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IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA:

ESTATE OF GARRISON G. TAWNEY, by LELA ANN GOFF, Executrix, LELA ANN GOFF and VERNON B. GOFF, husband and wife, JANICE E. COOPER and CLIFFORD R. COOPER, husband and wife, LARRY G. PARKER, JOHN W. PARKER, RICHARD L. ASHLEY, MYRTLE JONES, by her Attorney-in-Fact, ORTON A. JONES,

Plaintiffs,

v. // CIVIL ACTION NO. 03-C-10E
(Judge Thomas C. Evans, III)

COLUMBIA NATURAL RESOURCES, LLC., f/k/a COLUMBIA NATURAL RESOURCES, INC., a Texas corporation; NISOURCE INC., a Delaware corporation; and COLUMBIA ENERGY GROUP, a Delaware corporation,

Defendants.

O R D E R

(Re: Cross Motions for Summary Judgment Relating to Flat-Rate Leases)

Pending for decision are the following motions made pursuant to Rule 56, WVRCivP:

1. Defendant Columbia Natural Resources, LLC's Motion for Partial Summary Judgment Regarding Flat-Rate Leases; and,

2. Plaintiffs' Cross Motion For Summary Judgment Regard Flat Rate Leases.

These motions have been fully briefed by the Defendant Columbia Natural Resources, LLC ("CNR") and the Plaintiffs. Upon consideration of which, and the record before this court, the court makes its following Findings of Fact, Conclusions of Law and Order.

M. Masters
M. Casey
S. Segal
J. Lawrence
for

Statement of the Case

On February 3, 2003, nine West Virginia mineral owners who entered into oil and gas leases with CNR or who are otherwise beneficiaries of such leases ("Plaintiffs") filed suit against CNR in the Circuit Court of Roane County, West Virginia.

By Order entered on February 26, 2004, amended by Order entered on May 25, 2004, the Circuit Court granted the Plaintiffs' "Motion for Class Certification," certifying a Plaintiff Class which includes all lessors or beneficiaries of West Virginia oil and gas leases paid royalties by CNR after July 31, 1990. This broad certification on its face would include individuals who hold flat-rate leases with CNR. Following class certification, extensive discovery and additional review of the numerous leases that are the subject of this action was conducted by CNR and Plaintiffs.

CNR maintains that the flat-rate leases are not within the scope of the Plaintiffs' claims. In addition, CNR claims that those flat rate leases that may be subject to the provisions of §22-6-8 of the West Virginia Code allow deduction of post-production expenses as a matter of law.

Pursuant to these claims, CNR makes its Motion for Partial Summary Judgment asking this Court to (1) dismiss any claims or clarify that the Order granting class certification does not apply to wells on flat-rate leases that were permitted and drilled before the adoption of the Flat-Rate Royalty Statute, and, (2) hold that with respect to wells permitted or modified after the effective date of the statute, that the clear and unambiguous language of W.Va. Code § 22-6-8 requires only that gas operators pay royalties based on the proceeds from the sale of gas at the wellhead, i.e., proceeds less post-production expenses incurred from the wellhead to the point of sale.

By cross motion, Plaintiffs maintain that they are entitled to summary judgment regarding all of the flat-rate royalty leases. Their primary argument is that the flat-rate

royalty leases are unenforceable and void as contrary to public policy. The remedy sought is not clear. In their "Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment Regarding Flat Rate Leases," at page 6, the Plaintiffs move for summary judgment that the court declare void as against public policy all such flat-rate leases, effective June 13, 1982, the effective date of the Flat-Rate Royalty Statute. Similarly, in "Plaintiffs' Supplemental Brief in Support of Plaintiffs' Cross Motion for Summary Judgment Regarding Flat Rate Leases" at page 12, Plaintiffs maintain that they be awarded unjust profits relating to these leases and wells since the effective date of the statute in 1982, stating that at best, CNR should be considered a "non-willful trespasser." However, in their "Plaintiffs' Reply to Defendant CNR's Response to Plaintiffs' Supplemental Brief in Support of Plaintiffs' Cross Motion for Summary Judgment Regarding Flat Rate Leases" at p. 17, Plaintiffs appear to be moving the court to order that that flat-rate leases be converted to "1/8th royalty" leases.

Finally, with respect to wells and leases concededly within the purview of W. Va. Code 22-6-8 - - that is, flat-rate leases converted by operation of law to leases requiring that royalty to be paid based on volume of gas produced - - Plaintiffs allege that CNR has failed to pay the proper royalty as fixed by the statute. CNR maintains that statute allows deduction from royalty for all of the post-production expenses and moves for partial summary judgment as to that issue. Thus, a question of law is presented by CNR's motion regarding whether post-production expenses may be deducted from the "statutory" royalty.

Statement of Undisputed Fact

1. These cross motions for summary judgment present questions of law for the court to decide. The facts do not appear to be dispute.

2. The Second Amended Complaint, para. 7-9, alleges generally that Plaintiffs are owners of oil and gas rights in West Virginia, and that the Plaintiffs "leased oil and

gas rights to CNR." Plaintiffs allege that they are entitled to royalty on gas produced from the wells on the said leases, and that CNR has intentionally failed and refused to pay royalties due to Plaintiffs. In Court I of the Second Amended Complaint, Plaintiffs seek to recover all rents and royalties due them by CNR, but which remain unpaid. In Count III, Plaintiffs allege that "CNR violated West Virginia Code 22-6-8 by not paying plaintiffs royalty required of CNR pursuant to said statute."

3. CNR states that there are approximately 651 leases that provide that royalties are to be paid to landowners on a flat-rate basis.[1] The royalty clauses may differ somewhat, but all provide that the royalty is to be "based solely on the existence of a producing well, and thus is not inherently related to the volume of the oil and gas produced or marketed . . . " *W. Va. Code 22-6-8(a)(1)*. The Plaintiffs who are lessors under such "flat-rate leases" are paid a fixed annual (or otherwise periodic) sum regardless of the volume of gas actually produced, saved and marketed from the lease.

4. So that it is clear, all 651 CNR leasehold estates are leases of oil and gas producing properties in the State of West Virginia wherein CNR is the lessee, or the successor/assignee of the lessee, and, thus, the operator of the lease.

5. The law of this State is that courts will presume that the Legislature has made the fullest investigation before declaring a "fact." Accordingly, a legislative declaration of fact relating to a matter within the Legislature's police power, if not arbitrary, is final and binding on the judiciary. ***E. g., Lemon v. Rumsey, etc.,*** 108 W. Va. 24, 150 S.E. 725 (1929); ***Woodall v. Darst***, 71 W. Va. 350, 77 S. E. 264, 80 S. E. 367 (1912). ***Verba v. Ghaphery***, 552 S.E.2d 406 (W.Va. 2001)(holding that appellate courts ordinarily will not reexamine independently the factual basis for the legislative justification for a statute; instead, the inquiry is whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based.)

[1] See CNR's "MEMORANDUM IN SUPPORT OF DEFENDANT COLUMBIA NATURAL RESOURCES, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING FLAT-RATE LEASES," Page Two.

Therefore, based on *W. Va. Code 22-6-8*, the following legislative facts - - found and declared by the West Virginia Legislature in the year 1982- - and not challenged herein, are binding on this court:

> A. "That a significant portion of the oil and gas underlying this state is subject to development pursuant to leases or other continuing contractual agreements wherein the owners of such oil and gas are paid upon a royalty or rental basis known in the industry as the annual flat well royalty basis, in which the royalty is based solely on the existence of a producing well, and thus is not inherently related to the volume of the oil and gas produced or marketed;"
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> B. "That continued exploitation of the natural resources of this state in exchange for such wholly inadequate compensation is unfair, oppressive, works an unjust hardship on the owners of the oil and gas in place, and unreasonably deprives the economy of the state of West Virginia of the just benefit of the natural wealth of this state;"
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> C. "That a great portion, if not all, of such leases or other continuing contracts based upon or calling for an annual flat well royalty, have been in existence for a great many years and were entered into at a time when the techniques by which oil and gas are currently extracted, produced or marketed, were not known or contemplated by the parties, nor was it contemplated by the parties that oil and gas would be recovered or extracted or produced or marketed from the depths and horizons currently being developed by the well operators."

W. Va. Code 22-6-8(a)(1),(2) and (3).

Conclusions of Law and Opinion

Summary judgment is a device "'designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,' if, in essence, there is no real dispute as to salient facts or if only a question of law is involved." ***Painter v. Peavy***, 192 W.Va. 189, 192 n.5, 451 S.E.2d 755, 758 n. 5 (1994) (quoting *Oakes v. Monongahela Power Co.*, 158 W.Va. 18, 207 S.E.2d 191 (1974)). **See also *Hanks v. Beckley Newspapers Corp.***, 153 W. Va. 834, 172 S.E.2d 816 (1970). As such, a

motion for summary judgment should be granted when it is clear that there is no genuine issue of material fact to be tried and that inquiry concerning the facts is not desirable to clarify the application of the law. Syl. pt. 3, ***Aetna Casualty and Surety Co. v. Federal Insurance Co. of N.Y.,*** 148 W. Va. 160, 133 S.E.2d 770 (1963). See also, Syl. pt. 2, ***Painter v. Peavy,*** 192 W. Va. 189, 451 S.E.2d at 750 (1994). The court is of the opinion that the issues raised by the motion and cross motion are at this point pure questions of law and, therefore, well-suited to disposition by summary judgment.

