

Consolidated Cases No. ~~10046, 10057, 10058~~, 10059

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

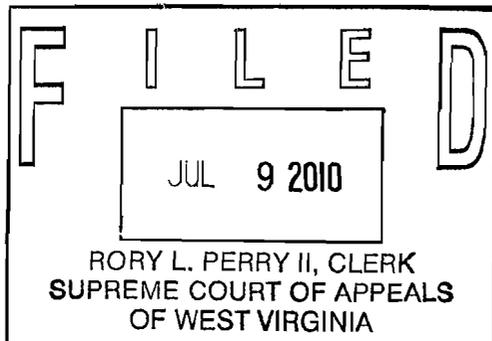
CABOT OIL & GAS, INC., PETITIONER, AND LAWSON HEIRS, INC., INTERVENOR,

V.

**DEPARTMENT OF ENVIRONMENTAL PROTECTION, RESPONDENT, AND
SIERRA CLUB, INC., WEST VIRGINIA HIGHLANDS CONSERVANCY,
FRIENDS OF BLACKWATER AND CORDIE HUDKINS, INTERVENORS**

On Appeal from the June 17, 2009 Decision and Order
of the Hon. Roger L. Perry, Chief Judge, Seventh Judicial Circuit
in CA No. 08-C- 14, Granting Petition for Judicial Review
Under W. V. Code § 22-6-40

**REPLY BRIEF OF APPELLANT
SIERRA CLUB, INC.**



July 9, 2010

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I. W. VA. CODE § 22-6-1 (c) EXPLICITLY MANDATES THAT DEP "CROSS-REFERENCE" ALL ENVIRONMENTAL POLICIES -- NATIONAL POLICIES, OTHER STATES' POLICIES, AND POLICIES OF OTHER AGENCIES OF THIS STATE, INCLUDING THE LEGISLATIVE POLICY AGAINST DRILLING IN STATE PARKS RECITED IN W. VA. CODE § 20-5-2(b) -- IN ITS ENFORCEMENT OF THE ENVIRONMENTAL LAWS OF THIS STATE.

In its June 16, 2006 Brief with this Court, Cabot Oil & Gas, Inc. contends that Appellants "cannot point to any provision in [the DEP or DNR] statutes providing that these Code sections are to be cross-referenced, or that gives administrative agencies legislative power or authority to selectively utilize and transfer legislatively delegated powers from one agency to another" and concludes that the "several different provisions of the West Virginia Code simply are not intended to be read together or otherwise cross-referenced." Brief at pp. 9-10.

No clearer misstatement of the law can be made.

First, this Court not only permits various legislative pronouncements to be read together; it requires such a reading. Thus, in *Zimmerer v. Romano Romano and West Virginia Department Of Transportation, Division Of Highways*, Case No. 34269. (April 30, 2009), this Court held that:

When two statutes address the same subject matter, this Court attempts to construe the statutes *in pari materia* to give effect to the full intent and meaning of both legislative enactments. "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361.

Zimmerer v. Romano Romano and West Virginia Department Of Transportation, Division Of Highways, Case No. 34269. (April 30, 2009).

Here there is no dispute whatsoever that both the DEP and DNR enabling statutes address the same issue, i.e., the grounds for granting or denying drilling permits. Cabot Oil & Gas, Inc. suggests that they be read separately; this Court's controlling precedents clearly require the exact opposite result.

Second, as a straight forward matter of simply reading the statutes themselves, it is patent that they in fact are intended to be cross-referenced, and the language of the legislature in providing for this

cross-referencing could not be more explicit. Thus, WV Code § 22-1-6 (c) mandates that in implementing state-wide environmental policy:

(c) The [DEP] secretary has responsibility for the conduct of the intergovernmental relations of the department, including assuring:

(1) That the department carries out its functions in a manner which supplements and complements the environmental policies, programs and procedures of the federal government, other state governments and other instrumentalities of this State.

W. Va. Code 22-1-6 (c)(emphasis added).

A more comprehensive, mandatory cross-referencing simply cannot be stated – the federal government, the other state governments, and the other instrumentalities of this State. Only laws of foreign nations are not explicitly referenced, but even those rules, if incorporated into a treaty adopted by the United States Senate, could become a part of the “law of the land.”

But Cabot Oil & Gas, Inc. objects to the DEP looking barely two chapters away, from Chapter 22 to Chapter 20 -- from its own enabling statute to the enabling statute of its sister agency, the DNR -- for guidance.

Acknowledging that the explicit language of W. Va. Code § 22-1-6 (c) (1) would require such a cross-reference, Cabot Oil & Gas, Inc. nonetheless argues that a literal interpretation of that section would require DEP “to complement and supplement – and therefore scrupulously consider – every environmental policy, program, or procedure of this state before acting on anything.” Brief at p. 10 (emphasis in original).

As this Court noted in *Boyd v. Merritt*, 177 W.Va. 472, 354 S.E.2d 106 (1986):

This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions.

177 W.Va. 474.

In short, if the legislature directs DEP to cross-reference other statutes, this Court is not in the business of second guessing that legislative decision.

II. CABOT'S ASSERTION THAT THE LEGISLATURE HAS NOT EXPRESSLY DELEGATED AUTHORITY TO DENY PERMITS TO DEP OR DEP'S OFFICE OF OIL AND GAS IS CONTRADICTED BY THE PLAIN LANGUAGE OF THE APPLICABLE STATUTES.

