

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35508

**CABOT OIL & GAS CORPORATION,**  
*Petitioner Below, Appellee,*

v.

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

and

**LAWSON HEIRS, INC.,**  
*Intervenor Below, Appellee,*

and

**SIERRA CLUB, INC.,**  
*Intervenor Below, Appellee,*

and

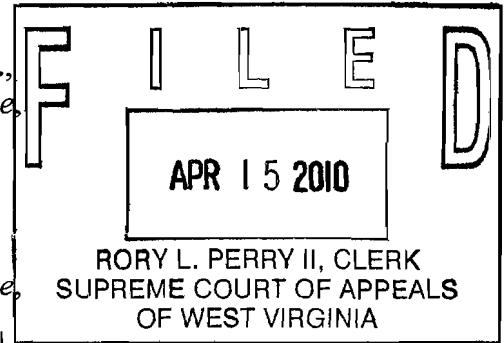
**CORDIE O. HUDKINS**  
**WEST VIRGINIA HIGHLANDS CONSERVANCY, INC.**  
**FRIENDS OF BLACKWATER,**  
*Intervenors Below, Appellees,*

and

**WEST VIRGINIA DIVISION OF NATURAL RESOURCES,**  
*Intervenor Below, Appellee.*

OPENING BRIEF OF RANDY C. HUFFMAN, CABINET SECRETARY,  
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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### *Kind of Proceeding and Nature of Ruling Below*

On January 11, 2008, Cabot Oil & Gas Corporation (“Cabot”), engaged in the business of developing, drilling, and operating oil and gas wells, filed with the Circuit Court of Logan County a Petition for Judicial Review of the December 12, 2007 Order issued by the Cabinet Secretary of the West Virginia Department of Environmental Protection (“DEP”), denying Cabot’s applications to drill five gas wells and perform related work within the confines of Chief Logan State Park (“Chief Logan” or the “Park”). DEP denied the applications on the ground that West Virginia law forbids the exploitation of minerals for commercial purposes in any State park. In filing its Petition, Cabot relied upon West Virginia Code § 22-6-40, which confers the right of review upon “[a]ny party to the proceeding under section fifteen of this article or section seven, article eight, chapter twenty-two-c of this code, adversely affected by . . . the refusal of the director to grant a drilling permit. . . .”<sup>1</sup>

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<sup>1</sup> The term “director” refers to the Cabinet Secretary of the Department of Environmental Protection, the office being formerly known as the Director of the Division of the same name. *See* W. Va. Code §§ 22-1-2, 22-6-1(f). The “proceeding under section fifteen of this article” is one conducted by the Cabinet Secretary or a designee, typically the chief of the Office of Oil and Gas, to resolve disputes between prospective oil or deep-well gas drillers and holders of various coal interests in the same property. *See* W. Va. Code § 22-6-15. The “proceeding under . . . section seven, article eight, chapter twenty-two-c” is one conducted by the Shallow Gas Well Review board to resolve similar, coal-related disputes when shallow-well gas drilling is proposed. The instant matter does not involve a coal dispute, and neither of the referenced proceedings was conducted in this case.

In addition to the above scenario, review may also be had pursuant to § 22-6-40 in cases where a well work permit has been denied or suspended under certain conditions specified in West Virginia Code § 22-6-6(h), governing instances where the applicant or permit holder has violated a prior permit or has otherwise previously transgressed the law. Judicial review of final orders of the Cabinet Secretary is also provided for in West Virginia Code § 22-6-5(c), but the orders referred to in that section also appear to relate primarily to violations, specifically those at existing operations found by environmental inspectors. DEP does not contend that Cabot is currently violating the law, or that it has previously engaged in unabated violations.

*(continued on succeeding page)*

By Order dated March 20, 2008, the circuit court granted leave to Lawson Heirs, Inc. (“LHI”), the owner of the gas underlying the Park, to intervene in the proceedings. LHI moved to supplement the administrative record with an “Appendix of Documents.” DEP opposed supplementation, but, on July 22, 2008, the circuit court granted the motion by signing an Order submitted by Cabot and LHI. In response to objections voiced by DEP, the circuit court entered a superseding Order on November 12, 2008, amending certain findings and conclusions but leaving intact the essence of its ruling.

The parties proceeded to brief the issues raised in the Petition, and they submitted supplemental memoranda as later directed by the court. On June 17, 2009, the circuit court signed an Order granting the Petition, reversing the DEP Order, and remanding the cause with

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*(continued from preceding page)*

Mindful of the oft-repeated admonition that parties to a dispute may not manufacture subject matter jurisdiction by consent, DEP has nonetheless not objected to the state courts’ exercise of authority over the case at bar. In counsel’s admittedly subjective judgment, such an objection would lack substantial grounds given the apparent intent of the legislature, implicitly expressed in the pervasiveness and breadth of the above-referenced provisions, to provide for judicial review of all permit denial decisions.

