WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

DANNY WEBB CONSTRUCTION, INC.,
Appellant,

v.

Appeal No. 17-15-EQB

DIRECTOR, DIVISION OF
OIL AND GAS,
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Appellee.

NOTICE OF APPEARANCE

Notice is hereby given of the entry of the undersigned as counsel for the Appellant, Danny Webb Construction, Inc. in the above-entitled action. Pursuant to the requirements of the West Virginia Rules of Civil Procedure, all further notice and copies of pleadings, papers and other material relevant to this action should be directed to and served upon:

John F. Leaberry (WV Bar 2168)
The Leaberry Law Firm PLLC
167 Patrick Street
Lewisburg, WV 24901
T: 304.645.2025
F: 888.469.6631
email: leaberrylaw@leaberry-law.com

John F. Leaberry
Counsel for Appellant

08/30/2017
Date

APPROVED:

Danny E. Webb, President
Danny Webb Construction, Inc.

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

DANNY WEBB CONSTRUCTION INC.,
APPELLANT'S NAME,

Appellant,

v.

Appeal No. _____

DIRECTOR, DIVISION OF

OIL AND GAS,
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellee.

NOTICE OF APPEAL

Action Complained Of: The appellant(s) named above respectfully represent(s) that it is aggrieved by (identify the order, failure or refusal, or permit, and give date of the order or permit): ORDER NO. 2017-UIC-4 dated Juy 26, 2017 and delivered to Appellant by electronic mail dated August 1, 2017. (See Exhibit 1 and Exhibit 2 attached)

Relief Requested: The appellant therefore prays that this matter be reviewed and that the Board grant the following relief (describe the relief sought): Appellant requests that the action of the Chief of the Office of Oil and Gas be stayed and held in abeyance pending final determination of Appellant's appeal to the West Virginia Supreme Court of Appeals. (See Exhibit 3 attached)

Specific Objections: The specific objections to the action, including questions of fact and law to be determined by the Board, are set forth in detail in separate numbered paragraphs and attached hereto. The objections may be factual or legal.

Amendment of this Notice of Appeal may be had only by leave of the Board, and only for good cause shown.

Dated this 30th day of August, 2017.

(Signature)

John F. Leaberry; Attorney for Appellant
(Address)
167 Patrick Street Lewisburg WV 24901

304-645-2025
(Telephone)

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA ,

DANNY WEBB CONSTRUCTION, INC.,
Appellant,

v. Appeal No._____

DIRECTOR, DIVISION OF
OIL AND GAS,
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Appellee.

SPECIFIC OBJECTIONS

Appellant appends the following specific objections to its Notice of Appeal of ORDER NO. 2017-UIC-4 issued by the Chief of the Division of Oil and Gas, WV Department Of Environmental Protection.

1. The Action of the Chief of the Division of Oil and Gas, WV Department Of Environmental Protection is premature. On July 10, 2017 Appellant herein submitted a Petition for Rehearing to the West Virginia Supreme Court of Appeals. Such Petition is presently pending before the Court.
2. The Appellant will be irreparably harmed if such Order revoking Appellant's Permit UIC 2D0190508 is allowed to take affect and Appellant ultimately prevails in its argument before the West Virginia Supreme Court of Appeals.
3. The potential harm to Appellant resulting from the revocation of Appellant's permit before all judicial remedies have been exhausted is great; while there is little chance of harm to any party to this action by delaying the revocation, since all activity at UIC 2D0190508 has been stayed by the action of the Fayette County WV Circuit Court.
4. West Virginia Rule 47CSR13 relied upon by Chief of the Division of Oil and Gas is discretionary. The revocation of the permit is not required by such rule.
5. In fact the decision of the Chief of the Division of Oil and Gas to revoke UIC 2D0190508 is an abuse of the discretion provided by West Virginia Rule 47CSR13 since it directly impacts a property right asserted by Appellant that is currently pending before and may yet still be upheld by the West Virginia Supreme Court of Appeals.

For the forgoing reasons Appellant, Danny Webb Construction, Inc respectfully requests that ORDER NO. 2017-UIC-4 issued by the Chief of the Division of Oil and Gas, WV Department

of Environmental Protection held to be stayed and held in abeyance pending final outcome of Appellant's appeal before the West Virginia Supreme Court.

Appellant further requests that in the event it prevails in its appeal before West Virginia Supreme Court, that ORDER NO. 2017-UIC-4 issued by the Chief of the Division of Oil and Gas, be held to have been issued without cause or reason, thus leaving Permit UIC 2D0190508 in good standing unaffected by the action of the Chief of the Division of Oil and Gas.