Cabot argues the none of the statutes DEP relied on in denying Cabot's application for well permits provide an "express delegation of such authority, citing W. Va. Code § 22-6-2 (c)(11), 22-1-6 (c)(1) and 20-5-2-(b)(8), but extending the claim to "any other provision of the West Virginia Code." Brief at p. 10.

W. Va. Code § 22-6-2 (a) provides that: "The Secretary shall have as his or her duty the supervision of the execution and enforcement of matters related to oil and gas set out in this article and in articles eight and nine of this chapter." (emphasis added). In fulfilling the duties outlined in W. Va. Code § 22-6-2 (a), the legislature in W. Va. Code §22-6-2 (c) expressly delegates full power over oil and gas matters to the Secretary of DEP. Specifically, W. Va Code § 22-6-2 (c) provides that that the [DEP] "Secretary shall have full charge of the oil and gas matters." (emphasis added).

One may question this authority on some grounds, but certainly not on the ground of breadth. Additionally, W. Va. Code § 22-6-2 (c)(12) provides that, In addition to all other powers and duties conferred, the DEP Secretary shall have the power and duty to:

(12) Perform all duties as the permit issuing authority for the state in all matters pertaining to the exploration, development, production, storage and recovery of this state's oil and gas;

W. Va. Code § 22-6-2 (c)(12)(emphasis added).

Cabot may not plausibly argue that the delegation of "all duties as the permit issuing authority" includes the authority to *grant* permit application, but not the authority to *deny* such

applications; the statutory grant is to perform “all duties.” One might fairly ask how § 22-6-2(c)(12) might be rewritten to satisfy Cabot’s demand for an explicit delegation.

The question is not whether the DEP Secretary, or his delegate the OOG Director, has the authority to issue or deny permits, but the grounds on which that authority may be exercised. Cabot argues that the Secretary’s discretion is limited to the sole criteria listed in W. Va. Code § 22-6-6 (h), which provides that the OOG director must deny the issuance of a permit if the director determines that the applicant has committed a substantial violation of a previously issued permit.

Obviously, such a narrow construction ignores the explicit “cross-referencing” of environmental policies which W. Va. Code § 22-6-1 (c)(11) mandates the Secretary undertake, including the West Virginia legislature’s pronouncement of its own environmental policy in W. Va. Code § 20-5-2 (b)(8), explicitly prohibiting the permitting of mineral exploration in state parks.

Cabot Oil & Gas, Inc. asserts, referencing nothing more than the title to the § 20-5-2 (b)(8) (“§ 20-5-2. Powers of the director with respect to the section of parks and recreation”) that “it appears that the legislature’s intent in enacting W. Va. Code § 20-5-2 (b)(8) was to limit the powers of the head of the DNR to act independently or outside the specific powers granted by the legislature.” Brief at p. 11-12. And Cabot adds, “In fact, no section of Article 5, Chapter 20 of the West Virginia Code grants DNR any authority over the DEP or well work permit applications.” Brief at p. 12 (emphasis added).

To the extent that the statute provides, explicitly, that the DNR regulations, if issued, may not permit “the exploitation of minerals...in any state park,” the Sierra Club concurs in the proposition; unquestionably the section limits DNR’s authority in that specific matter.

But DNR is not purporting to grant or deny Cabot anything; the DEP has exclusive permitting authority under W. Va. Code § 22-6-2 (c)(12) quoted above. And the breadth and limits of DEP’s authority is recited in the explicit “cross-referencing” statutes which Cabot bemoans -- W. Va. Code § 22-1-6 (c)(1). The rule making limits on DEP’s sister agency, the DNR, in no way foreclose DEP from

denying Cabot Oil & Gas, Inc. a drilling permit on the basis of W. Va. Code § 20-5-2 (b)(8), which the legislature requires DEP to “cross-reference.”

Moreover, it is totally irrelevant that *DNR* has not exercised its rulemaking authority pertaining to exploitation of minerals in state parks; the *legislative* policy is still clear. Specifically, *DNR*’s exercise of the delegation of regulatory authority is not necessary to make the statement of environmental policy by the legislature – certainly an “instrumentality of this state” for purposes of § 22-1-6(c) – binding on the DEP.

Do Appellees seriously suggest that DEP must, as the W.Va. Code § 20-5-2 (b) requires, conform with the environmental policies of the federal government and all of the other 50 states (including DC), but may disregard the environmental policy of the West Virginia legislature, as recorded in W. Va. Code § 20-5-2 (b)? The relevant legislative policy is the language of § 20-5-2 (b), which provides that the *DNR* Secretary:

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 [*DNR*] 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.

W. Va. Code § 20-5-2 (b)(8) (emphasis added).

Is there any serious question that this is a statement of an “environmental polic[y]”, for purposes of W. Va. Code § 22-1-6(c)(1)? Or that the legislature is an “other instrumentalities of this state” with which W. Va. Code § 22-1-6(c)(1) mandates that DEP function “in a manner which supplements and complements” that legislative policy?

As noted, the legislature in 1961 and 1995 enacted increasingly restrictive bans on drilling in state parks, and the Attorney General in 1976 and 1980, repeatedly interpreted the legislative bans barring drilling in state parks, and expressly ruled that the use of diagonal drilling may avoid any compensable taking.

There can be no serious doubt at this point about the legislature environmental policy as it relates to state parks, or DEP's duty to comply with that policy.