DEP likewise did not object to venue in the Circuit Court of Logan County, in support of which Cabot cited that portion of the State Administrative Procedures Act providing for venue in “contested” cases in the Circuit Court of Kanawha County or in the circuit court of “the county in which the petitioner . . . resides or does business.” W. Va. Code § 29A-5-4(b). Subsequently, however, Cabot veered on a different tack by contending that Rule 6(a) of the West Virginia Rules of Procedure for Administrative Appeals failed to provide the framework for deciding a motion to supplement the record, as the unilateral consideration and denial by the Cabinet Secretary of the well-work applications did not constitute a contested case. *See* W. Va. R. Admin. P. 1(a) (scope of rules limited to judicial review of final orders in contested cases). A contested case is any “proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.” W. Va. Code § 29A-1-2(b); *accord*, W. Va. R. Admin. P. 1(c).

Because no hearing was conducted before the DEP, it appears that the permit denial may not have risen to the level of a contested case. Nonetheless, under the general venue statute, venue would arguably be appropriate in Logan County as being the place where “the cause of action arose[.]” *See* W. Va. Code § 56-1-1(a)(1).

instructions that the agency grant the applications. The court's final Order incorporated the entirety of the proposed findings of fact and conclusions of law tendered by Cabot and LHI.

Thereafter, on September 17, 2009, Sierra Club, Inc., moved to intervene in the circuit court proceedings, with a similar motion being filed the following day on behalf of Cordie O. Hudkins, West Virginia Highlands Conservancy, Inc., and Friends of Blackwater. The court conducted a hearing on the motions on October 9, 2009. Prior to the hearing, on October 5, 2009, the Hudkins movants submitted a supplemental filing requesting, *inter alia*, that the West Virginia Division of Natural Resources ("DNR") be joined as an indispensable party.

Counsel for DNR attended the public hearing, and the agency was invited in open court to participate and to move for leave to intervene in the case. DNR accepted the invitation by so moving, whereby the court took that motion and the others pending under advisement. By its Order entered October 15, 2009, the circuit court reaffirmed its prior final Order, but allowed the various motions to intervene for appellate purposes and extended the deadline for filing petitions for appeal until December 16, 2009. Upon the several petitions timely filed, the Supreme Court of Appeals conducted a conference on March 11, 2010, and thereafter granted review.

#### ***Statement of Facts***

The estates comprising the affected property were bifurcated in 1960, when LHI deeded the surface and coal rights to the Logan Civic Association, which in turn transferred them to the Conservation Commission of West Virginia, the latter being the State entity that ultimately evolved into the Division of Natural Resources ("DNR"). The initial deed reserved and excepted unto LHI, among other things, "all oil and gas, or either, within and underlying the lands hereby conveyed, with the right to search for, explore, operate for, drill, produce and market oil, gas and gasoline. . . ." During the succeeding fifty years, the surface estate comprising the Park has,

through the efforts of many, developed into a prime public recreation area, while the minerals beneath have lain dormant.

Cabot filed the well work applications with DEP on November 21, 2007, pursuant to the requirements of West Virginia Code § 22-6-6. As the owner of the surface lands, DNR received notice of the applications, *see* W. Va. Code § 22-6-9(a), and, on December 6, 2007, it timely filed a comment letter with DEP. *See* W. Va. Code § 22-6-10(a). Therein, DNR objected to the applications and opined that DEP was required by law to deny them. Moreover, DNR maintained that if DEP decided to the contrary by granting the applications and issuing the permits, DNR could not legally allow well work to commence within the Park.

The decision fell to DEP's Cabinet Secretary, who must "review each application for a well work permit and shall determine whether or not a permit shall be issued." W. Va. Code § 22-6-11. The Secretary determined that the Chief Logan permits should be denied for the following reasons:

The proposed drilling would be contrary to state law, that is, West Virginia Code § 20-5-2(b)(8), which provides in pertinent part that the Director of the Division of Natural Resources "may not permit . . . the exploitation of minerals . . . for commercial purposes in any state park[.]" Although the legislative prohibition is not directed squarely at the Department [of Environmental Protection], the Secretary may nonetheless take note of it in accordance with West Virginia Code § 22-1-6(c)(1), which charges her with the duty to assure, among other things, that the Department "carries out its functions in a manner which supplements and complements the environmental policies, programs and procedures of . . . other instrumentalities of this state[.]"