Respectfully Submitted:
Danny Webb Construction, Inc.
Appellant

BY COUNSEL

John F. Leaberry (WV Bar # 2168)
Leaberry Law Office PLLC
167 Patrick Street
Lewisburg, WV 24901
Tel: 304.645.2025
email: leaberrylaw@leaberry-law.com

CERTIFICATE OF SERVICE

I, John F. Leaberry, Counsel for the Appellant, Danny Webb Construction, Inc., hereby certify that a copy of the foregoing Appeal has been served upon the following individuals on this 30th day of August 2017 in the following manner:

VIA FIRST CLASS MAIL, POSTAGE PREPAID

Jackie Shultz, Clerk
Environmental Quality Board
601 57th Street, SE
Charleston, WV 25304

WVDEP - OFFICE OF LEGAL SERVICES
601 57th Street, SE
Charleston, WV 25304

DIRECTOR, DIVISION OF WATER AND WASTE MANAGEMENT
601 57th Street, SE
Charleston, WV 25304

John F. Leaberry
Law Office of John Leaberry
Counsel for Appellant

EXHIBIT 1

91 7199 9991 7037 7093 9463

west virginia department of environmental protection

Office of Oil and Gas
601 57th Street, S.E.
Charleston, WV 25304
Phone: (304) 926-0450; Fax: (304) 926-0452

Jim Justice, Governor
Austin Caperton, Cabinet Secretary
www.dep.wv.gov

ORDER
ISSUED UNDER
WEST VIRGINIA CODE CHAPTER 22

TO: Danny E Webb Construction Inc
Attn: Danny Webb
P.O. Box 267
Lochgelly, WV 25866-0267

DATE: July 26, 2017

ORDER NO.: 2017-UIC-4

INTRODUCTION

This Order (hereinafter "Order") is issued by the Office of Oil and Gas (hereinafter "OOG"), by and through its Chief, pursuant to the authority of West Virginia Code §§ 22-6-1 *et seq.*, 22-1-1 *et seq.*, 22-11-1 *et seq.*, and 22-12-1 *et seq.* to Danny E Webb Construction Inc.

FINDINGS OF THE CHIEF

In support of this Order, the Chief hereby finds the following:

1. On August 26, 2015, OOG reviewed, approved and issued the renewal of underground injection control (UIC) permit UIC2D0190508 for brine disposal through the use of well API # 47-019-00508 to Danny E Webb Construction Inc.

2. On June 7, 2016, the Circuit Court of Fayette County (Civil Action No. 16-C-9) ruled that Danny E Webb Construction Inc's lease with North Hills Group, Inc. does not authorize the activities covered under UIC Permit 2D0190508.

3. Danny E Webb Construction Inc appealed the Circuit Court ruling to the West Virginia Supreme Court of Appeals.

4. On June 9, 2017, the West Virginia Supreme Court of Appeals (Docket No. 16-0640) upheld the lower court's ruling that the lease held between Danny E Webb Construction and North Hills Group, Inc. does not authorize the activities covered under UIC Permit 2D0190508.

ORDER

Therefore, in accordance with West Virginia Code §§ 22-1-1 *et seq.*, 22-6-1 *et seq.*, 22-11-1 *et seq.*, 22-12-1 *et seq.*, and West Virginia Legislative Rule 47CSR13 which states that a UIC permit may be revoked or suspended for cause, it is hereby ORDERED by the Chief that:

UIC Permit 2D0190508 issued August 26, 2015 is hereby revoked.

RIGHT OF APPEAL

Notice is hereby given of your right to appeal the terms and conditions of this Order which you are aggrieved to the Environmental Quality Board by filing NOTICE OF APPEAL on the form prescribed by such Board, in accordance with the provisions of Chapter 22, Article 11, Section 21 of the Code of West Virginia within thirty (30) days after receipt of this Order.
This Order shall become effective upon receipt.

7-26-17
Date

James A. Martin
Chief

EXHIBIT 2

Annie Smith
Danny Webb Construction Co.
304-465-9448

Attached Message

From	Nottingham, Justin E <Justin.E.Nottingham@wv.gov>
To	Danny Webb Construction <dannywebbconstruction@aol.com>; Urban, Terry W <Terry.W.Urban@wv.gov>
Cc	Martin, James A <James.A.Martin@wv.gov>; Smith, Gene C <Gene.C.Smith@wv.gov>; Hankins, Melanie S <Melanie.S.Hankins@wv.gov>; Lockwood, Andrew L <Andrew.L.Lockwood@wv.gov>
Subject	UIC2D0190508 UIC Permit Revocation (Order # 2017-UIC-4)
Date	Tue, 1 Aug 2017 19:57:10 +0000

Danny:

Well 47-019-00508 is no longer authorized by WVDEP OOG for the injection Class II fluids. I have attached a pdf copy of the UIC Permit Revocation (Order # 2017-UIC-4) for UIC Permit number UIC2D0190508.

