IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

APPALACHIAN POWER COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
WILLIAM W. NISSEN, II,	)	**Case No.: 7:14-cv-00535**
	)	
and	)	
	)	
LORA J. NISSEN,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF APPALACHIAN POWER COMPANY'S MOTION TO DISMISS COUNTERCLAIM FOR DECLARATORY JUDGMENT

Plaintiff and counterclaim defendant Appalachian Power Company ("Appalachian"), by counsel, hereby submits this Memorandum of Law in Support of its Motion to Dismiss Counterclaim for Declaratory Judgment filed by the defendants and counterclaim plaintiffs, William W. Nissen, and Lora J. Nissen (the "Nissens"). Specifically, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Appalachian moves to dismiss each of the five requests for declaratory relief set forth in the Nissens' counterclaim.

The Nissens' first and second requests for declaratory judgment on the issue of subject matter jurisdiction should be dismissed because this Court has already decided that it has subject matter jurisdiction to hear this case, and the Nissens' requests for declaratory relief are improper attempts to attack a previous ruling of the Court. Furthermore, the question of whether a court has subject matter jurisdiction is not an issue that gives rise to an independent cause of action and, therefore, it is not justiciable under the Declaratory Judgment Act. Even if the matter of subject matter jurisdiction was justiciable in a declaratory judgment action, the Court could

dismiss such a claim at its discretion to avoid the host of problems that would follow if litigants were allowed to, in effect, appeal interlocutory orders through declaratory judgment actions.

The Nissens' third request for declaratory judgment that Appalachian does not have the authority to enforce its Shoreline Management Plan should be dismissed because it rests on a legal theory that has been rejected in a previous decision by this Court. This request also should be dismissed because it is essentially a collateral attack on the issuance of the project license to Appalachian, and on Appalachian's compliance with the license. This Court does not have subject matter jurisdiction to hear challenges to Appalachian's license.

The Nissens' fourth request for declaratory judgment, which contends that a taking occurred when FERC issued Appalachian its license and when FERC approved the Shoreline Management Plan ("SMP"), also should be dismissed. The Nissens do not have standing to assert that claim because they were not the owners of the property when the alleged taking occurred. Lastly, the Nissens' fifth request for declaratory judgment, which seeks a declaration that in order to comply with its license, Appalachian must work with various government bodies rather than enforcing its rights under the flowage easement, should be dismissed because this Court lacks subject matter jurisdiction to hear challenges to Appalachian's operating procedures under its license.

BACKGROUND INFORMATION

Appalachian operates the Smith Mountain Hydroelectric Project (the "Project") on Smith Mountain Lake and Leesville Lake pursuant to an order issued to it by the Federal Energy Regulatory Commission ("FERC").[1] The Nissens own property on Smith Mountain Lake lying above and below the Project boundary, which is at the elevation of 800 feet above mean sea level

[1] Compl., ¶¶ 7, 9 (referring to December 15, 2009 FERC License Order, 129 FERC 62,210, attached thereto as Exhibit A) (Dkt. No. 1); Defs.' Answer to Pl.'s Compl. and Countercl. ¶¶ 7, 9 (Dkt. No. 40).

("FMSL").[2] The Nissens' property is subject to a Flowage Right and Easement Deed dated September 12, 1960, by and between Appalachian and the Nissens' predecessors-in-title (the "Flowage Easement").[3] The Flowage Easement gives Appalachian the right to flood the land in connection with the operation of the hydroelectric project and, among other things, to enter upon the premises to "remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet."[4]

Pursuant to its license with FERC, Appalachian has the responsibility to allow only those uses and occupancies of the Project property which protect and enhance the scenic, recreational, and other environmental values of the Project.[5] To this end, Appalachian developed the Shoreline Management Plan ("SMP") to address shoreline issues and development at Smith Mountain Lake. FERC approved the current version of the SMP by order dated January 30, 2014.[6] The Nissens did not acquire their shoreline property until after this date, by a deed dated April 14, 2014.[7] After acquiring such property, the Nissens commenced construction of a dock, removed vegetation, constructed a road, and placed fill on land which Appalachian contends is within the Project boundary.[8]

Appalachian filed its Complaint in this action seeking a declaration that the Nissens violated Appalachian's rights by constructing a dock, removing vegetation, constructing a road, and placing fill below the 800 FMSL contour. In response, the Nissens submitted a Motion to

[2] Compl., ¶ 21 (Dkt. No. 1); Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 21 (Dkt. No. 40).
[3] Compl., ¶ 22 (referring to Flowage Easement attached thereto as Exhibit C) (Dkt. No. 1); Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 22 (Dkt. No. 40). A copy of the Flowage Easement is attached hereto as **Exhibit A**.
[4] Compl., ¶ 24 (Dkt. No. 1); Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 24 (Dkt. No. 40).
[5] Compl., ¶ 14 (Dkt. No. 1).
[6] Compl., ¶ 17 (Dkt. No. 1); Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 17 (Dkt. No. 40).
[7] Compl., ¶ 21 (Dkt. No. 1); Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 21 (Dkt. No. 40).
[8] Compl., ¶ 27-31 (Dkt. No. 1); Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 27-31 (Dkt. No. 40).

Dismiss on the grounds that, among other things, this Court did not have subject matter jurisdiction to hear Appalachian's claims.[9] After the Court denied their Motion to Dismiss, the Nissens filed their Answer to Plaintiff's Complaint and Counterclaim for Declaratory Judgment.[10] The Counterclaim for Declaratory Judgment incorporated the Nissens' responses to the allegations in Appalachian's Complaint,[11] and asserts five separate requests for declaratory judgment.

The Nissens' requests are generally summarized in a manner consistent with the heading for each separate Request. In the first and second requests, the Nissens seek declaratory judgment that this Court lacks the subject matter jurisdiction necessary to hear this case. The third request seeks declaratory judgment that, under the FERC License Order and SMP, the Flowage Easement provides Appalachian with insufficient property rights to regulate the Nissens' property. The fourth request seeks declaratory judgment that a taking has occurred with respect to the Nissens' property rights. Lastly, the fifth request seeks declaratory judgment that Appalachian must satisfy its obligations under its FERC License by coordinating with local, state and federal authorities rather than exercising its rights under the Flowage Easement.

