



West Virginia E-Filing Notice

CC-33-2023-P-12

Judge: Debra McLaughlin

To: Lawrence Schultz
pvallejo@burkeandschultz.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

Dale Kirchner v. Brett W. McMillion

CC-33-2023-P-12

The following complaint was FILED on 4/14/2023 2:04:50 PM

Notice Date: 4/14/2023 2:04:50 PM

Melanie Shambaugh
CLERK OF THE CIRCUIT COURT
Morgan County
77 Fairfax St Rm 302
BERKELEY SPRINGS, WV 25411

(304) 258-8554
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IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

DALE KIRCHNER,

Petitioner,

v.

Civil Action No. 23-P-_____
JUDGE _____

**BRETT W. McMILLION, Director,
WV DNR, and THE WEST VIRGINIA DIVISION
OF NATURAL RESOURCES (WV DNR),**

Respondents.

PETITION FOR WRIT OF MANDAMUS

1. Plaintiff is a resident and taxpayer of Morgan County, West Virginia.
2. Respondents, Brett W. McMillion, Director, of The West Virginia Division of Natural Resources (WV DNR), a division of the West Virginia Department of Commerce, is in charge of West Virginia's State Parks, including Cacapon State Park here in Morgan County, West Virginia.
3. Respondents are desirous of using property within Cacapon State Park to carry out a joint venture with one of several different private companies which seek to install up to 350 recreational vehicle campsites in Cacapon State Park.
4. In order to achieve this objective of initiating a contract with a third-party vendor to place 350 RV camping sites in the State Park, Respondents are required by West Virginia Code §20-5-16(f) to:

“[C]onduct a public hearing to be held at a reasonable time and place within the county in which the facility is located. Notice of the time, place and purpose of the public hearing shall be provided as a Class II legal advertisement in accordance with §59-3-2 of this code which notice shall be given at least for the first publication 20 days in advance of the hearing.”

W.Va. Code §20-5-16(f).

5. W.Va. Code §59-3-2(b) defines a Class II legal advertisement in specific detail. §59-3-2(e), however, contains a specific *additional* requirement for State Agencies:

“Beginning July 1, 2022, any and all legal notices, advertisements, publications, statements, or whatever kind or character required to be published by the State of West Virginia, or its agencies, shall be made at the frequency and in the manner prescribed by subsection (a) or (b) of this section, and shall also be published on a public notice database to be created and maintained by the State Auditor.”

W.Va. Code §59-3-2(e).

6. While there is some evidence that WV DNR published a notice in the Martinsburg Journal on March 27, 2023, some 21 days before the April 18 hearing, it is equally clear that WV DNR has failed to publish timely notice on the Auditor’s website as of April 13, 2023. It is now too late to timely publish a Class II legal advertisement on the auditor’s website.¹

7. Given the requirement of the Code, it is clear that WV DNR violated the requirement of a State Agency as set forth in Code §59-3-2(e), and its public notice should be found wanting as a result.

8. This Court has jurisdiction of this matter pursuant to Code §53-1-2, as it relates to a public hearing to be held in this County.

9. Mandamus is an extraordinary remedy. The standard for issuance of a writ of mandamus is well-established. “Writ of mandamus will not issue unless three elements co-exist - - (1) a clear legal right in the petition to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petition seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 535, 170 S.E.2d 367, (1969).

¹ It now appears that 4 days before the scheduled hearing WV DNR has published a notice on the Auditor’s website. See, <https://www.wvsao.gov/LegalNotices/Default>

10. First, the right of the public in Morgan County to lawful notice of meeting at which the State Government will decide whether to lease, for profit, an interest in the beautiful and regenerative assets of Cacapon State Park, is undeniable. The previously cited statutes make clear the agency's duties and the public's rights.

11. Second, the clear duty of the State is set forth in Code §59-3-2, as cited above. The State is bound by Code §59-3-2 and by Code §20-5-16(f). If there were any remaining question, the actual notice printed in the Martinsburg Journal itself cites §20-5-16(f).

12. It seems clear there is no other adequate remedy at law other than an Order from this Court to WV DNR to follow the public notice law. Should WV DNR award a contract on April 19, 2023, to a private company on this defective notice, the public's right to be heard under the law will be forever taken away.

13. Your Petitioner asks this Honorable Court as follows:

Issue a Rule to Show Cause to the Director of the WV DNR to show cause, if he or she can, why the Court should not grant a writ of mandamus ORDERING the Director to: (1) cancel the hearing on April 18, 2023, until the WV DNR complies with the public notice statute; (2) to follow the public notice statutes and all other laws designed to protect the public in all future cases; and (3) grant to Petitioner any and all further relief allowable by law.

DALE KIRCHNER
By Counsel

/s/ Lawrence M. Schultz

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BRETT W. McMILLION, Director,
WV DNR, and THE WEST VIRGINIA DIVISION
OF NATURAL RESOURCES (WV DNR),

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF MORGAN, to wit:

Dale Kirchner being first duly sworn, says that he is the Petitioner named in the foregoing civil action filed in Morgan County, West Virginia, and as such is familiar with the contents of the foregoing; that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, he believes them to be true.

Dale Kirchner
DALE KIRCHNER

Taken, subscribed and sworn to before me, a Notary Public in and for said County and State, this 14th day of April, 2023.

Dana S Beard
NOTARY PUBLIC

My Commission Expires 7/3/27

