

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

CABOT OIL & GAS CORPORATION,

Petitioner,

v.

CIVIL ACTION NO. 08-C-14

(Hon. Roger L. Perry)

**RANDY HUFFMAN, CABINET
SECRETARY, WEST VIRGINIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
OFFICE OF OIL AND GAS,**

Respondent,

v.

LAWSON HEIRS, INC.

Intervenor.

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CABOT OIL & GAS CORPORATION'S AND LAWSON HEIRS INC.'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 11, 2008, the Petitioner, Cabot Oil and Gas Corporation ("Cabot"), filed a petition for judicial review of the December 12, 2007 Order issued by the Respondent, the West Virginia Department of Environmental Protection ("DEP"). The petition was filed as a matter of right pursuant to W.Va. Code §22-6-40, which provides that "any party ... adversely affected by ... the refusal of the director to grant a drilling permit ... is entitled to judicial review thereof." On March 20, 2008, pursuant to this Court's Order, the Lawson Heirs, Inc. ("Lawson Heirs") intervened in this matter. On December 16, 2008, the Petitioner submitted its brief and on January 20, 2009, a response brief was submitted by the Respondent. On March 12, 2009, the Petitioner filed a reply brief. On May 6, 2009, at the request of the Court, the parties submitted

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supplemental briefs. On May 13, 2009, the parties presented oral arguments. After considering the arguments and representations of counsel at the hearing, the briefs, response briefs and the supplemental briefs submitted by all of the parties, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On November 21, 2007, the Petitioner filed five well work permit applications with the DEP's Office of Oil and Gas ("OOG") pursuant to W.Va. Code §22-6-11.

2. The Petitioner intends to continue its development of the oil and natural gas owned by the Intervenor, the Lawson Heirs, located within Chief Logan State Park ("the Park"). The Petitioner has previously obtained permits for, drilled and operates a number of wells within the Park and adjacent wildlife management areas.

3. The Lawson Heirs obtained the surface property and mineral rights in question in the 1800s. In 1960, the Lawson Heirs deeded the surface and coal rights to the Logan Civic Association, which then transferred the property to the DNR's predecessor, the Conservation Commission of West Virginia.

4. The oil and gas rights were never transferred to the state. The deed transferring the property to the state clearly stipulated that the right to natural gas drilling and production were reserved to the Lawson Heirs and their lessee, and that the state will not own those property interests nor have the ability to prohibit their use.

5. Specifically, the deed states as follows:

There is excepted and reserved from this conveyance 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, together with the rights of way and servitude for the laying of pipe lines, building telephone and telegraph lines, structures, plants houses, drips, tanks, stations, electric power lines,

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meters, and regulators, and all other rights and privileges necessary and incident to and convenient for the economic operation of excepted oil and gas, or either, and the rights excepted and reserved and the care of the excepted products.

The excepted rights of way and servitudes may also be used by the party of the first part, its successors, assigns, and lessees, for search for, exploring, operating for, drilling, producing, and marketing oil, gas, or gasoline from other lands owned or held under lease.

See Deed dated November 18, 1960, of record at the office of the Clerk of the County Commission of Logan County, West Virginia, Deed Book 276, at page 347; Appendix of Exhibits, Tab 2.

6. Other reservations, easements, pipeline rights of way and other rights were also reserved and excepted from the deed, including specific oil and gas leases and rights to which Cabot is now lessee, and specific agreements as to how the gas rights within the Park would be developed. See Deed Book 276 at pages 348-350.

7. Also contained within the deed are certain restrictions upon the manner of mineral exploitation or guidelines as to how oil and gas may be drilled within the Park. Specifically, the deed states as follows:

No well shall be drilled, without the consent in writing of the party of the second part, its successors or assigns, first had and obtained, within one thousand (1,000) feet of any building or structure, tipple, shaft, air shaft, or lake; within two hundred (200) feet of any existing or projected entry, road, riding trail, haulway, or air course of any mine in operation, any of which is now or may hereafter be constructed upon the premises hereby conveyed; or within the view or site of any overlook that has been developed for public use; provided, however, that neither the party of the first part, its successors, assigns, or lessees, shall in any event be required to remove any equipment, facility, or installation by reason of these restriction, if at any time the same are constructed or installed, the location thereof complied with the requirements herein set forth.