I. Are the Royalty Provisions of the 651 Flat-Rate Leases Void and Unenforceable as a Matter of Law Based on the Public Policy of this State?

At the time flat-rate leases were utilized in the oil and gas industry, most drilling operations were for oil. *See* Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia*, 436 (1951). Gas wells were left uncontrolled to discharge into the air, because profitable uses for natural gas were only then being discovered. *Id.* As explained by the West Virginia Supreme Court of Appeals in discussing the oil and gas industry as expressed by Professor Donley: "[i]t is therefore not surprising that the standard legal form for a mineral lease at that time provided for a small lump-sum payment when natural gas was extracted. It is equally unsurprising to learn: '[i]n modern leases it is frequently provided that gas shall be on a royalty basis, which of course, is usually more profitable to the lessor.'" ***See McGinnis v. Cayton***, 173 W.Va. 102, 312 S.E.2d 765 (1984) (*citing Donley, supra* at 219).

Professor Eugene Kuntz explains:

> In the early days of operations under the oil and gas lease, the primary objective of exploration and drilling operations was the discovery of oil, and it was justifiably regarded as a major misfortune if gas alone were found. Although gas had a value it was difficult to market.
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> ***

> The circumstances surrounding the use and the value of gas apparently had an effect upon the development of the part of the royalty clause which deals with gas. . . . If the lessee marketed the gas and thereby held the lease, the lessor undoubtedly thought that the lessee should be required to pay for the privilege, and accordingly, provision was made for the lessee to make a fixed periodic payment to the lessor while the lease was so held. Unmarketed gas from a gas well and gas from and gas from an oil well were regarded as being virtually valueless and subject to use without charge by the lessee for operations on the premises. It was apparently the general attitude that if such gas were to be used off of the premises or sold, then such gas had a demonstrated value and the lessee should be required to make a fixed periodic payment to the lessor while the gas was so used or sold. At this stage of the development of the royalty clause, provision was made for fixed periodic payment for producing gas from a gas well and for selling or using any gas off of the premises.
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> As the natural gas industry developed and natural gas pipelines were extended over the country creating and expanding the market for gas, the value of gas increased. It also became apparent that the ultimate value of gas and the value of the right to extract and sell gas could not be foreseen or determined at any given time of leasing. Accordingly instead of merely increasing the amount of the fixed periodic payment to be made as the gas royalty, the parties to oil and gas leases changed their practices and began to provide for a royalty on gas which is measured either by volume or by the value of the gas produced. There was a transition period in some areas during which provision was made for a fixed periodic rental after discovery of gas and before marketing and for a royalty based on production after marketing had begun. The result would be similar to the result now sought to be reached by use of a shut-in gas clause.

3 Kuntz, A Treatise on the Law of Oil and Gas, § 40.1 at pp. 311-312 (footnotes omitted).

Professor Kuntz further stated:

> Although the fixed gas royalty provision is no longer in general use and although such provision has not been generally used for many years, the presence of such provision in old oil and gas leases continues to present a problem. It is not uncommon for a very old oil and gas lease to be held by many years by production of oil followed by a recent discovery of gas. When such event occurs, the lessor and lessee are frequently surprised to find that the royalty clause provides for a small

> fixed annual rate per well. Rather than take advantage of the windfall, many lessees have voluntarily modified their leases to provide for a one-eighth royalty. Many other lessees have not been so inclined. In the later instance, the lessors then search the oil and gas lease for some other provision under which they may assert a right to a gas royalty based on production. Such search may be expected to lead to a provision for a royalty on "other minerals."

Kuntz, Id., § 40.2 at pp. 315-316.

In response to the inequity presented by flat-rate royalty clause leases, the West Virginia legislature adopted in 1982 what is today W. Va. Code Chapter 22, Article 6, Section 8. *See 1982 Acts of Legislature, ch. 105.* In 1994, a reorganization of Chapter 22 of the West Virginia Code changed the placement of that statute to W. Va. Code § 22-6-8 while preserving its contents without significant revision. These statutes are collectively referred to here as the "Flat-Rate Royalty Statute."

The legislative findings regarding this section of the Code are mostly set forth in this court findings of fact, *supra*. The legislative findings of W. Va. Code 22-6-8 confirm what Professors Donley and Kuntz write:

> "[s]uch leases . . . have been in existence for a great many years and were entered into at a time when the techniques by which oil and gas are currently extracted, produced or marketed, were not known or contemplated by the parties, nor was it contemplated by the parties that oil and gas would be recovered or extracted or produced or marketed from the depths and horizons currently being developed by the well operators."

W. Va. Code 22-6-8(a)(3)

One additional finding of fact is pertinent and is as follows:

> (4) That while being fully cognizant that the provisions of section 10, article I of the United States Constitution and of section 4, article III of the Constitution of West Virginia, proscribe the enactment of any law impairing the obligation of a contract, the Legislature further finds that it is a valid exercise of the police powers of this state and in the interest of the state of West Virginia and in furtherance of the welfare of its citizens, to discourage as far as constitutionally possible the production and

> marketing of oil and gas located in this state under the type of leases or other continuing contracts described above.

W. Va. Code 22-6-8(a)(4)

The public policy of the State is then declared in subsection (b) of W. Va. Code 22-6-8, as follows:

> (b) In the light of the foregoing findings, the Legislature hereby declares that it is the policy of this state, to the extent possible, to prevent the extraction, production or marketing of oil or gas under a lease or leases or other continuing contract or contracts providing a flat well royalty or any similar provisions for compensation to the owner of the oil and gas in place, which is not inherently related to the volume of oil or gas produced or marketed, and toward these ends, the Legislature further declares that it is the obligation of this state to prohibit the issuance of any permit required by it for the development of oil or gas where the right to develop, extract, produce or market the same is based upon such leases or other continuing contractual agreements.

W. Va. Code 22-6-8(b)

This statute was enacted - - and the public policy of state declared - - well before the period of production activity at issue in this litigation.

The statute prohibits the subsequent issuance of any permit for the drilling of a new oil or gas well, or for the re-drilling, deepening, fracturing, stimulating, pressuring, converting, combining or physically changing to allow the migration of fluid from one formation to another, of an existing oil or gas production well, where the royalty provision is a flat-rate royalty. *Id., subsection (d)*. Nevertheless, this statute authorizes the issuance of such a permit where the operator files an affidavit which certifies that the royalty owner shall be paid not less than 1/8th of the total amount paid to or received by or allowed to the operator "at the wellhead for the oil or gas so extracted, produced or marketed before deducting the amount to be paid to or set aside for the owner of the oil or gas in place, on all such oil or gas to be extracted, produced or marketed from the well." *W. Va. Code 22-6-8(e)*. By the filing of such affidavit, the

royalty clause of the lease is converted by operation of law to a royalty based on volume of oil or gas produced.

The statute, in subsection (f), provides that "[t]he owner of the oil or gas in place shall have a cause of action to enforce the owner's rights established by this section." *W. Va. Code 22-6-8(f).*

The question thus posed for this court is the enforceability of the flat-rate royalty provisions of the 651 leases described by CNR as "Flat-Rate Leases" that fall outside the operation of the remedial provisions of W. Va. Code 22-6-8. In other words, for purposes of this order only, the court assumes that these 651 leases have royalty provisions providing a flat well royalty or a similar provision for compensation to the owner of the oil and gas in place, which is not inherently related to the volume of oil or gas produced or marketed. Further, that the activity on these leases, since 1982, has not been such so as to require the conversion of such leases by operation of statutory law to a royalty based on the volume of oil or gas produced.[2]

CNR insists that that the flat-rate royalty clauses must be enforced, essentially because of the public policy in favor of the enforcement of contracts. However, freedom to contract is not unfettered. **See *Wellington Power Corporation v. CNA Surety Corp.***, 217 W.Va. 33, 614 S.E.2d 680 (2005); ***see also Cayton v. McGinnis,*** 173 W.Va. at 109, 312 S.E.2d at 772 (1984)(Harshbarger, J concurring)("Freedom of contract" does not vindicate tolerance of blatant inequities or unconscionable acts. Our society values fundamental fairness, equality, honesty, cooperation and ethics).

[2] Plaintiffs allege that at least one of the flat-rate royalty leases in this case unlawfully remains so. In other words, they allege that activity has occurred on one or more leases since 1982 that requires "conversion" to a proceeds-based royalty under W. Va. Code 22-6-8; yet, CNR continues to be pay a flat-rate royalty.

Courts have judicial power to declare contracts void as contravening public policy. *Id.* The West Virginia Supreme Court has recognized that "no action can be predicated upon a contract of any kind or in any form which is expressly forbidden by law or otherwise void." ***State ex rel. Boone Nat. Bank v. Manns,*** 126 W.Va. 643, 647, 29 S.E.2d 621, 623 (1944)(*overruled on other grounds*).

