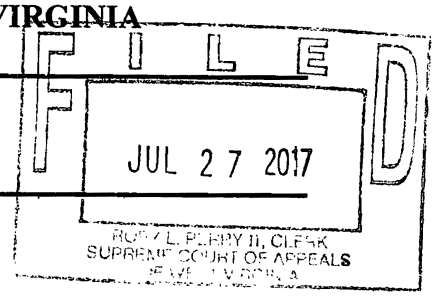
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 17-0126

ROBERT ANDREWS, et al.,
Appellants/Petitioners,

v.

ANTERO RESOURCES CORP., et al.
Respondents/Appellees.

Appeal from the Circuit Court of Ohio County (Civil Action No. 13-C-434)

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS/APPELLEES BY WEST VIRGINIA CHAMBER OF COMMERCE; WEST VIRGINIA BUSINESS AND INDUSTRY COUNCIL; WEST VIRGINIA COAL ASSOCIATION; CONTRACTORS ASSOCIATION OF WEST VIRGINIA; WEST VIRGINIA CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.; WEST VIRGINIA MANUFACTURERS ASSOCIATION; AND WEST VIRGINIA POULTRY ASSOCIATION

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I. INTRODUCTION

Pursuant to Rule 30(a) of the West Virginia Rules of Appellate Procedure, the West Virginia Chamber of Commerce, West Virginia Business and Industry Council, West Virginia Coal Association, Contractors Association of West Virginia, West Virginia Chapter of the Associated Builders and Contractors, Inc., West Virginia Manufacturers Association, and West Virginia Poultry Association (collectively "Amici Curiae") hereby submit this brief in support of the Respondents/Appellees, Antero Resources Corp. and Hall Drilling, LLC (hereinafter "Respondents").[1]

The Petitioners in the matter ask this Court to apply tort law to a property dispute. It is long been held that property law governs the conflicting rights of surface owners, mineral owners, and mineral lessees in West Virginia when acting pursuant to deeds, leases, or other property-based agreements. Adoption of tort concepts in such areas of property law would disturb the foundation upon which these agreements rest, and call into question the manner in which such agreements would be interpreted and applied in the future. Should it appear that such agreements are not being interpreted and applied in accordance with the long-standing jurisprudence of this state, businesses will question whether they can successfully or efficiently continue their operations in West Virginia.

Further, Marcellus shale exploration and development, in particular, has significantly contributed to West Virginia's economy. Marcellus shale development, and the activities related thereto, have created and continue to create numerous jobs and millions in tax revenue, among other things. Accordingly, a departure from the well-established principles of property law would

[1] Pursuant to West Virginia Rule of Appellate Procedure 30(e)(5), the Amici Curiae, by counsel, represent that no counsel for a party to this action authored this brief in whole or part. Moreover, no such counsel or party made a monetary contribution specifically intended to fund the preparation or submission of this brief. Finally, no other person who would need to be identified under Rule 30(e)(5) made such a monetary contribution.

not only affect the Marcellus shale industry, but West Virginia's economy as a whole. As such, the aforementioned Amici Curie state that an amicus curiae brief on such issues is desirable.

In accordance with West Virginia Rules of Appellate Procedure 30(a) and 30(b), Counsel for the Amici Curiae notified counsel of record for all parties of its intention to file an amicus curiae brief at least five days prior to its due date, and received consent from counsel of all parties to so file. W. Va. R. App. P. 30(a)–(b).

II. STATEMENT OF INTEREST

The Amici Curiae all have special interests in addressing this appeal:

(1) The West Virginia Chamber of Commerce ("The Chamber") is a nonpartisan advocacy association of employers that seeks to facilitate the continued operation and expansion of business in the State of West Virginia. The Chamber's member businesses come from every county in the state and employ more than half of West Virginia's workforce. Collectively, The Chamber's members constitute a major portion of the engine which drives West Virginia's economy. In facilitating the continued operation and expansion of existing businesses, and while also pursing new businesses to locate in our state, The Chamber consistently advocates for public policies that improve West Virginia's economic environment. The Chamber's objective is to build a business climate which promotes development that is sufficient to sustain employment in West Virginia, while simultaneously allowing certainty for employers. The Chamber's interest has always been to foster a stable legal environment in which our state laws and regulations are applied in a uniform and predictable manner. The Chamber recognizes that a legal system which is predictable in its outcomes and functions within the mainstream of American jurisprudence is critical. Without it, businesses in West Virginia are deprived of the stable judicial climate upon which other businesses operating in other states can and do rely. The absence of a predictable

and stable judicial climate serves to discourage the growth of existing businesses within, and the location of new businesses into, West Virginia.

(2) The West Virginia Business and Industry Council ("BIC") currently consists of over 60 West Virginia trade associations and businesses, and represents more than 395,000 workers across 26 industry categories. The BIC advocates for policies that improve the quantity and quality of employment opportunities for the residents of West Virginia.

(3) The West Virginia Coal Association ("WVCA") is a trade association representing more than 90 percent of the state's underground and surface coal mine production. WVCA's mission is focused around creating an environment that will establish West Virginia coal as a safer, cleaner, and more competitive energy source.

(4) The Contractors Association of West Virginia ("CAWV") represents over 450 businesses and 20,000 employees in the building, highway, industrial, and utility contracting industries. Its members are essential in building infrastructure that increases the quality of life for all West Virginians. The CAWV has been a long-time advocate for improvement of West Virginia's current infrastructure, which would create new jobs, office, retail, and commercial building investment, and regional boosts in economy.

(5) The West Virginia Chapter of Associated Builders and Contractors, Inc. ("ABCWV") represents and advocates for its members in the construction industry. Its philosophy is based upon a system of free enterprise, which is vital in creating employment opportunities and success.

