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June 15, 2017

VIA HAND DELIVERY ON JUNE 16, 2017

Honorable Teresa J. Brown, Clerk
Franklin County Circuit Court
275 South Main Street, Suite 212
Rocky Mount, VA 24151

Re: Appalachian Power Company v. William W. Nissen, II and Lora J. Nissen
CL17001605-00

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter please find Plaintiff's Reply Memorandum of Law in Further Support of Its Motion for Summary Judgment.

By copy of this letter, I am advising counsel for the Defendants of this filing.

Thank you for your assistance in this filing. Should you have any questions, please feel free to contact me.

Very truly yours,

WOODS ROGERS PLC

Matthew P. Pritts

MPP:emk
Enclosure

cc: Steven C. Wandrei, Esq. (*w/encl. via e-mail & mail*)
J. Frederick Watson, Esq. and Pavlina B. Dirom, Esq. (*w/encl. via e-mail & mail*)
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VIRGINIA:

IN THE CIRCUIT COURT FOR FRANKLIN COUNTY

APPALACHIAN POWER COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
WILLIAM W. NISSEN, II,	)	Case No. CL17-1605
	)	
and	)	
	)	
LORA J. NISSEN,	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff Appalachian Power Company ("APCO") submits this reply memorandum of law in further support of its motion for summary judgment against Defendants William W. Nissen, II, and Lora J. Nissen (collectively, the "Nissens").

I. INTRODUCTION

In opposition to APCO's motion for summary judgment, the Nissens ignore the relevant case law and relevant facts. They do not cite, much less distinguish, any one of the many cases that have addressed the very same issues raised in this case and decided them in APCO's favor, such as this Court's recent decision in *Pressl v. Appalachian Power Co.*, No. CL15-631. Nor do they mention the undisputed fact that they have built a dock that has more than twice as much square footage as is allowed under the Shoreline Management Plan ("SMP"), despite APCO's repeated requests that they stop.

Instead of addressing what is actually relevant to the parties' dispute, the Nissens raise a series of red herrings, almost all of which have already been addressed by this and other courts

and rejected. As demonstrated in APCO's opening memorandum and below, this case is not complicated: Under the plain and unambiguous language of the Flowage Right and Easement Deed ("Flowage Easement"), APCO has the right to remove any structure below the 800-foot elevation contour of the Nissens' property at any time and for any reason. APCO now seeks to enforce that right because the Nissens have built a dock that exceeds the size requirements of the SMP without prior approval from APCO. The Nissens have refused APCO's request to remove the dock or, in the alternative, to allow APCO to enter their property so that it may remove the dock itself. Accordingly, the Nissens are in violation of the Flowage Easement.

For these and the other reasons set forth in APCO's opening memorandum and below, the Court should grant APCO's motion for summary judgment, enter judgment in favor of APCO and against the Nissens, and grant APCO the declaratory and injunctive relief that it seeks against the Nissens.

II. ARGUMENT

A. The Nissens' arguments run contrary to the rulings of this and every other court to consider the Flowage Easement.

In their 28-page opposition memorandum, the Nissens do not cite, much less distinguish, any one of the numerous cases addressing the very same issues in this case. Perhaps the most glaring oversight is this Court's decision in *Pressl*, which was handed down just last month. There, the Pressls, owners of shoreline property on Smith Mountain Lake, challenged APCO's authority to regulate their construction of a dock below the 800-foot elevation contour, making many of the same arguments that the Nissens make here. The Court rejected each one of those arguments, sustained APCO's demurrer, and dismissed the complaint with prejudice. In doing so, the Court reached the following conclusions:

1. The language of the April 18, 1960 [Flowage Easement], which the Pressls agree applies to their property on Smith Mountain Lake, is plain and unambiguous;

2. The Flowage Easement grants APCO the right to overflow and/or affect the Pressls' property below the 800-foot elevation contour continuously or from time to time in any manner whatsoever, as a result of the construction, existence, operation and/or maintenance of the lake's dam and power station;

3. The Flowage Easement also grants APCO the right to enter onto the Pressls' property at any time from time to time and, at its discretion, cut, burn, and/or remove (among other things) any and all structures and objects located below the 800-foot elevation contour.

