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OWNERSHIP OF MINERALS UNDER PUBLIC HIGHWAYS AND STREAMBEDS

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PART I.

TITLE TO MINERALS UNDER PUBLIC HIGHWAYS

A. PUBLIC ROADS ARE ESTABLISHED BY DEED, EMINENT DOMAIN, DEDICATION OR USE OF "WASTE AND UNAPPROPRIATED" LANDS.

In West Virginia and surrounding states, title to minerals underlying public roads[1] is principally a function of over three centuries of evolving public policy and procedure in the establishment of public roads. A public road may have been established by (1) deed from a willing seller (2) eminent domain (3) the use of public lands (e.g., "waste and unappropriated lands" in Virginia and West Virginia) or (4) dedication by long established public use and maintenance. Whether a fee interest in surface and minerals has been acquired, or only an easement upon surface lands, is a function of both history and transaction specific considerations.

In recent decades, West Virginia and surrounding states have generally acquired only an easement across surface lands without acquiring the fee interest in minerals. But there are many exceptions in which a public body or private corporation may hold title in fee to both surface and minerals.

B. PUBLIC ROADS ESTABLISHED BY DEDICATION.

The dedication of a public road can occur with or without the consent of the private landowner. Pursuant to W.Va. Code § 17-1-12, an otherwise private road becomes a dedicated public road without consent upon ten years of continuous public use and the

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[1] In West Virginia, the terms "road", "public road" or "highway" are defined as "to include, but shall not be limited to, the right-of-way, roadbed, and all necessary culverts, sluices, drains, ditches, waterways, embankments, slopes, retaining walls, bridges, tunnels and viaducts necessary for the maintenance of travel...." W.Va. Code § 17-1-3.

expenditure of public monies for its improvement or maintenance.[2] West Virginia law also recognizes that a private landowner may dedicate a road over his land to public use providing that it is duly and expressly accepted by a governmental body. The landowner's intent is a necessary element to make such a dedication but this can be either express or implied from the owner's conduct.[3] This appears to have been the law of Virginia and West Virginia since the Colonial period. Public roads established by dedication vest the State with only an easement across private lands with title to the minerals remaining with the fee owner.[4] However, the mineral interests are subject to a right of subjacent support for the benefit of the easement for public road which is the dominant estate.[5]

C. ROADS ESTABLISHED DURING THE COLONIAL PERIOD.

C-1. GENERALLY.

Few roads were built in western or "Trans-Allegheny" Virginia - now West Virginia and Kentucky - during the Colonial period. Both the historical record and the sparse statutory authority suggests that the Colonial government established roads by either acquiescence or appropriation (without compensation) upon private lands. More significantly, many roads crossed the great expanses of public lands, e.g., "waste and unappropriated lands, vested in

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[2] See e.g., Riddle v. Department of Highways, 154 W.Va. 722, 179 S.E.2d 10 (1971); Baker v. Hamilton, 144 W.Va. 575, 109 S.E.2d 27 (1959); State Road Commission v. Oakes, 150 W.Va. 709, 149 S.E.2d 293 (1966).

[3] Concerned Loved Ones and Lot Owners Assoc. of Beverly Hills Memorial Gardens v. Pence, 383 S.E.2d 831 (W.Va. 1989); Hicks v. City of Bluefield, 103 S.E. 323 (W.Va. 1920).

[4] See, Herold v. Hughes, 141 W.Va. 182, 90 S.E.2d 451 (1956); Hark v. Mountain Fork Lumber Co., 127 W.Va. 586, 34 S.E.2d 348 (1945).

[5] Schuster v. Pennsylvania Turnpike Commission, 149 A.2d 447 (Pa. 1959); Boothe v. McLean, 267 S.E.2d 158 (Va. 1954).

the Crown.[6] Virginia case law supports the conclusion that only a surface easement was taken and that the minerals remained with the fee owner.[7] There are no West Virginia cases which address title to roads established by the Colonial government.

C-2. EARLY COLONIAL ROADS, 1607-1705.

From the first road law in 1632 until the revolution, roads were under the authority of local government. This practice continued almost unchanged after the revolution until the creation of the Virginia Board of Public Works in 1816. Beginning in 1657, - the county (fiscal) courts appointed the "*Surveyor of the Highways*" who was responsible to locate, establish and maintain public roads.[8] After 1661, public roads were required to be forty feet (40 ft.) for the remainder of the Colonial period.[9] There is no reference to the nature of title taken for public roads before 1705. No compensation was offered landowners for this taking.

C-3. COLONIAL GENERAL ROAD LAW, 1705-1776.

The 1705 "General Road Law"[10] was the first comprehensive enactment on the subject. The *Surveyor of the Highways* and County Courts retained their authority to establish roads. But the 1705 Act was the first to make even a tangential reference to private property rights by requiring that "every plantation is hereby directed and required to make a convenient passage....[to the] dwelling house" for use as a public road.[11] The General Road Law was revised in 1762 to require compensation to adjoining landowners

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[6] Nathaniel M. Pawlett, A BRIEF HISTORY OF THE ROADS OF VIRGINIA, 1607-1840, pgs. 3-10, Va. Highway and Transportation Research Council, Charlottesville (1977).

[7] Anderson v. Stuarts Draft Water Co., 197 Va. 36, 87 S.E. 2d 756 (1955); Bond v. Green, 189 Va. 23, 52 S.E.2d 169 (1949).

[8] 3 HEN. STAT. Chap. XXXIX, § 2 and § 3 (1705). 1 HEN. STAT. Act IX (1657). 1 HEN. STAT. Act L (1632)

[9] 2 HEN. STAT. Act V (1661).

[10] 3 HEN. STAT. Chap. XXXIX (1705)

[11] Id. at § 7.

when the Surveyor of the Highways used timber or earth for road construction.[12] No compensation was ever offered for the taking of lands during the Colonial period.

D. ROADS ESTABLISHED BY THE COMMONWEALTH OF VIRGINIA, 1776-1863: "COUNTY ROADS", "TURNPIKES" & "STATE-AID" ROADS.

D-1. VIRGINIA "COUNTY ROADS", 1776-1863.

Virginia continued with the Colonial road system discussed above for the first decade after the revolution. In 1785, Virginia enacted a new comprehensive statute for the "county roads" which remained under the authority of county (fiscal) courts.[13] The 1785 Act was the first to provide compensation to landowners - but only if they protested the location of the road. A jury was impaneled to determine the "damage" to such landowner by considering the "use of the land" and the costs of "additional fencing".[14]

Originally, county roads were required to be thirty feet (30 ft.) in width - but a 1789 amendment authorized the county courts of western Virginia to maintain a narrower road in their discretion.[15] The 1785 Act made no reference to taking a fee interest and in these respects the "county roads" statute remained unchanged until the creation of West Virginia in 1863.[16] Virginia case law supports the proposition that only an easement was taken for the county roads and the fee in the surface and minerals remained with the private owner.[17]

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[12] 7 HEN. STAT. Chap. XII, § 6 (1762).

[13] 12 HEN. STAT. Chap. LXXV (1785). VA. ACTS, Chap. 75 (1785).

[14] Id. at § 2. A subsequent amendment referred to "just compensation....for the land....to be taken" and for "damage to the residue of his tract....beyond the peculiar benefits....from the road...." VA. CODE, Chap. 52, § 11 (1849).

[15] 13 HEN. STAT. Chap. XXXIII (1789). 12 HEN. STAT. Chap. LXXV, § 6 (1785).

[16] VA. CODE, Chap. 52 (1860). VA. CODE, Chap. 236, 1819).

[17] Supra, fn. 7.

D-2. THE TURNPIKE COMPANIES AND THE VIRGINIA BOARD OF PUBLIC WORKS, 1816-1863.

In regard to contemporary mineral titles underlying existing or seemingly abandoned public roads, the Virginia "turnpike companies" are the most problematic. An 1815 General Assembly study declared that improved roads and navigable rivers were essential to Virginia's economic development and recommended the creation of a state agency for "rendering navigable the principal rivers; of more intimately connecting, by public highways, the eastern and western waters and the market towns of the Commonwealth."[18] In 1816, the Assembly created the Virginia Board of Public Works (VBPW) to supervise the first comprehensive state roads program. The Board of Public works would provide engineering and financial support to legislatively chartered public-private "internal improvement companies", a.k.a. "turnpike companies" and "navigation companies", which operated under VBPW supervision and were authorized to charge tolls.[19] The 1817 "General Turnpike Act" regulated the turnpike companies and the design criteria of the roads.[20]

Turnpike Companies were (Are?) Private Corporations - Typically, VBPW purchased up to two-fifths (40%) of the stock in a given turnpike company when the general public had purchased at least three-fifths of the stock offering. Most significantly for contemporary mineral issues - the turnpike companies were and are private corporations, and not public entities, and the property interests related to the turnpikes were vested in that corporation.[21] The contemporary status of these companies is discussed below.

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[18] Va. House of Delegates, Report of Committee on Roads and Internal Navigation (December 1815), pgs. 45-49, 54-56, VA. HOUSE JOURNAL (1816).

[19] VA. CODE, Chap. 228 (1819).

[20] VA. CODE, Chap. 234 (1819).

[21] Berkeley County Ct. v. Martinsburg & Potomac Turnpike Co., 92 W.Va. 246, 115 S.E. 448 (1922; Moore v. Schoppert, 22 W.Va. 282 (1883). See, Dunningtons v. N.W. Turnpike Road, 6 Gratt. (47 Va.) 160 (1849).

Extent of Turnpikes - Between 1817 and 1860, over two hundred & twenty-five (225) turnpike companies were chartered by the Assembly throughout Virginia.[22] The majority of these located in the Blue Ridge and contemporary West Virginia. Of course, some failed to raise adequate funds and did not construct a turnpike. VBPW records indicate that eight-nine (89) turnpikes were constructed west of the Blue Ridge between 1827 and 1840.[23] The West Virginia Division of Highways has determined that at least one hundred and twenty (120) were actually constructed within contemporary West Virginia. They are found in all fifty-five counties. See the following appendices attached at the end of this paper:

APPENDIX A — LIST OF TURNPIKE COMPANIES CHARTERED THROUGH 1863 BY THE VIRGINIA GENERAL ASSEMBLY WITH WORKS IN CONTEMPORARY WEST VIRGINIA

APPENDIX B — LIST OF TURNPIKE COMPANIES CHARTERED BY THE WEST VIRGINIA LEGISLATURE

Width of Turnpikes and Title Vested in Turnpike Companies - The General Turnpike Act specified the authority of the turnpike companies to acquire lands and the design specifications of turnpikes. But these generic requirements varied greatly in practice as follows:

Width: Turnpike were usually sixty feet (60 ft.) in width. The center eighteen feet (18 ft.) was a hard gravel and stone surface with "summer roads" occupying the same width on both sides of the "paved" surface.[24] However, many, if not most, turnpike companies could not afford to comply with these standards. The individual legislative charters of the turnpike companies, and also subsequent company-specific legislation, diminished the width requirements for the majority of turnpikes - usually to the 15-20 foot range by

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[22] Generally, VBPW ANNUAL REPORTS (1817-60).