(6) The West Virginia Manufacturers Association ("WVMA") represents and advocates for its members in the manufacturing industry across the State of West Virginia. With the emergence of Marcellus shale natural gas and natural gas liquid development, West Virginia is

attracting investment and creating good jobs at a pace not seen for decades. As such, it is, and has been, WVMA's goal to capitalize on the opportunities presented by the Marcellus shale.

(7) The West Virginia Poultry Association ("WVPA") consists of approximately 300 members across the state, all of who are actively engaged in issues pertaining to their producers, business associates, and all affiliates of the poultry industry. The WVPA also has a vested interest in the continuation of West Virginia's long history of agriculture.

The issues Petitioners seek to appeal would significantly impact the well-settled theories of property law, and the sustainability of the Marcellus shale industry in West Virginia. Because such issues necessarily implicate West Virginia's economic viability overall, including direct and indirect impacts on other industries, the Amici Curiae all have significant interests in the issues raised by the Petitioners in this appeal.

III. RELEVANT BACKGROUND

Petitioners have asserted an action for damages arising out of Respondents' conduct as it relates to natural gas exploration and extraction of minerals—specifically development of the Marcellus shale—underlying Petitioners' properties. A:002486-87 at ¶¶ 1–3. In particular, Petitioners allege that Respondents' drilling activities have resulted in noise, truck traffic, odors, dust, light, and vibrations. A:002487 at ¶ 5; A:002494 at ¶ 15. Respondent Antero Resources Corporation ("Antero") leases the rights to the minerals underlying Petitioners' properties and was granted the right to use the surfaces thereof pursuant to various agreements with individual Petitioners. *See* A:002488-2492 at ¶¶ 8–10; A:000811-974. Nonetheless, Petitioners asserted claims of negligence[2] and private nuisance related to Respondents' use of their surface tracts for mineral extraction. *See* A:002486-87 at ¶¶ 1, 5; A:002493 at ¶ 13. Notably, Petitioners have not

[2] In response to Respondents' Motions for Summary Judgment, Petitioners voluntarily withdrew their negligence claims. A:002493 at ¶ 14.

asserted any property damage or personal injury claims. A:002494-95 at ¶ 17; A:002272-73. Respondents filed Motions for Summary Judgment on Petitioners' claims, which were granted by the West Virginia Mass Litigation Panel (the "Panel") on October 11, 2016. *See* A:002485.

In sum, the Panel held that Respondents were properly operating within the scope of their agreements to develop the oil and gas underling the Petitioners' properties. A:002499–2500 at ¶ 29. Accordingly, the Panel noted that the Respondents were entitled to make use of all reasonable and necessary methods of mineral develop, unless it is shown to be "wholly incompatible with the surface estate due to total destruction." *See* A:002502 at ¶ 37 (citing *Quintain Dev. LLC v. Columbia Nat. Res. Inc.*, 210 W. Va. 128, 133, 556 S.E.2d 95, 100 (2001)). Because there was no evidence to show that Respondents' methods were "materially different" from traditional mineral extraction, the Panel held that such methods were "reasonable and necessary." A:002502 at ¶¶ 37-38. Specifically, "West Virginia precedent makes clear that the noise, traffic, vibrations, dust, lights, and odors of which [Petitioners] complain are well within the bounds of what is reasonable and necessary to develop minerals." A:002501 at ¶ 35 (citing *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 724, 61 S.E.2d 633, 636 (1950)). Accordingly, the Panel concluded that the noise, traffic, dust, lights, odors, etc. complained of were reasonable and necessary, and not wholly incompatible, for development of the minerals underlying Petitioners' surface tracts. A:002494 at ¶ 16; A:002500 at ¶ 30; A:002502 at ¶ 37. Because the Panel resolved summary judgment on the Respondents' contractual and property rights, it did not address Petitioners' claims of common law nuisance. A:0002499 at ¶ 28.[3]

It is the Panel's rulings on Respondents' Motions for Summary Judgment that are currently pending before the Court. Specifically, Petitioners raise three assignments of error:

[3] Petitioners filed a Motion to Alter or Amend Judgment, which was denied by the Panel on January 11, 2017. A:002902.

> 1. The Panel erred in holding that a mineral severance deed grants the mineral owner the right to extract natural gas using methods uncontemplated when the deeds were executed, that are not necessary to the extraction of the minerals, and that substantially burden the surface owner.
>
> 2. The Panel erred in concluding that an owner of mineral rights underlying a particular property has the right to create a nuisance on the surface of that tract to develop minerals underlying another property.
>
> 3. The Panel erred in failing to recognize that public policy supports allowing [Petitioners]' nuisance claims so that [Petitioners] should not be forced to disproportionately bear the burden of [Respondents]' activities.

Pet'rs' Br. at 1.

IV. ARGUMENT

Essentially, the Petitioners ask this Court to apply tort law to a property dispute. It is long been held that property law governs the conflicting rights of surface owners, mineral owners, and mineral lessees in West Virginia when acting pursuant to deeds, leases, or other property-based agreements. Simply put, activities that are *required* for mineral development cannot support a claim for nuisance because, by their very nature, they are reasonable and necessary to the exploration and extraction of minerals. This theory is well-settled in West Virginia property jurisprudence regarding mineral development. To hold otherwise would substantially alter West Virginia's common law by creating an unprecedented application of tort theories to mineral lessees, and impact the operations required to develop Marcellus shale. *See Faith United Methodist Church v. Morgan*, 231 W. Va. 423, 432, 745 S.E.2d 461, 469 (2013) ("This Court's goal in the area of land ownership is to avoid bringing 'upon the people interminable confusion of land titles;' instead, we must 'endeavor[] to prevent and eradicate uncertainty of such titles.'") (citing *Toothman v. Courtney*, 62 W. Va. 167, 183, 58 S.E. 915, 921 (1907)). Moreover,

restricting the necessary methods of natural gas extraction would directly contradict West Virginia's public policy for maximum and efficient development of natural gas. Accordingly, the Panel's holding that the Respondents' activities were reasonable and necessary is consistent with West Virginia jurisprudence and public policy, and should therefore be upheld.

