirs and Cabot in their Response Briefs demonstrates why this Court, in considering the instant case should not assume that factual allegations in the Appellees' Briefs that are not directly sourced to and verifiable in the record are true.

III. The Heirs and Cabot Have Abandoned their Principal Argument Before the Circuit Court.

In contravention of their position before the Circuit Court of Logan County, the Heirs and Cabot now effectively concede that for more than fifty years, pursuant to *W.Va. Code*, 20-5-2(b)(8) [2006] and its predecessors, the WVDNR has not permitted new gas wells for privately-owned (or publicly-owned) minerals to be drilled on the surface of State-owned, State

Park lands.¹ *See, e.g.,* Cabot Response Brief pp. 16-17. This concession drives a solid nail into the coffin of the arguments of the Heirs and Cabot in the instant case. It is precisely the application of *W.Va. Code, 20-5-2(b)(8) [2006]* to private mineral estates that the circuit court invalidated, as to the Heirs and Cabot -- on the grounds that the Heirs and Cabot had purportedly proven that the State had not applied the statute to private mineral estates in the past. *See* Circuit Court June 17, 2009 Order, R. 596.

Now, with this purported proof having thoroughly collapsed, and faced with the need to “recalibrate” their arguments in the face of overwhelming contrary evidence,² the Heirs and Cabot take a bizarre (and frail) new tack. They argue that the State, if it were to follow the statute as written, should shut down the existing wells in State Parks that were permitted before the land on which they sit became part of a Park! *See* Cabot Response Brief, p. 17.

¹ Authorization for reworking existing permitted wells on Park land has been given in a few instances, after review and a determination made that no further damage will be created due to the roads, distribution lines and well sites already in place. Requests to re-work wells have been denied when such work would cause additional damage. The U. S. Army Corps of Engineers, which owns all of the land on which Stonewall Jackson State Park, permitted wells to be drilled before the final lease was signed. All of the other wells mentioned in Cabot’s Brief were drilled prior to the land becoming a Park. To the best of Appellant Hudkins’ knowledge, no wells exist on Beech Fork State Park; there may be wells on Beech Fork Wildlife Management area, leased from the U.S. Army Corps of Engineers. The only place that the State has received gas royalties from a State Park was at North Bend. The wells were in existence when the land was bought for the Park. These wells are no longer in existence.

² The Response Briefs of the Heirs and Cabot do not challenge the record evidence of three former WVDNR Directors, and former State Park Chief Cordie Hudkins, and the excellent compendium of deeds, maps, and leases presented by the West Virginia Division of Natural Resources (“WVDNR”) to this Court. This evidence utterly refutes the fundamental premise of the Heirs and Cabot’s documentary onslaught to the Circuit Court, in which they added hundreds of pages of maps, etc. to the administrative record in a futile effort to “prove” that the State of West Virginia has permitted new gas wells to be drilled on State-owned, State Park land since the provisions of *W.Va. Code, 20-5-2(b)(8) [2006]* were first codified.

However, the fatal defect with this argument is found in the application of this Court's longstanding rule that the settled, plausible interpretation of a statute by the agency charged with its implementation is entitled to deference. *See* discussion at Hudkins Initial Brief, pp. 13-14. It is entirely rational and consistent with the statutory language for the State to allow wells that are removing private minerals that were permitted *before* the land became State-owned, State Park land to continue to produce -- while refusing to permit new wells to be drilled. Most of the damage caused by such wells has already been done, legally no new "permission" to use the surface of the Park for mineral extraction is involved, and any "takings" compensation problems is avoided.

IV. The Arguments by the Heirs and Cabot about the Meaning of *W.Va. Code, 20-5-2(b)(8) [2006]* are Erroneous.

The Heirs and Cabot argue that the title of the 1995 enactment of *W.Va. Code, 20-5-2(b)(8) [2006]*, and the fact that the statutory limitation on permitting mineral extraction is found in a section authorizing regulations, mean that the statute does not apply to private mineral estates. Both arguments are erroneous.