4. APCO's rights, including the right to remove any and all structures and other things below the 800-foot elevation contour on the Pressls' property, includes the right to regulate (among other things) the construction of and occupancy of the premises by any and all structures, including docks, on that portion of the property;

5. The Pressls' reserved right under the Flowage Easement to cross the portion of their property below the 800-foot elevation contour to reach the water of Smith Mountain Lake for recreational purposes does not include the right to construct any structures, including docks, on that portion.

. . . .

8. The application of the SMP through the Flowage Easement is a reasonable restriction on the Pressls' property rights for the portion of their property located below the 800-foot elevation contour; and

9. APCO's right to remove structures and improvements below the 800-foot elevation contour at its discretion encompasses the right to permit and approve on a pre-construction basis structures and improvements that would comply with its FERC license and SMP; such process provides an efficient economic process for the use of the property in question.

(Final Order 1–2, attached as Exhibit 11 to APCO's Memorandum of Law in Support of Its Motion for Summary Judgment.)

This Court's decision in *Pressl* is not an outlier. Quite the contrary: Every other court that has considered whether the Flowage Easement gives APCO the right to regulate the construction of structures such as a dock on land below the 800-foot elevation contour has likewise held that it does. *See Appalachian Power Co. v. Nissen*, 151 F. Supp. 3d 683 (W.D. Va.

2015); *Pressl v. Appalachian Power Co.*, 137 F. Supp. 3d 900, 910 (W.D. Va. 2015); *Appalachian Power Co. v. Arthur*, 39 F. Supp. 3d 790 (W.D. Va. 2014); *Appalachian Power Co. v. Longenecker*, No. 7:00-cv-731, 2001 U.S. Dist. LEXIS 27185, at *1 (W.D. Va. July 11, 2001).[1]

Rather than cite and attempt to distinguish *Pressl* and the other cases on point, the Nissens cite *Patterson v. Paul*, No. 290404, 2006 Mass. LCR LEXIS 17 (Mass. Land Ct. Feb. 21, 2006), from the Massachusetts Land Court. That case does not cite or apply Virginia law. Nor does it even address a flowage easement. It therefore has no relevance to the issues in this case.

At bottom, the Nissens fail to provide any reason why this case is distinguishable from *Pressl*, and there is none. The Court should thus follow its prior precedent, which was well reasoned and well supported, and conclude that the Flowage Easement gives APCO the right to remove the Nissens' oversized dock.

B. The Nissens ignore the relevant facts of this case.

The Nissens not only ignore the relevant cases, but they also ignore the relevant facts of this case. For instance, they do not address the fact that their dock is 3,520 square feet, which is almost 1,000 square feet larger than the average American home and over 2,000 square feet larger than what is allowed under the SMP. Nor do they address the fact that their dock, which takes up 65 of the 98 feet of shoreline on their property, exceeds other restrictions in the SMP concerning the dimensions and locations of docks.

While the Nissens go to great lengths to paint APCO's decision to enforce its rights under the Flowage Easement as arbitrary, they make no mention of their own actions. For example,

[1] As explained in APCO's opening memorandum, the Fourth Circuit vacated and remanded both *Nissen* and *Pressl* for lack of subject-matter jurisdiction. That court did not, however, reach the merits of either decision.

they do not discuss the fact that they continued to build their dock despite APCO's requests that they stop.

APCO does not seek to deprive the Nissens of a dock. But that dock must be of a size and location to meet the requirements of the SMP, which, as this Court held in *Pressl*, is a reasonable restriction on the rights of servient property owners. Indeed, the SMP serves to protect and enhance the scenic, recreational, and other environmental values of Smith Mountain Lake for the benefit of the Nissens and all other servient property owners.