A. Respondents have the Right to Use Petitioners' Surface Properties in the Development of Minerals to which they Own Leasehold Rights

The present case involves a dispute between a mineral lessee and surface owners regarding reasonable use of the surface property. It is undisputed that Respondent Antero has leasehold rights to develop the oil and gas underlying the Petitioners' properties. A:002488 at ¶ 9. As such, Antero enjoys the same right as the mineral owner to use the surface estate to develop the oil and gas. *Justice v. Pennzoil Co.*, 598 F.2d 1339, 1343 (4th Cir. 1979) ("[s]ubject of course to any restrictions in the lease, the lessee/operator enjoys the same right to use the surface as does the lessor/owner . . . in order that both parties may benefit from their interests in the mineral estate"). Furthermore, Antero executed various agreements with Petitioners, or the owners of the properties on which Petitioners reside, entitling Antero to specific surface uses—including right-of-ways, road use, pipeline easements, and more—in connection with its oil and gas development. A:002488-92 at ¶¶ 8-10. Because Antero contracted with Respondent Hall Drilling, LLC ("Hall Drilling") to perform various well-related operations, the Panel held that Hall Drilling was entitled to the benefit of those agreements to the same extent as Antero when performing work and services for or on behalf of Antero. A:002488 at ¶ 8. Notwithstanding the aforementioned agreements, Petitioners claim that Respondents' use of the surface land has created a nuisance. *See* A:002487 at ¶ 5; A:002493 at ¶ 13.

In general, "[t]he actions or inactions of the owner of an easement, which otherwise meet the legal definition of a nuisance, do not create a nuisance as to the estate servient to the

easement unless those actions or inactions exceed the scope of the easement." Syl. Pt. 5, *Quintain*, 210 W. Va. 128, 556 S.E.2d 95. Whether an owner of a property right has exceeded his rights is a question of law for the Court. *Id.* at 136, 103; *Justice*, 598 F.2d at 1343 ("Unreasonable use of land by a mineral owner is not measured by the tort standard of the ordinary reasonable man; rather, it is measured by concrete legal standards rooted in the common law."); *Adkins*, 134 W. Va. at 724, 61 S.E.2d at 636 ("it is the duty of the court to determine whether the use of the surface by the owner of the minerals has exceeded the fairly necessary use thereof, and whether the owner of the minerals has invaded the rights of the surface owner ....").

Here, through agreements with Petitioners, Respondents had express rights to use their surface properties in various ways, including but not limited to use of right-of-ways, roads, and easements, in connection with its oil and gas development. *See* A:002488-92 at ¶¶ 8-10. As such, the Panel held that Antero and Petitioners "entered into *unambiguous agreements* granting Antero the right to use [Petitioners]' properties in the course of its mineral development." A:002498 at ¶ 26 (emphasis added). Thus, the parties are bound by the terms of these agreements, which give Antero (and, therefore, Hall Drilling) "the full benefit of *express surface use rights* for mineral development and extraction." A:002498 at ¶ 26 (emphasis added). This is appropriate because, where an individual or entity has express rights to perform certain activities, those activities cannot create a nuisance. *See* Syl. Pt. 5, *Quintain*, 210 W. Va. at 134, 556 S.E.2d at 101.[4] Thus, Respondents, via the express terms of their agreements, had a right to conduct the activities that resulted in noise, dust, traffic, vibrations, lights, and odors. A.002500 at ¶ 30 ("Application of these agreements completely resolves this litigation as a matter of law in [Respondents]' favor").

[4] Because the Panel resolved summary judgment based upon contractual and property rights, it did not address whether Antero's actions would "otherwise meet the legal definition of nuisance" (*see* Syl. Pt. 5, *Quintain*, 210 W. Va. 128, 556 S.E.2d 95) under common law private nuisance principles. A:002499 at ¶ 28.

In addition to the express rights to use Petitioners' surface properties, Respondents are also entitled to use what is reasonable and necessary in their oil and gas-related activities. A.002500 at ¶31. "It is well-settled that ownership of a mineral estate includes the right to enter upon and use the superjacent surface by such manner and means as is fairly reasonable and necessary to reach and remove the minerals." *Phillips v. Fox*, 193 W. Va. 657, 662, 458 S.E.2d 327, 332 (1995).[5] Further, surface owners are not entitled to an unrestricted right to enjoyment of their property. *Martin v. Hamblet*, 230 W. Va. 183, 191, 737 S.E.2d 80, 88 (2012). Thus, Petitioners are only entitled to recover damages for use that goes beyond what is "reasonable and necessary" in developing the mineral estate.

The Petitioners "have not offered any admissible evidence of record to establish that [Respondents]' use of [Petitioners]' property has exceeded the scope of Antero's agreements with [Petitioners], or what is reasonable and necessary to develop the underlying minerals, other than self-serving assertions that Defendants' activities, *although within the scope of the agreements*, are excessive." A:002495 at ¶ 18 (emphasis added). In fact, counsel for Petitioners conceded that Respondents' were acting within the scope of what is reasonable and necessary in the development of the underlying minerals:

> JUDGE MOATS: . . . is there anything that the gas company is doing or that the [Respondents] are doing that would not be implied with the rights to explore or drill or produce?

[5] *See also Adkins*, 134 W. Va. 719, 61 S.E.2d 633 (recognizing that "the owner of the surface had no right to prevent such use of the surface as was reasonable and necessary for the production and transportation of gas") *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90 (1925) ("This rule is based upon the principle that, when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted."); *Coffindaffer v. Hope Natural Gas Co.*, 74 W. Va. 107, 81 S.E. 966 (1914) (mineral owner had right to build a road where necessary to haul machinery and material to drill a well); *Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E. 853, 854 (1909) (mineral owners have "an implied right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of their estates in the minerals"); *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E.137, 138 (1907) ("A lease granting minerals carries with it, by necessary implication, the right to enter upon the property and do all things necessary for the purpose of acquiring and enjoying the estate granted.").