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No road, power line, pipe line, or telephone line shall be constructed without the prior written approval, as to location, of the Director of the Conservation Commission of West Virginia, or his authorized representative, but such written approval shall not be unreasonably or arbitrarily withheld. Any timber that is cut in the construction of any of the above shall be sawed into standard log lengths and left along the right of way. This timber shall be the property of the party of the second par, its successors or assigns.

What timber is cut, in addition to being sawed into logs, the trees shall be trimmed and the branches stacked and piled in accordance with the rules and regulations of the Director of the Conservation Commission of West Virginia, its successors or assigns. Where timber is cut for rights of way for pipe line, or power or telephone lines, the rights of way shall be cleared for reseeded.

When in the exercise of any of the rights excepted or reserved it becomes necessary to expose the mineral soil, such shall be reseeded in manner that is approved in writing by the Director of the Conservation Commission of West Virginia, or his authorized representative, after the purpose of such exposure has been accomplished.

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

See Deed dated November 18, 1960, of record at the office of the Clerk of the County Commission of Logan County, West Virginia, Deed Book 276, at page 347; Appendix of Exhibits, Tab 2.

8. Currently, there are several operating gas wells located in the Park and the Chief Logan Wildlife Management Area; six wells are operated by Cabot. The record is clear that the DEP and DNR have authorized and allowed the development of minerals owed by private parties under numerous other state parks. *See* Appendix of Exhibits, Tabs 19-20. In fact, the DNR is

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the owner of the mineral rights in some cases and receives rentals and royalties on gas wells in North Bend State Park. *Id.*

9. On December 12, 2007, the Respondent issued an Order denying all five well work permit applications.

10. In denying the permit applications, the Respondent relied upon grounds which were outside of the statutes administered by the DEP for the permitting of oil & gas wells, W.Va. Code §§6-11-1 *et seq.*, and also outside of the regulations promulgated by that agency for the same purpose, 30 C.S.R. 4 (May 10, 2001).

11. The sole ground for the denial of the aforesaid permit applications was based on a statute applicable to another agency, the West Virginia Division of Natural Resources (hereinafter "DNR"), being W.Va. Code §20-5-2(b)(8) (hereinafter "DNR statute"), which states as follows:

(b) The Director of the Division of Natural Resources shall: (8) Propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to control the uses of parks: Provided, That the director may not permit public hunting, except as otherwise provided in this section, the exploitation of minerals or the harvesting of timber for commercial purposes in any state park.

12. 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.

13. The authority vested in the DEP's OOG is set forth in W.Va. Code §22-6-1 *et seq.* Section 22-6-6 sets forth the reasons which the DEP must deny a well work 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.

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14. Even if the DEP were authorized to apply the DNR statute, the plain and literal language of the DNR statute does not apply to the minerals owned by the Lawson Heirs. The statute only applies to state parks. As set forth above, the oil and gas are not part of the Park, but underlie the Park.

CONCLUSIONS OF LAW

1. Pursuant to W.Va. Code §29A-5-4(g), the court shall reverse, vacate or modify the order or decision of an agency if the substantial rights of the Petitioner have been prejudiced because the administrative findings, inferences, conclusions, decision or order are, *inter alia*, in excess of the statutory authority or jurisdiction of the agency.

2. An administrative agency can exert only such powers as those granted by the Legislature and if such agency exceeds its statutory authority, its action may be nullified by a court. *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

3. The DEP exceeded its statutory authority and erred as a matter of law by relying upon the DNR statute to deny the well work permit applications. The DEP has no authority under W.Va. Code §20-5-2(b)(8), and that statute applies only to limits on the proposed rules the Director of DNR may promulgate.

4. 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.

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5. In addition, the DEP erred as a matter of law in denying the well work permit applications as such denial was not based upon its statutory authority under W.Va. Code §22-6-1 *et seq.*

6. Even if it were authorized to use the DNR statute, the DEP erred as a matter of law in denying the well work permit applications based upon W.Va. Code §20-5-2(b)(8). That section states that the Director of the Division of Natural Resources “may not permit...the exploitation of minerals...for commercial purposes in any state park[.]”. The DEP erroneously interpreted §20-5-2(b)(8) by holding that it prohibits the exploitation of minerals not owned by the state.