Please note that you have the right to appeal the terms and conditions of the Order to the Environmental Quality Board. The Notice of Appeal must be submitted on the form prescribed by the EQB Board. This process is in accordance with the provisions of WV Code Chapter 22, Article 11, Section 21. The Notice of Appeal must be submitted within thirty (30) days after receipt of the Order.

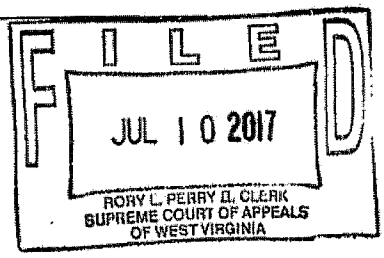
If you have any questions then please feel free to contact me.

Thanks,
Justin

Justin E. Nottingham
West Virginia Department of Environmental Protection
Office of Oil and Gas
Environmental Resources Analyst
601 57th Street, S.E.
Charleston, WV 25304
Office: (304)-926-0499 (Ext. 1650)
Fax: (304)-926-0452
Justin.E.Nottingham@wv.gov

EXHIBIT 3

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CASE No. 16-0640

DANNY WEBB and
DANNY WEBB CONSTRUCTION, INC.,

Respondents Below, Petitioners,

Appeal from a final order of the Circuit Court of Fayette County in Civil Action No. 16-C-9.

v.

NORTH HILLS GROUP, INC.,

Petitioner Below, Respondent.

PETITIONERS' PETITION FOR REHEARING UNDER RULE 25

George A. Patterson, III (WV Bar No. 2831)
Counsel for Petitioners
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325
(304) 347-2115
Facsimile: (304) 343-1118
gpatterson@bowlesrice.com

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INTRODUCTION

Pursuant to W. Va. R. App. P. 25, Petitioners Danny Webb and Danny Webb Construction, Inc. respectfully submit this Petition for Rehearing in response to the Memorandum Decision by this Court delivered on June 9, 2017. Under Rule 25, petitions for rehearing are appropriate where, in the opinion of the petitioner, the Court has overlooked or misapprehended critical points of law and fact. As explained in this Petition, the majority misapprehended the following critical points of law and fact:

I. The Court's Memorandum Decision mischaracterizes the nature of the Oil and Gas Lease and infers an interpretation inconsistent with the intent of the parties.

II. The Court's Memorandum Decision fails to properly apply West Virginia law with respect to knowledge imputed to corporations.

III. The Court's Memorandum Decision is not consistent with prior decisions regarding lease construction or practices in the oil and gas industry.

ARGUMENT FOR REHEARING

I. The Court's Memorandum Decision characterizes the Oil and Gas Lease in a manner inconsistent with the record, inconsistent with this Court's prior holdings, and inconsistent with the intent of the parties.

The Court's analysis of the Oil and Gas Lease is inconsistent with the record in this case, inconsistent with the prior holdings of this Court, inconsistent with the Oil and Gas Lease, and inconsistent with the understanding of the parties. In the Court's Memorandum Decision, the Court finds that "the purpose of the granting clause is explicitly for 'the purpose of

prospecting, exploring by geophysical and other methods, drilling both verically (sic) and horizontally, mining, operating for, producing and storing oil and/or natural gas and/or coalbed methane (hereinafter along with natural gas collectively called and including in the word "gas"), or all three . . . .'" (Memorandum Decision, p. 9.) The Court continued by saying that "[w]hen the granting clause references the 'right to inject air, gas, water, salt water, brine, and other fluids from any source,' it is not incorporating and expanding the injection right contained in paragraph 14. Rather, the granting clause is strictly limited to the purpose of exploring, operating for, producing, and storing oil and gas." (Memorandum Decision, p. 9.) Surprisingly, the Court acknowledges that "[it] is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning." Syl. Pt. 3, *Bennett v. Dove*, 166 W. Va. 772, 277 S.E.2d 617 (1981). (Memorandum Decision, p. 9.) However, the Memorandum Decision goes on to say that "[w]e consider the granting clause with acknowledgment of the oil and gas exploration and production industry practices using geophysical and horizontal drilling techniques, including fracturing, which use injection of various fluids to explore and, ideally, product oil and gas." (Memorandum Decision, p. 9.) This resort by the Court to factors beyond the text of the Oil and Gas Lease to arrive at the interpretation of the lease advanced in the Memorandum Decision is inconsistent with the prior holdings of this Court and practices in the industry.