I mean, No. 1, would it be an implied use to go on the surface of some property and use dozers to grade off a well?

MR. MAJESTRO: Sure. That would be approved. That would be within the scope of –

JUDGE MOATS: Would it be implied that they would have to have heavy machineary on there that makes noise?

MR. MAJESTRO: To a certain extent, I think, but the question is: If it's necessary – if the activities are necessary for the development, yes, it would be implied.

***

JUDGE MOATS: . . . I'll just get straight to the bottom line. Is there anything that they are doing that would not be viewed as an implied right necessary to development? In other words, running trucks on the road, hauling water in, having lights upon their well site, having machinery going that's going to cause noise; is there anything they're doing that would not be considered an implied right?

Now you may view it as excessive, but is there anything they're doing that's not implied, necessary to take place in developing of these - -

MR. MAJESTRO: Not as I'm sitting here today.

A:002495-96 (citing February 26, 2016, Hearing Transcript, 15:10-16:2; 16:11-17:6).

Simply put, Petitioners cannot prevent Respondents from rightfully entering onto their land to do what is within the scope of the agreements or what is reasonable and necessary for the development of the underlying minerals that they hold express rights to. *See, e.g., EQT Prod. Co. v. Adams*, No. 1:15-CV-102, 2015 WL 13000255, at *6 (N.D.W. Va. July 21, 2015) ("[u]pon severance, a party who retains the surface while conveying the minerals . . . has lost any right to exclude a mineral owner or its lessee from using the surface reasonably and necessarily for the production and transportation of minerals"); *Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E. 853, 854 (1909) (mineral owners have "an implied right to use the surface in such manner and

with such means as would be fairly necessary for the enjoyment of their estates in the minerals"); *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E.137, 138 (1907) ("A lease granting minerals carries with it, by necessary implication, the right to enter upon the property and do all things necessary for the purpose of acquiring and enjoying the estate granted.").

The fact that Petitioners have no property or personal injury damages is further evidence that Respondents could not have possibly exceeded what was reasonable and necessary in the development of minerals:

> JUDGE MOATS: Now, it's my understanding – or our understanding from all of your briefs that nobody's claiming any property damage. Is that correct, Mr. Majestro?
>
> MR. MAJESTRO: Yes, Your Honor.
>
> JUDGE MOATS: Nobody's claiming any personal injury?
>
> MR. MAJESTRO: Yes, Your Honor.

A:002272-73. Therefore, the Panel appropriately held that Respondents were operating within the scope of Antero's leasehold rights and various subsurface-use and right-of way agreements when performing the activities that resulted in noise, traffic, dust, lights, and odors, all of which are "reasonable and necessarily incident to mineral development." A:002499-50 at ¶¶ 29-30.

In sum, Respondents are not required to operate under any other standard than that which has been established with regards to the rights of mineral lessees, including what constitutes reasonable and necessary use of surface estates. Whether a mineral lessee's conduct exceeds the scope of its express or implied rights is a question of law for the Court. Here, Respondents had express rights regarding use of Petitioners' surface properties, and further did not exceed the scope of what was reasonable and necessary in the development of the mineral estate. To hold that Respondents exceeded the scope of their rights, or what was reasonable and necessary,

would be contrary to long-standing principles of property law and create instability and unpredictability in the interpretation of property rights in the future.

B. Respondents' Use of Petitioners' Surface Properties is Reasonable and Necessary

1. Respondents' Activities are Necessary and Expected in their Drilling Operations

As previously stated, this Court has long held that mineral owners and lessees have a right to use the surface in a manner in such a way that is reasonable and necessary for the enjoyment and development of their mineral estates. *See supra* Part IV.A. Here, Petitioners allege that Respondents' natural gas operations resulting in noise, traffic, vibrations, light, dust, and odors are not reasonable and necessary.

However, Petitioners' complaints result from normal drilling activities that have been held time and time again as reasonable and necessary. *See, e.g., Whiteman v. Chesapeake Appalachia, LLC*, 729 F.3d 381 (4th Cir. 2013) (creating drill waste pits were both reasonably necessary for recovery of natural gas, and did not impose a substantial burden on the surface owners); *Teel v. Chesapeake Appalachia, LLC*, 906 F.Supp. 2d 519 (N.D. W. Va. 2012), *aff'd*, 542 F. App'x 255 (4th Cir. 2013) (holding that defendant's depositing of drilling waste and other materials in pits on plaintiffs' property was reasonable); *EQT Prod. Co.*, No. 1:15-CV-102, 2015 WL 13000255, at *6 (use of preexisting road to access drilling site was reasonable and necessary); *Adams v. Cabot Oil & Gas Corp.*, No. 13-1299, 2014 WL 6634396 (W. Va. Nov. 24, 2014) (holding that a mineral owner's construction of a new access road over a surface owner's property was reasonable); *Thornsbury v. Cabot Oil & Gas Corp.*, 231 W. Va. 676, 682, 749 S.E.2d 569, 575 (2013) ("a reasonable use of a surface estate by a mineral owner generally includes the construction of a road to access a [natural gas] drilling site"); *Adkins*, 134 W. Va. at

723, 61 S.E.2d at (cutting ditches through surface owner's farmland, permanently burying a gas pipeline used for gas drilling, and spilling oil and oily water on surface owner's crops was did not violate surface owner's rights); *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90 (1925) (drilling test holes on surface and transporting machinery and men across the surface was reasonable and necessary); Syl. Pt. 2, *Coffindaffer v. Hope Natural Gas*, 74 W. Va. 107, 81 S.E. 966 (1914) (a mineral owner "has the right to build a road over the land, when necessary to haul machinery and material to the place selected for drilling a well"); *Porter*, 65 W. Va. 636, 64 S.E. 853 (finding that a "tram road" over surface estate owner's property was a reasonable use and fairly necessary to enjoy the mineral estate and enjoining surface owner from obstructing path).