III. THE LEGISLATURE ADOPTION OF W. VA. CODE § 22-6-6(H) WAS NOT ADOPTED TO LIMIT DEP'S AUTHORITY TO A SINGLE CRITERIA, BUT RATHER TO EXPAND DEP'S STATUTORY AUTHORITY TO CONSIDER AN APPLICANT'S PRIOR DRILLING HISTORY AND THEREBY AVOID JUDICIAL INVALIDATION UNDER THIS COURT'S DECISION IN *Mountaineer Disposal Service, Inc.*.

The Circuit Court invalidated DEP's actions on the theory that the authority of the Director of the DEP Office of Oil and Gas to deny a permit was limited to a finding that an applicant had a prior bad drilling record, recited in W. Va. Code § 22-6-6(h). The explicit ground for reversing DEP's denial of the permit is recited in the June 17, 2009 ruling, at page 5, ¶¶ 12 -13 where the Circuit Court, clearly but erroneously, ruled that:

There is no statutory, regulatory or legal precedent which authorizes DEP to use the provisions of W.Va. Code § 20-5-2(b)(8) as a basis to deny well work permits. The authority vested in DEP's OOG is set forth in W. Va. Code § 22-6-1 et seq. Section 22-6-6 sets forth the reasons which DEP must deny a well permit application. The DEP did not deny the permits for any reasons set forth in Section 22-6-6, nor any of the statute applicable to OOG permitting authority.

June 17, 2009 Order at p. 5 (emphasis added).

But § 22-6-6 (h) does not even purport, as Cabot and Lawson Heirs assert, to set out the general criteria for the grant or denial of a permit; it simply recites one per se circumstance in which an application must be denied, i.e., where "the director determines that the applicant has committed a substantial violation of a previously issued permit, including the erosion and sediment control plan, or a substantial violation of one or more of the rules promulgated hereunder, and has failed to abate or seek review of the violation within the time prescribed by the director..."

In *Mountaineer Disposal Service, Inc. v. N. H. Dyer, State Director of Health*, 156 W. Va. 766; 197 S.E.2d 111, (1973), this Court noted that agency authority depends on statutory grant, not common law, and ruled that, under the controlling statutes, "the director [of the Health Department] has no right to

prevent the commencement of business by an otherwise qualifying applicant based upon the past experience of the health department with an employee of the applicant.” Explaining that the health director’s authority was prospective only, the Court ruled that although the director “has the right to control, suspend or terminate noncomplying landfill operations conducted subsequent to the approval of the permit,” he “has no right to prevent inception of business by an otherwise qualifying applicant based upon the past experience of the health department with an employee of the applicant.” *Id.*

No issue of retroactivity or prospectivity is presented in this case that would trigger application of *Mountaineer’s* ruling as it pertains to the necessity for positive law, as opposed to common law, for agency authority. In short, *Mountaineer’s* broad invocation of the statutory limits on administrative agency’s to their statutory authority – eliminating thereby any resort to common law principles – has no application to this case because here consideration of retroactivity is expressly authorized in the statute.

However, a thoughtful reading of *Mountaineer* makes it clear, in fact very clear, that the enactment of W. Va. Code § 22-6-6 (h) -- some 22 years after the decision in *Mountaineer* -- was a conscious legislative decision to **expand** the power of the DEP to deny a permit on grounds of an applicant’s prior bad record. The plain language of the statute authorizes resort to retroactive misconduct as a ground for denial, thereby allowing the DEP Secretary to avoid a judicial invalidation of a permit denial on the grounds that the enabling statute did not authorize retroactivity, the precise grounds on which the Health Director was denied similar authority 22 years before in *Mountaineer’s*.

As noted in Sierra’s initial brief – and totally ignored by both Cabot and Lawson Heirs -- it would be nonsensical to convert the legislature’s conscious effort to **expand** the authority of the DEP Secretary to include consideration of past misconduct, into a **limit** on the otherwise plenary authority of DEP recited in W. Va. Code § W. Va. Code § 22-6-2 (c)(12) to “perform all duties as the permit issuing authority for the state in all matters pertaining to the exploration, development, production, storage and recovery of this state’s oil and gas.”

Surely this Court will not adopt a rule punishing a legislative draftsman for reading, and respecting, this Court's precedents twenty-two years before the DEP enabling statute was written. What result could be more preposterous than a ruling that converted a legislative draftsman's effort to expand agency authority, by expressly including one line item of authority previously found wanting, into a limitation of all authority to that single line item.

IV. THE LEGISLATURE EXPRESSLY EXTENDED THE DEP SECRETARY'S MANDATORY DUTY TO COMPLY WITH OTHER AGENCIES' ENVIRONMENTAL POLICIES TO THE DEP OOG DIRECTOR

In the fourth ordering paragraph of his June 17, 2009 order, the Circuit Court held that:

None of the statutory authority delegated to the DEP's OOG, including W. Va. Code § 22-1-6 (c)(1), authorizes the DEP's OOG to "take note", adopt or infer the statutory limit on rulemaking granted to the DNR to prohibit the exploitation of minerals for commercial purposes in state parks.

July 17, 2009 Order at p. 6.

This ruling is clearly wrong. WV Code 22-6-2 (c)(11) -- directly relating to OOG's authority over oil and gas drilling -- and which explicitly provides that:

"The secretary shall have full charge of the oil and gas matters set out in this articleIn addition to all other powers and duties conferred upon him or her, the secretary shall have the power and duty to:

(11) Perform all other duties which are expressly imposed upon the secretary by the provisions of this chapter.