ARGUMENT & AUTHORITIES

I. Applicable Legal Standards

a. The Declaratory Judgment Act

Under the Declaratory Judgment Act, "[i]n a case of actual controversy within its jurisdiction, … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. To satisfy the "actual

[9] Motion to Dismiss Complaint (Dkt No. 18).
[10] Defs.' Answer to Pl.'s Compl. and Countercl. (Dkt. No. 40).
[11] Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 39. (Dkt. No. 40).

controversy" requirement of the Declaratory Judgment Act, the dispute must "be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (*citing Aetna Life Ins. Co. v. Haworth*, 57 S. Ct. 461 (1937)).[12] Where a complaint seeking declaratory judgment concerns matters which do not present an actual controversy, it fails to state a cause of action. *Taylor v. U.S. Bd. of Parole*, 194 F.2d 882, 882 (C.A.D.C. 1952).

b. Rule 12(b)(1) Motion to Dismiss

A motion under Rule 12(b)(1) challenges the court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Article III, § 2 of the U.S. Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). The burden of proving subject matter jurisdiction rests upon the party that seeks to invoke the court's authority. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States,* 945 F.2d 765, 768 (4th Cir.1991), *cert denied,* 503 U.S. 984 (1992). District courts may not exercise ancillary jurisdiction over permissive counterclaims absent an independent basis for federal jurisdiction. *See Board of Ed. v. Admiral Heating and Ventilation, Inc.,* 511 F. Supp. 343 (N.D. Ill. 1981).

The Constitution's case or controversy limitation to the subject matter jurisdiction of federal courts is coextensive with the "actual controversy" requirement under the Declaratory Judgment Act. *See Teva Pharmaceuticals USA, Inc. v. Novartis Pharmaceuticals Corp.*, 482 F. 3d 1330, 1337 (Fed. Cir. 2007) ("[I]n a declaratory judgment action, 'all the circumstances' must demonstrate that a justiciable Article III 'controversy' exists. A justiciable Article III controversy

[12] The Fourth Circuit follows this general premise, noting that "a declaratory judgment action is appropriate when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and...when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Penn-America Ins. Co. v. Coffey*, 368 F.3d 409, 412 (4th Cir. 2004).

requires the party instituting the action to have standing and the issue presented to the court to be ripe.") (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "A justiciable controversy exists only where a plaintiff has shown "that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury [is] both 'real and immediate,' not 'conjectural' or 'hypothetical.' By injury in fact we mean an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Shenandoah Valley Network v. Capka*, 669 F. 3d 194, 202 (4th Cir. 2012) (internal punctuation marks and citations omitted). If the court lacks subject matter jurisdiction, it must dismiss the case. *See* Fed. R. Civ. P. 12(h)(3).

c. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) tests the sufficiency of a complaint. *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). The Fourth Circuit has concluded that the Supreme Court's decision in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), establishes a regime that is "more favorable to dismissal of a complaint" at the earliest stages of a case. *See Giarratano v. Johnson*, 521 F.3d 298, 306 n.3 (4th Cir. 2008). Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Fourth Circuit has recently explained:

> To survive a Rule 12(b)(6) motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." A*shcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Facts that are "merely consistent with" liability do not establish a plausible claim to relief. *Id*. (citation omitted). In addition, although we must view the facts alleged in the light most favorable to the plaintiff, we will not accept "legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments." *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (citation and internal quotation marks omitted).

United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc., 707 F.3d 451, 455 (4th Cir. 2013), *cert. denied,* 134 S. Ct. 1759 (2014).[13]

II. The Nissens' First and Second Requests For Declaratory Judgment Should Be Dismissed For Failure To State A Claim Upon Which Relief Can Be Granted.

The first and second requests for declaratory judgment in the Counterclaim both ask the Court to declare that it does not have subject matter jurisdiction over the matters at issue in this case. But this Court has already decided that it has subject matter jurisdiction over this case. Indeed, the Court's Memorandum Opinion on this matter was quite clear when it stated that "[a] straightforward reading of 16 U.S.C. § 825p shows that district courts have subject matter jurisdiction over these kinds of actions[,]" and "[t]his action thus falls within the exclusive jurisdiction of the District Courts of the United States." (Dkt. No. 34, p. 7).

Here, the Nissens have not asserted any reason why the Court's previous ruling should be disturbed, and certainly have not set forth any allegation of law or fact to plausibly support the conclusion that the previous ruling was clearly erroneous. In any event, if the Nissens wanted to challenge the Court's ruling on the issue of subject matter jurisdiction, the proper device to do so would be a motion to reconsider, not a request for declaratory judgment. *See* Fed. R. Civ. P. 54(b). Furthermore, Rule 12(b) provides that the way to raise the issue of subject matter jurisdiction is not through a request for declaratory judgment, but as a defense asserted in a responsive pleading or by motion under Rule 12(b)(1). Fed. R. Civ. P. 12(b). As it stands, in this case there is no actual controversy remaining as to subject matter jurisdiction because the Court has already ruled on the issue, and the ruling should not be disturbed except in the manner prescribed by the Federal Rules of Civil Procedure.

[13] When testing the legal sufficiency of a complaint, a defendant may supply and the court, may consider, all pertinent documents and contracts referred to in the complaint. *See, e.g., Gasner v. County of Dinwiddie*, 162 F.R.D. 280, 282 (E.D. Va. 1995); *Halzack Watkins v. Educational Credit Management Corp.*, 2011 WL 2015479, *1 n.1 (E.D. Va. 2011).

In addition, the Nissens first two requests for declaratory judgment should be dismissed because the question of whether this Court has subject matter jurisdiction does not relate to any legal relationship between the parties that would give rise to a claim. In other words, the Nissens could not assert a private right of action against Appalachian for filing a case in a court that did not have subject matter jurisdiction.[14] Given this, the Nissens cannot seek a declaratory judgment on the issue of whether there is subject matter jurisdiction. *See Campbell ex rel. Equity Units Holders v. American Intern. Group, Inc.*, --- F. Supp. 3d ---, 2015 WL 252228 *4 (E.D. Va. 2015) ("[T]o be eligible for a declaratory judgment, [a litigant] must first identify an underlying right for which she seeks a declaration.").

Also, the first and second requests—as well as the fourth and fifth requests—do not assert claims upon which relief can be granted because they seek declarations that "this case be remanded to the proper Virginia circuit court."[15] However, this case cannot be "remanded" because it has at all times been litigated in this (Federal) Court. Therefore, there is no State court from which the case was removed. *See* 28 U.S.C. § 1447.