Obviously, all of these things—drilling wells, building roads, digging ditches, and transporting men and machinery—necessarily result in noise, dust, vibrations, lights, odor, and traffic. As such, they are part and parcel to the normal drilling operations for which Respondents are entitled to perform.[6] Thus, the Panel below appropriately held that "West Virginia precedent makes clear that noise, traffic, vibrations, dust, lights, and odors of which [Petitioners] complain are well within the bounds of what is reasonable and necessary use to develop minerals." A:002501 at ¶ 35.

Petitioners further argue that Respondents' activities create a "substantial burden" on the surface owners' properties. *See Buffalo Mining Company v. Martin*, 165 W. Va. 10, 18, 267 S.E.2d 721, 725–26 (1980) (holding that "right to surface use will not be implied where it is

[6] Further, the Panel below noted that Antero obtained permits from the West Virginia Department of Environmental Protection for its gas wells. A:002493 at ¶ 12. It has been held that permits may inform the decision regarding whether activities related to use of said gas wells are reasonable and necessary within the industry. *See Whiteman*, 729 F.3d at 394 (noting that a permit cannot immunize its holder from liability, but can be used to "inform this Court of the practices of the oil and gas industry in West Virginia"); *EQT Prod. Co.*, No. 1:15-CV-102, 2015 WL 13000255, at *6 (same); *see also* W. Va. Code § 22-6A-7 (all permits require submissions of details on how the wells are drilled, cased, cemented, and readied for production, as well as details of how a well site, location, or pad is prepared initially and reclaimed after drilling). Furthermore, at the time Antero began preparations to drill the wells, it was required by law to provide notice to the surface estate owners, who were then given an opportunity to object. *See* A:000226; W. Va. Code §§ 22-6-9, 22-6-10.

totally incompatible with the rights of the surface owner"). However, as matter of law, none of these activities in any way substantially burden the surface owners' properties. *See, c.f., Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296, 107 S.E.2d 777 (1959) (finding "auger mining" to be substantially burdensome because it resulted in slippage of the surface sufficient to uproot trees, toss boulders, and divert streams); *W. Virginia–Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 837, 42 S.E.2d 46, 50 (1947) (finding "strip mining" to be substantially burdensome because it compromised subjacent support to the surface property).

In fact, Petitioners' concede this point. First, they do not allege *any* personal or property damages, let alone damages that would create a substantial burden. *See supra* Part IV.A; A:002272-73. By definition, "substantial burden" requires Petitioners to show that their burden is "substantial." Obviously, the complete lack of personal or property damage cannot rise to the level of a substantial burden. Second, Petitioners' own expert admits that Respondents' operations are derived and "expected" from "normal shale operations":

> From his review of documents, visit to the Cherry Camp area, and discussion with [Petitioners] in this action, Dr. Ingraffea opined, "[i]n summary, each family with whom I met recounted exactly the types of impacts to their health, to their peace and serenity, and to the continued use, enjoyment and value of their property described in the growing literature and to be *expected from 'normal' shale gas operations*."

Pet'rs' Br. at 10 (citing A:001597) (emphasis added). For these reasons, the Panel below correctly held that Petitioners have set forth no evidence to suggest that Respondents' methods are "wholly incompatible" from expected or normal natural gas operations. A:002502 at ¶ 37.

A finding that Respondents' use of "expected" and "normal" drilling activities would significantly undermine the well-established legal principles governing what is "reasonable and necessary," and detrimentally impact the "nuts and bolts" of mineral development that have long

been utilized in this state. Further, to allow a surface owner to baldly assert tort claims where no damages can be demonstrated would lead to a plethora of new litigation.

2. Use of "New" Technology is Reasonable and Necessary, and within the Contemplation of the Parties

Petitioners next argue that Respondents' use of the land is not reasonable and necessary because the methods used—i.e., hydro-fracturing and horizontal well drilling—could not have been contemplated by the parties at the time the deeds were executed. Horizontal drilling works by first drilling a traditional vertical well, then the drill bit is run underground in a horizontal direction creating a web-like design. A:002487 at ¶ 4. Consequently, horizontal well sites are usually larger than traditional vertical well sites. *Id.* Petitioners argue that this process, along with the infrastructure required, creates traffic, dust, noise, vibrations, etc. that were not within the contemplation of the parties at the time the agreements were executed. *See* A:002487 at ¶ 5.

"In any construction of the language of a deed the intent of the parties is controlling." *Quintain*, 210 W. Va. at 133, 556 S.E.2d at 100. With respect to oil and gas development, only where the methods used by the mineral owner or lessee are wholly incompatible with the rights of the surface owner, will those methods be found to be beyond the contemplation of the parties. *Id.* (methods not in existence at the time of execution may be used unless it would be "materially different from that which the owner contemplated at the time of granting the right"); *Buffalo Min. Co.*, 165 W. Va. at 18, 267 S.E.2d at 725 (activities not within the contemplation of the parties at the time of execution may be allowed as long as they are not "totally incompatible" with the rights of the surface owners).