There are many examples in the jurisprudence of this state where the Supreme Court of Appeals has invalidated a contract, or a term thereof, because the contract was in violation of the public policy of this state.[3]

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[3] ***See e.g. Helmick v. Potomac Edison Company***, 185 W. Va. 269, 406 S.E.2d 700 (1991) (contracts of adhesion by which monopolies require indemnification for incidents in which the monopoly is at fault are void as against public policy); ***Ealy v. Shetler Ice Cream Co.***, 150 S.E. 539, 150 S.E. 539 (1929) (contract to pay a witness for testifying, coupled with the condition that the right of compensation depends upon the result of the suit in which his testimony is used, is contrary to public policy, and void, for the reason that it leads to perjury and the perversion of justice); ***Committee on Legal Ethics of the West Virginia State Bar v. Sheatsley***, 192 W. Va. 272, 452 S.E.2d 75 (1994) (J. Cleckley, concurring) (recognizing holding in *Ealy v. Shetler Ice Cream Co., supra*); ***State ex rel. West Virginia Truck Stop, Inc. v. Belcher,*** 156 W. Va. 183, 192 S.E. 229 (1972) (contract resulting in unreasonable restraint of trade is void at common law as contrary to public policy); ***Summers County Citizens League, Inc. v. Tassos***, 179 W. Va. 261, 367 S.E.2d 209 (1988) (recognizing that if public officer's interest in a contract is such that would tend to influence him in making the contract, the contract is void because it violates public policy); ***State ex rel. Public Service Commission v. Southern West Virginia Oil & Gas Corporation***, 141 W. Va. 551, 91 S.E.2d 737 (1956) (J. Lovins, dissenting) (contract between gas company disposing of its gas leases and wells to a second company and vesting second company with power of management violated public policy); ***Pancake Realty Co. v. Harber***, 137 W. Va. 605, 73 S.E.2d 438 (1952) (contractual covenant between employer and employee restraining employee from engaging in similar business for period of one year was against public policy and void); ***Capehart v. Church***, 136 W. Va. 929, 69 S.E.2d 127 (1952) (contract between attorney and client for contingent fees, which provides that the client cannot make a compromise, is void as against public policy); ***Butler v. Young***, 121 W. Va. 176, 2 S.E.2d 250 (1939) (same); ***Shipley v. Browning***, 114 W. Va. 409, 172 S.E. 149 (1933) (note and assignment of rent to pay the same were void as against public policy); ***LeMasters v. Board of Education,*** 105 W. Va. 81, 141 S.E. 515 (1928) (settlement agreement compromising claim of plaintiff against board of education in consideration of the plaintiff's withdrawal of her suit was contrary to public policy); ***Shonk Land Co. v. Joachim***, 96 W. Va. 708, 123 S.E. 444 (1924) (contract void because it violated statute prohibiting a board of education from making contracts for building schoolhouses when contract required expenditure of money in excess of funds legally at the Board's disposal); ***Daugherty v. Parsons***, 95 W. Va. 211, 120 S.E. 519 (1923) (recognizing that contracts to stifle or suppress evidence are illegal and void as against public policy); ***Fallon v. Layfield***, 94 W. Va. 428, 119 S.E. 172 (1923) (agreement between creditor and insolvent debtor found void as against public policy because it affected other debtors' rights); ***State ex rel. Henson v. Gore***, 151 W. Va. 97, 150 S.E.2d 575 (1966) (written lease agreement made in behalf of the state held invalid because it violates a statute); ***Poling v. Board of Education***, 56 W. Va. 251, 49 S.E. 148 (1904) (contract for sale of land to board of education made

Concerning the concept of public policy, the Supreme Court of Appeals has explained:

> 'Public policy' is that principal of law which holds that 'no person can lawfully do that which has a tendency to be injurious to the public or against public good * * * even though no actual injury may have resulted therefrom in a particular case to the public.' It is a question of law which the court must decide in light of the particular circumstances of each case.
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> The sources determinative of public policy are, among others, our federal and state constitutions, our *public statutes*, our judicial decisions, the applicable principals of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety health, morals and general welfare of the people for whom government—with us—is factually established.

Cordle v. General Hugh Mercer Corp., 174 W.Va. 321, 325 S.E.2d 111 (1984), ***quoting Allen v. Commercial Casualty Ins. Co.,*** 37 A.2d 37 (1944)(emphasis added).

The West Virginia Legislature's declaration of public policy in this case is free from doubt. Its statutory declaration leaves no question for oil and gas lessees in West Virginia. This continued "exploitation" of natural resources leases in exchange for "wholly inadequate compensation" is "unfair," "oppressive" and works an "undue hardship" on the oil and gas lessors, and "unreasonably deprives" West Virginia's economy of the just benefit of the natural wealth of the state. The legislature expressly declared that it is the policy of this state to the extent possible "to prevent the extraction, production or marketing of oil or gas under a lease or leases or other continuing contract or contracts providing a flat well royalty or any similar provisions for

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by a member of the board is void and not enforceable because it violates a West Virginia statute); ***Wellington Power Corporation v. CNA Surety Corp.***, 217 W.Va. 33, 614 S.E.2d 680 (2005) (holds contract to be valid notwithstanding apparent conflict with public policy articulated in W. Va. Code § 38-2-39 in view of unambiguous clause in contract and the public policy of freedom of the parties to contract as they choose, a public policy of greater importance than the policy expressed in W. Va. Code § 38-2-39).

compensation to the owner of oil and gas in place, which is not inherently related to the volume of the oil or gas produced or marketed . . . " *W.Va. Code § 22-6-8 (1982).*

CNR asserts several arguments against the claim that the flat-rate royalty clauses in the subject leases are void and unenforceable based on the public policy of this state. Those arguments will be addressed *seriatim*.

1. CNR first asserts that the pleadings filed by the Plaintiffs do not contain any claim that the flat-rate leases are void and unenforceable, thus Plaintiffs have failed to give CNR adequate notice of the claim. Rule 8 of the West Virginia Rules of Civil Procedure requires that "a pleading which sets forth a claim for relief" shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *WVRCivP Rule 8 (2005).* The pleadings filed by the Plaintiffs have consistently alleged that CNR has failed to pay Plaintiffs rents and royalties due Plaintiffs. Should the court grant the cross motion for summary judgment and find the flat-rate royalty clause void, then Plaintiffs will have shown exactly what they alleged - - that CNR has failed to pay Plaintiffs royalty for gas production that is due the Plaintiffs. Plaintiffs also allege that they have not been paid royalty to which they are entitled based on W. Va. Code 22-6-8, which is the basis for Plaintiffs argument for their cross motion that the flat-rate royalty clause is void and unenforceable as being in contravention of the public policy evidenced by W. Va. Code 22-6-8. So, the broad outline of the ultimate nature of the claim - - underpayment of royalty - - has been sufficiently alleged in the opinion of the this court.

Of greater concern to the court would be the situation where, perhaps, CNR had been misled by discovery responses excluding the public policy argument as a basis for the claim of underpayment of royalties. However, CNR does not maintain that this is the case. The court is also not shown how CNR is prejudiced by defending the claim that flat-rate royalty clauses are void and unenforceable based on the public policy of this state. There is no claim that discovery would have been conducted in a different

manner or that CNR is prevented by surprise in fully presenting its defense to the argument.[4] For these reasons, the court believes that the cross motion cannot be denied on this basis.

2. CNR also argues that the West Virginia Supreme Court of Appeals has, since the adoption of the original Flat-Rate Royalty Statute, acknowledged and sanctioned that royalties may still be paid to royalty owners on a flat-rate basis, despite the adoption of the Flat-Rate Royalty Statute. Cited is Syl. pt. 1, ***Bruen v. Columbia Gas Transmission Corp.***, 188 W. Va. 730, 426 S.E.2d 522 (1992), where the court held that a flat-rate lease entered into in 1907 should not be terminated for failure to produce oil or gas in paying quantities, because flat-rate royalties are paid without regard to "the quantity of production." Therefore, according to this argument, there can be no dispute that where wells drilled pursuant to flat-rate leases existed at the time of the adoption of the flat-rate royalty statute, oil and gas royalties may be paid on a flat-rate basis. The court has carefully considered this case and the arguments presented therein. No challenge was presented to the continued viability of the lease and flat-rate royalty clause on the basis that it was void and unenforceable, because it was in conflict with the expressed public policy of this state. Since the issue was not presented to, nor resolved by the court in the ***Bruen*** case, the case cannot stand as precedent for CNR's position on the cross motion for summary judgment.

3. CNR next asserts that the language of W. Va. Code 22-6-8 limits the statute's applicability so as to exclude therefrom existing flat-rate leases, unless activity on those

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[4] After the cross motion for summary judgment was filed by the Plaintiffs, CNR filed two separate, comprehensive memoranda of law relating to this sole issue. The court's research also shows that equitable defenses - - estoppel, waiver, laches - - are not applicable to claims that a contract is unenforceable as being in violation of public policy. ***See e.g. Harding v. Heritage Health Products Co.***, 98 P.3d 945 (Colo. App. 2004). It also appears to be the rule throughout the United States that it is not necessary to plead contract unenforceability based on public policy or illegality, since the court may consider it at any time. ***E.g. Lind v. Spannuth,*** 137 N.E.2d 360 (Ill. 1956); ***Wells v. Comstock,*** 297 P.2d 961 (Cal. 1956). *See generally* Westlaw Key No. 95K138(6) for many cases in support of these propositions.

leases occurring **thereafterwards** was required to be permitted. It asserts that since these 651 leases have wells thereon that were permitted prior to the 1982 statute, to declare the flat-rate royalty clauses void and unenforceable because of W. Va. Code 22-6-8 is to give the statute retroactive effect, which CNR asserts is completely without merit and in direct contravention of the clear and unambiguous language expressed in the statute.