The Heirs and Cabot have effectively conceded that the State has applied the statute consistently since 1960, so that the 1995 enactment was not any sort of change that had to be reflected in the title. As to the fact that the language relating to mineral extraction occurs in a statutory section that authorizes the issuance of regulations, that argument is a red herring. *W.Va. Code, 20-5-2(b)(8) [2006]* says that when and if the WVDNR Director issues regulations about managing State Park Lands -- such regulations *may not permit* mineral extraction. This *proviso* is a clear statement regarding the powers and duties of the WVDNR and its Director. There could not be a clearer expression of the Legislative intent to prohibit the Director from

allowing new permits to extract both publicly- and privately-owned minerals – from State-owned, State Park land. The effectiveness of this clear delineation of the WVDNR's authority does not depend on the issuance or non-issuance of regulations.³

The Heirs attempt to "explain" their explicit recognition and acknowledgment of the statute's scope in a 1998 deed -- that is, the Heirs' written recognition that *W.Va. Code, 20-5-2(b)(8)* [2006] prohibits new permits for private mineral extraction on State-owned, State Park lands. Heirs Brief, p. 5, note 3. Respectfully, the Hudkins Appellants can make neither "heads nor tails" of this attempted explanation. The Heirs' 1998 acknowledgment of the statute's meaning and applicability remains a huge hole in and obstacle to the arguments of the Heirs and Cabot about the statute's meaning; and can be really explained in only one way – those arguments are wrong.

³The Heirs and Cabot claim that Legislature has never intended to prevent private mineral extraction on State-owned, State Park lands. However, the unrefuted evidence from Appellant Hudkins' Affidavit is that this intent was consistently expressed and never challenged during Hudkins' 35 years of service with the Park system, and in his dealings with every WVDNR Director, Chief, and attorney whom he worked with (Mr. Hudkins' duties would have involved more than a thousand meetings with legislators.) To dispute the word of former WVDNR Directors Dr. Willis Hertig, David Callaghan, and Ira Latimer is to say that they were feckless, and did not understand their responsibilities as Directors. No Legislative or WVDNR employee has ever interpreted the language in Chapter 20 to allow the extraction of privately-owned minerals from the surface of a State Park. While the language prohibiting mineral extraction first appeared in 1961, from the very beginning of the Park system in the 1930s it was stated that parks would be maintained in their "natural state," which included prohibition of mineral extraction. The "insofar as is practical" language in the pre-1995 version of *W.Va. Code, 20-5-2(b)(8)* [2006] never had anything to do with private minerals. This language modified language requiring parks to be maintained in a natural state. It was added to allow for the construction of roads, trails, golf courses, picnic areas, campgrounds, and related infrastructure. The Heirs and Cabot also refer to *W.Va. Code, 20-1-7(14)*, which states that the WVDNR Director is authorized to sell or lease publicly owned 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*. How this statute translates into support for the arguments of the Heirs and Cabot is anyone's guess.

V. The Other Arguments of the Heirs and Cabot Are Erroneous.

The Hudkins Appellants explain in their Brief at pp. 18-21 that an “inverse condemnation” mandamus proceeding, claiming compensation for a taking of private property for public use, is the proper forum to hear any claims by the Heirs and Cabot that the State of West Virginia is “reneging” on a written promise. Moreover, a necessary legal premise for the Heirs and Cabot to be able to even assert such a “takings” claim is the holding in the instant case that *W.Va. Code*, 20-5-2(b)(8) [2006] does authorize the Director to prohibit the drilling of new gas wells to extract privately-owned minerals from State-owned, State Park land. It now appears that the Heirs and Cabot have “come around” on this inverse condemnation issue and agree with the Appellants that they have the right to file an inverse condemnation action. They state that because they “were denied their property rights when the DEP denied the five well work permits at issue . . . [that denial gave rise to] a basis to file an inverse condemnation action.” Cabot Response Brief, p. 20.