In fact, West Virginia common law has long recognized that use of innovation and advancements in technology is reasonable and necessary in the development of mineral estates. *See, e.g., Faith United Methodist Church*, 231 W. Va. at 432, 745S.E.2d at 469 (citing *Ball v.*

Island Creek Coal Co., 722 F.Supp. 1370, 1373-74 (W.D. Va. 1989)) ("In 1908, as today, the parties knew that 'knowledge [would] increase' . . . and that better mining techniques would become available. An owner of mineral rights should be allowed to take advantage of modern technology subject of the terms of the deed."); *Buffalo Min. Co.*, 165 W. Va. at 18, 267 S.E.2d at 725 (suggesting a coal company may build electrical lines for ventilation purposes even though electricity was not contemplated at the time the original deed was granted); *Bassell v. West Virginia Central Gas Co.*, 86 W. Va. 198, 103 S.E. 116 (1920) ("Parties to contracts are held, in the absence of agreements to the contrary, to have contemplated modifications of their relations under their contracts, by the development of improvements and new methods in the progress of science and invention,"); *Armstrong v. Md. Coal Co.*, 67 W. Va. 589, 69 S.E. 195, 203 (1910) ("The [mineral] owner is not limited to such appliances as existed at the time of the grant; he may freely employ the means of invention; he may erect all adequate modern machinery for mining and draining.").

Petitioners primarily rely on *Quintain Dev., LLC v. Columbia Nat. Res., Inc.* in support of their argument here, stating that "parties' contemplation principles restrict the owner of an easement from utilizing technology that did not exist at the time an indenture was executed." Pet'rs' Br. at 19. However, *Quintain* stands for the opposite proposition. There, this Court held that "[i]n interpreting [the] general language [of the deed], we must construe it as of the date of its execution, *and we must also attempt to give effect to the intent of the parties.*" 210 W. Va. at 134, 556 S.E.2d at 101 (emphasis added). There, the Court held that, even though surface and mountain top removal mining were not methods known by the parties in 1914 when the deeds in question were executed,

> *the type of mining utilized does not materially impact upon what was within the contemplation of the parties at the time of the*

> *execution of the easements in questions.* The landowners clearly wished to reserve for themselves the right to remove coal from their respective properties. . . . This fact does not change simply because the method of mining the coal may have changed.

Id. (emphasis added). *See also Buffalo Min. Co.*, 165 W. Va. 10, 267 S.E.2d 721 (activities not within the contemplation of the parties at the time of execution may be allowed as long as they are not "totally incompatible" with the rights of the surface owners). The Court expressly distinguished its findings in *Quintain* from those in *Phillips v. Fox* and *Kell v. Appalachian Power Co.*, both of which dealt with activities that had a "material impact" on the parties' surface rights. *See Phillips*, 193 W. Va. 657, 458 S.E.2d 327, nn. 7–8 (holding that a mineral owner did not have "the right to destroy any substantial portion of the surface by surface mining or the employment of any other mining method which would destroy the surface or the integrity or support thereof" even though surface mining was contemplated by the parties at the time of execution); *Kell*, 170 W. Va. 14, 18, 289 S.E.2d 450, 454 (1982) (holding that aerial broadcast spraying of toxic herbicides would "inflict unnecessary damage to the land").

Here, the dust, noise, vibrations, odors, lights, and traffic do not materially impact the parties' surface rights. In fact, all of these are direct effects of normal drilling activities that would have also occurred through use of traditional methods of drilling. Just as with horizontal drilling, vertical drilling requires placement and use of a well and well pad, construction of access roads, and hauling equipment and personnel to and from the site.

Moreover, although the well sites may be larger, horizontal drilling may actually reduce the impact of drilling operations on the surface estates. For conventional vertical well drilling to produce the same volume of gas as horizontal drilling, numerous additional wells would need to be drilled. *See* Jason A. Proctor, *The Legality of Drilling Sideways: Horizontal Drilling and Its Future in West Virginia*, 115 W. Va. L. Rev. 491, 497-89 (2012). Consequently, conventional

vertical wells generally require significantly more surface space, pipelines, roads, and other surface disturbances in order to produce the same volume of gas as a single horizontal well:

> When cumulative use is taken into account, horizontal drilling may actually reduce the burden on the land. Historically, a natural gas producer would drill numerous wells on a given tract of land to reach most or all of the available gas. Horizontal drilling, which allows a producer to reach considerably more natural gas from a single well, can substantially reduce the overall number of wells needed. Furthermore, this effect is compounded when the producer is able to drill multiple horizontal wells from the same well pad. While a horizontal well may take up more surface area than a single vertical well, the horizontal well, with its ability to extract more natural gas, can reduce the total number of wells needed and ultimately lower the burden on the surface.

Id. at 516. Therefore, the Panel appropriately held that Respondents' activities did not exceed the contemplation of the parties because the activities complained of are not "materially different" from traditional methods of natural gas extraction, nor are they "totally incompatible" or destructive to the surface estates. A:002502.

In further support of their argument, Petitioners rely on findings by the West Virginia Legislature that identify certain methods of drilling, such as horizontal drilling, as "new" and not previously contemplated. *See* Pet'rs' Br. at 28-29 (citing Rotary Drilling Act, W. Va. Code § 22-7-1, *et seq.*; Natural Gas Horizontal Well Control Act, W. Va. Code § 22-6A-1, *et seq.*; and Flat Rate Statute, W. Va. Code § 22-6-1, *et seq.*). However, those statutes actually *encourage* the use of "new" technology in order to promote West Virginia's public policy of maximum and efficient recovery of natural gas. A:002502-03 at ¶ 39. *See, e.g.,* W. Va. Code § 22-6A-2(a)(1) ("advancement of new and existing technologies and drilling practices have created the opportunity for the efficient development of natural gas contained in underground shales"); W. Va. Code § 22-6A-2(a)(8) ("the responsible development of our state's natural gas resources [through horizontal drilling] will enhance the economy of our state and the quality of life for our

citizens while assuring the long term protection of the environment"). Remarkably, none of the statues cited by the Petitioners in any way prevent or limit the use of modern methods of mineral development because they are "new" or were not previously contemplated. *See* W. Va. Code § 22-6-1, *et seq*; W. Va. Code § 22-6A-1, *et seq.*; W. Va. Code § 22-7-1, *et seq.*

Petitioners' interpretation here would virtually eliminate all methods of mineral development that have been in place since the early 1900's. Certainly, parties to mineral leases did not expect that more efficient methods of mineral extraction be banned simply because such methods were not in use at the time the mineral leases were executed. *See Ball*, 722 F.Supp. at 1373-74. In fact, modern technology is and has been used to significantly reduce or eliminate negative impacts on the community, particularly with regards to public health and safety. Surely Petitioners do not suggest that "new" methods which are deemed safer or cleaner must be stopped simply because they were not within the original contemplation of the parties. If applied, such a rule would effectively revert the oil and gas industry back to the methods utilized in the 1800's and early 1900's, and significantly impact all advancements in clean energy and directly contradict West Virginia's public policy of maximum and efficient development of oil and gas.