Lastly, the first two requests should be dismissed under the Court's discretion to exercise declaratory jurisdiction. *See Alcan Aluminum Ltd. v. Department of Revenue*, 724 F.2d 1294, 1298 (7th Cir. 1984) ("[E]ven where a case presents an actual controversy, a court may refuse to grant declaratory relief for prudential reasons."); *White v. National Union Fire Ins. Co.,* 913 F.2d 165, 167 (4th Cir. 1990) ("[F]or a district court to have jurisdiction to issue a declaratory judgment… the trial court, in its discretion, must be satisfied that declaratory relief is appropriate—the 'prudential' inquiry.").

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[14] "[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Although the scope of subject matter jurisdiction for federal courts is set forth in Article III, Section 2, of the U.S. Constitution, Congress has not enacted a statute creating a private right of action for violation of this provision. Without Congress intending to create a private right of action, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

[15] Defs.' Answer to Pl.'s Compl. and Countercl. at pp. 6, 7, 15, and 16 (Dkt. No. 40).

Here, it would be prudential not to exercise declaratory jurisdiction over the first two requests because it would set a dangerous precedent inviting litigants to appeal denials of motions to dismiss and other interlocutory orders by way of requests for declaratory judgment. This type of procedural fencing, and the judicial inefficiency that would result, are the very evils that are meant to be avoided when courts decide whether to exercise discretion to hear declaratory judgment actions. *See The Hipage Co., Inc. v. Access2Go, Inc.*, 589 F. Supp. 2d 602, 615 (E.D. Va. 2008).

III. The Nissens' Third Request For Declaratory Judgment Should Be Dismissed For Failure To State A Plausible And Legally Sufficient Claim, And For Lack Of Subject Matter Jurisdiction.

In the third request for declaratory judgment, the Nissens pray that the Court enter an order declaring various things, all of which seek the same end. They want the Court to declare that Appalachian has no authority to keep the Nissens from constructing their oversized dock, removing vegetation, and constructing a road as described in the Complaint. However, this request fails to state a claim because the Nissens admit that their land is subject to Appalachian's easement, and the easement clearly gives Appalachian the right to prohibit such activities. *See Appalachian Power Co. v. Arthur*, 39 F. Supp. 3d 790, 2014 WL 3900618 (W.D. Va. 2014) (holding that the standard Flowage Right and Easement Deed gave Appalachian sufficient property rights to enforce the SMP at the 800 fmsl line and below).

The Nissens admit that their property is subject to the Flowage Easement in this case.[16] The Flowage Easement here provides the exact same rights to Appalachian as the Flowage Right and Easement Deed that was at issue in *Appalachian Power Co. v. Arthur*.[17] To wit, the instruments in both cases provide that Appalachian has the "right to overflow and/or affect so

[16] Compl., ¶ 22 (Dkt. No. 1), Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 17 (Dkt. No. 40).
[17] *Arthur,* 39 F. Supp. 3d at ___, 2014 WL 3900618, at *1; a copy of the Flowage Right and Easement Deed at issue in *Arthur* (referenced as Exhibit B to Dkt. No. 15 in Case No. 7:09-cv-00360) is attached hereto as **Exhibit B**.

much of the premises as be overflowed and/or affected . . . as a result of the construction, existence, operation and/or maintenance of . . . the dam and power station, [and] the impounding of the waters…."[18] Both instruments also grant Appalachian

> . . . the further right to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet.[19]

Further, the instruments in both cases retained the same rights to the grantors, specifically "the right to possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian."[20] Indeed, except for the identification of the grantors and the property effected, the Flowage Easement here and the one in *Arthur* are identical. *Comp.* Flowage Easement (attached hereto as Exhibit A) *with* Flowage Right and Easement Deed at issue in *Arthur* (attached hereto as Exhibit B).

Therefore, the Nissens' third request for declaratory judgment should be dismissed because the ruling in *Arthur* makes it clear that the Flowage Easement entitles Appalachian to enforce the SMP with regard to the portion of the Nissens' property within the Project boundary. *See Arthur*, 39 F. Supp. 3d at ___, 2014 WL 3900618 at *6. The Court in *Arthur* stated:

> It is [ ] evident that [Appalachian] not only receives regulatory authority from FERC to regulate the Project's boundaries in compliance with the SMP, but also possesses a Flowage Right and Easement Deed entitling it to enforce the SMP with regard to the portion of defendants' property within the Project boundary.

Id.

The express language in the Flowage Easement giving Appalachian the right to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut,

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[18] *Arthur,* 39 F. Supp. 3d at ___, 2014 WL 3900618, at *1; Compl., ¶¶ 22 (referencing Flowage Easement); Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 22 (Dkt. No. 40); Flowage Easement (attached hereto as Exhibit A).

[19] *Arthur*, 39 F. Supp. 3d at ___, 2014 WL 3900618, at *1- 2; Compl. ¶ 24; Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 24.

[20] *Arthur*, 39 F. Supp. 3d at ___, 2014 WL 3900618, at * 2; Flowage Easement, at p. 2.

burn and/or remove therefrom any and all buildings, structures, and improvements which are located below the 800 elevation contour clearly contradicts the Nissens' assertions in their counterclaim that: (1) the "Flowage Easement only limits the Nissens' rights to the property insofar as they may not materially impact [Appalachian]'s right to impound and flow waters up to the 800 foot contour level[;]" (¶ 62) and, (2) that Appalachian's "rights to the Nissens' property is limited to the ability to impound and flow waters up to the 800 foot contour and ensure that such flow is not being so impeded as to disrupt [Appalachian]'s operation of a hydroelectric dam." (¶ 63). Therefore, the Court does not have to accept these two allegations in considering whether the Nissens have sufficiently pled a justiciable controversy for the third request. *See Massey v. Ojanit*, 759 F.3d 343, 347 (4th Cir. 2014) (observing that a court "need not accept allegations that contradict matters properly subject to judicial notice or [ ] exhibit") (internal citations omitted).[21]

Considering the remarkable similarities between the instruments involved, the Nissens have not alleged sufficient facts to distinguish the facts in this case from those in *Arthur* to the extent necessary to nudge their claim for declaratory relief from "possible" to "plausible." *See Twombly,* 550 U.S. at 570 (To survive a motion to dismiss, a party must plead "enough facts to state a claim to relief that is plausible on its face… [and] nudge[ ] their claims across the line from conceivable to plausible."). Furthermore, just because the Nissens allege that the Flowage Easement does not provide Appalachian with sufficient "property rights to regulate the Nissens' property under the FERC License Order and SMP[,]",[22] this does not mean that the Court has to accept this allegation as true. *See Eastern Shore Markets, Inc. v. J.D. Assoc. Ltd.*, 213 F.3d 175, 180 (4th Cir. 2000) ("While we must take the facts in the light most favorable to the plaintiff, we

[21] Also, because they are contrary to the express language in the Flowage Easement, the Court need not accept the allegations in the third request that: (1) the "Flowage Easement … does not limit [the Nissens'] use [of the property] to specific dimension or purposes." (¶ 74), and (2) the "Flowage Easement … specifically only allows [Appalachian] to flood the property ..." (¶ 75).