[23] ROADS OF VIRGINIA, 1607-1840, at pgs. 35-36.

[24] VA. CODE, Chap. 234, § 14 (1819).

eliminating the "summer roads".[25] Therefore, it is essential to review all turnpike legislation between 1817 and 1860 to confirm a turnpike's width.

Title - General Authority: In willing seller transactions, that General Turnpike Act provided the turnpike company with broad discretion - it could purchase such interest as it might negotiate.[26] Minerals could be vested in the turnpike company.

Title - Actual Practice: As a general practice, the turnpike companies purchased whatever their legislative charters authorized - a fee simple or less. This results in a wide variety of interests vested in the turnpike companies.[27] Therefore, it is essential to review each company's charter in evaluating title issues related to turnpikes. However, there do not appear to be any charters which distinguish between fee simple in the surface and minerals. In practice, minerals were commonly vested in the turnpike company.

Title - Condemnation: The turnpike companies were authorized to condemn a right-of-way but in this event took only an easement in the surface.[28] The minerals remained with the fee owner.

D-3. VIRGINIA "STATE-AID" ROAD PROJECTS.

The Virginia General Assembly considered a few road projects of such importance that public monies were used to finance all engineering and construction costs. These roads were also designated as "turnpike companies" and established as corporations by legislative charter - but VBPW held all the stock and appointed

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[25] ROADS OF VIRGINIA, 1607-1840, at pg. 24.

[26] VA. CODE, Chap. 234, § 7 (1819).

[27] See, Danville v. Anderson, 189 Va. 662, 664, 53 S.E.2d 793, 793-4 (1949); Callison v. Hedrick, 15 Gratt. (56 Va.) 244, 252 (1859). V. Kelly, DISPOSITION OF RIGHT-OF-WAY ABANDONED BY PRIVATE TURNPIKE COMPANIES, pg. 8, Transportation Research Council, Va. Dept. of Transportation (1988).

[28] VA. CODE, Chap. 234, § 7-11 (1819). Virginia Hot Springs Co. v. Loman, 126 Va. 424, 428, 101 S.E. 326, 327 (1919).

the boards of directors.[29] In West Virginia, these roads included the Northwestern Turnpike and Staunton & Parkersburg Turnpike (today, State Routes 50 & 250). The issues concerning title to surface and minerals are the same as for the "joint stock" turnpike companies having public and private shareholders discussed above.

D-4. CONTEMPORARY STATUS OF THE TURNPIKE COMPANIES.

In 1866, the West Virginia Legislature transferred the State's equity interest in the turnpike companies to the county boards of supervisors (later, a.k.a. "today, county commissions).[30] To this day, the county commissions are vested with State's former shares of the outstanding stock of the turnpike companies. While some county commissions subsequently attempted to appropriate the turnpikes as public property, the West Virginia Supreme Court has affirmed the corporate nature of the turnpike companies on two occasions.[31] But despite these decisions, and the applicable statutory authority, the West Virginia Division of Highways (WVDOH) has taken a very assertive position in two respects:

(1) all Virginia turnpikes were vested with a fee interest in surface and minerals throughout their length, and

(2) WVDOH is vested with title to the turnpikes and the underlying minerals.

There is no judicial authority to support this position, but WVDOH claims title to all mineral underlying the Virginia turnpikes and the right to lease the same.

Contact for Virginia Turnpike Records:

Mr. Gary Scott
Property Management Unit
Right-of-Way Division
W.Va. Division of Highways

Building No. 5, Room A-317
1900 Kanawha Blvd., East
Charleston, W.Va. 25305-0430
(304) 558-9763

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[29] See, Dunningtons v. N.W. Turnpike Road at 160-61. ROADS OF VIRGINIA, 1607-1840, at pgs. 35-36.

[30] W.VA. CODE, Chap. 39, § 37. W. VA. ACTS, Chap. 117, (1866).

[31] Berkeley County Ct. v. Martinsburg & Potomac Turnpike Co.; Moore v. Schoppert.

E. ROADS ESTABLISHED BY THE STATE OF WEST VIRGINIA, 1863-PRESENT.

E-1. WEST VIRGINIA COUNTY ROADS, 1863-1933.

West Virginia continued with the county road system created by Virginia with few changes. There were no limits on the property interest the county (fiscal) courts could acquire in land either by acquisition or condemnation. There were no limits on width.[23] Generally, the few roads established by counties during this period took only an easement across the surface lands.[24]

E-2. ROADS ESTABLISHED AFTER THE CREATION OF THE STATE HIGHWAY SYSTEM, 1933 TO PRESENT.

WVDOH's predecessor, the West Virginia State Road Commission (SRC) was created in 1933 to establish a consolidated state highway system which replaced the county road system.

Acquisition by Grant: SRC and the West Virginia Division of Highways (WVDOH)were authorized to acquire "all land and interests and rights in lands necessary and required for road"[25] and it appears that they had ample authority to acquire a fee interest in minerals if so desired.[26] However, in 1963, the West Virginia Legislature diminished this authority:

> ....real property may be acquired in fee simple or in any lesser estate or interest therein, except may in the case of a public road the right-of-way only shall be acquired.[27]

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[23] W.VA. CODE, §§ 1223-1225 (1906). W.VA. ACTS, Chap. 114 (1872-73).

[24] See, Herold v. Hughes, 141 W.Va. 182, 90 S.E.2d 451 (1956). Board of Supervisors v. Virginia Elec. & Power Co., 213 Va. 407, 192 S.E.2d 768 (1972).

[25] W.Va. Code 17-23-8.

[26] W.Va. Code § 17-4-5, § 17-4-42 and § 17-23-8.

[27] W.Va. Code § 17-2A-17.

WVDOH Practice: 1933-1963 - WVDOH generally, but not always, acquired the fee interest in surface lands. It also acquired the fee interest in the minerals if they were also vested in the surface owners. If a mineral severance had occurred prior to surface acquisition, then WVDOH generally did not attempt to acquire the minerals.

WVDOH Practice: 1963 to Present - WVDOH acquires only a surface easement in lands for highway purposes unless some exceptional site specific condition requires acquisition of additional rights in the minerals. Otherwise, title to minerals remains in the fee owner subject to the subjacent support restrictions detailed below. WVDOH acquires a fee simple interest in minerals underlying facilities which are ancillary to public roads, e.g., rest stops, county maintenance garages.

Eminent Domain: When WVDOH uses eminent domain to establish a public road, the statute provides "that in the case of a public road title to the right-of-way only shall absolute vest in [WVDOH]".[28] This is also the rule in Virginia.[29] Therefore, title to minerals remains in the fee owner.

Restrictions on Mineral Development - For several decades, whether by eminent domain or deed from a willing seller, WVDOH has limited the development of coal reserves underlying pubic roads to assure subjacent support. Within one hundred feet (100 ft.) of the surface, all mining is prohibited. Within three hundred feet (300 ft.), depending on site specific geological conditions, from forty to sixty percent (40-60%) of the coal or other minerals must be left in place.

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[28] W.Va. Code 54-2-12. See, Hark v. Mountain Fork Lumber Co., 127 W.Va. 586, 34 S.E.2d 348 (1945).

[29] Bond v. Green, 52 S.E.2d 169, 189 Va. 23 (1949).

PART II.

TITLE TO STREAMBEDS AND UNDERLYING MINERAL

A. OVERVIEW: TITLE VERSUS RIPARIAN RIGHTS.

The title to the beds and banks of non-tidal watercourses (i.e., sub-aqueous surface lands) and underlying minerals associated with watercourse are commonly, albeit mistakenly, referred to as "riparian rights". In a technical sense, the term "riparian rights" includes all the interests of the owners of riparian lands (lands directly abutting a watercourse) in the use of the surface waters such as the right to make a reasonable consumptive or non-consumptive use of the flowing water.[30] But in the generally accepted meaning, riparian rights encompass the broader issues of public and private title to watercourses and underlying minerals and the public's interests in navigation and other uses of streams.

Mineral transactions involving riparian lands are commonly consummated without acknowledgment or consideration for the potential public title in the minerals underlying watercourses. particularly problematic in Virginia and West Virginia where the title to deceptively small watercourses are vested in the two States.

B. SUMMARY OF TITLE TO WATERCOURSES IN ORIGINAL THIRTEEN STATES AND STATE OF OHIO.

B-1. COMMON LAW RULE - TITLE VESTED IN RIPARIAN LANDOWNERS.

Riparian Title Originating During the Colonial Period (1607-1776) Except Pennsylvania -- For non-tidal streams, if title originates with a grant or patent made during the Colonial period,

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[30] Waters and Water Rights, Chap. 6.01(a), The Michie Co., Charlottesville, Va. (1991). Thurston v. City of Portsmouth, 205 Va. 909, 911-12, 140 S.E.2d 678 (1965). See; Gaston v. Mace, 33 W.Va. 14, 10 S.E. 60 (1889); Stokes & Smith v. The Upper Appomattox Co., 3 Leigh 318 (Va., 1831).

then the adjoining landowner(s) (i.e., "riparian") are vested with title. Where there are different riparian owners on opposing banks, each holds title to the centerline of the stream. This rule may not apply in Virginia and West Virginia for many grants and patents issued after May, 1780. The general rule has no application in Pennsylvania.

Riparian Title Originating Post-Independence in the Original Thirteen States Except Pennsylvania, Virginia & West Virginia -- Same as above - adjoining riparians are vested with title. Where there are different riparian owners on opposing banks, each riparian holds title to the centerline of the stream.

B-2. MINOR EXCEPTIONS TO GENERAL COMMON LAW RULE.

Kentucky Exception for Ohio River - Kentucky was formed from the Commonwealth of Virginia in 1792 and was included in the original thirteen states as part of Virginia. As to streambed title, Kentucky has adopted the common law rule that riparians are vested with title to the centerline of the stream.[31] However, there is an aberration in title affecting the Ohio River which vest the northern half of the Ohio River in public ownership. The Kentucky boundary with Ohio lies at the low water mark on the Ohio shore which included the entire Ohio river within Kentucky. But Kentucky riparians are vested with title only to the centerline - the Commonwealth of Kentucky is vested with title to the subaqueous lands and minerals from the centerline to the low water mark on the Ohio Shore. Excepting ownership of the Ohio River, the Virginia rule has been adopted in Kentucky.[32]

State of Ohio Exception for Lake Erie - Ohio follows the general common law rule except for Lake Erie. Title to all watercourses and underlying minerals are vested in riparian landowners.[33] However, the shore, submerged lands and underlying minerals below the ordinary low water mark of Lake Erie are vested

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[31] Natcher v. City of Bowling Green, 95 S.W.2d 255 (Ky. 1936); Berry v. Snyder, 66 Ky. 266, 277-79 (1867).

[32] Commonwealth v. Henderson County, 371 S.E.2d 27 (Ky. 1963); Berry v. Snyder at 266, 277-79.