3. It is Reasonable and Necessary to Use a Single Surface Tract to Develop Minerals Underlying other Properties

Petitioners further argue that Respondents did not have "the right to create a *nuisance* on the surface of that tract to develop minerals underlying another property." *See* Pet'rs' Br. at 24 (emphasis added). First, the Panel appropriately points out that Petitioners failed to previously raise this nuisance argument and, therefore, it must be waived. A:002910. Second, the Panel properly held that Respondents' use of a single surface tract to develop minerals underlying other tracts was reasonable and necessary under the various agreements with Petitioners because their minerals had been pooled. *See* A:002503 at ¶¶ 40-41; A:00874; A00882-83.

The U.S. District Court for the Northern District of West Virginia specifically addressed this issue in *Miller v. N.R.M. Petroleum Corp.*, 570 F. Supp. 28 (S.D.W. Va. 1983). In that case, the defendant was the lessee of the oil and gas rights under two contiguous tracts of land owned by the plaintiffs. *Id.* The defendant desired to drill an oil and gas well on one of the tracts and requested a right of way across the other. *Id.* When negotiations for the right-of-way were unsuccessful, the defendant declared a unitization of the two properties and thereby asserted the right to cross the first tract for the purpose of developing oil and gas on the entire pool. *Id.* The court held that West Virginia law was sufficiently clear that such use was permitted, noting that pooling and unitization served the valid purposes of "the sharing of resources and prevent[ing] the waste of requiring each tract owner to drill a well in order to enjoy his or her minerals." *Id.* Therefore, the court held that pooling granted the "right to use the surface *of any tract* in the drilling unit to produce gas or oil from the pool," as long as the use is reasonable and necessary:

> . . . A natural correlative notion to unitization or pooling is that minerals are being produced from under each separate surface tract of land included in a drilling unit regardless of whether a well is actually drilled on every tract or not. *It seems only reasonable that the surface area of each tract in a pool should be available for use in connection with the construction and operation of a well, as long as the use is reasonably necessary.*

Id. at 30 (emphasis added). Because the Respondents' use of Petitioners' surface was found to be reasonable and necessary (A:002502 at ¶¶ 37-38; *see also supra* Part IV.B.1–2), it is also reasonable that the surface area of a single tract be used in connection with Respondents' development of the pooled minerals. *See Miller*, 570 F. Supp. at 30.

Moreover, West Virginia public policy supports use of a single tract to develop minerals underlying multiple properties because it eliminates waste by the efficient, maximum development of the state's oil and gas resources from any and all productive formations. *See,*

Wellman v. Energy Resources, Inc., 210 W. Va. 200, 212, 557 S.E.2d 254, 266 (2001) ("The West Virginia Legislature has indicated that the policy of this State favors the conservation and maximum recovery of oil and gas."). For example, in West Virginia Code § 22C-9-1, the Legislature specifically declared it is "the public policy of this state and in the public interest to":

> (1) Foster, encourage and promote exploration for and development, production, utilization and conservation of oil and gas resources;
>
> (2) Prohibit waste of oil and gas resources and unnecessary surface loss of oil and gas and their constituents;
>
> (3) Encourage the maximum recovery of oil and gas; and
>
> (4) Safeguard, protect and enforce the correlative rights of operators and royalty owners in a pool of oil or gas to the end that each such operator and royalty owner may obtain his just and equitable share of production from such pool of oil or gas.

W. Va. Code § 22C-9-1(a).

More recently, the West Virginia Legislature passed the Natural Gas Horizontal Well Control Act, West Virginia Code § 22-6A-1 *et seq.* There, the Legislature found that horizontal drilling "has created the opportunity for the efficient development of natural gas contained in underground shales and other geologic formations," and that those practices "allow the development of multiple wells from a *single surface location.*" *Id.* at §§ 22-6A-2(a)(1)–(2) (emphasis added). Thus, the West Virginia Legislature has expressly recognized and approved the efficiency of extracting minerals under multiple tracts through a single surface. *See id.* at §§ 22-6A-4(b)(5), 22-6A-10(b)(1)-(2), 22-6B-1. If not for pooling, Petitioners' complaints relating to operations would only be magnified as more equipment, light, noise, and traffic would be necessary to drill each of the individual tracts—thus, making Petitioners' position on the issue even more untenable.

Therefore, a mineral lessee's right to use a single tract to develop pooled minerals is a recognized right that is consistent with West Virginia common law and public policy for the maximum and efficient development of natural gas. To hold otherwise would contradict express policy interests of the state and create uncertainty as to future application of property rights.

C. Economic Benefits of Marcellus shale Development in West Virginia

It is well known that the demand for energy in the United States continues to grow every year. It is also well known that there is a focus on developing cleaner and more widely available alternatives to traditional sources of energy. Natural gas has been identified as a major alternative because it is abundant, clean, safe, and versatile. *See Modern Shale Gas Development in the United States: An Update*, NAT'L ENERGY TECH. LAB., U.S. DEP'T OF ENERGY (Sept. 2013); *Projecting the Economic Impact of Marcellus shale Gas Development in West Virginia: A Preliminary Analysis Using Publicly Available Data*, NAT'L ENERGY TECH. LAB., U.S. DEP'T OF ENERGY (March 31, 2010) [hereinafter *Projecting the Economic Impact of Marcellus shale*]. The Marcellus shale is thought to be one of the largest natural gas fields in the world—and it is right in our backyard. In fact, West Virginia has already seen significant and rapid economic impacts from Marcellus shale development. The West Virginia Geological & Economic Survey reported approximately 1.35 trillion cubic feet of gas production in 2016, up from about 298 billion cubic feet in 2010. *Compare Oil and Gas Production Data*, W. VA. GEOLOGICAL & ECONOMIC SURVEY, http://www.wvgs.wvnet.edu/www/datastat/ogsummary/go2.asp (2010), *with id.* at http://www.wvgs.wvnet. edu/www/datastat/ogsummary/go2.asp (2016).