The court agrees with CNR - - the legislative remedy afforded by W. Va. Code 22-6-8 simply does not apply to the 651 flat-rate royalty leases at issue. Plainly, the statutory remedy operates prospectively. Just as plainly, however, based on the language of the statute[5], the Legislature did not enact a legislative remedy for flat-rate royalty leases where permitted activity did not occur after the effective date of the statute, because the Legislature was of the opinion that to do so would constitute a violation of the constitutional protections providing against the impairment of contracts.[6]

The 651 leases at issue have not been "converted" and, therefore, the legislative remedy is not applicable. However, to argue that Plaintiffs thus have no claim based on public policy is a *non sequitur*. Plaintiffs do not argue that it is the remedy provided

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[5] W. Va. Code 22-6-8(a)(4) provides: "(4) That while being fully cognizant that the provisions of section 10, article I of the United States Constitution and of section 4, article III of the Constitution of West Virginia, proscribe the enactment of any law impairing the obligation of a contract, **the Legislature further finds that it is a valid exercise of the police powers of this state** and in the interest of the state of West Virginia and in furtherance of the welfare of its citizens, **to discourage as far as constitutionally possible** the production and marketing of oil and gas located in this state under the type of leases or other continuing contracts described above." (emphasis added)

[6] See also W.Va.Code 22-6-8(b) provides: "In the light of the foregoing findings, the Legislature hereby declares that it is the policy of this state, **to the extent possible, to prevent the extraction, production or marketing of oil or gas** under a lease or leases or other continuing contract or contracts providing a flat well royalty or any similar provisions for compensation to the owner of the oil and gas in place, which is not inherently related to the volume of oil or gas produced or marketed, and toward these ends, the Legislature further declares that it is the obligation of this state to prohibit the issuance of any permit required by it for the development of oil or gas where the right to develop, extract, produce or market the same is based upon such leases or other continuing contractual agreements." (emphasis added)

by the Legislature in W. Va. Code 22-6-8 that renders the flat-rate royalty clauses of the 651 leases void and unenforceable under the law. On the contrary, the argument is that public policy - - as expressed in this statute - - renders the flat-rate royalty clause unenforceable in relation to gas produced subsequent to the effective date of the statute in 1982.

In this regard, the court notes that the legislative findings of fact - - to the effect that the continued exploitation of this State's natural resources presented by these leases is unfair, oppressive and works an unjust hardship on the owners of the oil and gas in place, and the statement of public policy set forth in W. Va. Code 22-6-8, facially applies to all flat-rate royalty leases, not just those leases where activity occurs after the effective date of the statute that is required to be permitted.

To reiterate, what is presented here is not the application of the remedy afforded by the Flat-Rate Royalty Statute. It is whether this court will enforce CNR's contract right to pay what has been found to be wholly inadequate compensation for CNR's operations that represent the continued exploitation of this State's natural resources, where such contract right has been found by the Legislature of this State - - some 24 years ago and substantially before the period of gas production involved in this class action case - - to be unfair, oppressive and unjust to Plaintiffs, as royalty owners, and to the people of this State.

4. CNR next argues that the Contract Clause of the United States Constitution and the Contract Clause of the West Virginia Constitution preclude this court from declaring that the flat-rate royalty clauses at issue in this case are void and unenforceable as being in violation of public policy.

This argument is suggested no doubt by the some of the terms of W. Va. Code 22-6-8, as follows:

> (a)(4) **That while being fully cognizant that the provisions of section 10, article I of the United States Constitution and of section 4, article III of the Constitution of West Virginia, proscribe the enactment of any law impairing the obligation of a contract,** the Legislature further finds that it is a valid exercise of the police powers of this state and in the interest of the state of West Virginia and in furtherance of the welfare of its citizens, to discourage **as far as constitutionally possible** the production and marketing of oil and gas located in this state under the type of leases or other continuing contracts described above.
>
> (b) In the light of the foregoing findings, the Legislature hereby declares that it is the policy of this state, **to the extent possible**, to prevent the extraction, production or marketing of oil or gas under a lease or leases or other continuing contract or contracts providing a flat well royalty or any similar provisions for compensation to the owner of the oil and gas in place, which is not inherently related to the volume of oil or gas produced or marketed, and toward these ends, the Legislature further declares that it is the obligation of this state to prohibit the issuance of any permit required by it for the development of oil or gas where the right to develop, extract, produce or market the same is based upon such leases or other continuing contractual agreements.

W. Va. Code, § 22-6-8(a) and (b) (emphasis added).

Article I, § 10 of the United States Constitution states that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts."

Similarly, Article III, § 4 of the Constitution of West Virginia directs that "[n]o bill of attainder, ex post facto law, or **law impairing the obligation of a contract,** shall be passed." (1872) (emphasis added).

CNR asserts, in effect, that the Legislature has determined that the remedy sought by the Plaintiffs, based on the public policy declared in W. Va. Code 22-6-8, would be an unconstitutional violation of CNR's rights under the Contract Clause and, therefore, never intended for the statute to be construed to apply to these 651 flat-rate leases. Since the Legislature concluded that such application would be unconstitutional, then this court may not declare the subject flat-rate leases void for

being in contravention of public policy. However, it has been the law since 1803 that it is for the judicial branch of government to determine -- and to be the final arbiter of -- whether a law is in violation of the constitution. **See *Marbury v. Madison***, 1 Cranch 137, 2 L.Ed. 60 (1803)(establishing doctrine of judicial supremacy). The opinion of the legislative branch of government (if that is what it is) regarding the constitutionality of the relief sought by Plaintiffs, is simply not binding on this court.

In further support of its defense based on the Contract Clause, CNR cites ***Energy Resources Group, Inc. v. The Kansas Power and Light Co.***, 459 U.S. 400, 103 S.Ct. 697, 74 L.E.2d 569 (1983), and ***Shell v. Metropolitan Life Ins. Co.***, 181 W.Va. 16, 380 S.E.2d 183 (1989).

At the outset, the court notes that it is the law that federal and state constitutional protections regarding impairment of the obligation of contracts by state action are directed only against impairment by legislation and not by judgments of courts. ***Barrows v. Jackson,*** 346 U.S.249, 73 S.Ct. 1031, 97 L.E. 1586 (1953); ***McCoy v. Union Elevated R. Co.,*** 247 U.S. 354, 38 S.Ct. 504, 62 L.Ed. 1156 (1918). ***See also, Geist v. Robinson***, 1 A.2d *153 (*Pa. *1938); 84 S.E.2d 390 (N.C. 1954);* ***King v. Phoenix Ins. Co. of Brooklyn N.Y.***, 92 S.W. 892 (Mo. 1906); ***Nowicki v. Ullsvik***, 69 F.3d 1320 (1995); ***King v. Safeco Ins. Co.***, 583 N.E.2d 1051 (Oh. 1990). Thus, the contention of CNR that the relief sought by Plaintiffs is barred by the Contract Clause has no merit.

The court also disagrees with the contention that the public policy provisions of W. Va. Code 22-6-8 have no application to the 651 flat-rate leases at issue. The legislative remedy of the statute - - prohibiting the issuance of permits for new drilling or re-working of existing wells on flat-rate leases - - is simply the action taken by the Legislature to accomplish and implement the public policy declared in W. Va. Code 22-6-8(a) and (b). As previously stated, there is nothing contained in such earlier declarations which indicates that such public policy was not intended to apply to all

preexisting flat-rate royalty leases. Rather, upon describing the evils inherent in all such flat-rate leases and acknowledging the existence of the Contract Clauses of the United States and West Virginia Constitutions, the Legislature expressed its intention that its public policy be applied to all such leases to the fullest extent constitutionally permitted. Accordingly, consistent with the Separation of Powers Doctrine, the Legislature has recognized its power to declare the public policy of the State and the power of the courts to determine the constitutional boundaries of such public policy.

While this court does not believe that the protections afforded by the Contract Clause of the State and Federal Constitutions are applicable here, nonetheless, even if applicable, declaring the royalty clause of the flat-rate leases void and unenforceable, would not be a violation of the protections afforded by the Contract clause.

The constitutional protection afforded preexisting contractual obligations by the Contract Clause is not absolute. A significant and legitimate public policy may override the protection afforded by the Contract Clauses provided that the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. ***See Syl. Pt. 3, Shell v. Metropolitan Life Ins. Co.,*** 181 W.Va. 16, 380 S.E.2d 183 (1989) ("Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people"). As noted by defendant, the West Virginia Supreme Court of Appeals has held:

> In determining whether a Contract Clause violation has occurred, a three-step test is utilized. The initial inquiry is whether the statute has substantially impaired the contractual rights of the parties. If a substantial impairment is shown, the second step of the test is to determine whether there is a significant and legitimate public purpose behind the legislation. Finally, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Syl. Pt. 4, ***Shell v. Metropolitan Life Ins. Co., supra; see also Energy Reserves Group, Inc. v. Kansas Power and Light Co.,*** 459 U.S. 400, 410-12 (1983) (applying the same analysis to protection afforded by federal Contract Clause; also noting that "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State `to safeguard the vital interests of its people.'" (citation omitted)).