C. The Nissens again argue that a reserved right "to cross" is equal to a right "to build."

As they have done before, the Nissens argue that the reserved right in the Flowage Easement "to cross said land to reach the impounded waters for recreational purposes" is actually a right to build a dock. (Defs.' Opp'n Mem. 12.) They argue that the Court should deny the motion for summary judgment by inferring that "recreational purposes" includes having a dock. *(Id.)*

The Grantors' reserved right was a right to possess and use said premises if such use was not inconsistent with the rights granted to APCO. (Flowage Easement 2.) The Nissens' argument that the right of "crossing" negates APCO's broad rights to prohibit unauthorized construction is flatly inconsistent with the estate, rights, and privileges granted to APCO. Logically, this possession and use could not be in the form of unfettered "recreational" construction, which use would be expressly contrary to APCO's right to remove any structures.

Judge Moon expressly rejected the Nissens' argument that the "right to cross" provides the right to construct anything as long as it is constructed for a recreational purpose. He stated:

> Moreover, the provision of the Flowage Easement retaining to the grantors "the right to cross said land to reach the impounded waters for recreational purposes" does not affect APCO's right to remove structures located below 800 FMSL. Giving these words their natural and ordinary meaning, the right to cross the land to access the lake for recreational purposes does not carry with it a right to build

> structures on that land, even if those structures are in furtherance of recreational use of the waters.

Nissen, 2015 U.S. Dist. LEXIS 53878, at *11 (W.D. Va. 2015).

It is a settled rule of construction, both in deeds and wills, that if an estate is conveyed, or an interest is given, or a benefit bestowed in one part of the instrument, by clear, unambiguous, and explicit words, such estate, interest, or benefit is not diminished nor destroyed by words in another part of the instrument, unless the terms that diminish or destroy the estate before given be as clear and decisive as the terms by which it is created. *Greenan v. Solomon*, 252 Va. 50, 55 (1996). The Nissens' interpretation simply tortures the language employed in the Flowage Easement.

D. APCO's regulation of other shoreline development is irrelevant as to whether it has the right to remove the Nissens' dock under the Flowage Easement.

In an effort to create a genuine issue of material fact, the Nissens argue that this Court must look to how APCO has regulated other shoreline development over the past 40-plus years in determining whether it has the right to remove the Nissens' dock under the Flowage Easement. (Defs.' Opp'n Mem. 19–21.) But what APCO has or has not done with respect to other shoreline development in the past is simply not relevant here. Indeed, Judge Moon found this point to be so obvious in the parties' federal litigation that he quickly dismissed it in a footnote, explaining:

> The [Nissens'] argument suggests that the Court rule that APCO's historical regulation, or lack thereof, should prove that APCO did not have the right to regulate their property. Whether APCO regulated property in the past or not is not at issue before the Court. The issue concerns only the regulation of the Nissen property at the current time. Therefore, the Court cannot concern itself with what APCO decided to regulate or not to regulate in the past, as it is irrelevant to the current action. The current action is based on questions concerning a Flowage Easement that the Court can ascertain from the clear language of the easement itself.

Nissen, 151 F. Supp. 3d at 689 n.2 (citing *Gordon v. Hoy*, 211 Va. 539, 541 (1971)).

In this case, then, the relevant inquiry is not what APCO has done in the past with respect to shoreline development, but rather, whether the Flowage Easement grants APCO the right to remove the Nissens' oversized dock, and, as this Court held in *Pressl*, it does.[2] Accordingly, there is no genuine issue of material fact that would preclude the Court from following its earlier precedent and granting summary judgment to APCO.

E. APCO has not waived its right to remove the Nissens' dock under the Flowage Easement.

The Nissens contend that APCO has somehow waived its right to remove their oversized dock under the Flowage Easement because it did not previously regulate the construction of such structures. This argument not only contradicts the plain and unambiguous language of the Flowage Easement and the undisputed facts of this case, but it also contradicts common sense.

The Flowage Easement clearly states that APCO may exercise its right to remove "at any time and from time to time" and that the construction of any structures other than fences "shall be deemed to be made under a revocable license from [APCO]." (Flowage Easement 2 (providing that uses that are inconsistent with rights granted to APCO are done under a revocable license from APCO and not adverse to any of its rights).) By allowing a structure to be built on land below the 800-foot elevation contour, then, APCO does not waive its right to remove that structure at some point in the future.