*December 12, 2007 Order of the West Virginia Department of Environmental Protection Office of Oil and Gas*, at 1. The Secretary's position was simple: the Code plainly barred what Cabot proposed, and DEP need not pass the buck secure in the knowledge that it would ultimately stop at DNR.

The circuit court disagreed, adopting Cabot's and LHI's conclusions that: (1) DEP lacks the inherent authority under § 20-5-2(b)(8) (the "DNR statute") to deny a well work permit; (2) the DNR statute bars only the exploitation of minerals owned by the State itself; (3) to hold otherwise would result in the taking of private property rights in derogation of the State constitution, and also contravene the constitutional proscription against impairment of the obligation of contracts; and (4) equity dictates that the permits be granted given the specific reservation of oil and gas rights in the transfer to the State of the surface estate, and because gas wells currently operate in other State parks. Consequently, according to the circuit court, the DEP's December 12, 2007 Order violated the constitution and laws of West Virginia and exceeded the agency's statutory authority. *See* W. Va. Code § 29A-5-4(g).

#### *Assignments of Error*

1. The circuit court erred as a matter of law in concluding that the plain language of DNR statute can be interpreted in any manner other than an utter and universal proscription of the exploitation of minerals for commercial purposes in any State park.
2. The circuit court erred as a matter of law in concluding that DEP must undertake the futile act of granting the well work permits inasmuch as DNR is bound by statute to prohibit the proposed drilling and development within the Park.
3. The circuit court erred as a matter of law in concluding that the DNR statute, as applied, is constitutionally infirm.
4. The circuit court erred as a matter of law in concluding that the unambiguous statutory prohibition against the proposed extractive activities in the Park may be ignored on the demonstrably incorrect notion that principles of equity militate in favor of granting the well work permits.

*Points and Authorities, Discussion of Law, and Prayer for Relief*

1. The circuit court erred as a matter of law in concluding that the plain language of DNR statute can be interpreted in any manner other than an utter and universal proscription of the exploitation of minerals for commercial purposes in any State park.

This matter boils down to fourteen words in a statute, section 20-5-2(b)(8) of the West Virginia Code, which instructs that the State “may not permit . . . the exploitation of minerals . . . for commercial purposes in any state park[.]” There is nothing ambiguous or unclear about this statutory prohibition. The law does not provide that the State may only prevent the commercial exploitation of coal, oil, or natural gas within one of its parks if it happens to own the minerals itself, or that it must permit extraction if there have long been operating wells in the subject park or in others, or that the bar is without effect if the State has previously acquiesced in a deed or contract. To the contrary, the Legislature plainly decreed that, from the point at which it acted, no exploitation of minerals in any State park is to be allowed.

West Virginia courts routinely observe the “fundamental rule” of statutory construction, namely that “where the language of a statutory provision is plain, its terms should be applied as written and not construed.” Fenton Art Glass Co. v. Office of Ins. Comm’r, 222 W. Va. 420, 664 S.E.2d 761, 770 (2008) (per curiam) (quoting DeVane v. Kennedy, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) (internal citation omitted)). In so doing, the words of the statute are to “be given their common, ordinary, and accepted meanings.” *Id.* (citations omitted).

It is difficult to conceive that the Legislative could be more plain than to say that the State “may not permit . . . the exploitation of minerals . . . for commercial purposes in any state park[.]” The words are there in black and white; there is no gray. In this case, Cabot has literally applied for a permit to build wells in Chief Logan State Park so that it may exploit through removal natural gas to sell in commerce. DEP could only have approved Cabot’s

applications at the risk of opening defying the Legislature. It is impossible to draw any other conclusion. The Attorney General has twice issued formal opinions to the same effect:

[T]he State through its police power said that there can be no commercial extraction of minerals on State parks since the State parks are to provide outdoor recreational opportunities for all of its citizens while preserving and protecting for its citizens, other amenities. [The Code] “in no uncertain terms requires that State parks be left unmolested and expressly places a duty on the Director (of the Department of Natural Resources) to so maintain those areas” . . . . We concur with the conclusion that the mineral owner may not enter upon the surface of the park for the purpose of oil and gas drilling, because we are of the opinion that the State through the police power has legislated against commercial exploitation of minerals on State park property where it will conflict with the stated purposes of the State park system.

59 Op. Atty. Gen. 3, 1980 WL 119413 at \*4 (quoting 56 Op. Atty. Gen 318 (1974-76)).

LHI argued below that the apparent clarity of the statutory command becomes murky when considered in the context of the predecessor statute within which the prohibition was initially enacted in 1961:

[T]he [DNR] 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.

LHI seized upon the phrase “insofar as is practical” to assert that there are certain unspecified limitations upon the State’s authority to bar mining or the production of oil and gas in its parks.