7. Where a statute is clear and unambiguous in expressing legislative intent, the statute is to be applied as written without resorting to rules of interpretation. *Syl. Pt. 2, State ex rel. Underwood v. Silverstein*, 167 W. Va. 121, 278 S.E.2d 886 (1981).

8. W.Va. Code §20-5-2(b)(8) clearly does not apply to minerals not owned by the state. To apply it otherwise would deprive the mineral owners of their private property rights and would be blatantly unconstitutional. By drafting specific legislation to preclude the Director of the DNR from permitting the exploitation of minerals for commercial purposes in any state park, the legislature likely intended to reserve unto itself the ability to decide when state owned minerals could be produced or sold. It was likely not the legislature’s intent to bar any and all exploitation of minerals in state parks whether state-owned or privately-owned.

9. The interpretation of W.Va. Code §20-5-2(b)(8) applied by the DEP, would result in the taking of the valuable property rights reserved by the Lawson Heirs, and the lease rights granted to Cabot. Such an interpretation would run afoul of multiple provisions of the Constitution of West Virginia.

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10. Article III, Section 10 of the Constitution of West Virginia provides that "no person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." This clause has been interpreted to be both a due process and an equal protection clause, and the protections are co-extensive or broader than those of the Fourteenth Amendment to the United State Constitution. *Payne v. Gundy*, 196 W.Va. 82, 468 S.E.2d 335 (1996). Where economic rights are concerned, the State Supreme Court looks to see whether the challenged action or classification is a rational one based on social, economic, historic or geographic factors; whether it bears a reasonable relationship to a proper governmental purpose; and whether all persons within the class were treated equally. *Gihson v. West Virginia Department of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991).

11. The interpretation of the DEP permitting statute and the DNR statute relied upon by the DEP, cannot withstand scrutiny under due process or equal protection grounds. The interpretation offered by the OOG would result in a taking of property if the permit denials were upheld.

12. The interpretation relied upon by the DEP, also violates Article III, Section 9 of the Constitution of West Virginia which provides "[p]rivate property shall not be taken or damaged for public use without just compensation; ... and when private property is taken...for public use,...the compensation of the owner shall be ascertained in such manner, and as may be prescribed by general law, and ...shall be ascertained by an impartial jury of twelve freeholders."

13. If the DEP permit denial were upheld, both Lawson Heirs and Cabot would be deprived of substantial private property rights without due process, and without just compensation being offered. The DEP permit denial would constitute an inverse condemnation or regulatory taking since it clearly would prohibit the development of the oil and gas estate and

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would take away substantial private property rights which were previously recognized by the State, when it obtained title to the property which became Chief Logan State Park.

14. The DEP's interpretation of the DEP permitting statute and the DNR statute is also violative of Article III, Section 4 of the Constitution of West Virginia, which provides that no bill or law impairing the obligation of a contract shall be passed by the Legislature. If the Court were to uphold the interpretation of the DEP, such would be in effect a law impairing the terms of the 1960 deed. The DEP application of the DNR statute would then mean the DNR statute is a law impairing the obligation of the deeds and property rights reserved by the Lawson Heirs, and leased to Cabot.

15. In light of the record of the OOG and DNR allowing the operation of other gas wells in other state parks, and in light of the clear and unambiguous provisions of the deeds which reserved the grant of gas wells and rights of way to Chief Logan State Park, the Court also finds that the permit denials should be reversed as matter of equity.

16. Any searching, exploring, operation, drilling and/or production of oil or gas pursuant to the permits at issue here remain subject to the restrictions set forth in the November 18, 1960 deed of the Park property – listed specifically above at paragraph 7 under "Findings of Fact," and is subject to other applicable rules administered by the DEP's Office of Oil and Gas.

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ORDER

Accordingly, it is, ORDERED, ADJUDGED AND DECREED, that the December 12, 2007 Order issued by the Respondent is vacated, reversed and remanded with instructions that the Respondent grant the Petitioner's five well work permit applications.

The clerk is directed to provide copies of this order to:

- Timothy Miller and Anne Blankenship, P.O. Box 1791, Charleston, WV 25326;
- Larry George, Law Offices of Larry George PLLC, 10 Hale Street, Suite 205, Charleston, WV 25301; and
- Raymond Franks, WV Department of Environmental Protection, 601 - 57th Street, S.E., Charleston, WV 25304.

Entered this 17th day of June, 2009.



 Roger L. Perry
 Chief Judge, 7th Circuit

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