[33] ; Miller v. Wisenberger, 61 Ohio St. 561, 56 N.E. 454 (1900); Pollock v. Cleveland Ship Bldg. Co., 56 Ohio St. 655, 47 N.E. 582 (1897)June v. Purcell, 36 Ohio St. 396 (1881).

in the State.[34] A permit is required from the Ohio Department of Natural Resources to produce these minerals.[35]

B-3. PENNSYLVANIA REJECTS COMMON LAW RULE - TITLE TO ALL NAVIGABLE RIVERS VESTED IN STATE.

Pennsylvania has adopted the civil law rule rather than English common law. Title to the beds and banks of all navigable rivers is vested in the State regardless of the whether riparian title originates during the colonial period or post-Independence. The State's title includes the beds between the ordinary low water mark.[36]

B-4. VIRGINIA AND WEST VIRGINIA - 1780 AND 1802 ACTS RESERVE TITLE FROM SUBSEQUENT LAND PATENTS TO MANY WATERCOURSES.

Beginning in 1780, Virginia alone among the original thirteen states reserved public ownership of watercourses by statute - and reserved much more than merely the "navigable" watercourses.[37] Virginia was unique in enacting statutes in 1780 and 1802 which retained title to the "rivers and creeks" from many land patents issued thereafter. Today, determining the title to minerals underlying watercourses in Virginia and West Virginia is significantly more complex than in any other eastern state.

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[34] Sloan v. Biemiller, 34 Ohio St. 492 (1878); Blanchard's Lessee v. Porter, 11 Ohio 138 (1841).

[35] OHIO REV. CODE § 1505.07.

[36] Shaffer v. Baylor's Lake Assoc., 392 Pa. 493, 141 A.2d 583 (1958); Miller v. Lutheran Conf., 331 Pa. 241, 100 A. 646 (1938); Flanagan v. City of Philadelphia, 42 P.A. 219, 230 (1862); Carson v. Blazer, 2 Binn. 475 (Pa. 1810).

[37] Farnham, The Law of Waters and Water Rights, pg. 256-57, Vol. I (1904).

C. PRINCIPAL CRITERIA DETERMINING PUBLIC & PRIVATE TITLE IN VIRGINIA AND WEST VIRGINIA.

1. *Physical Characteristics*: Whether the watercourses are classified as navigable (non-tidal), floatable or non-floatable at common law.

2. *Origin of Title*: Whether the title to the riparian lands originates from a Colonial patent or a grant by the Northern Neck Proprietary during the colonial period, a patent issued by the Virginia Land Office (1780-1863), a West Virginia land grant issued upon a Virginia treasury warrant entered prior to June 20, 1863 (1863 to 1884) or a deed from a West Virginia school fund commissioner (1865 to 1912).

3. *Eastern or Western Waters*: Whether riparian lands lie upon the "eastern waters" which drain to the Chesapeake Bay (Potomac River watershed in the Eastern Panhandle and Potts Creek watershed in Monroe County) or the "western waters" which drain to the Ohio River. Historically, the Allegheny Front divided the Commonwealth of Virginia, and now the State of West Virginia, between the eastern and western waters.

4. *"River or Creek" Reserved by the 1780 & 1802 Common Lands Acts*: Is a watercourse a "river or creek" as that term was used in the late 18th century. Virginia reserved in public ownership those "rivers and creeks" (a term without statutory definition) which had been "used as a common" on the eastern waters and which remained ungranted prior to May, 1780. But on the western waters, all the "rivers and creeks" which remained ungranted on January 15, 1802 were reserved without qualification.

D. THE COMMON LAW OF TITLE TO WATERCOURSES AND UNDERLYING MINERALS.

Public and private rights in watercourses are determined principally by the common law[38] and early Virginia statutes enacted

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[38] The common law of West Virginia is English common law as modified by the enactments of the Virginia General Assembly (1776-1863) and the West Virginia Legislature. 9 HEN. STAT. 127 (June 1776). W.VA. CONST., Art. IX, §8. Avery v. Beale, 195 Va.

between 1780 and 1819. At English common law, "navigable waters" included only the open sea, tidal bays, estuaries and inlets and the inland rivers only to the extent they were subject to the ebb and flow of the tide[39]. The non-tidal, upland Virginia rivers (including contemporary West Virginia), were not navigable-at-law regardless of whether they were navigable-in-fact. The seashores and banks thereof were vested in the Crown and later English and Virginia cases confirm this principal[40]. However, the beds and banks of the non-tidal rivers, i.e., non-navigable, were vested in the adjacent riparian landowners under land patents issued during the colonial period by the Crown or the Virginia colonial government[41].

E. SOURCES OF TITLE DURING THE COLONIAL PERIOD.

E-1. TWO SOURCES OF TITLE: COLONIAL PATENTS & GRANTS BY THE NORTHERN NECK PROPRIETARY.

Prior to independence, the title to lands within contemporary West Virginia originated with either:

(1) ***Colonial Patents*** - issued during the 1619 to 1775 period by the Colonial Governor with the consent of the Colonial Council of Virginia (the Colony's executive body); or

(2) ***Northern Neck Proprietary Grants*** - issued during the 1668-1782 period by the Northern Neck Proprietary which operated

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690, 697, 80 S.E.2d 584, 588 (1954); Commonwealth v. Newport News, 158 Va. 521, 541, 164 S.E. 689, 694-95 (1932).

[39] Commonwealth v. Garner, 44 Va. (3 Gratt.) 624 (1846); Mead v. Haynes, 24 Va. (Rand.) 33, 35 (1824); Miles v. Rose, 128 Eng. Rep. 868 (1814).

[40] De Jure Maris at 11-17; Garner; Mead at 35; Malcomson v. O'Dea, 11 Eng. Rep. 1155, 1165 (1863); Gann v. Free Fishers of Whitesable, 11 Eng. Rep. 1305, 1312 (1865); Carter v. Murcot, 98 Eng. Rep. 127 (1768).

[41] Garner; Mead v. Haynes, 3 Rand 33, 35 (Va. 1824); Home v. Richards, 8 Va. (4 Call.) 441, 446 (1798).

independently of the colonial government and was not subject to colonial land laws or procedures.[42]

The "waste and unappropriated lands" were those available for patent and not otherwise reserved by the Colonial government. Colonial patents were most commonly issued pursuant to the Land Act of 1705[43] but some patents were issued by the Colonial Governor pursuant to other authority conferred by the Assembly or Colonial Council, e.g., as compensation for military service. The Northern Neck Proprietary (NNP), frequently known by the misnomer "Fairfax Grant", was created by Royal Charter in 1668.[44] The NNP encompassed approximately 5.2 million acres (5,200,000 ac.) bounded by the Potomac and Rappahanock Rivers from the Chesapeake Bay to the "Fairfax Line" in the Eastern Panhandle of West Virginia. The NNP includes Virginia north of Fredericksburg and Luray and most of West Virginia's Eastern Panhandle.[45]

There are many significant distinctions between Virginia patents and NNP grants, e.g., public rights of stream access and fishing, which are not relevant to mineral titles. However, NNP

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[42] Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603, 604-606, 615-616, 618-619 (1813). Virginia Land Office Inventory, by Daphne S. Gentry, Virginia State Library, Richmond (undated) pgs. 1-21. Harrison, Virginia Land Grants: A Study of Conveyancing in Relation to Colonial Politics, pgs. 11-17, 54-58, Old Dominion Press, Richmond (1925).

[43] 3 Henings Stat. 304 (1705).

[44] The Proprietary is commonly and mistakenly known as the *"Fairfax Grant"* in recognition of Thomas Lord Fairfax, Sixth Baron of Cameron who, as the last Proprietor from 1733 to until death in 1781, was the most active in the leasing, granting and development of its lands within West Virginia.

[45] In 1733, the British Privy Council fixed the head springs of the North Branch of the Potomac River and the Rappahanock River as defining the western limits of the Proprietary. In 1736, the "Fairfax Line" was surveyed between these two points to fix the boundary which was confirmed by the Privy Council in 1745. 4 Henings Stat. 514 (1736). Smith at 279-80. Commetti, Concerning the First Survey of the Northern Neck, West Virginia Historical Quarterly, pgs. 52-64, Vol. II (1940-41).

grants and Colonial patents may differ in the mineral titles related to watercourses.

E-2. COLONIAL PATENTS VEST IN RIPARIANS ALL MINERALS UNDERLYING NON-TIDAL WATERS.

Virginia decisions cases provides that, prior to Independence, both Virginia Colonial patents conveyed title to the grantee of the beds and banks of non-tidal watercourses within or adjacent to the grant unless expressly reserved.[46] The dicta of West Virginia decisions also support this rule.[47] But historical authorities suggest that express reservations of streambeds by the Colonial government were very rare. Only the tidal waters, seashores and bays were reserved from such grants.[48]

E-3. NORTHERN NECK PROPRIETARY GRANTS MAY RESERVE A PARTIAL FEE INTERESTS TO THE STATE IN CERTAIN MINERALS.

Generally, Northern Neck Proprietary grants also vested title to streambeds and underlying minerals in the riparian.[49] As with Colonial patents, the NNP grants used a standard form. However, during the 1704-1782 period, all NNP grants reserved a fee interest of ***"all gold and silver; one third lead, copper, tin, coal and iron"*** to the Proprietary.[50] Prior to 1704, NNP grants reserved

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[46] Boerner v. McCallister, 89 S.E.2d 23 (Va. 1955); Stokes & Smith v. Upper Appomattox Co., 3 Leigh 318, 337-340 (Va. 1831); Crenshaw v. The Slate River Co., 6 Rand. 271, 289-290 (Va. 1828 Va.); Mead at 35; 1982 Opinion Va. Atty. Gen. 242.

[47] See, Barre v. Fleming, 29 W.Va. 314, 320-22, 324 (1887) Gaston v. Mace, 33 W.Va. 14, 27, 31 (1889)

[48] Id. Miller v. Commonwealth, 166 S.E. 557 (Va. 1932); Taylor v. Commonwealth, 47 S.E. 875 (Va. 1904).

[49] Martin v. Beverly, 5 Call 444 (1805).

[50] Marshall v. Conrad, 5 Call 364, 365 (Va. 1805). Generally, Northern Neck Land Books, Virginia State Library, Richmond, Va. Fairfax Harrison, VIRGINIA LAND GRANTS - A STUDY OF CONVEYANCING IN RELATION TO COLONIAL POLITICS, pgs. 133-34, Old Dominion Press, Richmond (1925).

varying interests in minerals.[51] None of the pre-1704 grants are found in West Virginia and are concentrated in the Virginia tidewater.

Virginia statutes and the historical record indicate that the Proprietary's reserved mineral interests were transferred to the Commonwealth of Virginia in 1798.[52] The NNP mineral reservation applies to an estimated 2.7 million acres (2,700,000 ac.).[53] If this is correct, West Virginia would have succeeded to those mineral interests within the boundaries of the new State effective June 20, 1863.[54] Any such interests would be vested in the W.Va. Public Land Corporation. However, additional historical and archival research will be necessary to confirm the transfer of the NNP reserved mineral interests to Virginia and West Virginia.