WV Code 22-6-2 (c)(11)(emphasis added).

The reference in § 22-6-2 (c) to the five italicized words "set out in this article" clearly refers to Article 6, entitled "Office of Oil and Gas; Oil and Gas Wells; Administration; Enforcement." The balance of the main clause of § 22-6-2 (c) provides for an addition to the authority recited elsewhere in Article 6 (specifically, in addition to the language on which the Circuit Court relied in Article 6-6 (h)).

Second, the reference in the last five italicized words of § 22-6-2 (c)(11) to “*the provisions of this chapter*” can only mean Chapter 22 (i.e., the Chapter establishing the DEP) which recites the added authority of the Office of Oil and Gas to include all of the general DEP authority, thereby vesting OOG with authority over an area of activities vastly broader than the inherently narrower area of management of oil and gas activities.

The language § 22-6-2 (c)(11) unambiguously contradicts the Circuit Court's holding limiting DEP's plenary authority over oil and gas to the very few items recited in Article 6 of Chapter 22, i.e., WV Code 22-6-6 (h). DEP and its component OOG not only have explicit legislative *authority* to enforce the legislative policy banning drilling permits in parks, DEP and OOG both have a mandatory, statutorily imposed, *obligation* to deny all requests for such permits.

Although fully briefed previously, Cabot and Lawson Heirs have obviously made the tactical decision to ignore this argument. And one cannot fault their logic, for there obviously is absolutely nothing to say by way of rebuttal – the Circuit Court erred, in no small part, because the briefs before it had no more discussion of W. Va. Code § 22-6-2 (c)(11) than the Cabot and Lawson Heirs’ briefs in this Court.

V. THE CIRCUIT COURT’S RULING UNQUESTIONABLY STRIPS DEP OF AUTHORITY TO ENFORCE THE LEGISLATURE’S ENVIRONMENTAL POLICY IN ALL 43 STATE PARKS ACROSS THIS STATE

Although Cabot Oil & Gas, Inc. attempts to persuade this Court that the only matter before it is the fate of 5 wells in one state 43 state parks in one of the states’ 55 counties, (Brief of Cabot at p. 24) this argument is contradicted by the simultaneous amicus filings on behalf of:

(1) the 23,000 members of the West Virginia Farm Bureau (decision by this Court “could affect landowners across West Virginia”) West Virginia Farm Bureau Amicus Brief at p. 2);

(2) the 124 active and associate corporate members¹ of the West Virginia Oil and Natural Gas Association (reversal of Circuit Court may “adversely affect the rights of mineral owners and developers across West Virginia”) WVONGA Amicus Brief at p. 3;

(3) the 52 landowner and associate members of the West Virginia Land and Mineral Owners Association (WVLMOA), filed in conjunction with WVLMOA members Piney Land Company, and McCreery Coal Land Company;² and

(4) the amicus filing of Hardy Oil, Inc. which owns 12,000 acres underlying Kanawha State Forest, administered by the West Virginia Division of Natural Resources (DNR), but which objects to the Department of Environmental Protection (DEP) interpretation of rules governing state parks which will “impair and erode the property rights of mineral estates underlying DNR lands...” (Hardy Motion to File Amicus Brief at p. 3)

Indeed, Cabot Oil & Gas, Inc. appears to be the *only* member of the petroleum industry who believes that the Circuit Court’s July 2009 ruling *only* affects the state park lands located in Logan County. The idea that the Circuit Court’s ruling – totally invalidating the authority of DEP to deny drilling permits by finding it lacks statutory power beyond that recited in W. Va. Code § 21-6-6(h) -- does not extend to the state in its entirety, or the Marcellus Shale geological formation which encompasses the entire state, is simply nonsense. If DEP cannot deny a permit to drill in Chief Logan Park, on the basis of W. Va. Code § 20-5-8, it cannot deny a permit to drill under any of the other 42 state parks spread across this state.

VI. CABOT OIL & GAS, INC.’S SUGGESTION THAT THERE DRILLING IN STATE PARKS HAS NO ENVIRONMENTAL RISKS, IS TOTALLY UNSUPPORTED BY THE RECORD, AND FLIES IN THE FACE OF A CONTROLLING LEGISLATIVE DETERMINATION THAT THE STATE PARKS NOT BE EXPOSED TO THE INHERENT RISKS OF ENERGY EXPLORATION.

¹ Members of WVONGA include Cabot Oil & Gas, Inc., a respondent in this proceeding. See http://www.wvonga.com/Default.aspx?&gv537_gvac=1&gv537_gvpi=0&tabid=162 (visited July 7, 2010).

² Members of WVLMOA include Lawson Heirs, Inc., a respondent in this proceeding, and Larry W. George and Robinson & McElwee, respectively, counsel for both respondents in this proceeding. See <http://www.wvalmoa.com/index.php?cat=members> (visited July 7, 2010).

Cabot Oil & Gas, Inc. goes one step further by arguing that there is no evidence in the record of environmental degradation from the Marcellus Shale or in Chief Logan Park: “Arguments related to Marcellus Shale are speculative and irrelevant.” Brief at p. 24. Cabot is not required to “concede” the allegations regarding the Marcellus Shale; they are uncontradicted and a matter of record.³

The Circuit Court’s October 14, 2009 order granting the intervention of the Sierra Club, Inc. explicitly ordered that:

[Interveners’] motions, memoranda and other pleadings and accompanying exhibits are made a part of the record of this proceeding for any and all purposes.