A. Invalidating the Flat-Rate Royalty Clause Does Not Substantially Impair CNR's Contract Rights.

Defendant's contention that interpreting the public policy of West Virginia set forth in *W.Va.Code § 22-6-8* as invalidating all flat-rate oil and gas leases would constitute not only a substantial impairment but a severe impairment is simply without merit when one considers the equities of the situation as well as the reasonably presumed intention of the parties at the time such antiquated flat-rate leases were entered. The importance of honoring contracts is to further the goal of protecting the reasonable expectations of the parties. It is neither reasonable nor logical to conclude that lessees who drafted and entered into these antiquated flat-rate leases intended, reasonably or otherwise, to receive the windfall profits they and their successors have obtained as a result of a drastic, unforeseen and unintended changes in the techniques of extraction, production and marketing of gas and the depths and horizons from which gas is currently being extracted and marketed.

It simply was never the reasonable expectation or intention of lessees to obtain such windfall profits. It therefore cannot be a substantial impairment of their rights for this court to modify or adjust the contract to reflect the realities of the modern world and to achieve what the parties desired and intended all along—a reasonable price and consideration for the production and marketing of any natural gas. ***See Energy Resources Group, supra,*** 459 U.S. at 411 ("state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a

substantial impairment"); ***Shell, supra,*** 380 S.E.2d at 188 (same, quoting Energy Resources Group).

Moreover, "[i]n determining the extent of the impairment, [courts] are to consider whether the industry . . . (at issue) . . . has been regulated in the past." ***Energy Resources Group, supra,*** 459 U.S. at 411. ***Accord*** Syl. Pt. 5, ***Shell, supra.*** "`In areas where there is regulation and the possibility of future regulation exists, state action affecting private contracts is less likely to be found violative of the contracts clause.'" ***Shell***, 380 S.E.2d at 189 (citations omitted). Of course, the oil and gas industry is one which has been and continues to be heavily regulated.

To suggest that preventing lessees and their successors from obtaining unexpected and unintended windfall profits is a substantial impairment of their rights, is to elevate form over substance and inequity over justice - - results which the law should never countenance.

Because applying the public policy of West Virginia does not result in a substantial impairment of lessees' rights, the inquiry ends there and the Contract Clauses of the United States and West Virginia Constitutions are not violated. However, even if one assumes that a substantial impairment does occur, the Contract Clauses are still not violated because a significant and legitimate public purpose exists behind the legislation and the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

B. A Significant and Legitimate Public Purpose Exists Behind the Legislation

The legislative findings of fact and the declarations of public policy by the West Virginia Legislature relating to Flat-Rate Leases plainly sets forth a significant and legitimate public purpose behind the existence of the legislation. The Legislature has

expressly recognized that a majority of flat-rate leases in the oil and gas industry, if not all of them, were created a great number of years ago when neither the current technologies for the extraction, production and marketing of oil and natural gas nor the degree of their production and marketing was known or contemplated by the parties. The Legislature has found not only that the continued exploitation of the natural resources of this state in exchange for such wholly inadequate compensation is unfair, oppressive, and works an unjust hardship on the owners of the oil and gas in place, but that it unreasonably deprives the economy of the state of West Virginia of the just benefit of the natural wealth of this state. *W.Va.Code §§ 22-6-8(a)(2) & (3).* ***See Energy Resources Group,*** 459 U.S. at 412 (citing United States Trust Co. v. New Jersey, 431 U.S. 1, 31, n. 30 (1977)("One legitimate state interest is the elimination of unforeseen windfall profits.").

The court is of the opinion that no violation of the Contract Clause is presented should the court declare that the flat-rate royalty provisions in the 651 leases at issue are void and unenforceable.

5. In "*Defendant Columbia Natural Resources, LLC's Response To Plaintiffs' Supplemental Brief in Support of Plaintiffs' Cross Motion For Summary Judgment Regarding Flat Rate Leases,*" CNR asserts that even if invalidation of the flat-rate royalty clauses is constitutionally permissible, nonetheless, this court's power and authority to do so is limited and must not be exercised in this case. CNR relies on the case of ***Wellington Power Corp. v. CNA Surety Corp.***, 217 W. Va. 33, 614 S.E.2d 680 (2005), wherein the Supreme Court of Appeals considered whether "pay-if-paid" contract provisions of a public works sub-contract violated public policy, so as to render the contract provision void. The Court noted that the "pay-if-paid" provision in the contracts in question were clear and unambiguous provisions; therefore, "[p]laintiffs bear a heavy burden in urging the non-enforcement of their contracts in light of the fact that these are valid, unambiguous agreements." *Id.* Despite the arguments by the Plaintiffs that courts in California, Connecticut, Florida, Illinois, New York, Virginia and

several federal courts had held "pay-if-paid" provisions void as against public policy, the West Virginia Supreme Court of Appeals denied the Plaintiff's requests that it render the contracts in question void. The ***Wellington*** court offered the following explanation as to why recognized public policy set forth in W. Va. Code § 38-2-39 - - to secure payment to the materialmen and laborers in the building of structures to be used by the public - - would not defeat the substantial public policy of the liberty to contract:

> ... this State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public. In the case of *State v. Memorial Gardens Development Corp.*, 143 W.Va. 182, 101 S.E.2d 425 (1957), we quoted the following language with which we still strongly agree:
>
> [Y]ou are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider,--that you are not lightly to interfere with this freedom of contract. 143 W.Va. at 191, 101 S.E.2d at 430, *quoting Baltimore & Ohio Southwestern Railway Co. v. Voigt*, 176 U.S. 498, 20 S.Ct. 385, 387, 44 L.Ed. 560 (1900).
>
> ***
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> When asked to void a contract based on a public policy, this Court is mindful of our rule that "[t]he judicial power to declare a contract void as contravening sound public policy 'is a very delicate and undefined power,' and should be exercised only in cases free from doubt. *Richmond v. Railroad Co.*, 26 Iowa, 191." Syllabus Point 1, *Barnes v. Koontz*, 112 W.Va. 48, 163 S.E. 719 (1932).
>
> In the instant case, we are confronted with two competing public policies. The first, which derives from W.Va.Code § 38-2-39, is "[t]he public policy of this state ... to secure payment to the materialmen and laborers in the building of structures to be used by the public." *State, for Use of E.I. Dupont de Nemours & Co. v. Coda*, 103 W.Va. 676, 685, 138 S.E. 324, 328 (1927). The second, of course, is the freedom to contract as one chooses. After carefully weighing these policies, we conclude that the

> public policy of freedom of contract is more compelling and outweighs the public policy found in W.Va.Code § 38-2-39.

Wellington, 217 W. Va. 33, 38-39, 614 S.E.2d 680, 685 -686 (2005).

CNR asserts that the facts of the instant case are not distinguishable from those of ***Wellington***. This court disagrees. The sub-contract in ***Wellington*** related to the construction of the West Virginia University Life Sciences Building in Morgantown. Although the opinion doesn't state the date of this commercial contract, it is fair to assume that it is of recent origin and that the time between contract formation and alleged breach was relatively short, all of which is completely unlike the antiquated, 100 year old flat-rate royalty leases at issue here. The entire premise for the legislative declaration and finding that flat-rate leases are oppressive, unjust and work a hardship on the owners of oil and gas in this state simply does not apply to the circumstances of the contracting parties in ***Wellington***. There is no suggestion from the facts of ***Wellington*** that a drastic, unforeseen and unintended change of circumstances had occurred since the formation of the sub-contract that created a windfall to one or the other or frustrated the reasonable expectations of the other. What occurred to the Plaintiffs in ***Wellington*** - - they were not paid because the general contractor was not paid – - was precisely within the contemplation of the contracting parties, and a risk that they specifically allocated, at the time of the contract formation. This court believes that the distinguishing facts of that case is the basis for the court's conclusion that the public policy of freedom to contract was more compelling than the public policy found in the public works statute. In other words, the facts of the instant case are so different that ***Wellington, supra***, cannot be considered dispositive.

Relating to the exercise of discretion by the court to declare, or to refrain from declaring, the flat-rate royalty provisions void and unenforceable on public policy grounds, the court has also carefully considered the ***Restatement (Second) of***

Contracts, Chapter 8. Unenforceability On Grounds Of Public Policy, Section 178 (REST Contr 2d 178) which provides:

> *§ 178. When A Term Is Unenforceable On Grounds Of Public Policy*
>
> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of
>
> (a) the parties' justified expectations,
>
> (b) any forfeiture that would result if enforcement were denied, and
>
> (c) any special public interest in the enforcement of the particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of
>
> (a) the strength of that policy as manifested by legislation or judicial decisions,
>
> (b) the likelihood that a refusal to enforce the term will further that policy,
>
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
>
> (d) the directness of the connection between that misconduct and the term.

Comment (b) provides in pertinent part:

> ". . . a decision as to enforceability is reached only after a careful balancing, in the light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement of such terms. The most common factors in the balancing process are set out in Subsections (2) and (3). Enforcement will be denied only if the factors that argue against enforcement clearly outweigh the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term."