F. GEOGRAPHIC EXTENT OF LANDS WITH COLONIAL PERIOD TITLES.

Virginia -- In Virginia, most land titles originate during the Colonial period. NNP grants dominate in northern Virginia.

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[51] VA. LAND GRANTS at pg. 133 [1675-77: "all gold and silver"; 1687-89: "all gold silver, copper, tin and lead"; 1690-93: "one fourth gold, one fifth silver, one third tin, copper, iron, lead and coal"; 1694-1703: "all gold and silver, one third lead, tin and iron"].

[52] With certain exceptions not relevant here, all remaining NNP properties, apparently including reserved mineral interests, were transferred by the "Marshall Syndicate" to the Commonwealth of Virginia by Deed dated October 10, 1798. E.g., Marshall v. Conrad, 5 Call at pgs. 370-73. VA. ACTS, Chap. 14 (1796). VA. ACTS Chap. 47 (1785). C.T. Cullen & H.A. Johnson, eds., THE PAPERS OF JOHN MARSHALL, VOL. II, pgs. 141-149, Univ. of North Carolina Press, Chapel Hill (1977).

[53] Of the original 5.2 million acres, 2.5 million acres had been granted by the NNP when it ceased operation in 1782. John A. Treon, "Martin v. Hunter's Lessee: A Case History", pg. 102, unpublished Ph.D Thesis, Univ. Of Virginia (1970).

[54] Chap. 68, § 1, ACTS OF THE ASSEMBLY OF THE RESTORED GOVERNMENT OF VIRGINIA (1863).

West Virginia -- NNP grants are common in the Eastern Panhandle west to Grant and Mineral Counties. Outside of the Eastern Panhandle, most land titles originate with patents issued after Independence by the Virginia Land Office.[55] However, Colonial grants for large tracts were issued in the Ohio River Valley, lower Kanawha River Valley and central Greenbrier River Valley.[56]

Caveat for Colonial Patents Within Northern Neck Proprietary -- The Virginia Colonial Land Office also issued patents within the NNP in that area west of the Blue Ridge until 1745. This occurred due to a boundary dispute between the NNP and the Colonial government at Williamsburg.[57]

G. VIRGINIA STATUTES REVISE COMMON LAW AND RESERVE TITLE TO CERTAIN WATERCOURSES.

G-1. 1780 & 1802 VIRGINIA COMMON LANDS ACTS.

Following independence, the General Assembly enacted statutory changes which revised the common law principals discussed above and which reserved the ownership of the beds and banks of watercourses to the Commonwealth:

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[55] 10 HEN. STAT. 50 (1779).

[56] Generally, Sims Index to Land Grants in West Virginia, Edgar B. Sims, W.Va. State Auditor (1952).

[57] A 1733 British Privy Council order resolved the disputed boundary in favor of the NNP. The subsequent survey of the Fairfax Line fixed the boundary. As part of the boundary settlement, the Privy Council order and subsequent enactment of the Colonial General Assembly required the Proprietary to recognize and confirm all Colonial Grants issued within its territory through 1745. 6 HEN. STAT. 198 (1748). Hite v. Fairfax, 4 Call 42 (1786). It appears a few of these Colonial grants were issued in contemporary West Virginia along the South Branch of Potomac River. Smith, pgs. 3-5.

(1) **1780 Act - Eastern Waters**: By enactment of May, 1780[58], the General Assembly which statutes reserved to public ownership "all unappropriated land ..... on the shores of any river or creek, and the bed of any river or creek in the eastern parts of this Commonwealth, which have remained ungranted by the former government, and which have been used as common to the good people thereof...." (emphasis added) [hereinafter "1780 Act"].

(2) **1802 Act - Western Waters**: The enactment of January 15, 1802[59] reserved to public ownership the "banks, shores and beds of the rivers and creeks in the western parts of the Commonwealth, which were intended and ought to remain as a common to all the good people thereof..." [hereinafter "1802 Act"].

Of course, these statutes reserved only those streambeds which had not been granted by the Crown or the Virginia Land Office prior to enactment. The property interests in the waters and the beds and banks of the watercourses reserved to the Commonwealth by these statutes[60], and the *jus publicum* interests created at common law, were transferred to the new State of West Virginia upon its creation on June 20, 1863[61]. The property interests reserved by these Virginia statutes and the *jus publicum* interests have been reserved by the State of West Virginia pursuant to the generic savings provisions of the West Virginia Constitution and statutes.[62]

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[58] 10 HEN. STAT. 226-27 (1780) [later amended at 1 SHEP. 65 (1792)].

[59] 2 SHEP. 317 (1802).

[60] These three Virginia statutes were consolidated in subsequent codifications of Virginia statutes and were last codified, before the creation of the State of West Virginia, at VA. CODE, Chap. 62, § 1 and § 2 (1860).

[61] RESTORED GOVT. VA. ACTS, Chap. 68, §1 (February 3, 1863).

[62] FIRST W.VA. CONST., Art. XI, §8 (1863). W.VA. CONST., Art. VIII, §13 (1872). W.VA. CODE § 63-1-2; W.VA. CODE, Chap. 166, §2; W.VA. CODE, Chap. 166, §2 (1868).

G-2. EASTERN AND WESTERN WATERS.

In 1780, the General Assembly enacted legislation which reserved public ownership of the ungranted "rivers and creeks" previously "used as common" on the eastern waters of Virginia and, in 1802, in an expansive departure from its earlier action, declared that the same on the western waters were all to be common lands. These enactments provide no guidance concerning the division of Virginia between eastern and western waters and the dictum in some Virginia cases and one West Virginia case suggest the Blue Ridge Mountains as the dividing line. The question is important since the Blue Ridge would place contemporary West Virginia exclusively within the western waters.

In his 1931 treatise, Waters of the State[63], Judge Embrey provides an exhaustive technical analysis of the 1769 surveys for the creation of Botetourt County from Augusta County, then comprising most of contemporary West Virginia, for which the survey line was to run west "as far as the western waters" and determines the Allegheny Front as the true division.[64] A 1982 formal opinion of the Virginia Attorney General, issued at the request of the Virginia Marine Resources Commission to assist in identifying the common lands, adopted the conclusions of Judge Embrey.[65] Both legislative and common historical usage also support the Allegheny Front as manifested in numerous turnpike and Land Office statutes[66]

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[63] Judge A.T. Embrey, Virginia Commission on Conservation and Development, WATERS OF THE STATE, pgs. 169-173. (1931) [cited by the Virginia Supreme Court as an authoritative treatise on common lands and riparian rights. Miller v. Commonwealth, 166 S.E. 557, 563 (Va. 1932)].

[64] WATERS OF THE STATE, pgs. 290-301.

[65] 1982 OPINION VA. ATTY. GEN. 244.

[66] E.g., 10 Henings Stat. Chap. 20 (1780) [authorizing the county court of Greenbrier County to have a wagon road built from Louisbourg, which lies west of the Allegheny Front, to the "eastern waters" at either "the Warm Springs, or.....the mouth of the Cow Pasture river..." which lie west of the Blue Ridge but east of the Allegheny Front]. Barre v. Fleming, 29 W.Va. 314, 317 (1887) [1780 Act "had no reference to lands west of the Alleghenies"]. See, United States v. Appalachian Electric Power Co. 23 F.Supp. 83, 101 (W.D. Va. 1938), revd. on other grounds, 311 U.S. 377 (1940) [New River is within the western waters of

and surveys by the Virginia Board of Public Works and General George Washington.[67]

Accordingly, "eastern waters" are those watercourses which drain to the Chesapeake Bay and "western waters" are those which drain to Ohio River for the purposes of the 1780 and 1802 Acts. The Allegheny Front divided the Commonwealth of Virginia, and now the State of West Virginia, between the eastern and western waters.[68]

G-3. "USED AS COMMON" REQUIREMENT ON THE EASTERN WATERS.

Pursuant to the 1780 Act, only those tidal shores and non-tidal watercourses on the eastern waters which had been previously "used as common" were excepted from Land Office patents.[69] The Virginia decisional authority provides that such "rivers and creeks" were those used by the public for fishing, fowling or

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Virginia and was subject to 1802 Act for purposes of Land Office patents]. WATERS OF THE STATE, pgs. 279-90.

[67] E.g., FIRST ANNUAL REPORT OF THE VIRGINIA BOARD OF PUBLIC WORKS, pg. 10 and appendix (1817) [proposed turnpike from head of navigation of James River at Dunlop Creek (Covington, Va.) to the Greenbrier River would provide "connection between the eastern and western waters"]. In 1784, shortly after Revolutionary War, George Washington conducted his famous field survey to locate a canal or turnpike between the navigable streams of the eastern and western waters of Virginia. In his diaries, General Washington identifies the Potomac River as comprising the eastern waters and the Monongahela, Cheat and Tygart Valley Rivers as being on the western waters. D. Jackson and D. Thowig, eds., THE DIARIES OF GEORGE WASHINGTON, 1784-JUNE 1786, VOL. IV, pgs. 4-6, 38-41 (1978).

[68] The "eastern waters" of West Virginia drain to the Chesapeake Bay and include the Potomac River watershed in the Eastern Panhandle and Potts Creek watershed in Monroe County. The "western waters" drain to the Ohio River.

[69] Barre v. Fleming, 29 W.Va. 314, 317 (1887); Garrison at 161; Mead v. Haynes, 3 Rand. 33 (Va. 1824); Martin v. Beverly, 5 Call 444 (Va. 1805).

hunting[70] or for regular and established navigation.[71] There are no West Virginia cases on point.

Many administrative and legal records of the Colonial government have been lost and it is probably impossible to identify many or even most of those eastern watercourses which were "used as common" for navigation.[72] On the eastern waters of West Virginia, there are governmental records and historical accounts identify the Potomac River upstream to Cumberland[73], the South Branch of the Potomac[74] and the Shenandoah Rivers[75] as subject to established use

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[70] Bradford v. Nature Conservancy, 294 S.E.2d 866, 871-72; Garrison at 159-161. See, Miller v. Commonwealth, 166 S.E. 557, 564-65 (Va. 1932).

[71] James River & Kanawha Power Co. v. Old Dominion I. & S. Corp., 122 S.E. 344, 347-348 (Va. 1924); Mead at 36. See, Hayes v. Bowman, 1 Rand. 417, 420 (Va. 1823) [holding that undated patent issued by "Commonwealth", but not being a colonial patent and presumably subject to 1780 Act, would convey to grantee the bed of a non-tidal river provided it was not navigable]. See also, Crenshaw v. Slate River Co., 6 Rand. 271, 288-291 (Va. 1828).

[72] WATERS OF THE STATE at pgs. 216, 224. W. Palmer, ed., 1 CALENDER OF VIRGINIA STATE PAPERS, 1652-1781, pg. viv (1875).

[73] 8 HEN. STAT. 570 (1772) [improvement of navigation on Potomac River above tidewater to Fort Cumberland]; Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA, pgs. 24-25 (1784).