Here, the Court found that the granting clause on the first page of the Oil and Gas Lease means something other than what it says, yet the Court offered no basis for its interpretation. While the oral argument held in this case did involve some discussion about the contemporary practices used in the oil and gas industry to drill and complete oil and natural gas wells, no such testimony was offered before the lower court, and no evidence on which this

Court could rely to reach such an interpretation was part of the record before the Court. Such reliance on extrinsic evidence was improper if the Court actually believed the language of the Oil and Gas Lease to be clear and unambiguous.[1] However, if the Court found the language of the granting clause on the first page of the Oil and Gas Lease to be less than crystal clear, then the Court should have refrained from imposing an interpretation based on insufficient facts and remanded the case back to the Circuit Court of Fayette County for additional findings of fact. *See Clark Apartments ex rel. Hood v. Walaszczyk*, 213 W. Va. 369, 582 S.E.2d 816 (2003) (per curiam). The Court's reference to industrial practices in the oil and natural gas industry as a basis for formulation of the Court's interpretation of the Oil and Gas Lease was improper under this Court's precedents, the West Virginia Rules of Civil Procedure, general oil and gas leasing protocol, and general practices in the oil and gas industry.

W. Va. R. Civ. Pro. 52(a) provides, in part, that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing preliminary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action." In the Court's Memorandum Decision, the Court had to resort to additional facts outside the record, and outside the Order entered by the Circuit Court of Fayette County, to uphold the lower court's order. This is inconsistent with the prior holdings of this Court, which require that a case be remanded for additional findings of fact in cases where additional factual findings are necessary. In Syl. Pt. 1,

[1] In Syl. Pt. 1, *Berkeley County Public Service District v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968), this Court held that "[t]he question as to whether a contract is ambiguous is a question of law to be determined by the court." Similarly, in Syl. Pt. 1, *Cotiga Development Co. v. United Fuels Gas Co.*, 147 W. Va. 484, 128 S.E.2s 626 (1962), this Court said "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent."

Commonwealth Tire Co. v. Tri-State Tire Co., 156 W. Va. 351, 193 S.E.2d 544 (1972), this Court held that "[r]ule 52(a) mandatorily requires the trial court, in all actions tried upon the facts without a jury, to find the facts specially and state separately its conclusions of law thereon before the entry of judgment. The failure to do so constitutes neglect of duty on the part of the trial court, ***and if it appears on appeal that the rule has not been complied with, the case may be remanded for compliance.***" (emphasis added) Here, if this Court was unable to conclude that the findings of fact and conclusions of law made by the Circuit Court of Fayette County provided a sufficient basis on which to affirm that court's order, then the Court should have remanded this case back to the circuit court for additional proceedings to establish a more complete factual record. *Blevins v. May*, 158 W. Va. 531, 212 S.E.2s 85 (1975) ("When the record in an action or suit is such that an appellate court can not in justice determine the judgment that should be finally rendered, the case should be remanded to the trial court for further development." Syl. Pt. 2, *South Side Lumber Co. v. Stone Construction Co.*, 151 W.Va. 439, 152 S.E.2d 721 (1967)).

II. The Court's Memorandum Decision fails to properly apply West Virginia law with respect to knowledge imputed to corporations.

Under this Court's estoppel jurisprudence, North Hills Group should have been estopped from asserting that the Oil and Gas Lease was terminated. As the Court observed, since *Dunbar Housing Authority v. Nesmith*, 184 W. Va. 288, 400 S.E.2d 296 (1990) was decided over twenty years ago, this Court has held that West Virginia follows the general rule that a lessor waives his or her right to forfeit a lease for a breach of a covenant or condition when, subsequently, he or she accepts rental payments "with knowledge or full notice of such breach." *Id.* at 291, 400 S.E.2d at 299. The Memorandum Decision incorrectly characterizes the record in

this case, however, when it says that "the record is also abundantly clear that North Hills Group had no knowledge that anything other than salt water or brine was being injected into the 508/1A well until learning information at a Fayette County Commission meeting in November, 2014, which prompted an inquiry into the nature of Webb Construction operations on the premises." (Memorandum Decision at p. 11.)

The only witness called to testify on behalf of North Hills Group was Patricia Hamilton. Ms. Hamilton testified that ***she*** first became aware of Webb Construction's operations on the leased premises at the November 2014, Fayette County Commission meeting. (J.A. at 271-75.) However, it is a significant departure from this Court's prior holdings to now conclude that because Ms. Hamilton was previously unaware of Webb Construction's ongoing operations on the leased premises, then the corporate entity of North Hills Group, Inc. was also unaware. Such a conclusion is not only unsupported by the record in this case, but also at odds with this Court's prior holdings with respect to knowledge imputed to a corporation. What Patricia Hamilton knew and when she knew it is irrelevant in any analysis of the applicability of estoppel to the ability of North Hills Group to terminate the Oil and Gas Lease.