The Heirs and Cabot additionally argue that the Director’s exercise of his authority in accord with the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006] constitutes an unconstitutional legislative impairment of contract. *See, e.g.*, Cabot Brief, pp. 17-20. However, Cabot has no standing to raise an impairment of contract claim, because Cabot’s contractual rights were created after *W.Va. Code*, 20-5-2(b)(8) [2006] and its predecessors were enacted. Contractual rights acquired after a statute is enacted cannot be unconstitutionally impaired by the statute’s operation. Syllabus Point 1, *Devon Corp. v. Miller*, 162 W.Va. 362, 280 S.E.2d 108 (1981). As to the Heirs’ impairment of contract argument, it should be recalled that the Heirs’ core complaint is that the State is “reneging” on an alleged “written promise.” Any first-year law student will see that alleging that a party “reneged on a promise” states a claim for *breach* of

contract -- not *impairment* of contract. This important distinction was succinctly explained in *Michigan Oil Co. v. Natural Resources Commission*, 71 Mich.App. 667, 691, 249 N.W.2d 135, 146 (1976):

Article 1, section 10 of the Michigan Constitution provides that: 'No * * * law impairing the obligation of contract shall be enacted.' The best that can be said for appellant's argument is that it confuses the constitutional prohibition against the state enacting laws impairing the obligations of contracts with the state allegedly breaching a contract to which it is a party. It has long been recognized that mere breach of contract by a governmental entity does not constitute an unconstitutional impairment of a contractual obligation. *Thompson v. Auditor General*, 261 Mich. 624, 634, 247 N.W. 360 (1933), *St. Paul Gaslight Co. v. St. Paul*, 181 U.S. 142, 21 S.Ct. 575, 45 L.Ed. 788 (1901), *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U.S. 462, 31 S.Ct. 452, 55 L.Ed. 544 (1911).

This Court should give short shrift to the argument by the Heirs and Cabot that in making well permitting decisions, the WVDEP may not take into account the position of the WVDNR to manage State Park lands, and the laws governing the exercise of that authority. As well explained in the initial briefs of the WVDNR, WVDEP, and Sierra Club, this argument is legally unsound. As the owner and manager of State-owned lands, the WVDNR is well-authorized in the statutes to express and exercise its authority in any administrative proceeding regarding those lands.

The Heirs and Cabot also argue, without citing to any record evidence (*see* Cabot Brief, pp. 20-21), that Cabot cannot use horizontal drilling to extract some or all of its leased minerals from under the Park – albeit possibly at greater cost. Evaluation of this complex factual and financial issue might be relevant and proper in an inverse condemnation “takings” proceeding. It is not appropriately resolved in the instant limited-record appeal of an administrative agency decision on well work permit applications.

Finally, the Heirs and Cabot argue that there is no legitimate public purpose behind prohibiting new permits for private mineral extraction in State Parks. Such a statement contradicts the fundamental purpose of our National and State Parks, which purposes to one degree or another require that such lands remain in a natural state in perpetuity. In this regard, the Heirs and Cabot never even *refer* to another elephant in the parlor – the undisputed fact that Cabot furnished a map showing their intention to drill 35 to 50 wells in Chief Logan State Park (Who can say now that some of these wells will not seek out the Marcellus Shale?) All of these drilling operations involve extensive logging; large excavated drill pads, pit fluid ponds, and pipe and fluid storage areas; giant, graveled roads designed to carry huge equipment; and miles of permanent collection and distribution pipelines. Yes, well sites and pipelines can be smoothed over, fenced, gated, and grassed (with plenty of access left for equipment). But the well sites and the areas around them entirely lose their diverse, natural character. Thus, for the Heirs and Cabot to argue that their drilling plans will cause no substantial injury to the undisturbed natural character of State Park land that has been recovering from mineral extraction for fifty years -- land that is required by law to be maintained in a “natural state” -- defies common sense. Moreover, the Heirs and Cabot’s briefs are silent on the issue of the federal Land and Water Conservation Fund, whose provisions prevent the permitting of gas wells on the surface of Chief Logan State Park. By failing to respond to the LWCF-based arguments of the Hudkins Appellants (Hudkins Brief at 24-25), the Heirs and Cabot have waived any objection thereto.