[74] 12 Henings Stat. Chap 19 (October, 1785) ["an act for improving the navigation of the south branch of Potowmack River" from its mouth upstream to the North Fork by requiring all mill dam to install a "slope" for passage of fish and "canal or race" for boats by 1787]. WASHINGTON DIARIES, pg. 51 [1784 survey by General Washington of the navigable watercourses on the eastern and western waters of Virginia. South Branch Potomac was being used for navigation to Fort Pleasant (Old Fields, W.Va.) and possibly "fifty miles higher"].

[75] Report of James Herron on the Surveys of the Shenandoah River and Valley, Nineteenth Annual Report of the Virginia Board of Public Works, pgs 349, 353 (1834) [navigation has been common on Shenandoah River upstream to Port Royal, Va. since 1720's]. WASHINGTON DIARIES, pgs. 53-54, 58-59.

for navigation prior to 1780. A further search of the historical records could identify other watercourses used as a common circa 1780 as the Eastern Panhandle was then settled even in the upper reaches of streams tributary to the Potomac River.

G-4. EFFECTIVE DATE FOR PUBLIC RESERVATION OF THE EASTERN WATERS: 1780 OR 1792 ?

In 1792, the General Assembly consolidated all the statutes concerning the Land Office and added the phrase "and the bed of any river or creek" to the 1780 Act which was now codified as section six of the consolidated Land Office Act.[76]. The 1780 Act reference to reserving only the "shores" of non-tidal watercourses, and its omission of any reference to their "beds", and the subsequent inclusion of the "bed of any river or creek" in the 1792 Act, has been a source of confusion. Taken literally, the effect between 1780 and 1792 would have been to reserve only the "shores" or banks of non-tidal waters while the bed passed to a private grantee -- a seemingly incredible result.

Was the 1792 amendment a clarification of earlier legislative intent or a substantive revision of the statute? The question is important in the Eastern Panhandle where Virginia has succeeded to the interests of the Northern Neck Proprietary and many Land Office patents were being issued during this period. Some Virginia cases refer to the 1792 Act as the effective date of reservation of the non-tidal watercourses[77] while others cite the 1780 Act.[78] A 1982 formal opinion by the Virginia Attorney General relies upon the 1792 Act.[79] In the dictum of Gaston v. Mace, the West Virginia

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[76] 1 VA. STAT. AT LARGE, Chap. 24, § 6 (1792). The purpose of the 1792 legislation was principally statutory consolidation and revisions to survey and patent procedures. JOURNAL OF THE VIRGINIA HOUSE OF DELEGATES, pgs. 66, 124 (1792).

[77] Miller v .Commonwealth, 166 S.E. 557, 565-56 (Va. 1932); Mead v. Haynes, 3 Rand. 33, 36 (Va. 1824).

[78] Boerner v. McCallister, 89 S.E. 23, 26-27 (Va. 1955); James River & Kanawha Power Co. v. Old Dominion I. & S. Corp., 122 S.E. 344, 348 (Va. 1924).

[79] 1982 OPINION VA. ATTY GEN. 242 [providing a formal opinion to the Virginia Marine Resources Commission which is vested with title to the common lands on both tidal and non-tidal

Supreme Court cited 1780.[80] However, none of these cases actually adjudicated title under a patent on the eastern waters issued between 1780 and 1792.

The best authority on point is probably the construction provided by the General Assembly. In drafting and reporting the 1849 Virginia Code, the revisers were instructed to consolidate and clarify existing statues without making substantive revisions.[81] The 1849 revision provided that rivers and creeks which were "used as a common ...shall continue as such common according to the acts of May seventeen hundred and eighty and January eighteen hundred and two" and made no reference to the 1792 amendment.[82] In Garrison v. Hall[83], the Virginia Supreme Court found that the revisions to the commons act set forth in the 1849 Code represented a legislative construction of the 1780 and 1802 Acts as originally enacted.[84] Accordingly, the 1792 amendment should be construed as a clarification of the 1780 Act which reserved from all patents issued after May, 1780 the beds and banks of those non-tidal eastern waters which had been used as common.

G-5. WESTERN WATERS RESERVED BY 1802 ACT WITHOUT QUALIFICATION THEY WERE "USED AS COMMON".

With a significant change in statutory construction from the 1780 Act, which reserved only those eastern waters previously "used as common", the 1802 Act declared that the western waters were "intended and ought to remain as a common." The 1802 Act reserved all the "rivers and creeks" on the western waters from patents issued by the Land Office after January 15, 1802[85] without any

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waters].

[80] Gaston at 31.

[81] VA. CODE, Preface, pg. vii (1849).

[82] VA. CODE, Chap. 62 (1849).

[83] 75 Va. 150 (1881).

[84] 75 Va. at 161.

[85] While language of the 1802 Act may appear retroactive in intent, raising obvious Constitutional issues, the West Virginia Supreme Court has found that the phrase "no grant issued...in

condition precedent of an established use for navigation, fishing, hunting or other common use.[86] The historical record and legislative materials related to the 1802 Act are scant, but in United States v. Appalachian Electric Power Co., in considering the navigability of the New River in Virginia and West Virginia, the United States District Court for the Western District of Virginia commented on the 1802 Act:

> That portion of the State was then largely unsettled and the state was the proprietary owner of great areas of land of which it was, from time to time, making grants to individuals. That it should see fit to reserve the beds of streams, in order that they should remain under ownership of the commonwealth to be controlled for the public good, was not unusual. But the power to do so was not dependent on the navigability of the stream. The power was that of any owner to grant what he chose and keep what he chose.[87]

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consequence of any survey already made ....shall pass any estate (in beds and banks)" applies only to surveys performed in contemplation of a subsequent application for a Land Office patent and does not apply to patents issued prior to January 15, 1802. Barre v. Fleming, 9 W.Va. 314, 324 (1887).

[86] United States v. Appalachian Electric Power Co. 23 F. Supp. 83, 101 (1938), revd. on other grounds, 311 U.S. 377 (1940). See, Gaston v. Mace at 31 [*dictum* states that the bed of Stonecoal Creek in Lewis County would be in public ownership if the patents to riparian landowners were issued after the 1802 Act. There is no reference to any requirement of prior use as a common.]; Crenshaw v. The Slate River Company, 6 Rand. 271, 297-98 (Va. 1828) [*dictum* refers to the lower seventy miles of Middle Island Creek in Wetzel, Tyler and Doddridge Counties as "a stream, whose bed and banks were declared by the act of 1802, to belong to the public, for the common use of all, and incapable of being granted to any individual, by any prior or subsequent patent."].

[87] Appalachian Electric at 101.

H. WEST VIRGINIA LAND GRANTS & SCHOOL FUND DEEDS.

When West Virginia was created in 1863, the vast majority of the "waste and unappropriated lands" had been granted. Some lands were "entered" (located and surveyed) under treasury warrants issued by the Virginia Land Office with a right to receive a patent upon filing a survey and meeting other procedural requirements. Only isolated tracts of "unentered" lands remained available for sale by the new state of West Virginia. In December, 1863, the Legislature authorized the Governor to issue West Virginia land grants for the lands entered prior to June 20, 1863 under Virginia warrants under the same provisions as set forth in the Virginia Land Office Act.[88] These West Virginia grants were subject to the same reservation of the beds and banks of watercourses as set forth in the common lands provisions of the Virginia Code of 1860.[89] Most West Virginia land grants had been issued by the early 1870's and the procedure was discontinued in 1884.[90]

With the exception for those lands entered prior to the creation of West Virginia, the new State immediately abolished the treasury warrant and patent system used by the Virginia Land Office.[91] A new system was created in 1865 for the benefit of the State school fund by which a commissioner of school lands in each county sold by deed the remaining "unentered" waste and

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[88] W.VA. ACTS, Chap. 134, § 1 and 3 (1863) [Requiring compliance with the procedural provisions of Chapter 112 of the Virginia Code of 1860 for the issuance of patents by the Virginia Land Office].

[89] W.VA. ACTS, Chap. 134, § 1 (1863) [requiring that any West Virginia grants for lands entered under Virginia treasury warrants comply with section forty-three of the Virginia Land Office Act (VA. CODE, Chap. 112, § 43 (1860)) which prohibited any grants of "lands which are a common under chapter sixty-two"]. W.VA. CODE, Chap. 68, § 1 (1884).

[90] W.VA. CODE, Chap. 68, § 3 (1884). See generally, SIM'S INDEX TO LAND GRANTS IN WEST VIRGINIA, W.Va. State Auditor, pgs. 836-864 (1952).

[91] FIRST W.VA. CONST., Art. IX, §2 (1863). W.VA. CONST., Art. XIII, §2 (1872). State v. Miller, 84 W.Va. 175, 177-78 (1919).

unappropriated lands.[92] But unlike the West Virginia land grants, the beds and banks of watercourses were not excepted from the operation of the school fund deeds.[93]

In 1872, the Legislature excluded "lands under the bed of the Ohio River" from sale by the commissioners of school lands[94] and, in 1893, this exception was expanded to proscribe "lands under the bed of the Ohio River or any other navigable stream" from such sales.[95] But as discussed below, the "rivers and creeks" reserved by the earlier Virginia statutes included a much greater category of streams than merely the navigable streams excepted from school fund deeds. Given the paucity of "unentered lands" inherited by West Virginia in 1863, it appears that school fund deeds are of minor significance to public and private rights in watercourses.

I. AN ABERRATION IN THE COMMON LAW RULE FROM THE WEST VIRGINIA SUPREME COURT: *CAMPBELL, BROWN & CO. v. ELKINS*.

Until 1956, the decisions of the West Virginia Supreme Court, principally Barre v. Fleming and Gaston v. Mace, had adopted, or at least acquiesced in, the interpretations of the common law and the 1780 and 1802 Acts as interpreted by the Supreme Courts of Virginia and Kentucky. But in Campbell, Brown & Co. v. Elkins,[96] the West Virginia Court in effect, if not in word, rejected its previous holdings and adopted an erroneous, unprecedented rule that all navigable watercourses in Virginia were reserved in public ownership at the time of independence.[97]

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[92] W.VA. ACTS, Chap. 92 (1865). W.VA. CODE, Chap. 105 (1868). W.VA. CODE, Chap. 68 (1884).

[93] W.VA. ACTS, Chap. 93, § 2 (1865). W.VA. CODE, Chap. 105, § 2 (1868) ["All waste and unappropriated lands" may be sold for benefit of the School Fund unless claimed by entrymen under Virginia treasury warrants].

[94] W.VA. ACTS, Chap. 134, § 3 (1872-73).

[95] W.VA. ACTS, Chap. 24, § 3 (1893).

[96] 93 S.E.2d 248 (1956).

[97] Campbell, Brown at 266-67. In Campbell, Brown, the W.Va. Public Land Corporation claimed title to the bed of the

But the practical repercussions of Campbell, Brown are modest. First, the holding applies only to navigable rivers -- by far the smallest category of watercourses -- and is not applicable to the floatable and non-floatable streams which comprise the vast majority of West Virginia streams. Secondly, the subject patents were issued in the 1790's and the Court did not address riparian titles originating during the colonial period. Thirdly, the great majority of Land Office patents were issued in western Virginia after enactment of the 1802 Act. The errors in Campbell, Brown should have limited effect upon the western waters.