[22] Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 78 (Dkt. No. 40).

need not accept the legal conclusions drawn from the facts.") (*citing Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir.1991), *cert denied,* 503 U.S. 936 (1992)). Indeed, from the holding in *Arthur*, the Nissens' conclusion of law here regarding Appalachian's rights under the Flowage Easement is clearly incorrect. This fact disposes-of or moots all of the declaration requests in the third request.

In addition, the third request should be dismissed under Rule 12(b)(1) because of a lack of subject matter jurisdiction. In this request, the Nissens are claiming that Appalachian is not in compliance with its federal license for the Project. They allege that Appalachian should have acquired more property rights in 1960, or in 2009 when its license was amended by the FERC License Order.[23] They also allege that Appalachian is using its permit system to regulate property which they claim is not subject to the SMP.[24] However, this is not the forum for the Nissens to contend that Appalachian is in violation of its federal license. "It is for FERC to decide in the first instance whether the licensee is in compliance with the conditions of the license." *DiLaura v. Power Authority*, 786 F. Supp. 241, 253 (W.D.N.Y. 1991), *aff'd*, 982 F.2d 73, 80 (2d Cir. 1992). Complaints may be made to the FERC, which can then investigate and make rulings to require compliance by the licensee with the terms of its license. The *DiLaura* court noted:

> It is the FERC, and not this Court, that has the power and the expertise to decide if the license was violated or if the current operating procedures should be changed. Thus, plaintiffs should have initially filed a complaint with FERC pursuant to 16 U.S.C. § 825e. If they were dissatisfied by FERC's determination, then they should have exhausted their administrative remedies and ultimately appealed to the Second Circuit Court of Appeals. It is the Court of Appeals, not the District Courts, that have sole jurisdiction over questions arising under FERC licenses.

[23] *See* the allegations in ¶¶ 69, 72, 76-79 of Defs.' Answer to Pl.'s Compl. and Countercl. (Dkt. No. 40).
[24] Defs.' Answer to Pl.'s Compl. and Countercl. ¶¶ 86, 94 (Dkt. No. 40).

Id. at 253; *see also Center for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1175 (D. Ariz. 1997)(granting Rule 12(b)(1) motion to dismiss because District Court did not have subject matter jurisdiction over complaint regarding operation of FERC licensed hydroelectric project).

Similarly, the Nissens also appear to be questioning the wisdom of FERC's decision to issue a license for the Project to Appalachian in 1960, and again in 2009, and for FERC to approve the Update to the SMP in 2014, with FERC having known since the 1960's that Appalachian did not own all the Project property in fee simple, but instead had acquired flowage easements over certain parcels of Project property.[25] This also is an improper claim in this Court. This Court lacks jurisdiction to review the validity of FERC license orders. Any challenge to the reasonableness of any FERC order can only be made in accordance with the judicial review procedures spelled out in Section 313(b) of the Federal Power Act, 16 U.S.C. §825l(b). A judicial challenge must be preceded by a request for rehearing to the FERC and any petition for judicial review must be made within 60 days after rehearing is denied to the U.S. Court of Appeals for the circuit in which the licensee is located or to the D.C. Circuit. The U.S. Courts of Appeal have exclusive jurisdiction to resolve such disputes. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1956). This decision has been cited and followed where litigants have attempted make a collateral attack on FERC orders in District court proceedings. *See, e.g., State of North Carolina. v. FPC*, 393 F. Supp. 1116, 1127 (M.D. N.C. 1975)(granting motion to dismiss for lack of subject matter jurisdiction).

IV. The Nissens' Fourth Request For Declaratory Judgment Should Be Dismissed For Failure To State A Claim And For Lack Of Standing.

The Nissens' fourth request for declaratory judgment proclaims that "this Court must determine if there has been a taking of rights or condemnation of rights."[26] The Nissens go on to

[25] *See generally* the allegations in ¶¶ 67-72, 77-79, 94 of Defs.' Answer to Pl.'s Compl. and Countercl. (Dkt. No. 40).
[26] Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 97 (Dkt. No. 40).

assert that if a taking occurred, they are entitled to compensation but this Court is not empowered to determine the value of the allegedly condemned property rights.[27] Given this, the Nissens again ask for a declaratory judgment declaring that "this case be remanded to the proper Virginia circuit court to determine the loss of value curative of this taking and condemnation of rights."[28] Thus, similar to the Nissens' first two requests for declaratory judgment, their fourth request should be dismissed because it fails to state a claim. This case was never removed from state court so it cannot be remanded to state court.

In addition, the Nissens do not have standing to assert a taking claim. "The standing principle is related to a fundamental takings rule: it is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Hansen v. U.S.*, 65 Fed. Cl. 76, 127 (Fed. Cl., 2005). "[I]t is undisputed that since compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment." *U.S. v. Dow*, 357 U.S. 17, 20-21 (1958).

Here, the Nissens assert that their property rights were "superseded or extinguished by the FERC License Order and SMP."[29] The Nissens admit that the FERC License Order was issued on December 15, 2009,[30] and that by Order dated January 30, 2014, FERC approved Appalachian's most recent SMP update.[31] The Nissens also admit that the property they claim was subject to a taking was not conveyed to them until April 14, 2014—after the alleged taking took place.[32] Given these admissions, it is clear from the pleadings that the Nissens were not the owner of the property at issue when the alleged taking took place. Therefore, the Nissens have

[27] *Id.* at ¶ 98 (Dkt. No. 40).
[28] *Id.* at p. 15, ¶ C (Dkt. No. 40).
[29] Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 96 (Dkt. No. 40).
[30] Compl. ¶ 9; Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 9 (Dkt. No. 40).
[31] Compl. ¶ 17; Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 17 (Dkt. No. 40).
[32] Compl. ¶ 21; Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 21 (Dkt. No. 40).

no standing to assert that a taking of their land took place and their fourth request for declaratory judgment should be dismissed.