October 14, 2009 Order at p. 3 (emphasis added).

No cross appeal has been taken by either of the Appellees with regard to the Circuit Court’s granting of the petition to intervene, or the Circuit Court’s admission of Appellants’ evidentiary exhibits into evidence “for any and all purposes.”

In short, the evidence which Cabot acknowledges is “in very lengthy detail” but which they nonetheless dismiss as “speculative” was admitted by the Circuit Court. For purposes of this appeal, the critical fact is that the evidence was also totally uncontradicted. By contrast, the self-serving “facts” casually appended to Cabot’s brief – including purportedly precise 50-foot measurements -- are emphatically *not* a part of the record below. (See footnote 6, p. 25 and the Addendum accompanying Cabot’s brief).

³ Importantly, the evidentiary matters pertaining to environmental degradation submitted by interveners below were not gleaned from a biased or sympathetic source. To the contrary, they are virtually all a result of simply typing the word “Marcellus” in the search engine of the online edition of The State Journal, the editorial page of which no one, right or left, confuses with the opinions expressed in the Sierra Club’s monthly magazine. See <http://www.statejournal.com/search.cfm> (visited July 7, 2010).

VII. A CLAIM OF “REGULATORY TAKING” MAY NOT BE INTERPOSED AS A COLLATERAL BAR TO THE EXERCISE OF THE STATE’S POLICE POWER TO PROTECT THE ENVIRONMENT

In an effort to wrap itself in a halo of philanthropy, Lawson Heirs, Inc. continues to insist that its sale of the 3,200 acres to a civic association in Logan County was a “gift.” Lawson Heirs ignore the unequivocal fact that they were paid \$90,000 in 1960 dollars, which the Bureau of Labor’s Consumer Price Index calculator⁴ translates into 2010 dollars of not less than \$ 663,379.05. This figure (more than 7 times the nominal 1960 dollars) is impossible to confuse with any concept of a “gift” Indeed, Lawson Heirs, Inc. only describes their sale of the 3,200 acre industrial waste land as a “*de facto*” gift, all the while citing the IRS regulations that, if applicable, would have made the transaction a “*de jure*” gift. Tellingly, they do not even suggest that they actually took a gift deduction in 1960; but that – a gift – is in fact what they are seeking from this Court.

Of course, Lawson Heirs, Inc.’s self-congratulations, like their supercilious tracing of their deed back to the landing at Plymouth Rock, is intended to put a mustache on the fact that, having sat on their hands for nearly half a century, the Lawson Heirs have managed to stumble forward into a world in which the gas underlying Chief Logan Park may in fact be a bonanza -- indeed a spectacular windfall for them-- compared to which the environmental cost to the citizens of the state of West Virginia is so much background noise, and the legislative policy of the state is to be casually ignored.

The simple fact is that the history of the land transaction is totally irrelevant to the taking issue. The Lawson Heirs could have obtained a deed from the Virgin Queen herself, and actually *paid* the state in 1960 to take the property, and neither of those eventualities would alter the “taking” analysis. The state has the power of eminent domain, and it can be exercised, subject to the Constitutional

⁴ See <http://data.bls.gov/cgi-bin/cpicalc.pl>

requirements of just compensation, regardless of the provenance of the Lawson Heirs deed, or the financial terms of their 1960 transaction.

Nor do the details of the reservation of mineral interests affect the state's eminent domain power. The Lawson Heirs could have retained the fee interest in the land in its entirety and merely leased the surface to the Logan civic association for a fixed term of years, but that reservation of fee would not have impacted, even minutely, the state's eminent domain power to take the entirety of the reserved interest.

The Attorney General Opinions, cited in memoranda below and prior briefing in this Court, succinctly state the authority for a so-called regulatory taking, i.e., the state's police power:

[T]he State parks are public lands and can be regulated by the State Legislature through the State's police power for the benefit of the citizens and the 'rights' of any mineral owner will be subordinate to the State's valid exercise of its 'police power.'

59 W.Va. Op. Atty. Gen 3 (1980).

Cabot Oil & Gas, Inc. state Sierra Club's position incorrectly when they state that: "The Sierra Club is the only Appellant willing to acknowledge that the permit denial by the DEP, if upheld, would clearly be an unconstitutional taking, but Sierra Club creatively argues that there is no 'taking' because Cabot does not have to disturb the surface of Chief Logan State Par in order to extract the minerals." Cabot Brief at p. 17-18.

In fact, as the Attorney General Opinion quoted above makes clear, no great imaginative leap is required to see the way around a finding of a "taking" here; one need only read the available legal authorities. But Cabot's argument is flawed in a much, more important respect, and the error permeates the briefing of all Appellees and their amici.

The error in Cabot et al.'s argument is the suggestion that a regulatory taking, by the mere fact that it takes property, is *ipso facto* "unconstitutional." A constitutional issue is only presented if one is not compensated justly; the fact of a taking itself does not constitute a constitutional offense. It may

trigger a duty of compensation, but – importantly – the regulatory action itself is not thereby invalidated.

And that is what Cabot and Lawson Heirs, Inc. ask this Court to do: invalidate and reverse the regulatory taking itself; plainly, they are not before this Court seeking just compensation. And the distinction is critical. The range of environmental legislation and policies that would be invalidated, merely because they involve a taking, is obviously very, very broad. One cannot on the basis of a taking, frustrate the police power of the State; that power is inherent in the State.