But even if that were not the case, it is undisputed here that there was no dock on the Nissens' property before 2014 when they started building the dock at issue. It is also undisputed that APCO objected to the dock in 2014 as the construction began (by filing suit to stop it in federal court). It is also undisputed that once the federal case was dismissed in January 2017 and

[2] By the same token, none of the discovery requests about APCO's regulation of other shoreline development in the past are relevant. The Court should thus grant APCO's pending motion for protective order as to those discovery requests, and ones dealing with other irrelevant issues.

the Nissens inquired of APCO whether APCO would object to the Nissens restarting construction, APCO responded that it objected and it filed this suit. So contrary to the Nissens' contention, APCO has not waived or otherwise slept on its right to remove their dock under the Flowage Easement.

F. *Brown v. Haley* lends no support to the Nissens' position because it did not address APCO's rights under the Flowage Easement.

In an attempt to support their incorrect reading of the Flowage Easement, the Nissens rely on dicta in *Brown v. Haley*, 233 Va. 210 (1987). (Defs.' Opp'n Mem. 8–12.) That case, however, is of help to them.

Brown has no relevance here. It dealt with the implied easement between the Browns and the Haleys; it did not deal with the express easement between the Browns and APCO. 233 Va. at 212. Indeed, the trial court saw no reason for keeping APCO in the case past the demurrer stage. *Id.* The case at hand, by contrast, deals with the express easement between the Nissens and APCO. That is significant because, as the Supreme Court of Virginia has made clear, when there is "an express easement created by deed whose terms govern the rights of the parties, . . . it is impermissible to imply an easement at odds with those terms." *Cooper v. Kolberg*, 247 Va. 341, 348 n.1 (1994) (citations omitted). Accordingly, the Court has held that *Brown* and cases of its ilk have no application in cases where, as here, there is an express easement governing the parties' rights. *Id.*

The Nissens also relied on *Brown* in the parties' federal litigation. There, they argued at the motion-to-dismiss stage that *Brown* stood for the proposition that APCO's rights under the Flowage Easement were limited to clearing the land below the 800-foot elevation contour for the creation of Smith Mountain Lake; thus, APCO could not prohibit servient property owners such as themselves from building docks over those easements. Judge Moon quickly dispensed of this

contention at oral argument, stating: "[*Brown* is] about Haley's easement, not about Appalachian's easement at all." Transcript of Oral Argument at 20, *Nissen*, 2015 U.S. Dist. LEXIS 53878 (relevant portions of transcript attached as **Exhibit 1**). Similarly, FERC has also noted that *Brown* "did not address the scope of Appalachian Power's easement." *Appalachian Power Co.*, 153 F.E.R.C. ¶ 61,299, 2015 FERC LEXIS 2040, at *25 (F.E.R.C. 2015).

In short, *Brown* is a case about an implied easement; it is not a case about APCO's flowage easement. It is thus inapposite here.

G. Code § 62.1-164 does not give the Nissens the right to build a dock without APCO's prior approval.

The Nissens contend that Code § 62.1-164 gives them the right to construct a dock. Although that statute does grant certain riparian owners the right to erect a private wharf, pier, or landing over the submerged lands of the Commonwealth, that right is limited. The statute, in relevant part, states:

> Any person owning land upon a watercourse may erect a private wharf on the same, or private pier or landing, in such watercourse opposite his land; provided, such wharf, pier or land is for noncommercial purposes and navigation be not obstructed, nor the private rights of any person be otherwise injured thereby.

Va. Code. § 62.1-164 (emphasis added). Accordingly, a riparian landowner may build a private wharf, pier, or landing only if (1) it is for noncommercial purposes, (2) it does not obstruct navigation, and (3) it does not violate the private rights of another.

Even assuming that the Nissens' dock meets the first two of these conditions, it does not meet the third: As this Court held in *Pressl*, "APCO's right to remove structures and improvements below the 800-foot elevation contour at its discretion [under the Flowage Easement] encompasses the right to permit and approve on a pre-construction basis structures and improvements that would comply with its FERC license and SMP." Thus, the Nissens'

construction of a dock without APCO's prior approval would be in violation of its rights under the Flowage Easement.