As to the eastern waters, colonial period grants issued by the Northern Neck Proprietary dominate the Eastern Panhandle and are not affected by this decision. Further, essentially all Land Office patents on the eastern waters are subject to the 1780 Act reserving streams "used as a common". But here Campbell, Brown becomes more problematic since it would assert public title to navigable rivers in instances where a lack of common use (or at least a lack of historical evidence thereof) would vest title in the riparian patentee. While Campbell, Brown is presently the law in West Virginia, its holding is precarious and ripe for reconsideration.

J. CLASSIFICATION OF WATERCOURSES AND CRITERIA TO DETERMINE PUBLIC OR PRIVATE OWNERSHIP OF UNDERLYING MINERALS.

J-1. NAVIGABLE AND FLOATABLE WATERCOURSES AT COMMON LAW.

The common law of West Virginia distinguishes between "navigable", "floatable" and all other (non-floatable) watercourses. A "navigable" watercourse is one capable of at least

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Guyandotte River in Lincoln County. The riparian owner also claimed title to the riverbed under Virginia patents issued in 1796 and 1797 - prior to the 1802 Act reserving such waters in public ownership. The Court relied upon and erroneously interpreted a single decision of the Virginia Supreme Court, Norfolk City v. Cooke, 27 Gratt. 430 (Va. 1876), which concerned ownership of the tidal bed underlying the Chesapeake Bay. No other cases were cited. That tidal waters were the subject of Norfolk City made the Virginia case irrelevant to the non-tidal streams of West Virginia since, as discussed above, tidal waters were always reserved at common law.

seasonal use by watercraft customarily used in commercial trade and transport including the historical use of small steamboats, batteau, tobacco canoes and canoes.[98] That specific segments of a watercourse include obstructions to navigation which required portaging or the construction and use of sluices, wing dams, short canals or locks through mill dams for passage by such historical watercraft does not diminish its navigable status at common law. A "floatable" watercourse is non-navigable for batteau and larger watercraft customarily used in trade and transport but is capable of seasonal passage of saw-logs, timber rafts, canoes, push-boats and small boats.[99]

J-2. QUANTITATIVE CRITERIA TO IDENTIFY NAVIGABLE AND FLOATABLE WATERCOURSES.

Relying upon the historical record, this presenter has developed quantitative criteria by which to identify navigable, floatable and non-floatable streams. The delineation of navigable streams is important when the rule in Cambell, Brown & Co. v. Elkins (discussed above - Section I), may have a bearing upon mineral titles.

Historically, the characteristics of navigable and floatable watercourses have been the subject of numerous decisions of the West Virginia Supreme Court and Virginia Supreme Court as discussed and cited above. Of much greater utility are the legislative designations of streams as a "public highway" pursuant to the **"Mill Act"**[100] by the West Virginia Legislature and Virginia General

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[98] VA. CODE, Chap. 235, § 21 (1819). U.S. v. Appalachian Elec. Power Co. 311 U.S. 377 (1941); Loving v. Alexander, 548 F.Supp. 1079 (W.D. Va. 1982), aff'd. 745 F.2d 861 (4th Cir. 1984); Campbell, Brown & Co. v. Elkins, 141 W.Va. 801, 92 S.E.2d 248 (1956).

[99] Hot Springs Lumber & Mfg. Co. v. Revercomb, 55 S.E. 580 (Va. 1906); State v. Elk Island Boom Co., 41 W.Va. 796, 24 S.E. 590 (1896); Gaston v. Mace, 33 W.Va. 14, 31, 10 S.E. 60 (1889).

[100] The *"Mill Act"*, as enacted in 1785, protected the passage of fish, navigation and floatage from mill dams, fish-hedges and other obstructions in watercourses. County (fiscal) courts could authorize the construction of mill dams and determine whether locks or slopes were to be installed to protect

Assembly, the recent historical navigation studies by the U.S. Army Corps of Engineers[101] and the state river surveys conducted by the Virginia Board of Public Works starting in 1816 until the 1840's.[102] The historical record supports the following guidance in the identification of navigable and floatable watercourses as a function of their physical characteristics:

(a) **Larry W. George's Criteria -- Navigable Watercourses**:

**** Drainage Area Exceeding One Hundred & Twenty-Five square Miles (125 sq. mi.)**

**** Average Stream Gradient Less Than Fifteen Feet Per Mile (15 f.p.m.)**

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navigation, floatage or the passage of fish. VA. CODE, Chap. 235, (1819). Anthony v. Lawhorne, 1 Leigh (28 Va.) 1 (1829); Kownslar v. Ward, 1 Gilmer (21 Va.) 127 (1820). The designation of a stream as a "public highway" prohibited the construction of any mill dams thereon without locks or slopes and eliminated the discretion of the county courts. VA. CODE, Chap. 62, § 6 (1849). VA. CODE, Chap. 235, § 22 (1819).

[101] The Army Corps of Engineers has conducted several exhaustive studies of the nature and upstream limits of historical navigation on streams in the Blue Ridge and Allegheny Mountains of contemporary Virginia. E.g.; Report on Navigability of Rivanna River, Virginia, Norfolk District, U.S. Army Corps of Engineers (Aug. 1982); Report on Navigability of Craig Creek, Virginia, Norfolk District, U.S. Army Corps of Engineers (Sept. 1980); Report on Navigation of Streams Tributary to the Upper Roanoke River Basin, Virginia., Wilmington District, U.S. Army Corps of Engineers (May, 1976); Navigability of the Jackson River, Virginia, Norfolk District, U.S. Army Corps of Engineers (Jan. 1976); Report on Navigation in the Maury River Basin: An Investigation to Determine the Head of Navigation, Norfolk District, U.S. Army Corps of Engineers (May, 1974).

[102] Generally, Annual Reports of the Virginia Board of Public Works (1817-1860). E.g., Survey of the Little Kanawha River, 6th Annual Report (1821) [Little Kanawha suitable for navigation upstream to Bulltown Salt Works (a point inundated by Burnsville Lake a few miles above Burnsville, W.Va.)].

A watercourse would be considered navigable even if some segments exceed a gradient of 15 f.p.m. or are rendered non-navigable by obstructions. Further, it is plausible that watercourses of lesser drainage area or greater gradient may be determined navigable by a judicial ruling or administrative ruling.

(b) **Larry W. George's Criteria -- Floatable Watercourses**:

**** Drainage Area In Excess of Seven Square Miles (7.0 sq. mi.)**

**** Average Gradient of Less Than Thirty-five Feet Per mile (35 f.p.m.)**

A watercourse would be considered Floatable even if some segments exceed a gradient of 15 f.p.m. or are rendered non-floatable by obstructions. Again, it is plausible that watercourses of smaller drainage area will be determined to be floatable streams by a judicial ruling or an administrative decision.

J-3. QUANTITATIVE CRITERIA TO IDENTIFY THE "*RIVERS AND CREEKS*" RESERVED UNDER THE 1780 & 1802 ACTS.

The 1780 and 1802 Acts do not include a statutory definition of the "rivers and creeks" subject to reservation in public ownership. From 1680 through the present, the use of "rivers and creeks" as a statutory term appears repeatedly and consistently in Virginia legislation concerning mill-dams, obstructions, common lands and other matters affecting watercourses.[103] The term clearly had a generally accepted meaning and, under the rules of statutory construction, the plain and ordinary meaning of the term is applied in the absence of a statutory definition.[104]

An examination of the case law, Colonial and Commonwealth statutes and historical authorities indicate that "rivers and

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[103] WATERS OF THE STATE, pgs. 237-55.

[104] State v. White, 425 S.E.2d 210(W.Va. 1992); Application of Metheney, 391 S.E.2d 635(W.Va. 1990).

creeks" are commensurate in dimensions and flow with "navigable" and "floatable" streams. But "rivers and creeks" also includes those streams of similar magnitude which, by reason of natural obstruction or steep gradient, could not have been utilized for navigation or floatage.[105]

Larry W. George's Criteria - "*Rivers and Creeks*" Reserved by 1780 & 1802 Acts

**** Minimum Drainage Area of Seven Square Miles (7.0 sq. mi.)**

**** No Limits on Stream Gradient**

**** Navigability or Floatability Not Required**

**** No assumption that all "Rivers and Creeks" are subject to public reservation**

J-4. VIRGINIA CRITERIA IN DETERMINING "*RIVERS AND CREEKS*" RESERVED UNDER THE 1780 & 1802 ACTS.

The Virginia Marine Resources Commission (VMRC), vested with title to both tidal and non-tidal beds in the Commonwealth, has adopted a ***five square mile (5.0 sq. mi.) criteria*** for determining public ownership under the 1780 and 1802 Acts. Administratively, at the recommendation of the Attorney General of Virginia, VMRC assumes that all riparian lands are subject to the 1780 and 1802 Acts unless title can be documented. In other words, VMRC assumes that ownership of all "rivers and creeks" is vested in the Commonwealth unless the riparian landowner can prove that his title originates prior to the reservations in the 1780 or 1802 Acts. Most significantly, VMRC assumes that all the "rivers and creeks"

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[105] Garden Club of Va. v. Va. Public Service Co., 153 Va. 659, 674, 669-70 (1930) [affirming the ruling of the State Corporation Commission in Application of the Virginia Public Service Company for a License to Construct a Dam Across North River, at the North End of Goshen Pass, Case No. 3835, Annual Report of the State Corporation Commission (1929), where the Commission found that the 1780 Act reference to "rivers and creeks" included non-navigable and non-floatable streams]. See, Mead v. Haynes, 3 Rand. 33 (Va. 1824).

on the eastern waters were "used as common" and thereby subject to public reservation if not granted prior to the 1780 Act.[106]

Virginia Marine Resources Commission Criteria -
"*Rivers and Creeks*" Reserved by 1780 & 1802 Acts

**** Minimum Drainage Area of *Five Square Miles* (5.0 sq. mi.)**

**** No Limits on Stream Gradient**

**** Navigability or Floatability Not Required**

**** Assumes all "Rivers and Creeks" are Reserved in public Ownership Unless Riparian Landowner Can Document:**

(1) Eastern Waters - Origin of Title Prior to 1792, or

(2) Western Waters - Origin of Title Prior to 1802

Note: The VMRC practice conflicts with criteria proposed above by the Presenter, Larry W. George.

K. ORDINARY LOW WATER MARK AS BOUNDARY OF PUBLIC TITLE

Generally, in the eastern United States, public title on freshwater streams includes the bed and banks between the ordinary low water marks. This appears to be the rule in Virginia and West Virginia.[107] The "*ordinary low-water mark*" is that point to which

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[106] VA. CODE § 28.2-1200. 1982 OPINION VA. ATTY. GEN. 242. Letter from Tony Watkinson, Virginia Marine Resources Commission, to Larry W. George (November 20, 1997) [Commission has administratively adopted a standard of five square miles or an average flow of five c.f.s. for public ownership. Commission recognizes that smaller streams may be also be in public ownership].