V. The Nissens' Fifth Request For Declaratory Judgment Should Be Dismissed Because Of A Lack Of Subject Matter Jurisdiction, And For A Failure To State A Claim.

For their fifth request for declaratory judgment, the Nissens want this Court to declare that Appalachian "must satisfy its obligations under the FERC license order by integrating and coordinating with local, state and federal regulatory authorities without the deprivation of rights retained by the Nissens' [sic] under the Flowage Easement."[33] They want a declaration that Appalachian "has the means to integrate with and rely upon other existing and comprehensive local, state and federal regulatory authorities to satisfy its obligations under FERC License Order without taking property rights as enunciated under the current SMP."[34]

This Court does not have subject matter jurisdiction to hear this request. A claim that Appalachian should do one thing instead of another thing to "satisfy its obligations under the FERC License Order" is just a complaint about the operating procedures Appalachian uses to comply with its federal license. Again, it is for FERC to decide in the first instance whether a licensee is in compliance with the conditions of the license. *DiLaura*, 786 F. Supp. at 253. The Nissens can bring this complaint to the FERC under 16 U.S.C. §825e, which then can investigate and decide whether Appalachian should pursue judicial enforcement of its flowage easements to remedy encroachments, or whether Appalachian needs to pursue some alleged "integration and coordination" with other entities to satisfy its obligations under the FERC License Order to ensure that non-project uses and occupancies of Project lands and waters "are consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of

[33] *See* the heading for the Nissens' fifth request, Defs.' Answer to Pl.'s Compl. and Countercl., p. 15, (Dkt. No. 40).
[34] Defs.' Answer to Pl.'s Compl. and Countercl., p. 16, ¶ A (Dkt. No. 40).

the project."[35] The *DiLaura* court noted that the FERC, and not the district court, had the power and the expertise to decide if the license was violated or if the current operating procedures should be changed. *DiLaura*, 786 F. Supp. at 253. If the complainants are dissatisfied by FERC's determination, then they need to exhaust their administrative remedies and then appeal to the Court of Appeals. *Id; see also Center for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1175 (D. Ariz. 1997).

Another fatal flaw with the Nissens' fifth request is that they have pled no legal right to insist that Appalachian pursue options that do not conflict with the Nissens' view of how the Flowage Easement affects their property rights. *See Campbell ex rel. Equity Units Holders v. American Intern. Group, Inc.*, --- F. Supp. 3d ---, 2015 WL 252228 *4 (E.D. Va. 2015) ("[T]o be eligible for a declaratory judgment, [a litigant] must first identify an underlying right for which she seeks a declaration."). Here, the Nissens have no legal right—nor could they assert a substantive cause of action—to insist that Appalachian exhaust all other options before defending its own property rights vis-a-vis the Flowage Easement. Therefore, the Court does not have jurisdiction under the Declaratory Judgment Act to rule on the Nissens' fifth Request for declaratory judgment because the Nissens have not properly pled a substantive cause of action. *See Clear Sky Car Wash, LLC v. City of Chesapeake, Va.,* 910 F. Supp. 2d 861, 871 n. 8 (E.D. Va. 2012) ("[T]he Court must have before it a properly pled claim over which it has an independent basis for exercising original jurisdiction before it may act pursuant to the Declaratory Judgment Act."), *affd.,* 743 F.3d 438 (4th Cir. 2014).

The fifth request also fails to state a claim upon which relief can be granted. It seeks a declaration that curative steps are required to correct land title records,[36] but it alleges no facts to support an assertion that the Nissens' land title records are incorrect in any way. It goes on to

[35] FERC License Order at Art. 415, 129 FERC 62,210.
[36] Defs.' Answer to Pl.'s Compl. and Countercl. p. 16 ¶ C (Dkt. No. 40).

seek a declaration that the "case be remanded to the proper Virginia circuit court to determine the means by which curative steps be taken [to correct land title records]."[37] However, this case cannot be "remanded" because it has at all times been litigated in this (Federal) Court and there is no State court from which the case was removed. *See* 28 U.S.C. § 1447.

CONCLUSION

For the reasons stated above, Appalachian Power Company respectfully requests that the Court grant its Motion to Dismiss Counterclaim for Declaratory judgment filed by the defendants and counterclaim plaintiffs, William W. Nissen, and Lora J. Nissen.

Respectfully submitted,

APPALACHIAN POWER COMPANY

By /s/ Matthew P. Pritts
Of Counsel

Matthew P. Pritts, Esq. (VSB #34628)
C. Carter Lee, Esq. (VSB # 78731)
WOODS ROGERS PLC
Wells Fargo Tower, Suite 1400
10 South Jefferson Street
P. O. Box 14125
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E-mail: clee@woodsrogers.com

Counsel for Appalachian Power Company

[37] Defs.' Answer to Pl.'s Compl. and Countercl. p. 16 ¶ D (Dkt. No. 40).

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2015, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such to the following:

Mark D. Kidd (VSB # 24149)
Compton M. Biddle (VSB # 46187)
Ryan M. Walsh (VSB # 85887)
OPN Law
3140 Chaparral Drive, Suite 200-C
Roanoke, VA 24018
Telephone: 540-989-0000
Facsimile: 540-772-0126
Email: mkidd@opnlaw.com
cbiddle@opnlaw.com
rwalsch@opnlaw.com

Counsel for Defendants

By /s/ Matthew P. Pritts
Of Counsel

Exhibit A

RE 199—(Page 1)
1½M—4-60—A

BOOK 179 PAGE 402

FLOWAGE RIGHT AND EASEMENT DEED
SMITH MOUNTAIN COMBINATION HYDRO ELECTRIC PROJECT
UPPER RESERVOIR

Parcel No. 413 Document No. SM-407

THIS DEED made the 12 day of September, 19 60, by and between

HARRY J. CUNDIFF and MAGGIE E. CUNDIFF, his wife

herein called "Grantors" (whether one or more persons), and Appalachian Power Company, a Virginia corporation, herein called "Appalachian,"

WITNESSETH THAT:

WHEREAS, Grantors are the owners in fee simple of the following described land and appurtenant rights, herein referred to as "said premises," to-wit:

That certain land situate in Gills Creek District, Franklin County, State of Virginia, on or near the waters of Roanoke River (sometimes called Staunton River) and/or of a tributary or tributaries thereof, and bounded and described as follows:

On the Northeast, by W. B. Toney et al The Franklin Real Estate Co. (formerly Willie S. Chewning)

On the Southeast, by The Franklin Real Estate Co. (formerly Willie S. Chewning)

On the Southwest, by Appalachian Power Co. (formerly Ben Rucker Southerland), and Rives S. Brown

On the Northwest, by Appalachian Power Co. (formerly Adolphus E. Meeks)

containing 218.25 acres, more or less; being the same land conveyed to Harry J. Cundiff and Maggie E. Cundiff by deeds as shown in "INSERT" on Page 2 ~~[illegible]~~, to which deed reference is hereby made for a description of said land; and being all of Grantors' land located on, in, and/or near said river and/or its tributaries in the County aforesaid.