While it does not appear that the West Virginia Supreme Court of Appeals has expressly adopted the Restatement's balancing and weighing test, it is apparent that this is exactly the process undertaken by the majority of the court in reaching its decision in ***Wellington, supra***. The decision in ***Wellington*** simply gave overriding weight to the interest of the parties and the public policy[7] in the enforcement of the "pay when paid" clause, because of the reasonable, justifiable expectations of the contracting parties to that commercial contract. As previously indicated, this court believes that CNR has no reasonable nor justifiable expectation in the enforcement of the flat-rate royalty clauses - - enforcement of these clauses results simply in a monetary windfall to CNR, a windfall beyond the reasonable contemplation of the parties at the time of the execution of these leases, a windfall found and declared by the Legislature of this state to be unjust, oppressive and unfair. Refusal to enforce the flat-rate royalty clauses of the 651 leases at issue during the class certification period will directly further the public policy set forth in W. Va. Code 22-6-8(a) and (b), by providing a mechanism for the owners of the oil and gas to receive some measure of fair value for the natural resources extracted.

In determining the interest of the parties in the enforcement of the flat-rate royalty clause, the court has considered whether any **forfeiture** would result if enforcement of the flat-rate royalty clauses is denied. This is a very significant consideration, because this court does not believe that the flat-rate royalty leases can be considered "divisible" and "severable" contracts. If the flat-rate royalty clause is invalidated by operation of law because of public policy, it is not severable from the rest of the lease. The royalty is the only consideration flowing to the owner of the oil and gas under these leases. It is, therefore, the essence of the lease and if it is void, then the lease must be held to be rescinded.[8] ***Compare White v. Cook***, 51 W. Va. 201,

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[7] REST 2d Contr 178, Comment *c. Strength of policy*, provides that "[t]he strength of the public policy involved is a critical factor in the balancing process. Even when the policy is one manifested by legislation, it may be too insubstantial to outweigh the interest in the enforcement of the term in question. . . "

[8] In **Quinn v. Beverages of West Virginia, Inc.**, 159 W.Va. 571, 224 S.E.2d 894 (1976), the court held in Syllabus Point 2 "[w]hether contract is entire or severable is a determination to be made by court according to intention of parties and such intention shall be ascertained from a consideration of subject

41 S.E. 410 (1902)(void covenant of public official bond could be severed from lawful covenants, therefore the bond was not vitiated). Therefore, the invalidation of the flat-rate royalty clauses of these leases, under traditional contract analysis, must result in the rescission of the lease.

The *Restatement of Contracts 2d, Section 178*, Comment (e) relating to *forfeiture* provides:

> *e. Other factors.* A court will be reluctant to frustrate a party's legitimate expectations unless there is a corresponding benefit to be gained in deterring misconduct or avoiding an inappropriate use of the judicial process. . . . The promisee's ignorance or inadvertence, even if it does not bring him within the rule stated in Section 180 is one factor in determining the weight to be attached to his expectations. . . . . To the extent, however, that he engaged in misconduct that was serious or deliberate, his claim to protection of his expectations fails. The interest in favor of enforcement becomes much stronger after the promisee has relied substantially on those expectations as by preparation or performance. The court will then take into account any enrichment of the promisor and any forfeiture by the promisee if he should lose his right to the agreed exchange after he has relied substantially on those expectations.

A forfeiture that will accrue to CNR if the flat-rate royalty clauses are deemed to be invalid is disgorgement of windfall profits. CNR has no legitimate expectation in retaining these windfall profits under these leases by reason of the public policy of this state in effect since 1982, and the court does not consider this a reason to refrain from invalidating the flat-rate royalty clauses.

However, to the extent that the 651 leases - - not just the royalty clauses - - are invalidated should the royalty clauses be declared unenforceable, then CNR forfeits: (1) its contract rights to continue to produce oil or gas from existing wells during the

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matter of contract, a reasonable construction of terms thereof and conduct of parties during their negotiations, all of which should be viewed in light of surrounding circumstances." Surely, no lessor would intend to enter into any lease where there was no provision for royalty or other compensation to the lessor.

secondary term of the leases; (2) its rights hereafter to explore, extract and market gas or oil from the premises from new wells or reworked wells on the subject leases, where the provisions of *W. Va. Code 22-6-8* would convert the leases to ones with royalty based on the volume of oil or gas produced. Such a result arguably is entirely justified here - - CNR has continued to operate these leases with full knowledge and appreciation of the fact that since 1982, it has been the public policy of this state to discourage to the extent possible extraction of minerals pursuant to these leases, and that these leases are oppressive, unfair and work an unjust hardship on owners of the oil and gas and the people of this state. Having stated the argument, the court has nevertheless concluded that the effects of a forfeiture can and should be mitigated, for reasons assigned *infra.*

Having considered ***Wellington*, supra,** and *Restatement 2d Contracts Section 178,* this court believes that the public interest in its enforcement of the flat-rate royalty clauses set forth in the subject 651 leases is clearly outweighed in the circumstances by the public policy against the enforcement of such terms. *See W. Va. Code 22-6-8(a), (b).*

6. Regarding CNR's final argument based on ***Wellington*, *supra***, it is the position of CNR that Plaintiffs have failed to produce evidence to support their claim that the flat-rate royalty provisions of the 651 lease should be declared invalid. For instance, CNR argues that there is no evidence of the dates when the parties entered into the flat-rate leases, nor do Plaintiffs offer the testimony of any individual Plaintiffs indicating that they thought that there was no market for the gas at the time they entered into flat-rate leases. Because the Plaintiffs make such unsupported assertions, according to CNR, the rule of ***Wellington, supra***, must control. This court believes that one need look no further than the legislative findings of fact in *W. Va. Code 22-6-8(a) and (b)* for sufficient evidence of the Plaintiffs' claim, together with the undisputed fact that CNR is the operator of 651 leases in West Virginia that are flat-rate leases.

7. CNR argues that the "Separation of Powers" doctrine prevents this court from declaring unenforceable the royalty clauses of the subject 651 flat-rate leases. This is, perhaps, CNR's most persuasive argument. It is based upon the premise that courts are not entitled to create law, but must merely interpret and apply the law in individual cases. ***See State ex rel. W. Va. Citizens Action Group v. W. Va. Econ. Dev. Grant Comm.***, 213 W. Va. 255, 262, 580 S.E.2d 869, 876 (2003) (stating that "[u]nder the constitutions, the legislature is empowered to make laws; it has that power exclusively; the executive has the power to carry them by all executive acts into effect, and the judiciary has the exclusive power to expound them as the law of the land between suitors in the administration of justice.").

In ***State ex rel. Riffle v. Ranson,*** 195 W.Va. 121, 126, 464 S.E.2d 763,768 (1995), the court held that a statute, providing for change of venue where convenience of parties would be served, was the exclusive authority for discretionary change of venue, and any other change of venue from one county to another within West Virginia that was not explicitly permitted by the statute was impermissible and forbidden. At *Id.*, 126,768, the court stated that:

> [The] West Virginia Legislature is the paramount authority for deciding and resolving policy issues pertaining to venue matters. Once the Legislature indicates its preference by the enactment of a statute, the Court's role is limited. Our duty is to interpret the statute, not to expand or enlarge upon it. State ex rel. Frazier v. Meadows, 193 W.Va. 20, 23-24, 454 S.E.2d 65, 68-69 (1994). More significantly, any subsequent policy changes must come from the Legislature itself and, in the absence of constitutional or statutory authority to the contrary, this Court has no blanket power to recast the statute to meet its fancy. State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995).

The court is of the opinion that to declare that the subject flat-rate royalty clauses are void and unenforceable by being in contravention of public policy expressed in the statute, is not expanding or enlarging upon the statute itself. It is the simple, everyday function of the judicial branch of government to refuse in individual cases to enforce a contract term in violation of the public policy of this state. The usual and ordinary remedy here is rescission of the oil and gas lease in its entirety, because a flat-rate royalty lease is not a divisible contract. Rescission certainly is not a remedy contemplated by the statute. It is therefore apparent that the only connection to W. Va. Code 22-6-8 is the public policy therein stated in plain and unambiguous terms.

Regulation of mineral leases has never been considered the exclusive domain of the Legislature. In a closely analogous case, the Supreme Court of Appeals recognized the power of the judiciary to declare the equitable remedy of rescission of a flat-rate royalty oil and gas lease, based on mutual mistake of fact. ***McGinnis v. Cayton***, 173 W.Va. 102, 312 S.E.2d 765 (1984).[9] At 173 W. Va. 105, 312 S.E.2d 769, the court stated:

> This principle provides that a contract is reformable or voidable if it can be shown that the parties mutually erred about a basic fact that is material to their agreement. . . In the case at hand, the parties agreed to provisions concerning both oil and natural gas and both resources were present. Nevertheless, the limited awareness of the economic value of natural gas at the time when the contract was drafted raises at least the possibility that both parties were operating under the assumption that the value of gas would remain *de minimus*. Their agreement, then, could be seen as one primarily concerned with oil production . . . A *mutual* mistake as to a material assumption

[9] While this case was decided in 1984, it apparently commenced prior to the effective date of the Flat-Rate Royalty Statute in 1982; the majority opinion does not mention this statute.

The "legislative facts" found by the Legislature, as set forth in W. Va. Code 22-6-8, appear to support at least *prima facie*, the equitable remedy of rescission based on mutual mistake. Plaintiffs have not pursued this theory.