Sierra Club is perfectly prepared to concede that an uncompensated taking is unconstitutional; but at least two steps are needed to arrive at the conclusion that an unconstitutional taking has occurred: (1) establish a “taking,” and (2) show a failure of compensation – in that order. In this regard, one of the cases from other states – string-cited by Lawson Heirs, Inc. but not discussed in any detail – is actually instructive.

Specifically, *Miller Brothers v. DNR*, 203 Mich. App. 674, 513 N.W. 2d 217 (1994) addressed the issue of when a taking has occurred in connection with a regulatory taking affecting subsurface oil and gas interests. In *Miller Brothers*, the “taking” consisted of the DNR’s designation of a 4,500 acre area in Michigan as a protected area on which no oil or gas exploration could occur. And, as here, both the owner of the subsurface rights, and their lessee were before the court.

Importantly, the Court noted, the lawsuits brought by the private parties against the DNR were inverse condemnation actions, and did not seek to invalidate the taking (“Their lawsuits are not a collateral attack on the [DNR] director’s decision, and do not seek to invalidate it.”) *Miller* at p. 681. The appeal focused primarily on the formula for compensation.

However, for present purposes, the critical fact which supported a finding of a taking was the fact that the DNR order barred use of horizontal drilling. Specifically, after a full trial at which evidence

was adduced, the trial court found that the taking order prohibited “directional” drilling, a finding which the Miller court upheld as “not clearly erroneous.” *Miller* at p. 691, n.2

As a matter of law, though, the *Miller* court recognized that the measure of a regulatory taking could be reduced (and theoretically eliminated) by “directional drilling.” In the regulatory taking before it, *Miller* ruled that compensation due under the “just compensation” clause was limited to the portion of the property holdings that could not be extracted by directional drilling. *Miller* at 680. Again, importantly, the matter was not resolved on summary judgment motion but was resolved only after a full trial at which an informed calculation of the taking, if any, could be made. *Id.*⁵

In short, the authorities cited by Lawson Heirs, Inc. do not support the idea that the regulatory taking may be invalidated; to the contrary, they clearly and unambiguously reject the result which Lawson Heirs, Inc. seeks in this proceeding.

VIII. APPELLEES’ “TAKING” ARGUMENT IS NOT RIPE FOR REVIEW BECAUSE NO PARTY HAS FILED AN INVERSE CONDEMNATION PROCEEDING, AND THE ASSERTION THAT HORIZONTAL DRILLING WILL NOT AVOID A “TAKING” IS CONTRADICTED BY ALL EVIDENCE OF RECORD IN THIS PROCEEDING, INCLUDING THE PUBLIC STATEMENTS OF CABOT’S CEO.

The threshold issue before this Court is not the existence of the state’s power of eminent domain, or its applicability to the Lawson Heirs Inc.’s reserved interests via a regulatory limitation, but rather whether any “taking” has, in fact, occurred by the mere denial of a drilling permit to drill from the surface of the state park. And that issue is not now ripe for review.

Again, oblivious to the Circuit Court’s explicit admission of the interveners’ exhibits and other evidentiary matters (October 14, 2009 Order at p. 3, “[Intervenors’] motions, memoranda and other

⁵ *Belden & Blake Corp. v Dept of Conservation and Natural Resources*, 969 A. 2d (2009), the other non-binding precedent cited by Appellees, is less instructive to this case because it did not include an express statutory authority for a taking, similar to the delegation of the right of eminent domain to the DEP Secretary in this case, but rather involved a claim of authority by the government agency under a common law “public trust” doctrine. Moreover, the property interest at issue was an implied easement, not an explicit grant of mineral interests.

pleadings and accompanying exhibits are made a part of the record of this proceeding for any and all purposes”), Cabot Oil & Gas, Inc. asserts that “Appellants’ arguments, however, are not based on any facts of record in this matter...” (Brief at p. 20). Further, Cabot Oil & Gas, Inc. attempts to dismiss as merely “speculative” (Brief at p. 21) the demonstrable fact that Cabot Oil & Gas, Inc. possesses the horizontal drilling skills necessary to access the minerals underlying Chief Logan Park, a fact which makes the claim of a “taking” specious.

What was the evidence admitted below on the ability of Cabot Oil & Gas, Inc. to employ horizontal drilling?

According to a press release of **Dan O. Dinges, Chairman, Cabot Oil & Gas’ President and Chief Executive Officer**, Cabot has demonstrated horizontal drilling capacity in superlative terms. According to Dinges, Cabot’s horizontal completion in the Marcellus, the Teel 8H, had an initial production (24-hour into sales) rate of 10.3 Mmcf per day with a maximum spot rate during that period of 12.0 Mmcf per day. Production from this well remained strong with a 30-day average rate of 9.8 Mmcf per day. The Teel #6, a vertical Marcellus well, was flowing to sales at an initial 24-hour rate of 4.2 Mmcf per day. The well was completed over a 370-foot interval in the lower and upper Marcellus shale.

“We believe the stimulation contacted most of the lower and upper shales, plus the Purcell limestone,” added Dinges. “We consider this completion a critical event in the development of our Marcellus acreage.” “Today in Pennsylvania, we are producing 39 Mmcf per day from seven horizontal and 20 vertical wells,” stated Dinges. “One year ago we announced our first Marcellus production from a vertical well. Since that time we have cumulatively produced over 5.8 Bcf.” Cabot’s 2009 drilling program was on schedule to spud 18 additional horizontal wells by year-end.