Together with all easements and rights appurtenant to the above described land, including without limitation any and all riparian and/or water rights in and to said river and/or its tributaries and any and all right, title and interest in and to the bed, water and creeks of said river and/or its tributaries and in and to any and all islands in said river and/or its tributaries, within or adjacent to the above described land; and

WHEREAS, Appalachian proposes to impound the waters of said river and tributaries by constructing a dam across said river at Smith Mountain downstream from said premises and to construct and operate at and in connection with such dam a hydro electric power station including provision for pumping, which dam is to be of such height and so designed that at such dam the elevation of the so impounded waters, except on very rare occasions, will not exceed 800 feet.

NOW, THEREFORE, for and in consideration of Ten Dollars ($10.00) and other valuable considerations in hand paid by Appalachian to Grantors, the receipt of which is hereby acknowledged, Grantors hereby grant, bargain, sell and convey with covenants of general warranty, unto Appalachian forever the right to overflow and/or affect so much of said premises as may be overflowed and/or affected, continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station, the impounding of the waters of said river and tributaries and/or the varying of the level of the so impounded waters by reason of the operation of said power station, including any pumping as part of such operation.

ALSO, for the above mentioned considerations, Grantors hereby grant to Appalachian the further right to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet.

IT IS UNDERSTOOD AND AGREED BY AND BETWEEN THE PARTIES HERETO THAT:

1. Grantors shall have the right to possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including (a) the right to cross said land to reach the impounded waters for recreational purposes and for obtaining their domestic water supply and water for their livestock and (b) the right to extend and maintain necessary fences across said land and into the impounded waters for a sufficient distance to prevent livestock from wading around said fences;

"INSERT" - Harry E. Cundiff and Maggie E. Cundiff acquired this parcel by deeds of record in the Clerk's Office for the Circuit Court of Franklin County, Virginia as follows:

FROM	DATE	DEED BOOK	PAGE
Russell L. Davis, Trustee	8-20-1938	91	466
W. A. Alexander et ux	1-24-1947	107	502
D. C. Brown, Acting Trustee	10-9-1953	125	48

AND, FOR THE ABOVE MENTIONED CONSIDERATIONS, GRANTORS HEREBY COVENANT AND AGREE TO AND WITH APPALACHIAN THAT:

(a) If Grantors exercise any of the rights set forth in 1 above or make any other use of said premises or of any other lands or of any waters in or to which any estate, right or privilege is now or hereafter owned or held by Appalachian, such exercise or use shall be at the sole risk of Grantors and no claims shall be made against Appalachian for any injuries or damages arising out of or in connection with such exercise or use; and such other use shall be deemed to be made under a revocable license from Appalachian and not adverse to any right, title, interest or privilege of Appalachian;

(b) Grantors will not cause, permit or suffer any garbage, sewage, refuse, waste or other contaminating matter to be cast, drained or discharged onto the portion of said premises below the contour the elevation of which is 800 feet or onto or into any of the other lands or waters referred to in (a) above or directly or indirectly into such impounded waters; and

(c) The above mentioned considerations include full compensation for any effect, change or result whatsoever which, by reason of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station, the impounding of the waters of said river and tributaries and/or the varying of the level of the so impounded waters, may now or hereafter in any manner, directly or indirectly, be caused or produced to, upon or in relation to said premises, the waters of said river and tributaries or any use made of any thereof by Grantors;

and that the covenants and agreements herein shall be covenants attaching to and running with said premises.

THE ELEVATION herein mentioned has been and hereafter shall be determined in accordance with the system of elevations used locally by the United States Geological Survey.

THIS CONVEYANCE is hereby made subject to any and all public roads, highways and public utility easements of record and affecting said premises.

GRANTORS COVENANT that they are seized of said premises and have the right to convey the estate, rights and privileges hereby granted; that they have done no act to encumber the same and the same are not encumbered except as aforesaid; that Appalachian shall have quiet and peaceful possession of the same free from encumbrances, except as aforesaid; that they will execute such further assurances of the same as may be requisite; and that they will forever warrant and defend the same unto Appalachian against the claims and demands of all persons whomsoever.

THIS DEED and the provisions hereof shall extend to and be binding upon the parties hereto and their heirs, personal representatives, successors, assigns, lessees, licensees, permittees and tenants.

IT IS AGREED that this deed sets forth the entire agreement between the parties hereto and was fully understood by them before its execution; that there is no consideration for this deed except the considerations hereinabove referred to and provided; that the agent of Appalachian securing this deed has no authority to bind Appalachian by any verbal representation or verbal promise; and that this deed is complete in all of its terms and provisions.

IN WITNESS WHEREOF, the Grantors have hereunto set their hands and seals this the day and year first above written.

_____ (SEAL) Harry J. Cundiff (SEAL)

_____ (SEAL) Maggie E. Cundiff (SEAL)

_____ (SEAL) _____ (SEAL)

_____ (SEAL) _____ (SEAL)

_____ (SEAL) _____ (SEAL)

STATE OF VIRGINIA
COUNTY OF Franklin } To-wit:

I, Carl E. Gibson, a Notary Public in and for the County and State aforesaid, do certify that Harry J. Cundiff and Maggie E. Cundiff, his wife, whose names are signed to the writing hereto annexed bearing date on the 12th day of September, 1960, have acknowledged the same before me in my said County.

My Commission expires on the 10th day of August, 1962

Given under my hand this 13th day of September, 1960

Carl E. Gibson
Notary Public for the State of Virginia At Large.

STATE OF VIRGINIA
COUNTY OF _____ } To-wit:

I, _____, a Notary Public in and for the County and State aforesaid, do certify that _____, whose names are signed to the writing hereto annexed bearing date on the ____ day of _____, 19___, have acknowledged the same before me in my said County.

My Commission expires on the ____ day of _____, 19___.

