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PRIVATE PROPERTY MINERAL RIGHTS UNDER STATE PARKS

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When private land is originally conveyed to develop a state park, the State may not in fact have acquired all of the property rights associated with a given parcel. In particular, pre-existing subsurface mineral rights may have been retained by the original owner and/or conveyed to other private parties. As illustrated by the recent state supreme court opinions described herein, a private party who has the right to mine a tract of land also "has the right of possession even as against the owner of the soil, so far as it is necessary to carry on mining operations."

As a result, the State may not unduly interfere and/or burden the use and access to such private property rights in the interest of state park preservation and resource protection. On the contrary, any regulation of such private subsurface mineral rights to protect park resources must be reasonable and not so burdensome as to effect an unconstitutional regulatory "taking" of private property without just compensation. On the other hand, the private owner of such subsurface mineral rights is also "limited by a good faith requirement that it use the surface area only in a reasonably necessary manner to extract the minerals."

OIL CREEK STATE PARK, PENNA.

In the case of *Belden & Blake Corporation v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources*, 600 Pa. 559; 969 A.2d 528; 2009 Pa. LEXIS 664 (April 29, 2009), plaintiff Belden & Blake (B&B) notified the Department of Conservation and Natural Resources (DCNR) that it was in the preliminary stages of developing gas wells on three parcels of property in which it owned oil and natural gas estates in Oil Creek State Park. The defendant Commonwealth of Pennsylvania through DCNR owns and operates the surface of the state park.

B&B posted bond with the Department of Environmental Protection (DEP) as required by the state oil and gas law to secure well closure, well site reclamation, and pollution remediation costs. DCNR, however, sought to impose an additional "coordination agreement" on B&B before allowing it to access the parcels. The terms of the agreement would require a $10,000 performance bond for each well, and $74,885 in stumpage fees, double the fair market value of the timber to be removed.

B&B objected to this DCNR requirement and pursued judicial review in state court claiming "an implied easement with a right to enter the parcels was acquired with the oil and gas estates." Accordingly, B&B sought a court order to enjoin (i.e., prohibit) "DCNR from further interference with its rights." In so doing B&B alleged DCNR had effectively refused B&B access to its subsurface oil and gas property rights "by imposing unlawful bonds, fees, and an unnecessary right-of-way (as it already had an easement)."

In response, DCNR contended that it was "authorized to condition the surface use of a state park" as "a trustee for public resources under Article I, § 27 of the Pennsylvania Constitution." In pertinent part, Article I, § 27 provided as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. Pa. Const. art. I, § 27.

The trial court agreed with B&B. In so doing, the trial court held "the law recognizes Belden & Blake's right to enter upon the land to exercise its oil and gas rights; consequently, DCNR has no power to condition Belden & Blake's exercise of those rights by requiring it to enter into the coordination agreement." DCNR appealed.

On appeal, DCNR reiterated its argument that it was "obligated to preserve state parks" and it had a fiduciary obligation to conserve and maintain parklands as natural resources under Article I, § 27 of the Pennsylvania Constitution." Further, DCNR argued on appeal that the trial court had failed to adequately address "how to balance an oil and gas developer's rights against a surface use that has been afforded special protection as a public natural resource." Moreover, DCNR claimed the trial court had failed to properly address DCNR's role "in determining what constitutes reasonable use." In so doing, DCNR contended the trial court should have applied the "public trust doctrine" which provided that "certain natural resources are impressed with a trust for the public's benefit, outweighing private interests. "

According to DCNR, "the best way for Belden & Blake to exercise due regard to its rights and obligations as surface owner" was to enter into the "coordination agreement" proposed by DCNR. DCNR emphasized that it was "not trying to deny Belden & Blake access to its rights." On the contrary, DCNR claimed it simply did not want B&B to "unilaterally determine what constitutes reasonable use of the surface."

In response, B&B argued it had an implied easement to legally enter, take, possess, and use the surface as reasonably necessary to exercise its mining rights. Further, B&B claimed it had "exercised more than due regard to DCNR and the Park" by posting the required bond with DEP to cover the cost of well closure, including site reclamation and remediation.

SUBSURFACE RIGHTS

Under the circumstances of this case, the Supreme Court of Pennsylvania found "summary judgment in Belden & Blake's favor was warranted." In the opinion of the state supreme court "Belden & Blake has the right to enter the surface property to access what it owns, a right that is not contested by DCNR." According to the court, "[o]ne who has the exclusive right to mine …upon a tract of land has the right of possession even as against the owner of the soil, so far as it is necessary to carry on mining operations."

> An owner of an underlying estate, such as Belden & Blake here, has the right to go upon the surface in order to reach the estate below, as might be necessary to operate his estate, and this is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained, within proper limits, by a court.