Because the Nissens have not obtained APCO's approval to construct the dock, it does not meet the conditions of Code § 62.1-164. Contrary to the Nissens' argument, then, that statute does not give them the right to build the dock. *Cf. Smith Mountain Lake Yacht Club v. Ramaker*, 261 Va. 240, 249 (2001) (holding that, pursuant to Code § 62.1-164, a riparian owner at Smith Mountain Lake may not build a dock "extending into a watercourse across the property of another without that owner's permission").

H. APCO's right to remove is not subject to an implied covenant of good faith and fair dealing.

The Nissens argue that APCO's right to remove structures under the Flowage Easement is not absolute but discretionary and thus subject to an implied covenant of good faith and fair dealing. (Defs.' Opp'n Mem. 15–16.) Accordingly, they continue, "APCO must have a rational, fair and reasonable reason consistent with the purposes of the Flowage Easement for exercising its discretion and must not exercise its discretion arbitrarily or capriciously." (*Id.*)

This contention is wrong for at least two reasons. First, the Flowage Easement is not subject to an implied covenant of good faith and fair dealing because it falls outside the scope of the Virginia Uniform Commercial Code. *See Harrison v. US Bank Nat'l Ass'n*, No. 3:12-cv-224, 2012 U.S. Dist. LEXIS 85735, at *5–6 (E.D. Va. June 20, 2012) ("Virginia . . . does not recognize an implied covenant of good faith and fair dealing in contracts outside of those governed by the Uniform Commercial Code (U.C.C.), and the U.C.C. 'expressly excludes the transfer of realty from its provisions.'" (citing *Greenwood Assocs. Inc. v. Crestar Bank*, 248 Va. 265, 270 (1994))).

Second, even if the Flowage Easement were subject to a covenant of good faith and fair dealing, that covenant would not apply to APCO's exercise of its right to remove. As this Court held in *Pressl*, the plain and unambiguous language of the "Flowage Easement . . . grants APCO the *right* to enter onto the Pressls' property at any time from time to time and, at its discretion, cut, burn, and/or remove (among other things) any and all structures and objects located below the 800-foot elevation contour." (Final Order 2, ¶ 3 (emphasis added).) The Virginia Supreme Court has long held that "when parties to a contract create valid and binding rights, an implied covenant of good faith and fair dealing is inapplicable to those rights." *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 38 (1997). That APCO may decide whether and when to exercise its right to remove does not make it any less of a right.

I. Even assuming that APCO's right to remove is subject to an implied covenant of good faith and fair dealing, the undisputed facts establish that APCO has acted in good faith and fairly in seeking the removal of the Nissens' dock.

If need be, this Court can decide as a matter of law that APCO's actions to remove the Nissens' oversized dock have been made in good faith and fairly. APCO's license from FERC allows it to grant permission to docks that meet the requirements of the SMP. (Ex. 1 to APCO's opening brief, at 61, Art. 415(b), also available at *Appalachian Power Co.*, 129 F.E.R.C. P62,201, 2009 FERC LEXIS 2427 (F.E.R.C. Dec. 15, 2009).) It is undisputed that the Nissens' dock does not comply with the size limitations on docks in the SMP, and thus does not comply with APCO's obligations under its license. It is too big, too tall, and has an enclosure that is too large, among other things. And this is not a situation where the size of the dock is just a small deviation from the SMP, like one that is 10 square feet too large. Instead, it is over 2,000 square feet larger than what is allowed under the SMP, which would allow only a dock of 1,500 square feet on the Nissens' narrow shoreline lot. (Ex. 2 to APCO's opening brief, at 39.) There is no

genuine issue of material fact regarding APCO's actions to remove the Nissens' oversized dock that would preclude the entry of summary judgment in favor of APCO.[3]

J. The Nissens' proposal for judicial intervention into APCO's decision to remove structures on land below the 800-foot elevation contour ignores the plain and unambiguous language of the Flowage Easement and would create an unreasonable and unworkable system.