This argument ignores that as a matter of grammar, the phrase “insofar as practical” modifies only the remainder of the clause immediately following, *i.e.*, “maintain in their natural condition” the lands that constitute state parks. The prohibitions against hunting, timbering, and exploitation of minerals remain absolute and unaffected by the qualifier of practicality. Even were that not the case and the phrase modified the entirety of the sentence, there is no practical impediment keeping the State from seeing to it that the minerals beneath its parks remain right

where they are: the police can be contacted and resort taken to the judicial process once the first mining or drilling rig is wheeled onto the property.

A more problematic defect in the argument, however, is that the phrase “insofar as practical” no longer exists in the statute, having been repealed in 1995, and consequently is of no legal effect. Undeterred, LHI referred the circuit court to the current version of the prohibition set forth within its broader context:

The [DNR] Director shall . . . [p]ropose rules for legislative approval . . . 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.

W. Va. Code § 20-5-2(b)(8). LHI recognized the essential nature of the legislation as a rulemaking statute, but asserted that the general authorization to propose rules controlling park uses with delineated exceptions translated into a command that the DNR Director explicitly bar, through regulation, the private exploitation of minerals. According to LHI, the failure heretofore of DNR to affirmatively promulgate conforming rules somehow demonstrates that such exploitation is allowed.

In actuality, the language under examination does just two things. First, it directs DNR that it must propose rules generally governing the uses of parks. Second, it instructs DNR that when it proposes those rules, none of them may enable hunting, timbering, or the exploitation of minerals. The statutory prohibition being sufficient, DNR is not required to parrot the statute through rulemaking.

Moreover, that separate provisions exist elsewhere in the Code banning hunting and timbering in state parks, *see* W. Va. Code §§ 20-2-58, -7(13), does not mean that the Legislature was required to twice ban the exploitation of minerals in order for the initial enactment to

become effective. LHI maintained below that because the prohibition happens to appear within a rulemaking provision, it merely bears on DNR's procedural authority with no substantive ramification. Surely, though, if DNR is prohibited from promulgating rules authorizing the exploitation of minerals for profit in state parks, the inescapable conclusion is that such exploitation is simply not permitted, period.

2. The circuit court erred as a matter of law in concluding that DEP must undertake the futile act of granting the well work permits inasmuch as DNR is bound by statute to prohibit the proposed drilling and development within the Park.

The West Virginia Legislature has imbrued DEP with, among other things, the wide-ranging responsibility

[t]o strengthen the commitment of this state to restore, maintain and protect the environment . . . provide a comprehensive program for the conservation, protection, exploration, development, enjoyment and use of the natural resources of the state of West Virginia . . . [and] supplement and complement the efforts of the state by coordinating state programs with the efforts of other governmental entities.

W. Va. Code § 22-1-1(b)(1), -(b)(3)-(4). The agency's executive authority is vested in the Cabinet Secretary, who must ensure that DEP "carries out its functions in a manner which supplements and complements the environmental policies, programs and procedures of . . . other instrumentalities of this State[.]" W. Va. Code § 22-1-6(c)(1). With especial regard to the Office of Oil and Gas ("OOG"), the Secretary shall "[p]erform 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).

Some general observations can be gleaned from the express statutory language: (1) DEP has been designated the primary arm of the State to bring its available resources to bear on maintaining and protecting the environment; (2) DEP has also been accorded oversight with

respect to the development and use of the State's natural resources, including oil and gas; and (3) in executing its mandate to harmonize the cultivation of natural resources with the protection of the environment, it is required to consider the efforts and policies espoused by or imposed upon public bodies, state and federal, however those may be manifested. In that regard, there is no doubt that DNR is an "instrumentality of the State" and that the statutory provisions pertaining to DNR, at least insofar as they relate to the natural environment, embody that agency's policies and procedures.

Thus, if DNR is prohibited by law from allowing the exploitation of natural resources underlying a State park because the Legislature has made a judgment that this sort of development cannot be squared with the need to protect the park's unique surface aesthetic, that is precisely the sort of environmental policy that DEP is required to acknowledge and to which it must conform its own conduct. That conclusion is only reinforced when one considers that DNR, as a division of the Department of Commerce, *see* W. Va. Code § 5F-2-1(b)(4), is part and parcel of the same executive branch as DEP, *see* W. Va. Code § 5F-1-2(a)(3), -(a)(8), and as such are both subject to the direction and control of the governor. Indeed, had the governor so wished, he could have issued an executive order directing that DEP deny Cabot's permit applications. The validity of such an order, inasmuch as it would not be "contrary to specific statutory authority," would likely stand unchallenged. *See County Comm'n of Mercer County v. Dodrill*, 182 W. Va. 10, 12, 385 S.E.2d 248, 250 (1989) (citation omitted).