Further, the state supreme court held "a grant or reservation of minerals and the right to mine them constitute property rights, which the law recognizes, and which may not be taken for public use without compensation."

In this particular instance, the state supreme court found B&B had fulfilled its obligation to exercise its legal rights as a subsurface owner in a reasonable fashion. The specific issue before the state supreme court was, therefore, "whether DCNR's special responsibilities allow it to unilaterally impose additional conditions on Belden & Blake's exercise of its right to enter."

In the opinion of the state supreme court "[a] subsurface owner's rights cannot be diminished because the surface comes to be owned by the government, or any party with statutory obligations, regardless of their salutary nature."

> DCNR may wish to do so because of its statutory duties, but its mandate does not allow it to do so unilaterally, nor does it shift the burden of seeking redress to the subsurface owner. That is, whatever its admirable obligations to the public, as concerns the owner of private property, the government and its agencies must be held to the same standard as any other surface owner…
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> We reiterate that it is for the surface owner to challenge the subsurface owner's reasonable exercise of its rights, not the converse. A "regular" surface owner cannot unilaterally impose extra conditions on the subsurface owner beyond those that are reasonable.

In so doing, however, the state supreme court noted that "DCNR may *seek* additional conditions because of its mandate, but it has no authority to *impose* them unilaterally without compensation."

> If the subsurface owner wishes to access its property, as was the case here, DCNR may seek conditions like any other surface owner, even additional conditions consistent with its statutorily imposed duties. If there is no agreement on the reasonableness of conditions sought, DCNR must seek redress in the appropriate judicial forum; it is not the obligation of the subsurface owner to do so.

Further, if "DCNR wishes further conditions pursuant to its statutory duties," the state supreme court concluded "the Commonwealth must compensate the subsurface owner for the diminution of its rights; indeed it may condemn the subsurface interests altogether pursuant to the Eminent Domain Code." As a result, the state supreme court held "a property owner's interests and rights cannot be lessened, nor their reasonable exercise impaired without just compensation, simply because a governmental agency with a statutory mandate comes to own the surface." The state supreme court, therefore, affirmed the order of the trial court in favor of B&B.

CHIEF LOGAN STATE PARK, W. VA.

Similarly, in the case of *Cabot Oil & Gas Corporation v. Huffman*, 705 S.E.2d 806; 2010 W. Va.

LEXIS 122 (November 3, 2010), the West Virginia Department of Environmental Protection (DEP) refused to issue five oil and natural gas well drilling permits in Chief Logan State Park. The circuit court, however, ordered the DEP Office of Oil and Gas to issue the requested permits to allow development of wells in Chief Logan State Park by Cabot Oil & Gas Corporation (Cabot) under its lease of mineral rights with Lawson Heirs, Inc.

The Lawson Heirs, Inc. owned substantial land holdings in present-day Logan County, West Virginia. In 1960, the Lawson Heirs and the Logan Civic Association began negotiations about forming a West Virginia state park in Logan County. On November 18, 1960, the Lawson Heirs conveyed 3,271 acres of surface land and coal to the Logan Civic Association for $90,000. In the deed, the Lawson Heirs explicitly reserved the property's oil and gas rights as well as the ability to drill wells for the extraction and production of these resources. The deed also recognized the property was intended to be used as a West Virginia state park. Furthermore, the deed specified the manner in which the Lawson Heirs would exercise their oil and gas rights and the manner in which such wells would be developed.

Following this initial conveyance, the Logan Civic Association conveyed the entire parcel to the State of West Virginia to be managed first as Chief Logan Recreation Area and later as Chief Logan State Park. In 1961, the West Virginia Legislature passed W. Va. Code § 20-4-3 which described "the purpose of a state park and recreation system" as follows:

> Promote conservation by preserving and protecting natural areas of unique or exceptional scenic, scientific, cultural, archaeological or historic significance, and to provide outdoor recreational opportunities for the citizens of this state and its visitors.
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> *In accomplishing such purposes the director of the DNR* 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 the minerals* or harvesting of timber thereon for commercial purposes. (Emphasis added by Court).

In 1995, the West Virginia Legislature re-codified this language at W. Va. Code § 20-5-2. The version of this statute in effect at the time Cabot requested issuance of the five well permits provided, in pertinent part:

> The Director of the Division of Natural Resources *may not permit* public hunting, except as otherwise provided in this section, *the exploitation of minerals* or the harvesting of timber for commercial purposes *in any state park*. (Emphasis added by Court).