Given under my hand this ____ day of _____, 19___.

_____
Notary Public

With Revenue Stamps of the value of 1.65 placed in same and cancelled according to law.

VIRGINIA, FRANKLIN COUNTY, To Wit

In the Office of the Clerk of the Circuit Court for the County of Franklin the 15 day of September 19 60 this deed was presented, and with the certificate annexed admitted to record at 10:30 o'clock M.

Teste Edwin Green Clerk

RE 199—(Page 3)
IM—4-60—A

$1350.00

9-15-60
10:30 am

Received for Record
15 day of Sept. 1960

Recorded in Deed Book
1367 Page 462

Clerk

1367

FRANKLIN COUNTY, VIRGINIA

STATE TAX	$	2.10
COUNTY TAX	$	.70
TRANSFER FEE	$	
CLERK'S FEE	$	.30 cc
REVENUE STAMPS	$	1.65
RECORDING PLAT	$	
TOTAL	$	7.45

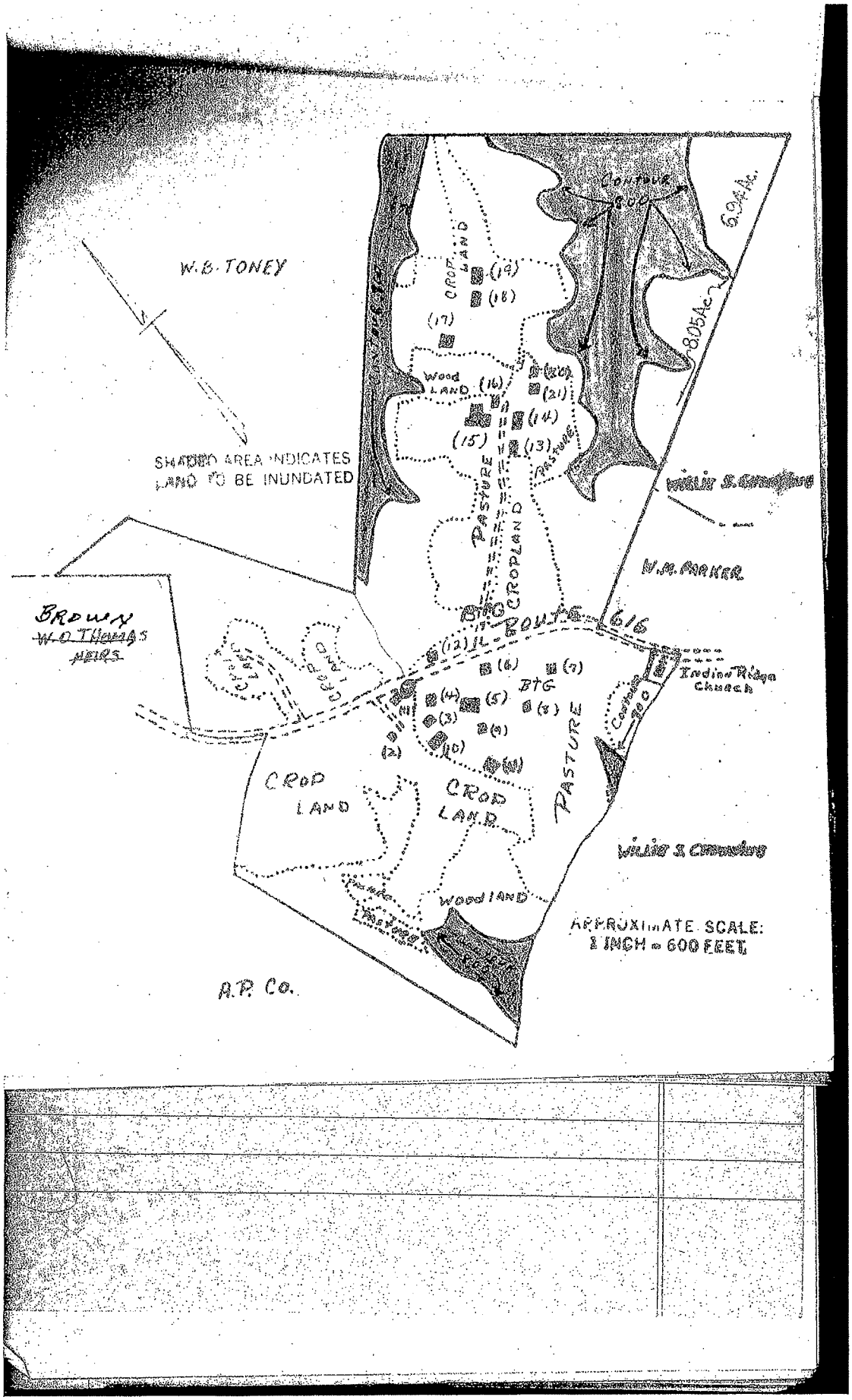
W.B. TONEY
SHADED AREA INDICATES LAND TO BE INUNDATED
CONTOUR 600
6.0 Ac.
8.05 Ac.
CROP LAND
Wood LAND
PASTURE
CROP LAND
Willis S. Crawford
W.M. PARKER
BROWN
W.O. THOMAS HEIRS
BTG
ROUTE 616
Indian Ridge Church
CROP LAND
CROP LAND
PASTURE
WOODLAND
Willis S. Crawford
APPROXIMATE SCALE:
1 INCH = 600 FEET
A.P. Co.

Exhibit B

RE 198—(Page 1)
11½M—4-60—A

BOOK 176 PAGE 195

FLOWAGE RIGHT AND EASEMENT DEED
SMITH MOUNTAIN COMBINATION HYDRO ELECTRIC PROJECT
UPPER RESERVOIR

Parcel No. 332 Document No. SM-303

THIS DEED made the 12 day of May, 1960, by and between L. B. HOLYFIELD, single

herein called "Grantors" (whether one or more persons), and Appalachian Power Company, a Virginia corporation, herein called "Appalachian,"

WITNESSETH THAT:

WHEREAS, Grantors are the owners in fee simple of the following described land and appurtenant rights, herein referred to as "said premises," to-wit:

That certain land situate in Gills Creek District, Franklin County, State of Virginia, on or near the waters of Roanoke River (sometimes called Staunton River) and/or of a tributary or tributaries thereof, and bounded and described as follows:

On the North, by Va. Primary Highway #122,
On the East, by Roanoke River,
On the South, by Appalachian Power Company (formerly John O. Hurt, et al), and
On the West, by Fred W. Wuerglers; Warren Moorman,
containing 115.06 acres, more or less; being the same land conveyed to L. B. Holyfield by W. J. Hundley, single and Fannie Hundley Dooley, widow by deed dated the 16 day of January, 1959, and of record in the Office of the Clerk of the Circuit Court of Franklin County, Virginia in Deed Book 164 at page 19, to which deed reference is hereby made for a description of said land; and being all of Grantors' land located on, in, and/or near said river and/or its tributaries in the County aforesaid.