[107] Campbell, Brown at 260; Barre at 324-25 [reversing the holding four years earlier in Town of Ravenswood v. Fleming, 22 W.Va. 52, 67-68 (1883), adopting the Virginia common law rule that riparian lands extended down to only the ordinary high-water mark].

the water recedes at its lowest normal level.[108] Pursuant to the common law and the enactment of February 16, 1819 (1819 Act)[109], the State of West Virginia is vested with a public easement between the ordinary low-water and ordinary high-water marks[110] on certain streams for specific purposes.[111] The purpose of the common law easement is to facilitate public access to and use of navigable waters for purposes reasonably related to navigation and commerce.[112] While the easement may be relevant for regulatory purposes, it does not affect title to minerals.

On the eastern waters, pursuant to the 1819 Act, a statutory easement exists between the ordinary low and high-water marks for "fishing, fowling and hunting" and necessary incidents thereof by the public adjacent to those watercourses in public ownership (i.e.

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[108] Union Sand & Gravel Co. v. Northcott, 135 S.E. 589 (W.Va. 1926).

[109] Chap. 87, § 1, VA. ACTS (1819). VA. CODE, pg. 341 (1819). The Act reads in relevant part: "WHEREAS doubts exist how far the rights of owners of shores on the Atlantic ocean, the Chesapeake bay and the rivers and creeks thereof.....extend; for explanation whereof, and in order effectually to secure said rights ....hereafter the limits or bounds of the several tracts of land lying on the Atlantic ocean, the Chesapeake bay, and the rivers and creeks thereof.....shall extend to ordinary low water mark; and the owners of said lands shall have, possess and enjoy exclusive rights and privileges to, and along the shores thereof, down to ordinary low water mark .....*provided, also,* That nothing in this section contained shall be construed to prohibit any person or persons from the right of fishing, fowling and hunting on those shores....which are now used as a common to all the good people [of the Commonwealth]."

[110] "Ordinary high water mark" means that point on the bank below which the intermittent presence and action of the water creates a distinction in character of both the soil and vegetation and is normally the top of the bank. State ex rel. Johnson v. City of Charleston, 112 S.E. 577 (W.Va. 1922).

[111] VA. CODE, Chap. 62, § 2 (1860). Bradford v. Nature Conservancy, 294 S.E.2d 866 (Va. 1982); Barre; Northcott. 1967 OPINION W.VA. ATTY. GEN. 401.

[112] Barre at 324-25.

"used as common" prior to 1780).[85] Until the 1819 Act, it was generally held that the title of riparian landowners extended down to only the ordinary high water mark although there had historically been significant debate particularly in regard to tidal shores.[86] To resolve this issue, the General Assembly lowered all riparian boundaries on the eastern waters to the low water mark subject to a statutory public easement.[87] However, possibly due to the focus on tidal shores, this legislation was not extended to the western waters.[88] There is no authority which supports a public easement for fishing, fowling or hunting adjacent to public beds on the western waters.

L. AGENCY JURISDICTION FOR PUBLIC MINERALS UNDERLYING STREAMBEDS

West Virginia - The title of the State of West Virginia in the beds and banks of watercourses, including underlying minerals,

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[85] Bradford at 873-74; Miller v. Commonwealth at 566.

[86] French v. Bankhead, 11 Gratt. 136, 159-60 (Va. 1854). See, Miller v. Commonwealth at 565-566. Livingston, Ownership of Virginia's submerged Lands: Commonwealth v. Morgan and Beyond, pgs. pgs. 339-346, 353-355, 4 VA. J. OF NATURAL RESOURCES LAW 325 (1985). Butler, The Commons Concept: An Historical Concept with Modern Relevance, pgs. 902-03, 23 WM. & MARY. L. REV. 835 (1982). The rule in England provided that the Crown was vested with the tidal shores to the ordinary high-water mark. De Jure Maris, pgs. 12-13.

[87] Id. Supra, fn. 336.

[88] Barre at 319; Ravenswood at 67. The question of public rights between the low and high water marks for purposes other than navigation and commerce was emasculated by the Barre holding that title at common law had always extended to the low water mark. The Barre Court did not attempt to reconcile its decision with the earlier Virginia cases supporting the high water mark and dismissed its earlier adoption of the Virginia rule in Ravenswood. There are no Virginia cases reviewing whether riparian boundaries extend to the high or low water mark on the western waters.

are vested in the West Virginia Division of Natural Resources.[89] Historically, DNR has issued "licenses" and charged annual fees for utility, highway and other easements across watercourses and construction work in the beds and banks. However, the DNR has not adopted any regulations or administrative guidelines for the leasing of minerals under watercourses.

West Virginia Contact:

Office of Lands and Streams
W.Va. Division of Natural Resources
Building No. 3, Room 643
State Capitol Complex
Charleston, W.Va. 25305
(304) 558-3225

Virginia - The Virginia Marine Resources Commission (VMRC) has jurisdiction and is vested with any public title in both tidal and non-tidal banks, shores, streambeds and underlying minerals.[90] VMRC manages and leases minerals underling subaqueous lands in compliance with the State Minerals Management Plan (1991) which is an inter-agency policy issued by the Virginia Department of Mines, Minerals and Energy pursuant to statute.[91]

Virginia Contact:

Habitat Management Division
Virginia Marine Resources Commission
2600 Washington Avenue, 3rd Floor
Newport News, Virginia 23607
(757) 247-2200

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[89] W.VA. CODE § 5A-11-1(d)(1). Campbell, Brown & Co. v. Elkins, 141 W.Va. 801, 93 S.E.2d 248 (1956).

[90] VA. CODE § 28.2-1200.

[91] VA. CODE § 2.2-1157.

APPENDIX A - LIST OF TURNPIKE COMPANIES CHARTERED THROUGH 1863 BY THE VIRGINIA GENERAL ASSEMBLY WITH WORKS SITUATED IN CONTEMPORARY WEST VIRGINIA

COUNTY & TURNPIKE	CHARTERED
BARBOUR	
Beverly & Fairmont Turnpike	January 14,1848
Clarksburg & Buckhannon Turnpike	March 9, 1848
Clarksburg & Philippi Turnpike	March 13,1849
Gnatty Creek & West Union Turnpike (a.k.a. Elk Turnpike)	February 16,1853
Middle Fork Turnpike	February 28, 1854
Morgantown & Beverly Turnpike	March 12, 1849
BERKELEY	
Berkeley & Hampshire Turnpike	March 1, 1851
Hedgesville & Potomac Turnpike	February 18, 1850
Martinsburg & Potomac Turnpike	March 17, 1849
Martinsburg & Winchester Turnpike	March 24, 184B
Middleway & Gerrardstown Turnpike	February 18, 1854
BOONE	
Kanawha and Logan Road	March 2, 1846
BRAXTON	
Gilmer & Braxton Turnpike	March 29, 1853
Weston & Gauley Bridge Turnpike	March 25, 1848
BROOKE	
Holliday's Cove Turnpike	March 2, 1838
Wellsburg & Washington Turnpike	March 2, 1822
Wellsburg & Bethany Turnpike	March 15, 1849
Wheeling, West Liberty & Bethany Turnpike	March 20, 1847

CABELL

Guyandotte Turnpike[92]	January 7, 1831
James River & Kanawha Turnpike (Extension into Cabell Co.)	January 30, 1829

CALHOUN

Gilmer, Ripley & Ohio Turnpike	March 19, 1850
Ritchie & Gilmer Turnpike	March 12, 1851

DODDRIDGE

Northwestern Turnpike	March 19, 1831
Salem & Harrisvllle Turnpike	March 10, 1851
Shinnston Turnpike	February 7, 1850
Sistersvlle & Salem Turnpike	February 1, 1847
West Union Turnpike	February 24, 1851
Weston & West Union Turnpike	February 17, 1851

FAYETTE

Giles, Fayette & Kanawha Turnpike	March l, 1837
James River & Kanawha Turnpike (Extension of February 21, 1817)	January 30, 1829
Weston & Gauley Bridge Turnpike	March 25, 1848

GILMER

Gilmer & Braxton Turnpike	March 29, 1853
Gilmer, Ripley & Ohio Turnpike	March l9, 1850
Ritchie & Gilmer Turnpike	March 12, 1851
Staunton & Parkersburg Turnpike	March 16, 1838

GRANT

Hardy & Randolph Turnpike	March 24, 1851
Moorefield & Allegheny Turnpike	March 31, 1838
Moorefield & North Branch Turnpike	March 22, l841
New Creek & Hardy Turnpike	February 25, 1850
Northwestern Turnpike	March 19, 1831

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[92] Merged into the James River & Kanawha Turnpike on March 10, 1834 - became a branch from Barboursville to the mouth of the Guyandotte River.

GREENBRIER

Huntersvllle & Lewisburg Turnpike (a.k.a. Marlin's Bottom & Lewisburg Turnpike)	March 22, 1853
James River & Kanawha Turnpike	February 21, 1817
Lewisburg & Blue Sulphur Turnpike	March 12, 1834
Red & Blue Sulphur Springs Turnpike (a.k.a. "Alderson Pike" - Local Name)	January 18, 1836
White & Salt Sulphur Springs Turnpike	January 8, 1834

HAMPSHIRE

Back Creek Valley Turnpike	March 8, 1856
Berkeley & Hampshire Turnpike	March 1, 1851
Bloomery Turnpike	February 3, 1830
Cacapon & North Branch Turnpike	April 3, 1838
Hampshire & Morgan Turnpike	March 15, 1849
Moorefield & North Branch Turnpike	March 22, 1847
North River Turnpike	February 17, 1851
Northwestern Turnpike	March 19, 1831
Potomac Turnpike	March 4, 1851

HANCOCK

Holliday's Cove Turnpike	March 2, 1838
New Manchester Turnpike	April 4, 1848

HARDY

Hardy & Randolph Turnpike	March 24, 1851
Hardy & Winchester Turnpike	March 5, 1846
Moorefield & Allegheny Turnpike	March 31, 1838
Moorefield & North Branch Turnpike	March 22, 1841
Mt. Jackson & Howards Lick Turnpike	February 6, 1856
North River Turnpike	February 11, 1851

HARRISON

Clarksburg & Buckhannon Turnpike	March 9, 1848
Clarksburg & Philippi Turnpike	March 13, 1849
Morgantown & Bridgeport Turnpike	March 15, 1849
Northwestern Turnpike	March 19, 1831
Salem & Harrisville Turnpike	March 10, 1851
Shinnston Turnpike	February 7, 1850
West Milford & New Salem Turnpike	March 7, 1850
Weston & Fairmont Turnpike	March 9, 1848

JACKSON

Charleston, Ripley & Ravenswood Turnpike (also includes Parkersburg Branch)	March 25, 1853
Gilmer, Ripley and Ohio Turnpike	March 19, 1850
Ravenswood & Reedy Creek Turnpike	February 18, 1850