See Sierra Club September 17, 2009 Rule 24 Statement In Support of Intervention, at p. 18-20 and Exhibit “B” to Rule 24 Statement (Reuter’s article on Cabot press release announcing successful use of horizontal drilling for Marcellus wells).

To which Cabot Oil & Gas, Inc. in its June 16, 2010 Brief filed with this Court argues that the use of horizontal drilling is "speculative." No evidentiary basis in the record is asserted for the proposition that use of horizontal drilling at the 8,000+ foot depths common in the Marcellus Shale is not equally practical at the much smaller depths for the proposed mineral interests underlying Chief Logan Park. Nor is it relevant that Cabot Oil & Gas, Inc. does, or does not, own land adjacent to the park which might make the drilling exercise easy.

Any number of matters may occur that make a particular economic enterprise unfeasible or expensive; a taking is not thereby established. Indeed, the U. S. Supreme Court has unambiguously held that regulations may make a particular enterprise less profitable without thereby triggering any duty of compensation under the taking clause of the U. S. Constitution.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.*, at 415.

More recently, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592, 69 USLW 4581, 69 USLW 4605 (2001), the Supreme Court stated that it had given guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking.:

First, we have observed, with certain qualifications, see *infra*, at 629-630, that a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. *Lucas*, 505 U.S., at 1015; see also *id.*, at 1035 (Kennedy, J., concurring); *Agins v. City of Tiburon*, 447 U.S. 255, 261(1980). Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes

with reasonable investment-backed expectations, and the character of the government action. *Penn Central*, *supra*, at 124. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

150 L.Ed.2d 592 at 617-618 (all).

The question of a regulatory taking subsumes within it the question of the *extent* of the taking, and the Supreme Court has explicitly held that a substantial remaining interest will defeat a claim of a taking. Indeed, the Court has focused on the question of:

[W]hat is the proper denominator in the takings fraction. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," 80 Harv. L. Rev. 1165, 1192 (1967). Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, e. g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497(1987).

id.

The fact that Cabot Oil & Gas, Inc. might need to purchase and/or lease land in proximity to the mineral interest underlying Chief Logan Park, does not mean that it has been deprived of its property as a whole, or that the remaining economic interest is trifling, such as to compel compensation. It merely means that the question is one of proof in an inverse eminent domain proceeding.

The Supreme Court in *Palazzolo* rejected the "ripeness" argument asserted by the State as a means of defeating the taking argument because the state had, in fact, made a final decision on the inverse taking proceeding. But plainly no claim of a taking is ripe for review here where: (a) Appellees have not even commenced an inverse proceeding, (b) no demonstration has been made at all as to the unfeasibility of horizontal drilling, or (c) the economic impact of employing horizontal drilling, from leased or hereafter acquired lands, is totally unknown. Indeed, Cabot Oil & Gas, Inc.'s taking argument is a model of precisely the kind of speculation they purport to condemn.

It is axiomatic that the proponent of the proposition that a “taking” has occurred, has the burden of proof with regard to that issue in an inverse taking proceeding, and neither Cabot Oil & Gas, Inc. nor Lawson Heirs, Inc. have even paid lip service to that burden. Indeed, they do not pretend to have satisfied it, because they have not even petitioned the Circuit Court to commence an inverse eminent domain proceeding. Rather, they seek this Court’s aid in frustrating totally the exercise of the state’s police to protect its most prized lands from the inherent risks of oil and gas exploration.

Importantly for the “takings” issue in the present litigation, the Attorney General’s 1980 opinion recognized that nothing in the prohibition against drilling within the state parks prohibited drilling outside of those parks, employing so-called “slant” drilling, as a means of accessing minerals underlying the state park:

It is our opinion that a directionally drilled well that would be drilled diagonally from outside a State park and would seek completion beneath a State park could be approved by the Commission and could include oil and gas owned by the State for royalty participation, provided there are sufficient safeguards in such permit that protect the State park surface from any disturbance.

59 W. Va. Op. Atty. Gen. 3 (1980)(Addendum to Appellant Sierra Club, Inc.’s Brief at p. 39).

This Court has historically deferred to administrative agencies’ decisions to effect a taking for a public purpose. Thus, the Court held that the role of the judiciary in reviewing an administrative taking was limited.

The right of a state to take private property for public purposes is an inherent attribute of sovereignty, irrespective of any constitutional or statutory provision. 29 C.J.S. Eminent Domain § 2, p. 777. 'It is an inherent, inalienable, sovereign right, and lies dormant in the state until the Legislature sees fit to exercise it, either directly, or by investing some corporation, or individual, with the power to exercise it.' *Pittsburg Hydro-Electric Co. v. Liston*, 70 W.Va. 83, 85, 73 S.E. 86, 87, 40 L.R.A.,N.S., 602. The right of eminent domain may be vested by the legislature in the various subdivisions of the State, as well as in private ventures in which the public has a right to share. *State v. Horner*, 121 W.Va. 75, 1 S.E.2d 486.

Article III, Section 9 of the State Constitution is not a source of the power of eminent domain, but rather a restriction upon its exercise. It provides that private property shall not be taken or damaged for public use without just compensation and that, when required by either of the parties, the compensation shall be ascertained by a jury of twelve freeholders. In consequence of such constitutional provision, the legislature has provided a method for judicial determination of such compensation. Code, 54-2. But such statutes provide a quite limited delegation to the judicial branch of the inherent power of the sovereign. The functions and power of the court in eminent domain proceedings do not exist inherently, but are wholly dependent upon legislative delegation thereof.