For purposes of determining the applicability of estoppel to this case, what matters, and all that matters, is what the officers and directors of North Hills Group, Inc. knew when the Oil and Gas Lease was entered into and throughout the term of the Oil and Gas Lease. The record is clear that Ms. Hamilton did not negotiate the Oil and Gas Lease. The North Hills Group officers and directors who did negotiate the Oil and Gas Lease were not called as witnesses. However, the representatives of North Hills Group, Inc. who negotiated the Oil and Gas Lease knew that the purposes of the lease included injection of water from other sources

besides wells drilled on the leased premises and accepted rental payments while those injections occurred.

In *Commercial Banking & Trust Co. v. Doddridge County Bank*, 119 W. Va. 449, 194 S.E. 619 (1937), this court recognized that "[t]he law will also impute to a corporation knowledge of facts which its directors ought to know, in the exercise of ordinary diligence in the discharge of their official duties, when the imputation of such knowledge to the corporation is necessary to protect the rights of third persons. The directors are presumed to know that which it is their duty to know and which they have the means of knowing." 3 *Thompson on Corporations*, 354, § 1783. In *Commercial Banking & Trust Co.*, this Court went on to say that "[t]he manner in which a corporation's business is conducted may be such as to impute to the board of directors and the corporation knowledge of business transactions entered into by a representative of the corporation." *Id.* (citing *Beall v. Morgantown and Kingwood Railroad Co.*, 118 W.Va. 289, 190 S.E. 333 (1937).) This principle is not unique to West Virginia. Indeed, the United States Supreme Court has noted that corporate officers and directors have a duty to remain informed about the corporations they govern and may not simply hide their heads in the sand in order to preclude estoppel. In *Martin v. Webb*, the United States Supreme Court noted that "[knowledge] which they ought, by proper diligence, to have known as to the general course of business in the [corporation], they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." 110 U.S. 7 (1884) (overruled on other grounds, *Atherton v. FDIC*, 519 U.S. 213 (1997)). North Hills Group, Inc. accepted in excess of Eighty Thousand Dollars ($80,000.00) from Webb Construction during the term of the Oil and Gas Lease. The corporation's officers and directors knew that none of the money they received was derived from

royalty payments from a producing oil or natural gas well. North Hills Group, Inc. twice received copies of Webb Construction's injection permits, once in September 2008, (J.A. at 797-99.) and again in December 2014, and the record contains no evidence of any objection by North Hills Group. On the very first page of Webb Construction's permits, the permit states that Webb Construction is

> "authorized by this permit to inject Class II fluids that are brought to the surface in connection with conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection . . . ." (J.A. at 800.)

The officers and directors of North Hills Group, Inc. have changed since the Oil and Gas Lease was executed, and while Ms. Hamilton may not have known that fluids from other wells were being injected, the corporation, North Hills Group, Inc. did know long before Ms. Hamilton became an officer. (J.A. at 797-99.) Moreover, the officers and directors of North Hills Group, Inc. could have at any time made their own independent inquiries into the nature of Webb Construction's operations on the leased premises. They did not.

III. The Court's Memorandum Decision is not consistent with prior decisions regarding lease construction or practices in the oil and gas industry.

The Court's Memorandum Decision notes that "[t]his case is resolved based upon the plain language of the Lease, and the evidence that substances other than salt water or brine were injected into the 508/1A well, which was not proven to be unproductive." (Memorandum Decision, p. 11.) First, the statement that well 508/1A had not proven to be unproductive is totally inconsistent with the record, including the Memorandum Decision.

As the Memorandum Decision indicates, North Hills Group sold Webb Construction a tract of land on which a plugged, but unproductive well was located. (J.A. at 231.) In contrast to the well on the deeded property, the well on the leased property was so unproductive that it had been plugged with cement and abandoned. (J.A. at 182.) The Court's statement that "[m]oreover, the fluids were injected into a well that was not proven to be unproductive' is inconsistent with the facts. Well 508 was, as noted in the Memorandum Decision, drilled and completely by Peake Petroleum Company in 1982, produced for several years, became non-productive, and was plugged as a non-productive well by the year 1986 (J.A., at 83.), which is 25 years prior to the time the lease in issue here was executed. The well had been proven so unproductive it was plugged and the prior lease surrendered. The parties knew the totally unproductive plugged well was on the lease premises, and that is why Paragraph 14 of the Lease provides that the lessee is granted the right to inject in any well "...drilled **or located** upon the lease premises which may prove unproductive of oil and or gas...." [emphasis added]. Well 508 was located on the leased premises, produced, but became so unproductive that it had been plugged by pumping cement in the well (J.A. at 83.). When Webb Construction drilled out the cement plugs, its intention was to convert well 508 into an injection well as contemplated by the Lease, but there was a slight chance the well might have been productive because Webb Construction had injected into the deeded well. Webb Construction did give well 508 the chance to be productive; it did not produce, and was recompleted as an injection well. There is no other evidence in the record on that point. The Memorandum Decision refers to the testimony of Webb Construction's representative on that point, but ignores it.