If DEP could have denied the permit applications at the governor's instance, then there is no compelling reason to doubt that the Cabinet Secretary, as the governor's designee to whom plenary jurisdiction over oil and gas permits is statutorily delegated, could deny them on the authority of the office. Moreover, it bears repeating that there is no tension between DEP and

DNR on this point: DNR submitted an objection during the comment period and requested that the permits be denied as contrary to law. Likewise, DEP's denial visits no violence upon the DNR statute. By denying permits to commence well work operations in state parks, DEP does not detract from DNR's authority to prohibit that type of activity should it be attempted without a permit.

As a practical matter, why should DEP be compelled to issue a well work permit for a State park when it is manifest that its sister agency has no authority to allow the operator to proceed? Conversely, DNR has no authority to deny well work permits, so under the Cabot/LHI view of the world, DNR would have to wait until the permit is issued and the operator has spent thousands of dollars wheeling drilling rigs into the park before the superintendent could tell the driver to turn around and head back out. It is much better for practicality to be served as it was in the instant case: “[t]he law does not require the doing of a futile act.” State v. Varner, 212 W. Va. 532, 537, 575 S.E.2d 142, 147 (2002) (citations omitted) (brackets in original).

Cabot and LHI nevertheless plod on, insisting that DEP is without authority to invoke the DNR statute to deny their well work permits because it not a “DEP statute.” According to Cabot and LHI, the technical bases identified in Code section 22-6-6(h), relating specifically to the Office of Oil and Gas, provide the only legal justification available to DEP to deny a permit.

In fact, section 22-6-6(h) nowhere confides that the list of grounds contained therein are intended to be in any way exclusive, and any contention of exclusivity is belied by the Code. For example, among the enumerated duties of the Director (now Chief) of OOG is to inspect, if necessary, the proposed well location and deny the well work permit if, among other things, “[d]amage would occur to publicly owned lands or resources.” W. Va. Code § 22-6-11(3). Inasmuch as Cabot could hardly undertake any well work or road-building within the confines of

Chief Logan State Park without damaging the land, the determination specified by the statute inheres in the December 12, 2007 Order. In any event, the unduly restrictive interpretation of DEP's authority urged by Cabot and LHI is not justified by the general statutory scheme.

Cabot and LHI have argued in the alternative that DNR itself could not do what DEP has done in this case, because the prohibitions in the DNR statute apply only to publicly owned minerals. As support for their proposition, Cabot and LHI cite to Code section 20-1-7(14), which specifically bars the sale or lease of State-owned minerals within the park system. Cabot and LHI maintain that this provision, by implication, gives the green light to private owners to avoid any bar.

This argument finds no support in the law. West Virginia Code section 5A-11-6(d), relating to the Public Land Corporation ("PLC"), now organized under the auspices of DNR, commands that "[n]otwithstanding any other provisions of the code to the contrary, nothing herein may be construed to permit extraction of minerals by any method from, on or under any state park or state recreation area. . . ." (emphasis supplied). There is no distinction to be found between publicly and privately owned minerals. Thus, the assertion by LHI that Code section 20-1-7(14), specifically barring only the sale or lease of State-owned minerals, creates by implication a right in private owners to do the opposite is unfounded. The sale-or-lease prohibition of section 20-1-7(14) simply complements the bans on exploitation found elsewhere in the Code.

3. The circuit court erred as a matter of law in concluding that the DNR statute, as applied, is constitutionally infirm.

With respect to the 1960 deed, the circuit court adopted Cabot and LHI's proffer that any construction of the 1961 law fettering Cabot's ability to exploit the gas reserves underlying the

Park would work a taking of LHI's vested property rights. According to the court below, the Legislature could not have intended such a result when it enacted the prohibition against exploitation so soon following the execution of the deed by DNR's predecessor.

Assuming without conceding that Cabot and LHI have accurately gauged the potential effect of the Legislature's action, any attempt to ascribe intent contrary to the clear words of the statute is problematic, inasmuch as it has long been established that the right of the sovereign to advance the public welfare through eminent domain cannot be trumped by private contract. In Waynesburg Southern R.R. Co. v. Lemley, 154 W. Va. 728, 178 S.E.2d 833 (1970), the plaintiff railroad had previously been deeded a right-of-way by the defendant landowners subject to the latter's reservation of easements granting access through two existing roadways to a private cemetery. The plaintiff nonetheless destroyed the easements by building tracks upon the roadways, prompting the landowners to rely upon the broken covenant as a defense against the railroad's subsequent condemnation petition.