In the case of *Pittsburg Hydro-Electric Co. v. Liston*, 70 W.Va. 83, 73 S.E. 86, 40 L.R.A.,N.S., 602, in the third point of the syllabus, with reference to eminent domain proceedings, it is stated: 'Courts are limited in their inquiry to the question whether the particular service provided for is a public service.' 'When the court has determined that the use for which property is condemned is a public use, its judicial function is gone, and the legislative discretion is unrestrained. Whether the proposed plan will accomplish the end proposed, or to what extent it will be beneficial to the public, are not matters to be determined by the courts. These are matters belonging to the legislative discretion.' *Charleston Natural Gas Co. v. Lowe & Butler*, 52 W.Va. 662, 664, 45 S.E. 410, 411. Obviously, under the statute, it is a judicial function also to ascertain the compensation for the property taken or damaged. *State ex rel. United Fuel Gas Co. v. De-Berry*, 130 W.Va. 418, syl. 1, 43 S.E.2d 408; *State by State Road Commission v. Bouchelle*, 137 W.Va. 572, syl. 2, 73 S.E.2d 432.

Nevertheless, this Court has in many prior decisions pointed out the area of legislative discretion in connection with the delegation of powers of eminent domain. The necessity for the taking is a matter left to the sound discretion of the agency exercising the power of eminent domain under legislative authority, and the decision by it that a necessity exists will not be interfered with by the courts, unless the agency exercising the right 'have acted capriciously, fraudulently, or in bad faith.' *George v. City of Wellsburg*, 111 W.Va. 679, syl. 1, 163 S.E. 431; *City of Huntington v. Frederick Holding Co.*, 85 W.Va. 241, 101 S.E. 461; *Pittsburg Hydro-Electric Co. v. Liston*, 70 W.Va. 83, 73 S.E. 86, 40 L.R.A.,N.S., 602.

State by State Road Commission v. Professional Realty Co., 144 W.Va. 652, 110 S.E.2d 616 (W.Va. 1959)(emphasis added).

As this brief is being typed crude oil from the April 20, 2010 explosion of an offshore drilling rig operated by British Petroleum continues to pollute the ocean at an estimated rate of 12,000 to 19,000

barrels per day. See <http://www.doi.gov/news/pressreleases/Flow-Rate-Group-Provides-Preliminary-Best-Estimate-Of-Oil-Flowing-from-BP-Oil-Well.cfm> (Visited July 7, 2010).

Although the measure of the various parties' share of responsibility for the catastrophic failure of the BP drilling rig will surely be debated, no one seriously questions that the lax regulation by the Minerals Management Service of the U.S. Department of Interior played a role – a significant role – in the events leading up to the April 20 environmental catastrophe. Among other things the MMS permitted BP to conduct its deep water drilling without an adequately documenting the capacity of the BP proposed blowout preventer.⁶

Acknowledgement here of the largest environmental disaster in US history is not a matter of sensationalizing or exploitation of bad news. It is a matter of recognizing the reality that energy production has inherent costs and risks. As noted in prior briefing, the West Virginia legislature has for many years now attempted, with increasingly clear and unambiguous policy pronouncements, attempted to insulate our state parks, barely 1% of the state's total acreage, from those inherent dangers.

This Court should approach the invitation to undo that longstanding legislative policy determination with some measure of modesty, in recognition of the fact that the legislative branch has exercised its judgment about where, when and how oil and gas drilling should take place, and the executive branch has, in this instance at least, diligently attempted to enforce that legislative policy. The legislative policy decisions regarding drilling in state parks have consequences, and ignoring those policy decisions will have consequences.

The appropriate judicial consideration is whether this Court feels competent to substitute its policy judgment for that of the legislature, on the advisability or inadvisability of drilling in state parks.

⁶ See http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/updates_from_oil_rig_explosion.html (Visited July 7, 2010).

To be sure, nothing in the briefs of Lawson Heirs, Inc. or Cabot Oil & Gas, Inc., or their supporting amici, offers any compelling rationale for setting aside that long standing legislative policy.

IX. CONCLUSION

No reason is offered in Cabot's or Lawson Heirs' briefs for ignoring the unambiguous environmental policy of the legislature to put state parks off limits for oil and gas drilling, particularly where the legislature has expressly mandated DEP's comprehensive "cross-referencing" of the environmental policies of the federal government, all fifty state governments, and of the other agencies of this state. Moreover the purported limits on DEP authority in W. Va. Code § 22-6-6 (h) – alone cited as the ground for the Circuit Court's reversal of DEP's denial of the permits -- were in fact expansions of DEP authority, adopted out of respect for this Court's prior decision in *Mountaineer Disposal Service, Inc.* mandating statutory authority for denials based on past conduct. Finally, the question of a "taking" requiring compensation is not ripe for review where no inverse eminent domain proceeding has been conducted, where Cabot's recent use of horizontal drilling strongly suggest that no taking can be shown, and where the finding of an unconstitutional taking, at this premature stage in the proceedings, would frustrate a compelling state interest in preserving the state parks of this state from the inherent risks of energy exploration which, as this is written, are on full display for the world to see.

Respectfully submitted,
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