The Memorandum Decision relies on the operation of the habendum clause in the granting language of the opening paragraphs of the Oil and Gas Lease to conclude the lease

"terminated on its own accord at the conclusion of the secondary term. No party needed to take any action with respect to termination." (Memorandum Decision, P. 10.) However, the Court also plainly states that "[w]e accept the contention of the Webb Petitioners that the Lease is not a standard lease, despite its title, but, rather, it is a 'dual purpose lease.'" (Memorandum Decision, P. 8.) As the Court agreed, the Lease was never meant to operate as a run-of-the-mill production lease, *id.*, and it was error to conclude that the Lease could be terminated like such a lease. The Court's Memorandum Decision implies an obligation on the lessee of the lease to produce oil and gas, when it is clear that the Lease is held by the injection and storage of gas or brine, which occurred.

The habendum clause of Paragraph 14 of the Lease provides that Webb Construction could maintain the Lease "...in the event such salt brine injection ... continues beyond the primary or secondary term of this lease, then the lease shall continue in full force and effect so long as [Webb Construction] shall continue paying lessor annually thereafter the sum of Three Thousand Six Hundred Twenty-Four ($3,624.00) for such privilege so long as such activity continues.") (J.A. at 52.) There is no dispute that Webb Construction has made all payments required under the Lease, and there is no dispute that Webb Construction has injected salt water and brine into the leased premises. Salt brine injection has continued, and with the salt brine, injection of "...other fluids..." from oil and gas production has also continued as authorized in rights granting paragraph of the lease. In addition to Paragraph 14, Paragraph 2 of the lease provides that the lease continues "[so long as oil or gas] is produced... **or as long as gas or brine is stored therein.**" Brine is being stored in the lease premises, and as authorized by the grant of the right to inject other fluids, other fluids are being injected as well. Those other fluids also contain brine. The next question is what compensation the lessor should receive

because the lease continued? That question is answered by paragraph 14, which provides the amount of rent, which was paid.

For purposes of maintaining the Oil and Gas Lease under Paragraph 14, Webb Construction had to meet only two requirements: (1) payment of the required annual fee of $3,624.00, and (2) continuous injection of salt water or brine. It is undisputed Webb Construction met both requirements. Webb Construction's injection of other fluids was not a breach of the Lease because other fluids where specifically authorized. Brine and other fluids within flow back from oil and gas fracturing operations, have been injected since Well 508 was converted to an injection well in 2008 as authorized by the Lease. The Lease remains effective under Paragraph 2 and Paragraph 14 so long as the rental payments are made, which admittedly they have been. This Court alleges that Webb Construction would "conflate" the Lease, but this Court has ignored the granting words of Paragraph 2, and the plain language of the Oil and Gas Lease. The Court would read Paragraph 14 as if the lease contained no other language, when the copy of the lease in the Joint Appendix is 13 pages long.

Termination of the Lease works a forfeiture, and is a harsh remedy. In *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008), this Court explored the applicability of equitable and legal remedies in the context of disputes arising out of oil and gas lease agreements. There, this Court noted that an alleged failure by a lessee to honor a covenant in an oil and gas lease agreement is ordinarily redressed in an action for damages, not termination or rescission of the underlying lease agreement. *See Doddridge County Oil and Gas Co. v. Smith*, 154 F. 970 (N.D.W.Va. 1907) (recognizing that a lessee's failure to honor obligations to lessor "is ordinarily [redressed] by action at law for damages, and not by way of forfeiture of the lessee's [other rights under the lease]."); *accord* Syl. Pt. 3, *Core v.*

New York Petroleum Co., 52 W. Va. 276, 43 S.E.128 (1903) ("... the remedy for a breach of an implied covenant is ordinarily not by way of forfeiture of the lease in whole or in part, but by an action for damages caused by such breach."). If the North Hills Group, Inc., wanted Construction to drill a new well, they should have, in compliance with *St. Luke's United Methodist Church,* made a demand to drill, thus giving the lessee the opportunity to drill or surrender the oil and gas drilling and operating parts of the lease, instead of seeking termination or forfeiture.