This Court held the landowners' contention "untenable," noting that "[a]n entity which by statute has the authority to acquire property by condemnation cannot alienate or terminate such authority even though it may attempt to do so by covenant or contract." 154 W. Va. at 737; 178 S.E.2d at 839. The Court went on:

"Whenever the Legislature by statute-law has authorized any person or corporation to condemn the lands of others in order to carry on its business, the courts will regard this as a legislative declaration, that this character of business is such, as that the public has so great and direct an interest in, that the courts must hold it as contrary to public policy to permit any restrictions of it by private contract[?]. . . . Such contracts cannot be specifically enforced in equity and are probably absolutely void, being both Ultra vires and against public policy. If there is any attempt to contract away the power, it may be resumed at will.

154 W. Va. at 738; 178 S.E.2d at 839 (quoting Syl. Pt. 4, West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600 (1883)) (additional quotation marks and cited authorities omitted).

The right to exercise eminent domain and the attendant procedure is detailed in Chapter 54 of the West Virginia Code. Among those entities to which the right is reserved are the State and its political subdivisions. *See* W. Va. Code § 54-1-1. Where the State sets out to take private property for public use, it must file a verified petition in the circuit court of the county in which the property is located. *See* W. Va. Code §§ 54-2-1, -2. Upon proper notice and a threshold finding that the taking is permitted, the court appoints five commissioners to take evidence and calculate such compensation as they determine to be just. *See* W. Va. Code §§ 54-2-5, -8. The commissioners report their findings to the court, to which any party may except and demand a jury trial to settle the issue. *See* W. Va. Code §§ 54-2-9, -10.

If a property owner believes that the State has engaged in a taking without adhering to the statutory strictures, the owner may petition for mandamus relief to compel institution of the eminent domain process. Orlandi v. Miller, 192 W. Va. 144, 147, 451 S.E.2d 445, 448 (1994) (per curiam) (citations omitted). Such an action by a landowner is commonly referred to as an inverse (or reverse) condemnation proceeding. *See* Burch v. Nedpower Mount Storm, LLC, 220 W. Va. 443, 459-60 & n.2, 647 S.E.2d 879, 895-96 & n.2 (2007) (citations omitted).

In the instant matter, LHI has not filed a mandamus application seeking inverse condemnation. Moreover, the State has legitimate defenses to any takings claim involving Chief Logan, and these defenses will require presentation and careful consideration in connection with the mandamus application, or the eminent domain petition (if required), or both. Finally, even if a taking is eventually decreed, ascertaining just compensation is bound to be a complex and

protracted process, not just involving questions of valuation but also of access, *i.e.*, the State may only be liable to LHI for the increased costs, if any, of drilling outside the park rather than within.

In other words, there is a specific, deliberate, and time-honored process governing the taking of private property for public purposes. It would therefore be inappropriate for a court to short-circuit that process by summarily deciding in the context of an administrative appeal that a taking has occurred. Even farther afield is the notion that, in light of this Court's long-standing imprimatur upon the sovereign's unqualified discretion to exercise the right of eminent domain for the public good, as set forth in West Virginia Transp. Co., *supra*, and its progeny, a statute's plain language should be disregarded on the assumption that the enacting Legislature intended, *sub silentio*, that an equitable exception be had in this particular case.

Consequently, there is no merit in any attempt to frame the salient issue as whether the Legislature "intended to cause a taking" by enacting section 20-5-2(b)(8), inasmuch as the question incorporates a faulty premise and posits a premature answer. Whether DEP correctly denied Cabot's application to drill is the lone question properly before the courts, the resolution of which must necessarily be fairly and finally determined before the subject of any potential taking is broached. Indeed, if DEP is ultimately found to have been in error, there will be no need to fritter away any effort or resources determining the far more complicated constitutional question.

Cabot's efforts below to introduce a Contracts Clause issue into the appellate analysis deserve only passing consideration. See State ex rel. Lambert v. County Comm'n of Boone County, 192 W. Va. 448, 452 S.E.2d 906 (1994) (analyzing potential violation of Article III, Section 4 of the State Constitution encompasses three steps of whether the parties contractual

rights have been “substantially” impaired, whether there is a “significant and legitimate” public purpose behind the impairing legislation, and whether the resultant adjustment of the parties’ contractual rights and responsibilities is reasonable and “of a character appropriate to the public purpose justifying the legislation’s adoption”). 192 W. Va. at 458, 452 S.E.2d at 916.

It is difficult for LHI to argue with a straight face that its rights under the 1960 deed were substantially impaired under the 1961 enactment when it waited until 2007 to attempt to have Cabot vindicate those rights. Even if a substantial impairment existed in this case, the legitimacy of the public purpose behind the statute preserving Chief Logan and preventing its aesthetic deterioration cannot be gainsaid. The Legislature manifestly concluded that the only way to adequately protect the sanctity of the State park system was to wholly prohibit the commercial exploitation of minerals therein, and insofar as that conclusion is eminently reasonable, it must be accorded deference.