> which underlies a contractual agreement is sufficient grounds to find that agreement void. The *Restatement (Second) of Contracts* specifically provides in § 152(1): "[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has the material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake . . . "

In two early cases relating to natural resources contracts and leases, the Supreme Court of Appeals discussed supervening factors, such as change in value of natural resources over extensive time periods, and their effect on contracts. In ***Buffalo Coal & Coke Co. v. Vance,*** 71 W.Va. 148, 76 S.E. 177 (W.Va. 1912), the Court had refused to grant specific performance of a *five-year-old* executory contract to lease minerals, utilizing equitable principles to evaluate what was fair and just and concluding that it would not permit the appellees to "reap where they have not sown" to the disadvantage and injury of the other party to the contract. ***Buffalo Coal & Coke Co.,*** 76 S.E. at 180.

In reaching its conclusion, the Court in ***Buffalo Coal & Coke Co.***, *supra*, noted:

> True there is no evidence in the case showing what changes in value have taken place since the date of the contract, **but we may take judicial notice that the value of all mineral and timber land in this state had greatly enhanced in value within the five years** intervening between the date of the contract and the date of the suit. We think we may assume from the facts established in the cause that some object of advantage to the plaintiff and disadvantage to the defendant called the plaintiff to action after nearly five years of unexplained delay.

Id., 76 S.E. at 179 (emphasis added). See also McGinnis, 312 S.E.2d at 775-76. Similarly, in Wellman v. Virginia Railway Co., 101 S.E. 252, 253 (W.Va. 1919), the Court stated that "**[y]ears have brought changes of circumstances and of parties. Timber then of little value has now become of great value, of which we may take judicial notice.**" (Emphasis added).

In summary, the judicial branch of government has intervened in mineral and natural resource leases and contracts where supervening, unforeseen events have occurred which make enforcement of a lease or contract beyond the reasonable expectations of the contracting parties.

CNR also cites ***Collins v. AAA Homebuilders, Inc.***, 175 W. Va. 427, 333 S.E.2d 792 (1985), where the court refused to add to a statute by creating a cause of action in favor of an additional class, absent a constitutional mandate. ***Collins***, 175 W. Va. at Syl. pt. 2, 333 S.E.2d at Syl. pt. 2. In ***Collins***, the plaintiff brought a cause of action against apartment owners, because his application was denied on grounds of his criminal record. This suit was based on the existing public policy of the state, as expressed statutorily that landlords may not refuse potential tenants based on "race, religion, color, national origin, ancestry, sex, blindness and handicap." *Id.* at 428, 793. However, the Supreme Court of Appeals refused to permit the plaintiff a cause of action where none existed in the statute, stating that it would not go beyond the actions of the Legislature. Thus, the court refused to expand upon and add to the public policy of this state by adding to the statutory criteria a classification based on the "previous criminal history" of the applicant.

At Id. 428, 793, the court stated as follows:

> The legislative branch of government has the primary responsibility for translating public policy into law. *See, e.g.*, Cooper v. Gwinn, 171 W.Va. 245, 298 S.E.2d 781, 785-86 (1981). This is appropriate because the members of the legislature are elected representatives of "the public," and thus have the unique ability to collectively discern public opinion and formulate statements thereof. The legislature in fact has considered the criteria employed by landlords in selecting their tenants, and found certain criteria impermissible: "race, religion, color,

> national origin, ancestry, sex, blindness and handicap." Refusal to rent for any of these reasons gives rise to a statutory cause of action in favor of the rejected applicant. This list does not, however, include criminal convictions, and the rule of construction expressed by the Latin, *inclusio unius est exclusio alterius* (the certain designation of one precludes the implication of another) leads us to the conclusion that the legislature did not intend to include any additional categories. **Where, as here, the legislature has made what appears to be a comprehensive statement regarding classifications offensive to public policy, this Court will not add to that list in the absence of constitutional mandate.** (Emphasis added)

With the facts of the instant case, however, the Legislature has already spoken - - in clear, unmistakable terms - - leases that contain flat-rate royalty clauses, which include the subject 651 leases, are "unfair, oppressive, work(s) an unjust hardship on the owners of the oil and gas in place, and unreasonably deprive(s) the economy of the state of West Virginia of the just benefit of the natural wealth of this state." *W. Va. Code 22-6-8(a)(3).* To find that the flat-rate royalty clauses are void and unenforceable, as Plaintiff asserts, simply does not require this court to add to or expand on what the Legislature has found to be the public policy of this state.

In ***Yoho v. Triangle PWC, Inc.,*** 175 W.Va. 556, 336 S.E.2d 204 (1985), a retaliatory discharge action brought against the employer and union by an employee/workers' compensation recipient, the court held that a provision of a collective bargaining agreement mandating termination of seniority after the employee's absence from work for one year for work-related injury, for which she received worker's compensation benefits, was not contrary to public policy, even though loss of seniority also resulted in the loss of her job. In refusing to hold the "loss of seniority" provision

of the collective bargaining agreement void as being against public policy, the court stated the following:

> Further, the Court cannot help but feel sympathy for a woman who suffered a physically and emotionally painful injury which caused her to be off work for the last twelve months, and finds that it is now mandated by the terms of her collective bargaining agreement that her employer dismiss her. Nevertheless, we feel it would be a mistake to extend public policy to cover Ms. Yoho's case.
>
> [The power to declare an action against public policy is a broad power and one difficult to define. "No fixed rule can be given to determine what is public policy. (citations omitted). It is sometimes defined as that principle of law under which freedom of contract or private dealings are restricted by law for the good of the community-the public good." *Higgins v. McFarland*, 196 Va. 889, 894, 86 S.E.2d 168, 172 (1955). Nevertheless, despite the broad power vested in the courts to determine public policy, we must exercise restraint when we use it.
>
> **The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions.** It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community so declaring. *Mamlin v. Genoe*, 340 Pa. 320, 325, 17 A.2d 407, 409 (1941). An issue which is fairly debatable or controversial in nature is one for the legislature and not for this Court. (Emphasis added)

In regard to the 651 flat-rate royalty leases, since 1982, CNR has continued to exploit the natural resources of this state for wholly inadequate compensation, to the oppression of Plaintiffs who are the owners of the oil and gas. Is this a "specific economic . . . problem" which is "controversial in nature and capable of solution only as the result of a study of various factors and conditions . . "? The court believes not. The Legislature has spoken clearly and convincingly in terms that unambiguously apply to all flat-rate leases.

There is simply nothing that is "fairly debatable" or "controversial" regarding the public policy of this State as expressed by the Legislature in relation to flat-rate royalty leases.[10]

Courts are created to do justice in individual cases. The Legislature of this state fixes the public policy. The courts implement that policy. CNR has cited no case where a court has ever enforced a contract term that has been found to be unjust, unfair, oppressive, that works an unjust hardship on the other party, and that is exploitative. CNR insists that the court enforce a contract term that provides it windfall profits for activity the Legislature has told us that public policy requires be "discouraged as far as constitutionally possible." (note 10). To enforce such a contract term under these circumstances would require this court to perpetuate oppression and injustice, in violation of the clear public policy of this state.

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[10] [I]s the policy of this state, to the extent possible, to prevent the extraction, production or marketing of oil or gas under a lease or leases or other continuing contract or contracts providing a flat well royalty or any similar provisions for compensation to the owner of the oil and gas in place, which is not inherently related to the volume of oil or gas produced or marketed . . . . " *W. Va. Code 22-6-8(b).* Subsection (a)(4) provides in pertinent part that it is a valid exercise of its police power, in order to further the welfare of the citizens of this state, ". . . to discourage as far as constitutionally possible the production and marketing of oil and gas located in this state . . " pursuant to flat-rate leases.

Based on the foregoing, the court concludes as a matter of law that the royalty provisions of the 651 flat-rate royalty leases at issue are void and unenforceable, based on the public policy of this state contained in W. Va. Code 22-6-8(a) and (b).

II. What is the Remedy Based on the Court's Declaration that the Flat-Rate Royalty Clauses are Void and Unenforceable?

As stated, the flat-rate leases are not divisible or severable contracts. If the royalty clause in these leases is unenforceable, there simply is no provision for the payment of royalty, which is the only consideration flowing to the owner of the oil and gas in the secondary term of the lease. Ordinarily, therefore, rescission is the remedy where a contract term in a lease of this nature is held to be void and unenforceable. In PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT REGARDING FLAT RATE LEASES, Plaintiffs move that these leases be invalidated, and that CNR be considered a non-willful trespasser. However, in the subsequent PLAINTIFFS' REPLY TO DEFENDANT CNR'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT REGARDING FLAT RATE LEASES, Plaintiffs there move the court to convert the flat-rate natural gas leases to a royalty provision consistent with that found in W. Va. Code 22-6-8(e), that is:

> "not less than one eighth of the total amount paid to or received by or allowed to the owner of the working interest at the wellhead for the oil or gas so extracted, produced or marketed before deducting the amount to be paid to or set aside for the owner of the oil or gas in place, on all such oil or gas to be extracted, produced or marketed from the well."

Such a remedy avoids the forfeiture of CNR's other important and valuable contract rights under the flat-rate royalty leases. By avoiding the "plugging" of wells on the lease, and removal of equipment and machinery, it also permits the full, efficient

development of the Plaintiffs' mineral estate by the continued extraction, production, and marketing of the lessors' gas.

Throughout this opinion, it has been noted that CNR's expectations regarding these flat-rate royalty leases have not been reasonable, and that by continuing to extract, produce and market gas from these leases, subsequent to 1982, its conduct amounts to exploitation, according to the public policy expressed in the statute. However, this pertains only to CNR's expectations in regard to the flat-rate royalties payable under these antiquated leases. There are other expectations, arising under these leases, that are reasonable and justifiable, and these are mentioned, *infra*, page 29.