North Hills Group, Inc. cannot, and has not, denied that Webb Construction has faithfully made all payments required under the Lease to keep the agreement in full force and effect. Likewise, North Hills Group, Inc. cannot deny that Webb Construction has continuously utilized the leased premises for injection of salt water and brine. These are the only two factors necessary for Webb Construction to maintain the Lease Agreement under the habendum clause of Paragraph 14.

Memorandum Decision states that the purpose of the granting clause of the lease is "...explicitly for 'the purpose of prospecting, exploring by geophysical and other methods, drilling both verically (sic) and horizontally, mining, operating for, producing and storing oil and/or natural gas and/or coalbed methane (hereinafter along with natural gas collectively called and included in the word "gas"), or all three'". Certainly, those purposes were granted, but those were not the only purposes granted. The granting clause of the lease continues, "...and the **further exclusive right to inject air, gas, water, salt water, brine and other fluids from any source into the subsurface strata** and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of said land, alone or jointly with neighboring land, for the production, saving, storing and taking care of oil and gas and **the injection of air,**

gas, water, brine and other fluids into the subsurface strata...". The Lease granted the right to inject other fluids specifically two times, and it also granted such other rights as were necessary for that purpose. The Memorandum Decision states: "...the granting clause is strictly limited to the purpose of exploring, operation for, producing, and storing oil and gas". That statement is absolutely, totally, clearly wrong. Surely justice requires at least consideration of the agreement of the parties.

This Court seems to believe that the Lease language regarding "other fluids" contemplated fracturing operations in connection with production. Nothing could be further from the practices of an industry that is critically important to our state. Very few oil and gas leases contain any injection language whatsoever. Fracturing is absolutely necessary to produce oil and gas from the valuable Marcellus and Utica shales, and has been used in almost every well drilled in West Virginia since the 1950s. Water, other fluids, and sand are injected, a practice even President Obama's Environmental Protection Agency recently found safe.[2]

As fracturing is necessary to oil and gas production, the right to fracture is implied in every lease. In West Virginia, it is well established that when an estate is granted, all the means to obtain the estate and the fruits of it are also granted. *Squires v. Lafferty*, 95 W.Va. 307, 121 S.E. 90 (1924); *Porter v. Mack Mfg. Co.*, 65 W.Va. 636, 64 S.E. 853 (1909), *Squires, supra, McKell v. Collins Colliery Co.*, 46 W.Va. 625, 33 S.E. 765 (1899). This right extends to all acts reasonably necessary for the minerals exploration, production, removal and marketing. *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 SE.2d, 721 (W. Va. 1980), *Adkins v. United*

[2] *See* . EPA's *Study of Hydraulic Fracturing for Oil and Gas and Its Potential Impact on Drinking Water Resources, Final Assessment 2016*, released 12/12/2016, https://www.epa.gov/hfstudy (last accessed July 10, 2017).

Fuel Gas Co., 134 W.Va. 719, 61 S.E.2d 633, (1950), 54 Am.Jur.2d *Mines and Minerals* §210, 58 C.J.S. *Mines and Minerals* §159, R. Donely, *Coal Mining Rights and Privileges in West Virginia*, 52 W.Va. L.Rev. 32 (1949). There was no need for the Lease to separately state the right to inject as part of the oil and gas production purposes of the Lease. The injection and storage rights were separately stated in the granting clause because this is a multiple purpose Lease. The right to inject fresh and salt water is even implied in every production lease.[3] As the right is implied in connection with oil and gas production, the only reason to specifically grant the right is because the injection right was separate, and substances other than fresh or salt water would be injected.

Fracturing occurs even though oil and gas leases do not contain injection rights because it is necessary for production, and benefits the many thousands of royalty owners, producer employees, oil and gas service companies, lawyers and their employees, title abstractors, court house workers, engineers, rig hands, office employees, investors, bankers, hotel operators, truck sales people, equipment manufacturers and repairmen, advertisers, and others involved in the oil