The Nissens submit that the Flowage Easement does not give APCO the right to develop its own policy (i.e., the SMP) as to what docks it will allow and when it will exercise its right to remove structures on land below the 800-foot elevation contour. (Defs.' Opp'n Mem. 13–17.) Instead, they suggest that a court must determine on a case-by-case basis whether APCO's decision to remove is "rational, fair and reasonable" under the circumstances. (*Id.*)

This argument fails for at least three reasons. For starters, it ignores the plain and unambiguous language of the Flowage Easement, which provides, in relevant part, that APCO has the "right to enter upon said premises at any time and from time to time and, at [APCO's] discretion, to cut, burn and/or remove therefrom any and all buildings, structures, [and] improvements." (Flowage Easement 2.) Nothing in this or any other language in the Flowage Easement requires APCO to negotiate with servient property owners the adoption of a policy as to how and when it will exercise its right to remove.

Second, as this Court held in *Pressl*, "the application of the SMP through the flowage easement is a reasonable restriction on . . . property rights for the portion of their property located below the 800-foot elevation contour." (Final Order 3, ¶ 8.) After all, the SMP, which was developed after months and months of community input, ensures the protection and

[3] In an effort to cast themselves as the victims of some kind of vendetta, the Nissens suggest that this is the first time that APCO has sought to enforce its right to remove structures at the lakes. The cases cited in this brief demonstrate that this claim is not true. Over the years, APCO has brought or defended numerous cases involving that right, including *Longenecker*, *Arthur*, *Pressl*, and *Virginia Timberline, LLC v. Appalachian Power Co.*, 2008 U.S. Dist. LEXIS 6394 (W.D. Va. 2008), *aff'd*, 343 Fed. Appx 915 (2009).

enhancement of Smith Mountain Lake's recreational, environmental, cultural, and scenic resources, for all servient property owners.[4]

And third, judicial intervention into APCO's decision to remove would create an unreasonable and unworkable system. As private parties, APCO and the Nissens (or their predecessors in title) chose not to add any language requiring judicial oversight of APCO's decision to remove. And for good reason: Such a system would be costly and time consuming. Say, for instance, that the Court decided in this case that a dock with 3,520 square feet is too big and thus it is reasonable for APCO to seek to remove it. This decision would lead only to more litigation to determine whether a dock with 3,510 square feet is too big—and so on and so on.

APCO and the Nissens (or their predecessors in interest) did not intend to create such a system. Rather, they elected to keep the court out of APCO's decision to remove, allowing APCO and APCO alone to decide how and when to exercise that right. The Court should not go against the parties' intentions by imposing some *ad hoc* system requiring judicial intervention.

K. APCO's right to remove under the Flowage Easement is not limited by APCO's 1960 license from FERC.

Finally, the Nissens argue that APCO's right to remove under the Flowage Easement is limited by selected language in APCO's 1960 license from FERC. That is not so. The plain and unambiguous language of the Flowage Easement is much broader than the particular language the Nissens refer to in the1960 license. The right to remove provisions in the Flowage Easement are very broad. In another section, the Flowage Easement grants APCO rights to affect the property as a result of the "construction, existence, operation and/or maintenance of the aforesaid

[4] In 2010, the existing SMP was updated with input received from repeated meetings of a steering committee consisting of representatives from state agencies, counties, business organizations, and from meetings with homeowner groups, realtors, marina operators, surveyors, dock builders, and the general public. (See discussion of consultation in SMP, ex. 2 to APCO's opening brief, at 7-9.) FERC approved the updated SMP following public notice and comment, litigation, and a mediated settlement with the challengers to the SMP following a fifteen month long mediation. *Appalachian Power Co.*, 146 FERC ¶ 62,083 at 4-5 (2014).

dam and/or power station." The purpose of the easement grant concerned an ongoing obligation, on APCO's part, to operate and maintain the dam and power station - obligations that continue to be determined through updated licenses. APCO negotiated broad rights with servient property owners like the Nissens' predecessors in interest in the flowage easements.