The West Virginia Department of Commerce noted that interest in Marcellus shale has "drawn companies in from other parts of the United States and the world to lease land, acquire companies with acreage positions often held by shallower production, and begin to drill both

vertical and horizontal wells to evaluate the gas potential of the Marcellus." *Marcellus shale*, W. VA. DEP'T OF COMMERCE, http://www.wvcommerce.org/energy/fossil_energy/marcellusshale.aspx. Additionally, West Virginia has developed and produced a significant amount of natural gas liquids, such as ethane and propane, which opens the door for further economic growth. Nicole Jacobs, *West Virginia's Marcellus shale Production "Remarkable,"* ENERGY IN DEPTH MARCELLUS, https://energyindepth.org/marcellus/west-virginias-marcellus-shale-production-remarkable (Jan. 18, 2016). The continued development of natural gas, natural gas liquids, and the ongoing need for additional infrastructure to support the development of natural gas, will continue to create numerous employment opportunities for West Virginians.[7] *See id.*

The economic impact we have experienced, and will continue to experience, from Marcellus shale development in West Virginia would not have been possible without modern methods of mineral extraction and, specifically, horizontal drilling. *See* Proctor, *supra* at 496. Prior to hydraulic fracturing and horizontal well drilling, shale gas was overlooked because production of the gas was viewed as not economically viable. *See Projecting the Economic Impact of Marcellus shale*, *supra* at p. 4. With horizontal drilling, however, mineral owners and lessees are now able to reach target gas locations that could not be reached with vertical drilling and have even produced gas from wells that were originally thought to be depleted.

Based upon the pace of Marcellus shale drilling, it has been *conservatively* projected that, by 2020, West Virginia will see $2.9 billion in gross economic activity, $1.6 billion in value added, $1.3 billion direct payments to households through royalties and industry payroll, approximately 17,000 additional jobs, and over $870 million in state and local taxes. *See Projecting the Economic Impact of Marcellus shale*, *supra* at 31. Indeed Respondents Antero

[redacted] A:000857.

Resources Corporation and Hall Drilling LLC have already significantly contributed to West Virginia's economy. *See* A:000857-864. [redacted] A:000857-58. [redacted]. A:000861-62.

In sum, allowing surface owners to baldly make claims for nuisance—or any other tort—against a mineral owner or lessee *where no tangible damages have been shown*, would have a significant negative impact on the Marcellus shale industry, and West Virginia's economy as a whole. Not to mention, such a holding would create a great deal of new litigation in property and tort law that this state has not seen before. Increased litigation and uncertainty pertaining to these issues will cause businesses to question whether they can successfully or efficiently continue their operations in West Virginia. Indeed, this is a time in which business activities should be supported and encouraged as West Virginia was recently ranked "the worst state for business." *See* Kurt Badenhausen, *The Best and Worst States for Business 2016*, FORBS, https://www.forbes.com/sites/kurtbadenhausen/2016/11/16/the-best-and-worst-states-for-business-2016 (Nov. 16, 2016).

V. CONCLUSION

In summary, adherence to well-established property law is necessary to create and maintain a stable, predictable legal environment that industries can rely on to conduct and grow their businesses in West Virginia. This is also vital to West Virginia's economic growth, particularly in the development of Marcellus shale now and in the future.

WHEREFORE, for the reasons stated herein, the West Virginia Mass Litigation Panel's October 11, 2016 Order granting Respondents' Motion for Summary Judgment (A:002485) should be upheld.

WEST VIRGINIA CHAMBER OF COMMERCE;

WEST VIRGINIA BUSINESS AND INDUSTRY COUNCIL;

WEST VIRGINIA COAL ASSOCIATION;

CONTRACTORS ASSOCIATION OF WEST VIRGINIA;

WEST VIRGINIA CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.;

WEST VIRGINIA MANUFACTURERS ASSOCIATION; and

WEST VIRGINIA POULTRY ASSOCIATION,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 17-0126

ROBERT ANDREWS, et al.,
Appellants/Petitioners,

v.

ANTERO RESOURCES CORP., et al.
Respondents/Appellees.

Appeal from the Circuit Court of Ohio County (Civil Action No. 13-C-434)

CERTIFICATE OF SERVICE

I, Louis S. Southworth, hereby certify that on this 27th day of **July, 2017** a copy of the foregoing **BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS/APPELLEES BY WEST VIRGINIA CHAMBER OF COMMERCE; WEST VIRGINIA BUSINESS AND INDUSTRY COUNCIL; WEST VIRGINIA COAL ASSOCIATION; CONTRACTORS ASSOCIATION OF WEST VIRGINIA; WEST VIRGINIA CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.; WEST VIRGINIA MANUFACTURERS ASSOCIATION; AND WEST VIRGINIA POULTRY ASSOCIATION** was mailed via United States, first class mail, postage prepaid to:

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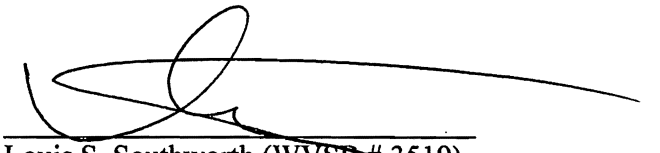

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