[3] *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972) ("The implied grant of reasonable use extends to and includes the right to inject fresh water from the leased premises in such amount as may be reasonably necessary to carry out the lessee's operations under the lease."); *Mosser v. Denbury Res., Inc.*, 112 F. Supp. 3d 906, 913 (D.N.D. 2015) ("[U]sing the subsurface for disposal of salt water would be an implied right under the lease given it is a necessary consequence of oil and gas production and the need to dispose of it."); *Colburn v. Parker & Parsley Dev. Co.*, 17 Kan. App. 2d 638, 646 (1992) (An oil and gas lease includes an implied covenant to dispose of the salt water produced during operations by utilizing a saltwater disposal well drilled on the leased premises without additional compensation to the lessor and such a right is required in order for the production of oil and gas to be accomplished.); *Leger v. Petroleum Engineers, Inc.*, 499 So. 2d 953, 956 (La. Ct. App. 1986) (Disposal of salt water obtained during production of oil was impliedly granted under mineral lease where salt water disposal was reasonably necessary for production of oil from leased property and such use did not cause damage to surface or subsurface.); *Stephens v. Finley Res., Inc.*, 2006 WL 768877, at *1 (Tex. App. Mar. 27, 2006) (A lessee has an implied right to dispose of salt water produced in conjunction with performing its contractual obligations and may do so by injecting it into an oil and gas well on the leased premises.); *Brown v. Lundell*, 162 Tex. 84, 344 S.W.2d 863, 869 (Tex.1961) (A lessee has the right to use so much of the land as is reasonably necessary in the production of oil, and since the production of oil necessarily involves its separation from the salt water, the lessee has the right under the implied terms of the lease to use the land for that purpose.)

and gas industry. Fracturing brings high-value wells which are taxed as property, and a substantial portion of that property tax revenue goes to our schools. Fracturing brings millions of dollars of severance tax revenue – for example, $186,800,214 in 2014, $156,800,000 in 2015, and $72,300,000 in 2016 - and more in the future. After fracturing, the frac fluid, which contains brine but is mostly water, must have some place to go. West Virginia's solution to the question of where to put frac fluid is to inject it deep into the ground, way below the surface water, and way below subsurface aquifers which contain fresh water, back into the deeper brine producing subsurface formations that formerly produced oil and gas and already contain brine and fracturing fluid, using injection wells like the one in issue here.

Injection is so important to the oil and gas industry and the State of West Virginia that Senators Manchin and Capito have joined together to sponsor federal legislation to create an injection and storage hub for oil and gas liquids in West Virginia and surrounding states.[4] Injection rights must be upheld for the oil and gas industry to bring West Virginia the enormous benefits it offers. Webb Construction has no doubt that the current generation of owners of North Hills Group, Inc. does not like fracturing, and does not want oil and gas production. But that is not grounds to cancel an injection lease the prior owners of North Hills Group, Inc. authorized and profited from. Ignoring rights clearly granted jeopardizes the industry which might provide employment and revenue to keep West Virginia finically stable.

CONCLUSION

The Court's Memorandum Decision affirming the order by the Circuit Court of Fayette County declaring the Oil and Gas Lease between Webb Construction and North Hills

[4] *See* Senate Bill 1075, "*Appalachian Ethane Storage Hub Study Act*," introduced May 9, 2017.

Group, Inc. to be terminated is a significant departure from many prior precedents of this Court. Based on the facts recited and the law applied in the Memorandum Decision, it is apparent that the Court lacked a sufficient factual record on which to base a complete decision in this matter. Moreover, this factual deficiency apparently caused the Court to mistakenly believe that the Circuit Court was proper when it entered a permanent injunction against Webb Construction. Additional factual development in this case would prove that the Oil and Gas Lease agreement never terminated by its own terms, and that any injunction entered in this case should have been, at most, a temporary injunction to permit proper discovery and factual development under the West Virginia Rules of Civil Procedure.

Webb Construction respectfully asks that this Court either (1) grant a rehearing of this matter, or (2) enter an Order remanding this case back to the Circuit Court of Fayette County for more complete factual development through the process of civil litigation.

Respectfully submitted this 10th day of July, 2017.

DANNY WEBB CONSTRUCTION, INC., and DANNY WEBB

By Counsel

George A. Patterson, III (WV Bar No. 2831)
Counsel for Petitioners
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325
(304) 347-1118
Facsimile: (304) 343-2867
gpatterson@bowlesrice.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE No. 16-0640

DANNY WEBB and
DANNY WEBB CONSTRUCTION, INC.,

Respondents Below, Petitioners,

Appeal from a final order of the
Circuit Court of Fayette County in
Civil Action No. 16-C-9.

v.

NORTH HILLS GROUP, INC.,

Petitioner Below, Respondent.

CERTIFICATE OF SERVICE

I, George A. Patterson, III, counsel for Danny Webb and Danny Webb Construction, Inc., do hereby certify that the foregoing **"Petitioners' Reply Brief"** was served upon the following by hand delivery this 10th day of July, 2017:

Kevin Thompson, Esq.
David Barney, Esq.
Thompson Barney PLLC
2030 Kanawha Boulevard, East
Charleston, West Virginia 25311

George A. Patterson, III (WV Bar No. 2831)