VI. The *Amicus* Briefs

The brief filed on behalf of Hardy Oil and Gas argues that unless this Court holds that *W.Va. Code*, 20-5-2(b)(8) [2006] does not apply to privately owned minerals under State

Park lands, the State *might* in the future unfairly regulate gas drilling in State Forest lands. Of course, Hardy's remedy for an allegedly improper restriction of its property rights in such a case would be the same as the Heirs and Cabot – an inverse condemnation mandamus proceeding, not a baseless challenge to the basic right of the State to manage its lands for the public benefit.

The brief filed on behalf of the West Virginia Land and Mineral Association argues that *W.Va. Code, 22-1A-1 et seq.* requires the WVDEP to prepare an assessment of the cost of any property rights that might be impaired by its denial of the well work permits. The Association's brief omits the fact that that "(c) The following do not require an assessment under this section: Licensing or permitting conditions, requirements or limitations to the use of private real property *pursuant to any applicable state or federal statutes, rules or regulations; . . .*" *W.Va. Code 22-1A-2 [200]*. Of course, *W.Va. Code, 20-5-2(b)(8) [2006]* is a state statute, so *W. Va. Code, 22-1A-1 et seq.* is entirely inapplicable.

The Hudkins Appellants respect the concerns expressed in the West Virginia Farm Bureau's brief regarding the rights of private landowners. The Bureau correctly states in its Brief at page 3 that the Heirs and Cabot have standing to seek "just compensation" for any taking in an appropriate proceeding. Nothing in the Bureau's brief suggests that the proper forum for making such a claim is a limited-record circuit court appeal of an administrative decision on well work permits.

The brief of the West Virginia Oil and Gas Association states at page 5 that "the DEP erroneously denied the well work permits without offering just compensation." But the WVDEP is a gas well *permitting* agency. How can the WVDEP offer just compensation? It is from the WVDNR, if anyone, that the Heirs and Cabot must seek compensation, if any, in an

inverse condemnation mandamus proceeding. (Ironically, the Heirs and Cabot vigorously opposed joinder of WVDNR in the instant case!)

In sum, the briefs of the various *Amici* support the conclusion that the Order of the Circuit Court in the instant case should be reversed.

VII. Conclusion

This Court should reverse the Circuit Court of Logan County's Orders overturning the WVDEP's denial of five well work permits, and hold:

(1) that the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006] apply to privately-owned minerals under the surface of state-owned, state park land; and

(2) that when the West Virginia Division of Environmental Protection considers applications for well work permits, it is authorized to consider and give effect to the position of the West Virginia Department of Natural Resources pursuant to the provisions of *W.Va. Code*, 20-5-2(b)(8) [2006]; and

(3) that the proper forum for claiming an uncompensated “taking” of private property for public use is an inverse condemnation mandamus suit brought by the person alleging the taking.

This Court should also make it clear that the allegations of the Heirs and Cabot in the instant case do not necessarily establish the occurrence of a compensable taking; and that in a proceeding in which the issue is whether government action constitutes a “taking” for which just compensation is due, the court must develop a full record on all of the issues involved, and weigh a wide range of factors. On this important point, the Hudkins Appellants respectfully direct this Court to the discussion in their Brief at pages 18-21.

Respectfully Submitted,

Appellants Cordie O. Hudkins, Friends of Blackwater,
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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the attached "REPLY BRIEF OF THE APPELLANTS CORDIE HUDKINS, FRIENDS OF BLACKWATER, AND THE WEST VIRGINIA HIGHLANDS CONSERVANCY" to the following addressees, on July 6, 2010.

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