4. The circuit court erred as a matter of law in concluding that the unambiguous statutory prohibition against the proposed extractive activities in the Park may be ignored on the demonstrably incorrect notion that principles of equity militate in favor of granting the well work permits.

The record below, as supplemented, tended to show that Cabot already operates three gas wells in Chief Logan, one of which was permitted following the 1961 enactment of the prohibition. Cabot operates three more in the Park’s vicinity, but outside its boundaries. LHI contended that the Appendix of Documents revealed that “dozens of oil & gas wells,” at least some of which presumably have been permitted since 1961, are currently producing in eight other state parks.<sup>2</sup> Evidence produced by the other intervenors, however, effectively rebuts the

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<sup>2</sup> It is doubtful that section 20-5-2(b)(8) applies to bar the operation of wells already emplaced at the time the statute was enacted. *See, e.g., Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W. Va. 252, 664 S.E.2d 137, 144 (2008) (reciting “deeply rooted” general rule that “[a]

notion that any of these wells were permitted following the designation of the attendant surface areas as State parks.

Nonetheless, assuming for the sake of argument that the State has previously failed to enforce the statutory prohibition, it matters not whether those occasions number several, or several dozen, or several hundred. Cases are legion that, notwithstanding prior inattention, the State may act to prevent the law from being further violated. For example, in Hanson v. Turney, 94 P.3d 1 (N.M. Ct. App. 2004), New Mexico denied the plaintiff's application to alter the designated use of her water permits from irrigation to subdivision on the ground that her failure to perfect her rights under state law beyond the preliminary drilling stage rendered her ineligible to request a change. The court of appeals upheld the state's denial, even though the evidence suggested that other applications (including one by the plaintiff) had been granted under similar circumstances:

This does not meet the requirements of estoppel against the State. Less than perfect consistency may be caused by mistakes by employees or supervisors, by changes in policy, or by changes in the agency's interpretation of its governing statutes. . . . Under Plaintiff's view, once the State Engineer granted some requests to change use without prior application to beneficial use, then he could never reevaluate or change his position. Estoppel against the government would then be the rule, not the exception. . . . The fact that an agency overlooked a particular requirement in one case does not estop it from enforcing the requirements in another case.

*Id.* at 6 (citation omitted); see City of New York v. New York State Dep't of Environ. Conservation, 89 A.D.2d 274, 276 (N.Y. Ct. App. 1982) ("Equitable estoppel can never be used

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statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from [its] language") (citations omitted).

to prevent the State from enforcing its laws or, as here, an agency from carrying out its duties.”) (citation omitted).

The reticence of the courts to impose estoppel against the government “is motivated by the concern that doing so may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials.” Vestrup v. DuPage County Election Comm’n, 779 N.E. 376, 383-84 (Ill. Ct. App. 2002) (citations and internal quotation marks omitted). *See, e.g., Penner v. King*, 695 S.W.2d 887, 892 (Mo. 1985) (en banc) (“The failure of the administrative authorities to require the [social security] number on the appellants’ previous applications does not estop the state from enforcing the law as to subsequent renewals.”); Eicher v. Louisiana State Police, 710 So.2d 799, 804 (La. Ct. App. 1998) (“[T]he failure of public officers to correctly enforce statutory provisions should not be permitted to inhibit correct administration of the law or be construed to estop more diligent enforcement.”) (citation omitted); Security Savings Life Ins. Co. v. Weaver, 579 So.2d 1359, 1360 (Ala. Ct. App. 1991) (“Government nonenforcement of validly enacted laws cannot act to estop the government from later enforcing those laws. . . . Otherwise, validly enacted laws could be repealed by nonenforcement.”) (internal citations omitted).

The law in West Virginia is no different, as most vividly expressed in Samsell v. State Line Development Co., 154 W. Va. 48, 174 S.E.2d 318 (1970), a case that is in several key respects a useful analog to the one at bar. In Samsell, DNR and PLC purported to enter into a lease with a private developer to mine coal in Panther State Forest. 154 W. Va. at 50, 174 S.E.2d at 321. The agencies were thought to own the surface and mineral rights, respectively, within the forest, and the same public official signed the lease on behalf of both as Director of DNR and

Secretary of PLC. 154 W. Va. at 50-51, 174 S.E.2d at 321. As it happened, the lease was invalid because DNR had previously been statutorily divested of title in the land and minerals, and the official had no actual or apparent authority to bind PLC. *See* 154 W. Va. at 56-57, 174 S.E.2d at 324.