JEFFERSON

Berryville & Charles Town Turnpike	March 22, 1847
Cross Roads & Summit Point Turnpike	March 29, 1851
Hillsborough & Harpers Ferry Turnpike	March 9, 1849
Middleway & Gerrardstown Turnpike	February 18, 1854
Shepherdstown & Smithfield Turnpike	January 31, 1816
Smithfield, Charles Town & Harpers Ferry Turnpike	February 18, 1830

KANAWHA

Charleston & Pt. Pleasant Turnpike	January 23, 1835
Charleston, Ripley & Ravenswood Turnpike	March 25, 1853
Giles, Fayette & Kanawha Turnpike	March 1, 1837
James River & Kanawha Turnpike (Extension into Kanawha Co.)	January 20, 1829
Kanawha & Logan Road	March 2, 1846

LEWIS

Buckhannon & Little Kanawha Turnpike	March 15, 1849
Staunton & Parkersburg Turnpike	March 16, 1838
West Milford & New Salem Turnpike	March 7, 1850
Weston & Fairmont Turnpike	March 9, 1848
Weston & Gauley Bridge Turnpike	March 25, 1848
Weston & West Union Turnpike	February 17, 1851

LOGAN

Kanawha and Logan Road	March 2, 1846
Logan, Raleigh & Monroe Turnpike	March 17, 1849

MARION

Beverly & Fairmont Turnpike	January 14, 1848
Fairmont & Wheeling Turnpike	April 6, 1838
Morgantown & Bridgeport Turnpike	March 15, 1849
Ohio River & Maryland Turnpike	March 15, 1836

Weston & Fairmont Turnpike	March 9, 1848

MARSHALL

Fairmont & Wheeling Turnpike	April 6, 1838
Grave Creek & Pennsylvania Line Turnpike	March 21, 1850
Marshall & Ohio Turnpike	February 11, 1848
Rock Lick & Cameron Turnpike	March 3, 1856

MASON

Charleston & Pt. Pleasant Turnpike	January 23, 1825
Gilmer, Ripley & Ohio Turnpike	March 19, 1850
Letart Falls & West Columbia Turnpike	February 15, 1854

MCDOWELL

Abe's Valley & Tug River Road Company	February 19, 1850

MERCER

East River & Princeton Turnpike	March 31, 1858
Price's Turnpike & Cumberland Road (a.k.a. "Fincastle Turnpike")	Undetermined
Princeton & Red Sulphur Turnpike	March 7, 1850
Raleigh & Grayson Turnpike (a.k.a. Raleigh & Wythe Line, Raleigh & North Carolina)	February 4,1850

MINERAL

Cacapon & North Branch Turnpike	April 3, 1838
New Creek & Hardy Turnpike	February 25, 1850
Northwestern Turnpike	March 19, 1831
Patterson Creek Valley Turnpike	March 11, 1850

MONONGALIA

Dunkard Creek Turnpike	February 1, 1839
Fairmont & Wheeling Turnpike	April 6, lB38
Morgantown & Beverly Turnpike	March 12, 1849
Morgantown & Bridgeport Turnpike	March 15, 1849
Morgantown, Kingwood & West Union Turnpike	March 25, 1848
Ohio River & Maryland Turnpike	March 15, 1836

MONROE

Giles, Fayette & Kanawha Turnpike	March 1, 1837
Mountain Lake & Salt Sulphur Springs Turnpike	March 3, 1856
Price's Turnpike & Cumberland Gap Road	Undetermined
Princeton & Red Sulphur Turnpike	March 7, 1850
Red & Blue Sulphur Springs Turnpike (a.k.a. Alderson Pike - Local Name)	January 18, 1836
Sweet & Salt Sulphur Springs Turnpike	March 15, 1849
White & Salt Sulphur Springs Turnpike	January 8, 1834

MORGAN

Hampshire & Morgan Turnpike	March 15, 1849
Morgan & Fredericks Turnpike	February 25, 1851
Sir John's Run Turnpike	March 8, 1841
Third Hill, Green Spring & Morgan Turnpike	March 10, 1856

NICHOLAS

Summersvllle & Slaven's Cabin Turnpike	March 12, 1853
Weston & Gauley Bridge Turnpike	March 25, 1848

OHIO

Cumberland Road (a.k.a. "National Road")[93]	1779
Fairmont & Wheeling Turnpike	April 6, 1838
Marshall & Ohio Turnpike	February 11, 1848
Wheeling, West Liberty & Bethany Turnpike	March 20, 1847

PENDLETON

Franklin & Circleville Turnpike	March 10, 1853
Franklin & Monterey Turnpike	February 14, 1853
Hardy & Randolph Turnpike	March 24, 1851
Harrisonburg & Franklin Turnpike	March 9, 1847

POCAHONTAS

Allegheny & Huntersvllle Turnpike	March 13, 1849

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[93] Sixty-six foot (66 ft.) Wide right-of-way and fee interest.

Huntersvllle & Lewisburg Turnpike (a.k.a. *Marlin's* Bottom & Lewisburg Turnpike)	March 22, 1853
Huntersvllle & Monterey Turnpike	March 29, 1853
Huntersvllle & Warm Springs Turnpike	February 15, 1860
Huttonsville & Huntersville Turnpike	February 25, 1BSO
Staunton & Parkersburg Turnpike	March 16, 183B

PRESTON

Brandonville, Kingwood & Evansville Turnpike	April 7, 1838
Cranberry Summit & Brandonville Turnpike	February 10, 1853
Gnatty Creek & West Union Turnpike	February 16, 1853
Leading Creek & Buffalo Turnpike	March 31, 1851
Morgantown & Beverly Turnpike	March 12, 1849
Morgantown, Kingwood & West Union Turnpike	March 25, 1848
Northwestern Turnpike	March 19, 1831
Ohio River & Maryland Turnpike	March 15, 1836

PUTNAM

Charleston & Pt. Pleasant Turnpike	January 23, 1835
James River & Kanawha Turnpike (Extension)	January 30, 1829

PLEASANTS

St. Marys Turnpike	March 24, 1851

RALEIGH

Giles , Fayette & Kanawha Turnpike	March 1, 1837
Logan, Raleigh & Monroe Turnpike	March 17, 1849
Raleigh & Grayson Turnpike (a.k.a. Raleigh & Wythe Line, Raleigh & North Carolina)	February 4, 1850

RANDOLPH

Beverly & Fairmont Turnpike	January 14, 1848
Hardy & Randolph Turnpike	March 24, 1851
Huttonsville & Huntersvllle Turnpike	February 25, 1850
Leading Creek & Buffalo Turnpike	March 31, 1851
Middlefork Turnpike	February 28, 1854
Morgantown & Beverly Turnpike	March 12, 1849
Staunton & Parkersburg Turnpike	March 16, 183B
Summersvllle & Slaven's Cabin Turnpike	March 12, 1853

RITCHIE

Harrisville Turnpike	March 28, 1848
Northwestern Turnpike	March 19, 1831
Reedy & Harrisville Turnpike	March 24, 1851
Ritchie & Gilmer Turnpike	March 12, 1851
Salem & Harrisville Turnpike	March 10, 1851
Staunton & Parkersburg Turnpike	March 16, 1838

ROANE

Gilmer, Ripley & Ohio Turnpike	March 19, 1850
Ravenswood and Reedy Creek Turnpike	February 18,1850

TAYLOR

Beverly & Fairmont Turnpike	January 14, 1848
Morgantown & Bridgeport Turnpike	March 15, 1849
Northwestern Turnpike	March 19, 1831

SUMMERS

Giles, Fayette & Kanawha Turnpike	March 1, 1837
Red & Blue Sulphur Springs Turnpike	January 18, 1836

TYLER

Shinnston Turnpike	February 7, 1850
Sistersville & Salem Turnpike	February 1, 1847
West Union Turnpike	February 24, 1851

TUCKER

Gnatty Creek & West Union Turnpike	February 16, 1853
Leading Creek & Buffalo Turnpike	March 31, 1851

UPSHUR

Buckhannon & Little Kanawha Turnpike	March 15, 1849
Clarksburg & Buckhannon Turnpike	March 9, 1848
Middlefork Turnpike	February 28, 1854
Staunton & Parkersburg Turnpike	March 16, 1838
West Milford & New Salem Turnpike	March 7, 1850

WAYNE

James River & Kanawha Turnpike (Extension)	January 30, 1829
Sandy River Turnpike	March 31, 1851

WEBSTER

Summersville & Slaven's Cabin Turnpike	March 12, 1853

WETZEL

Fairmont & Wheeling Turnpike	April 6, 1838
Ohio River & Maryland Turnpike	March 15, 1836

WIRT

Newark Turnpike	March 28, 1851
Parkersburg & Elizabethtown Turnpike	March 11, 1850
Reedy & Harrisvllle Turnpike	March 24, 1851
Staunton & Parkersburg Turnpike	March 16, 1838

WOOD

Charleston, Ripley & Ravenswood Turnpike (Parkersburg Branch)	March 25, 1853
Northwestern Turnpike	March 19, 1831
Parkersburg & Elizabethtown Turnpike	March 11, 1850
St. Marys Turnpike	March 24, 1851
Staunton & Parkersburg Turnpike	March 16, 1838
Williamsport Turnpike	March 15, 1849

WYOMING

Abe's Valley & Tug River Road (Company)	February 19, 1850
Logan, Raleigh & Monroe Turnpike	March 17, 1849

APPENDIX B - LIST OF TURNPIKE COMPANIES CHARTERED BY THE WEST VIRGINIA LEGISLATURE

Arnoldsburg & Harrisville Turnpike

Berkeley & Jefferson Turnpike

Burning Springs Turnpike

Bellton & Wetzel Turnpike

Boone & Cabell Turnpike

Browns Mill & Wilsonburg Turnpike

Charles Town & Duffields Turnpike

Charles Town & Leetown Turnpike

Circleville & Beverly Turnpike

Cross Roads & Summit Point Turnpike

Cumberland & Pattersons Creek Turnpike

Dunkard Valley Turnpike

Ellenboro & Harrisville Turnpike

Gilmer, Ritchie & Tyler Turnpike

Harpers Ferry & Smithfield Turnpike

Horse Shoe & Backbone Turnpike

Kabletown & Bloomery Turnpike

Lewisburg & Ronceverte Turnpike

Marshall & Ohio Turnpike

New Creek & Mechanicburg Turnpike

New Martinsville & Ritchie Turnpike

North & South Branches Turnpike

Peninsula Turnpike

Piney River Turnpike

Pocahontas & Webster Turnpike

Point Pleasant b Mud Bridge Turnpike

Raleigh Courthouse & Blue Sulphur Springs Turnpike

Randolph, Tucker & Preston Turnpike

Rocky Point Turnpike Company

Roney's Point & West Union Turnpike

Sir John's Run & Rock Gap Turnpike

Sistersvllle, Wick & Pennsboro Turnpike

Slaven's Cabin & Summersville Turnpike

Union & Greenbrier River Turnpike

Walkers Station & Burning Springs Turnpike

Webster & Braxton Turnpike

Wheeling Creek & Pennsylvania Turnpike Wheeling Iron Works &

Glen's Run Turnpike Wheeling & Moundsville Turnpike

White Sulphur & Sweet Springs Turnpike

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