In fashioning a remedy, the court must also consider that these leases were unquestionably valid and reasonable at the time of contract formation. The history of the development and evolution of natural gas royalty clauses demonstrates that it was the intention of the parties to such contracts to provide a reasonable consideration for the value of the natural gas. The lessees clearly neither foresaw nor intended the windfall profits which they have received as a result of advancing technologies and increased markets for the sale of natural gas. Both lessors and lessees believed that the value of their gas was *de minimus*.

Plaintiffs argue that the court should adjust the rights and responsibilities of the contracting parties by converting such flat-rate leases to 1/8 royalty leases, and that this will accomplish what the parties intended upon entering such contracts, i.e., achieving a reasonable compensation for the value of the natural gas.

Plaintiffs also submit that in addition to and consistent with the public policy set forth in W.Va.Code § 22-6-8, other equitable and legal principles also support converting flat-rate natural gas leases to 1/8 royalty leases. By way of example, in

McGinnis v. Cayton, supra, Justice Harshbarger noted in his concurring opinion that in the historical development of common law contracts concepts:

> "there has been a positive movement away from strict and rigid rules of law in order to accommodate long-term contracts that have become manifestly unfair: ***evenness and equity should prevail over form, and justice demands whatever flexibility is necessary to fill in contractual gaps and adapt to unexpected changes."*** *Id.* at 772 (emphasis added).

Among the various doctrines discussed by Justice Harshbarger were supervening events causing unjust enrichment and unconscionability.

While discussing supervening events causing unjust enrichment, Justice Harshbarger explained:

> If the increased utility of and the concomitant advances in technology to capture and produce natural gas were unpredictable, supervening events working to undermine the purpose of the contract (for lessor and lessee to reap fair and equitable benefits from the extraction and sale of valuable minerals on the leased tract), discharge from performance is not the only possible remedy. The contract may be reformed, duties may be enhanced, or restitution ordered for unjust enrichment.

Id., at 775.

In discussing possible solutions to such dilemmas, Justice Harshbarger reasoned:

> Situations arising from contracts like the McGinnises' recommend solutions by inter-party renegotiation. When that does not work, **courts should make themselves available to provide just and equitable resolutions with the primary goal being to maintain the integrity of the long-term contractual relationship. . . . . This can be better achieved by remedies such as equitable adjustment than rescission or discharge from performance.**
>
> **Equitable adjustment is an evolved form of "reformation". It can be used to prevent or remedy unjust enrichment, unconscionability or other inequities.** It has received considerable scholarly support. . . .

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> Long-term contract problems that arise because of fundamental shifts in the balance or equities of the original relationships are best resolved by the parties. Courts should do all they can to encourage settlement and private resolution. Scriveners of new long-term contracts are aware of this need to provide for dispute resolution and equitable adjustment by parties. . . .
>
> However, **in the event that a court must intervene, it should only be limited by its perception of fairness.**
>
> . . . .
>
> I agree with the California court in MacFarlane v. Peters, 103 Cal.App.3d 627, 163 Cal.Rptr. 655, 657 (1980), that "**[w]hile sitting in its equitable capacity, a court may avail itself of powers broad, flexible and capable of being expanded to deal with novel cases and conditions . . . While the facts in this case are without reported precedent, such lack is no deterrent to equitable relief.**" (Citations omitted.) **Lack of precedent does not warrant denial of justice. Our state courts have equitable power to fashion just remedies.**

McGinnis, 312 S.E.2d at 779-81 (citations and footnotes omitted; emphases added).

To order a remedy here as suggested by the Plaintiffs is reforming the contract to reflect a term not agreed on by the parties but imposed by the court. Reformation of contracts is granted to "reform" the contract so that it reflects the true intention of the parties. Here, there is no claim that the antiquated leases do not reflect the true intention of the parties. Accordingly, reformation as a remedy appears inapplicable.

Justice Harshbarger speaks of "equitable adjustment" as a remedy. The term "equitable adjustment" does appear in the cases, but not necessarily as an equitable remedy. In ***Travelers Indemnity Company v. Rader,*** 152 W.Va. 699, 704, 166 S.E.2d 157, 160 (1969), the court stated that *subrogation* is a 'creature of equity having for its purpose the working out of an equitable adjustment between the parties by

securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it.' " *quoting* 16 Couch, *Cyclopedia of Insurance Law,* 61: (18 2d Ed.1964). In ***Kyle v. Kyle,*** 197 W.Va. 252, 475 S.E.2d 344 (1997), the court refers to equitable adjustment in the context of effecting equitable distribution in a divorce case. To the same effect is ***Chafin v. Chafin,*** 202 W.Va. 616, 505 S.E.2d 679 (1998)(see footnote 18).

Plaintiffs have agreed to the adjustment of these flat-rate leases to a 1/8th royalty based on proceeds received by the lessee at the well-head, effective for the entire period of this class action claims. (See Page 37, *supra*). The court has a paucity of authority to "reform" the contract by ordering what the Plaintiffs have agreed on. Therefore, it is the Order of the Court as follows:

Subject to the agreement and concurrence of CNR, and commencing with the period encompassed by the claims asserted in this class action litigation, royalty for gas produced from the 651flat-rate royalty leases shall be calculated as follows:

> "not less than one eighth of the total amount paid to or received by or allowed to the owner of the working interest at the wellhead for the oil or gas so extracted, produced or marketed before deducting the amount to be paid to or set aside for the owner of the oil or gas in place, on all such oil or gas to be extracted, produced or marketed from the well."

This royalty calculation method, unless otherwise agreed by the parties, shall continue for so long as such leases are subsisting and viable.

If CNR does not, within 20 days from date of entry of this order, agree and concur with this method of royalty calculation by written instrument filed with the clerk of this court, then it is the order of this court that each of the 651 flat-rate royalty leases for oil and gas are rescinded, the royalty clauses therein provided being in contravention of the public policy of this state and, therefore, void and unenforceable.

In such latter event, CNR shall be considered a non-willful trespasser with respect to gas produced from such leasehold estates.

III. May CNR Deduct Post-Production Expenses Incurred From the Well-Head to the Point of Sale Where the Royalty is Payable Pursuant to W. Va. Code 22-6-8(e)?

The language of the statute - - W. Va. Code 22-6-8(e) - - states that owners of the oil and gas are entitled to royalties of not less than 1/8 of the proceeds, not market value, "at the wellhead."

CNR's arguments on this issue were submitted on this question prior to the decision of the West Virginia Supreme Court of Appeals in ***Estate of Tawney v. Columbia Natural Resources, LLC, et al,*** -- W. Va. --, 2006 WL 1685249 (dec'd June 15, 2006). That case concerned the issue of whether post-production expenses were deductible from the royalty payable to the owner of the oil and gas, based on certain royalty clauses set forth in various private lease agreements between lessors and lessees. While a royalty clause based on the language of a statute is obviously different than a royalty clause based on private agreement, similarities nonetheless exist, and the court would therefore benefit from oral argument of the parties on the issue. Therefore, counsel for CNR is directed to schedule a hearing for that purpose at a time and place convenient with counsel.

ORDER

Based on the foregoing, it is therefore ORDERED as follows:

1. Defendant Columbia Natural Resources, LLC's Motion for Partial Summary Judgment Regarding Flat-Rate Leases is denied and overruled, except that the court takes under advisement, pending further argument, the issue of whether post-production expenses are deductible from statutory royalty based on W. Va. Code 22-6-8(e).

2. Plaintiffs' Cross Motion For Summary Judgment Regard Flat Rate Leases is granted, except as otherwise provided, *infra*.

3. Subject to the agreement and concurrence of CNR, and commencing with the period encompassed by the claims asserted in this class action litigation, royalty for gas produced from the 651 flat-rate royalty leases in issue shall be calculated as follows:

> "not less than one eighth of the total amount paid to or received by or allowed to the owner of the working interest at the wellhead for the oil or gas so extracted, produced or marketed before deducting the amount to be paid to or set aside for the owner of the oil or gas in place, on all such oil or gas to be extracted, produced or marketed from the well."

This royalty calculation method, unless otherwise agreed by the parties, shall continue for so long as such leases are subsisting and viable.

If CNR does not, within 20 days from date of entry of this order, agree and concur with this method of royalty calculation by written instrument filed with the clerk of this court, then it is the order of this court that each of the 651 flat-rate royalty leases for oil and gas are rescinded, the royalty clauses therein provided being in contravention of the public policy of this state and, therefore, void and unenforceable. In such latter event, CNR shall be considered a non-willful trespasser with respect to gas produced from such leasehold estates.

4. CNR's objection and exception to this order is saved and shall be considered by this court "saved" regardless and irrespective of whether CNR agrees and concurs with the remedy provided in paragraph no. 3 of this Order.

5. The Clerk shall forward attested copies of this order to counsel of record.

All of which is ORDERED, accordingly.

ENTER: August 4, 2006

A TRUE COPY, CERTIFIED THIS THE

DEC 22 2015

Andrea Hackney
CLERK CIRCUIT COURT
ROANE COUNTY, WEST VIRGINIA

Thomas C. Evans, III, Circuit Judge
Fifth Judicial Circuit, State of West Virginia

Entered in C.O.B. No. 41 Page 490
this 7 day of Aug, 20 06