As contemplated in the 1960 deed, the Lawson Heirs ultimately exercised their reserved oil and gas rights and leased these rights to Cabot. On November 21, 2007, Cabot filed five well work permit applications to drill wells to develop the oil and gas reserves underneath Chief Logan State Park.

On June 17, 2009, the circuit court ordered the Office of Oil and Gas to issue the permits requested by Cabot. In reaching this decision, the circuit court concluded "[t]he DEP [Department of Environmental Protection] exceeded its statutory authority and erred as a matter of law by relying upon the DNR statute to deny the well work permit applications." While the DNR statute expressly prohibited "the exploitation of minerals for commercial purposes in any state park," in the opinion of the circuit court, this DNR statute "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.

As a result, the circuit court found the state legislature had not intended to "bar any and all exploitation of minerals in state parks whether state-owned or privately-owned."

> 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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> 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 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.

In the opinion of the circuit court, upholding DEP's interpretation of the law would also violate the terms of the 1960 deed by "impairing the obligation of the deeds and property rights reserved by the Lawson Heirs, and leased to Cabot." DNR and the other defendants (i.e., DEP Office of Oil and Gas, the Sierra Club, and Friends of Blackwater) appealed to the state supreme court.

DEED AS CONTRACT

On appeal, the issue before the state supreme court was, therefore whether "the statutory provision prohibiting the DNR from authorizing mineral exploitation within West Virginia state parks preclude the issuance of the well permits for which Cabot has applied." In the opinion of the state supreme court, the DNR statutory prohibition against mineral exploitation in state parks would not legally preclude the requested permits because this "this statutory language was enacted *after* the 1960 deed conveying the subject property was executed. As a result, the court found these statutes could not be "applied to retroactively modify the parties' written agreement memorialized in their deed," i.e., the "agreement of the Lawson Heirs and the Logan Civic Association vis-a-vis the oil and gas rights underlying the property conveyed therein" in 1960.

As noted by the state supreme court, “the 1960 deed is a contract” and “like any other written agreement, are the repository of the contract.” Accordingly, the court’s analysis of the 1960 deed would be governed by “the law of contract” to construe this particular “written, contractual agreement reflecting the parties' intent.” Specifically, when a “valid written instrument... expresses the intent of the parties in plain and unambiguous language,” the court acknowledged such contracts are “not subject to judicial construction or interpretation but will be applied and enforced according to such intent.”

> [I]n construing a deed, will, or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith…
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> Where the contractual language is clear, then, such language should be construed as reflecting the intent of the parties… It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.
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> Rather, an unambiguous written contract entered into as the result of verbal or written negotiations will, in the absence of fraud or mistake, be conclusively presumed to contain the final agreement of the parties to it, and such contract may not be varied, contradicted or explained by extrinsic evidence of conversations had or statements made contemporaneously with or prior to its execution.

Applying these principles to the 1960 deed at issue, the state supreme court noted “the parties do not dispute the language employed in the deed nor the intent of the parties expressed therein.” On the contrary, the court found everyone agreed that the “unambiguous contract language” in “the 1960 deed reserves unto the Lawson Heirs the oil and gas rights underlying the conveyed property and that, by virtue of and in addition to such reservation, the Heirs also retain the ability to extract those minerals.” Further, the court noted that, typically, “the law that is in effect at the time a contract is executed is the law that thereafter applies to and governs the parties' agreement.” As a result, the court found "[t]he laws which subsist at the time and place where a contract is made and to be performed enter into and become a part of it to the same extent and effect as if they were expressly incorporated in its terms."

The state supreme court would, therefore, “apply the law in effect at the time of the deed's execution” to “determine what effect, if any, the prohibitions against mineral exploitation in state parks would have upon the 1960 deed. Since the statutory prohibitions were not in effect at the time of the 1960 deed's execution,” the state supreme court held the statutory prohibitions against exploitation of minerals in state parks “cannot be applied to bar the issuance of the requested well permits.”

> Here, the Lawson Heirs and the Logan Civic Association executed a deed in 1960 for property that was ultimately to become Chief Logan State Park. The statute

> relied upon by the DEP Office of Oil and Gas and the DNR as a basis for denying the well permits requested by Cabot to develop the minerals reserved in the 1960 deed was enacted in 1961 *after* the 1960 deed had been executed. There is no indication that the Legislature intended either the 1961 original version of this statutory language, *i.e*., W. Va. Code § 20-4-3, or its subsequent recodified version, *i.e*., W. Va. Code § 20-5-2(b)(8), to be applied retroactively. .

As a result, the state supreme court affirmed "the circuit court's order directing the DEP Office of Oil and Gas to grant Cabot the five well permits it requested to allow Cabot to develop the oil and natural gas reserves retained by the Lawson Heirs in their 1960 deed."

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