90.23 ac

Together with all easements and rights appurtenant to the above described land, including without limitation any and all riparian and/or water rights in and to said river and/or its tributaries and any and all right, title and interest in and to the bed, water and creeks of said river and/or its tributaries and in and to any and all islands in said river and/or its tributaries, within or adjacent to the above described land; and

WHEREAS, Appalachian proposes to impound the waters of said river and tributaries by constructing a dam across said river at Smith Mountain downstream from said premises and to construct and operate at and in connection with such dam a hydro electric power station including provision for pumping, which dam is to be of such height and so designed that at such dam the elevation of the so impounded waters, except on very rare occasions, will not exceed 800 feet.

NOW, THEREFORE, for and in consideration of Ten Dollars ($10.00) and other valuable considerations in hand paid by Appalachian to Grantors, the receipt of which is hereby acknowledged, Grantors hereby grant, bargain, sell and convey with covenants of general warranty, unto Appalachian forever the right to overflow and/or affect so much of said premises as may be overflowed and/or affected, continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station, the impounding of the waters of said river and tributaries and/or the varying of the level of the so impounded waters by reason of the operation of said power station, including any pumping as part of such operation.

ALSO, for the above mentioned considerations, Grantors hereby grant to Appalachian the further right to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet.

IT IS UNDERSTOOD AND AGREED BY AND BETWEEN THE PARTIES HERETO THAT:

1. Grantors shall have the right to possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including (a) the right to cross said land to reach the impounded waters for recreational purposes and for obtaining their domestic water supply and water for their livestock and (b) the right to extend and maintain necessary fences across said land and into the impounded waters for a sufficient distance to prevent livestock from wading around said fences;

AND, FOR THE ABOVE MENTIONED CONSIDERATIONS, GRANTORS HEREBY COVENANT AND AGREE TO AND WITH APPALACHIAN THAT:

(a) If Grantors exercise any of the rights set forth in 1 above or make any other use of said premises or of any other lands or of any waters in or to which any estate, right or privilege is now or hereafter owned or held by Appalachian, such exercise or use shall be at the sole risk of Grantors and no claims shall be made against Appalachian for any injuries or damages arising out of or in connection with such exercise or use; and such other use shall be deemed to be made under a revocable license from Appalachian and not adverse to any right, title, interest or privilege of Appalachian;

(b) Grantors will not cause, permit or suffer any garbage, sewage, refuse, waste or other contaminating matter to be cast, drained or discharged onto the portion of said premises below the contour the elevation of which is 800 feet or onto or into any of the other lands or waters referred to in (a) above or directly or indirectly into such impounded waters; and

(c) The above mentioned considerations include full compensation for any effect, change or result whatsoever which, by reason of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station, the impounding of the waters of said river and tributaries and/or the varying of the level of the so impounded waters, may now or hereafter in any manner, directly or indirectly, be caused or produced to, upon or in relation to said premises, the waters of said river and tributaries or any use made of any thereof by Grantors;

and that the covenants and agreements herein shall be covenants attaching to and running with said premises.

THE ELEVATION herein mentioned has been and hereafter shall be determined in accordance with the system of elevations used locally by the United States Geological Survey.

THIS CONVEYANCE is hereby made subject to any and all public roads, highways and public utility easements of record and affecting said premises.

GRANTORS COVENANT that they are seized of said premises and have the right to convey the estate, rights and privileges hereby granted; that they have done no act to encumber the same and the same are not encumbered except as aforesaid; that Appalachian shall have quiet and peaceful possession of the same free from encumbrances, except as aforesaid; that they will execute such further assurances of the same as may be requisite; and that they will forever warrant and defend the same unto Appalachian against the claims and demands of all persons whomsoever.

THIS DEED and the provisions hereof shall extend to and be binding upon the parties hereto and their heirs, personal representatives, successors, assigns, lessees, licensees, permittees and tenants.

IT IS AGREED that this deed sets forth the entire agreement between the parties hereto and was fully understood by them before its execution; that there is no consideration for this deed except the considerations hereinabove referred to and provided; that the agent of Appalachian securing this deed has no authority to bind Appalachian by any verbal representation or verbal promise; and that this deed is complete in all of its terms and provisions.

IN WITNESS WHEREOF, the Grantors have hereunto set their hands and seals this the day and year first above written.

_____ (SEAL) L. B. Holyfield (SEAL)

_____ (SEAL) _____ (SEAL)

_____ (SEAL) _____ (SEAL)

_____ (SEAL) _____ (SEAL)

_____ (SEAL) _____ (SEAL)

STATE OF VIRGINIA
~~COUNTY OF~~ City of Roanoke } To-wit:

I, Ray E. Martin, a Notary Public in and for the County and State aforesaid, do certify that L. B. Holyfield, unmarried _____, whose names are signed to the writing hereto annexed bearing date on the 12 day of May, 1960, have acknowledged the same before me in my said County.

My Commission expires on the 12 day of October, 1962

Given under my hand this 12 day of May, 1960

Ray E. Martin
Notary Public
State at Large

_____ Notary Public in and for the County and State aforesaid, do certify that _____, whose names are signed to the writing hereto annexed bearing date on the _____ day of _____, 19___, have acknowledged the same before me in my said County.

My Commission expires on the _____ day of _____, 19___.

Given under my hand this _____ day of _____, 19___.

_____
Notary Public

With Revenue Stamps of the value of 4.95 placed in same and cancelled according to law.

VIRGINIA, FRANKLIN COUNTY, To Wit
In the Office of the Clerk of the Circuit Court for the County of Franklin the 12 day of May 19 60 this deed was presented, and with the certificate annexed admitted to record at 2:41 o'clock M.
Teste Edwin Greer Clerk

RE 195—(Page 3)
IM—4-60—A

Received for Record
12 day of May 1960
Recorded in Deed Book
176 Page 195
[signature] Clerk

(718)

6.45
2.15
3.00
11.60
4.95
$6.55

5-12-60
2:41 P.m