About five years later, the official's successor demanded that coal extraction cease in the forest on the ground that the mining operations being conducted in the recreation area were "not in the best interests of the State of West Virginia and . . . not compatible with the intended use of Panther State Forest." 154 W. Va. at 51, 174 S.E.2d at 321. In response to the inevitable suit, the developer contended that the State was estopped from denying the validity of the lease. 154 W. Va. at 52-53, 174 S.E.2d at 322.

This Court disagreed, notwithstanding that the developer: (1) had at all times acted in good faith; (2) had spent more than \$500,000 (in 1960s dollars) in reliance on the lease; (3) had paid DNR almost \$120,000 in royalties; and (4) would have to forgo the entirety of the ongoing profits it expected. *See* 154 W. Va. at 52-53, 62-63, 174 S.E.2d at 322, 327-28. In holding for the State, the Court invoked "[t]he general rule . . . that an estoppel may not be invoked against a governmental unit when functioning in its governmental capacity." 154 W. Va. at 59, 174 S.E.2d at 325 (citations omitted). The Court went on to note that "[i]n accordance with a well settled principle, [we have] stated many times that the state and its political subdivisions are not bound, on the basis of estoppel, by the Ultra vires or legally unauthorized acts of its officers in the performance of governmental functions." 154 W. Va. at 59, 174 S.E.2d at 326 (citations omitted); *see also* Lemley, *supra*, 154 W. Va. at 737-38, 178 S.E.2d at 838-39 (right of eminent domain not subject to abridgement by estoppel).

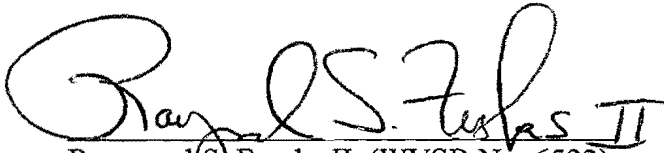
Although the public sins in Samsell were those of affirmative commission and not neglectful omission, DEP is similarly not bound in this case even if the Court concludes that it or DNR has previously failed to properly enforce the law. Estoppel is inherently an equitable doctrine, and the Samsell Court recognized the “great harm” inflicted on the public by extraction operations “weigh[ed] . . . heavily against” the developer in that case. 154 W. Va. at 62-63, 174 S.E.2d at 327-28. The balance in the instant proceeding is even more extreme when one considers that Cabot and LHI, being at a far more preliminary stage of the extraction process, have likely spent only a tiny fraction of the resources expended by the developer in Samsell, and, moreover, that any expectation of profit that LHI may have had when it retained the rights to the oil and gas underlying Chief Logan lay dormant and without nurture for nearly fifty years thereafter. Consequently, to the extent that this Court is inclined to consider the equities, the weight thereof only reaffirms the inevitable conclusion that the proposed exploitation of the Park’s gas reserves is contrary to law.

WHEREFORE, for all the reasons set forth above and any others fairly appearing on the record, Petitioner Randy C. Huffman respectfully requests that this honorable Court reverse the judgment of the Circuit Court of Logan County with instructions to deny the Petition for Review of the December 12, 2007 Order of the West Virginia Department of Environmental Protection, thereby reinstating said Order denying the five well work applications to drill and develop gas wells within Chief Logan State Park.

Respectfully submitted,

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

By Counsel:

A handwritten signature in black ink that reads "Raymond S. Franks II". The signature is written in a cursive style with a large initial "R".

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 35508**

**CABOT OIL & GAS CORPORATION,**  
*Petitioner Below, Appellee,*

**v.**

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

and

**LAWSON HEIRS, INC.,**  
*Intervenor Below, Appellee,*

and

**SIERRA CLUB, INC.,**  
*Intervenor Below, Appellee,*

and

**CORDIE O. HUDKINS**  
**WEST VIRGINIA HIGHLANDS CONSERVANCY, INC.**  
**FRIENDS OF BLACKWATER,**  
*Intervenors Below, Appellees,*

and

**WEST VIRGINIA DIVISION OF NATURAL RESOURCES,**  
*Intervenor Below, Appellee.*

**CERTIFICATE OF SERVICE**

I, Raymond S. Franks II, counsel for Randy Huffman, Cabinet Secretary, West Virginia Department of Environmental Protection, do hereby certify that service of the foregoing "Opening Brief of Randy C. Huffman, Cabinet Secretary, West Virginia Department of Environmental Protection" has been made on this 15<sup>th</sup> day of April, 2010, by depositing a true and exact copy thereof in the regular course of the United States mail, postage prepaid, addressed as follows:

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