CONCLUSION

For the reasons set forth in its opening memorandum and above, APCO requests that the Court grant APCO's motion for summary judgment, enter judgment in APCO's favor and against the Nissens, and grant APCO the declaratory and injunctive relief that it seeks against the Nissens.

Respectfully submitted,

APPALACHIAN POWER COMPANY

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2017, I sent a true copy of the foregoing Plaintiff's Reply Memorandum of Law in Further Support of Its Motion for Summary Judgment by regular and electronic mail to the following counsel for Defendants:

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Matthew P. Pritts

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

APPALACHIAN POWER COMPANY,

Plaintiff,

vs.

No. 7:14-cv-535
Lynchburg, Virginia
April 10, 2015

WILLIAM W. NISSEN, II, and
LORA J. NISSEN,

Defendants.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE.

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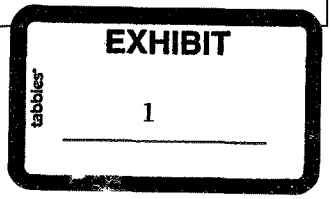
Proceedings recorded by mechanical stenography; computer-assisted transcription.



two, under paragraph number one. "And they will have the right to possess and use said premises in any manner not inconsistent with the estate rights and privileges herein granted to Appalachian and including the right to cross said land to reach the impounded waters for recreational purposes."

Now, "recreational purposes" meant there was some contemplation --

THE COURT: You said "use the land for recreational purposes" or the water for --

MR. KIDD: "To reach the impounded waters for recreational purposes."

THE COURT: Yeah. It doesn't say the land --

MR. KIDD: It does not. And the land, of course, is below the water at the point -- most of the time it is below the water that we're talking about. So they -- but the only way to reach the water is going to be across that land.

THE COURT: Yeah.

MR. KIDD: So you have the right to get to -- and that's what we say the *Brown* case was talking about, about how important it was --

THE COURT: I don't -- I don't -- the *Brown* case is between Brown and Haley; right?

MR. KIDD: Yes.

THE COURT: That's about Haley's easement, not about Appalachian's easement at all.

MR. KIDD: I agree with that, Your Honor.

The importance, I think, the *Brown* case has in this instance is how important it is in the state system that these easements and property owners' rights exist in a manner that is not inconsistent with what the easement intended to grant at the time --

THE COURT: Well, it is not what the easement intended, if it is plain language. Even -- no matter -- if the parties agreed to something -- I mean, is there any law that says if the parties agree to something that they -- you can get more or less because of what might have been somebody's subjective intent?

MR. KIDD: No, sir. But what we're saying is that the easement doesn't talk about docks; it doesn't talk about how you regulate the recreational use of the impounded waters. And so to the extent that it doesn't, then the document is ambiguous. And to say it reads --

THE COURT: Where do you find any such authority as that? I mean, it bothers me when lawyers come in and say I can order something and -- it is just so contrary to law. When you have got a plain language -- I mean, when there's no -- there's no confusion there. Recreational purposes on the water doesn't give you the right to build on the land.

I mean, recreation -- I mean, you can cross the land to get to the water. It doesn't mean you can build a canal or something from your home to the lake or whatever.

MR. KIDD: It doesn't mean that. But it also doesn't say -- the easement doesn't say that there's going to be any type of regulation --

THE COURT: Have you got a case that supports what you are saying?

MR. KIDD: No, sir, we're --

THE COURT: Anywhere in the United States?

MR. KIDD: No, sir, we're saying --

THE COURT: I had -- this would be the first case in the United States, or the English-speaking world, and your clients are paying for this?

MR. KIDD: Your Honor --

THE COURT: I mean -- I mean -- well, you realize any kind of relief like that, that would be so contrary to established law, that it would probably -- I would be bound by my oath to obey the law. Now, if the Fourth Circuit should decide something different, that's okay, but -- you know, they might have the power or the Supreme Court of the United States. But this court is bound by the law. They are bound by the law too, but they get -- they are last, so they get to say what the law is.

MR. KIDD: Yes, sir. But our argument is -- is,