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Surface Owners Rights Organization
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LEGISLATIVE INTENT MEMO

From: Dave McMahon, J.D., Co-Founder

To: Oil and Gas Conservation Commission

Date: 2018-05-09

Re: Requests to Commission for rulemaking/action

2018 HB 4268 enacted a new Chapter 37B of the State Code that includes the "Cotenancy Modernization and Majority Protection Act" (the "2018 Cotenancy statute"). The effective date of the new statute is June 3, 2018.

The most important benefit for surface owners in the enactment is that drillers will have to get the agreement of the surface owners where the well pad and road are going to go if the driller uses the 2018 Cotenancy statute in drilling a well. This provision of the bill is not a model of clarity. Some drillers will try to say that the surface owner's agreement is only needed if the 2018 Cotenancy statute is used to drill into the mineral tract directly under the surface tract where the pad or road or other disturbance is going to be located.

WVSORO believes that the 2018 Cotenancy statute requires the consent of the surface owner where the well pad is if the 2018 Cotenancy statute is used to drill into any mineral tract no matter how far away from the surface owner's land. Because the statute is not a model of clarity, we think that the history of the passage of the bill shows that we are right.

Here is the actual language of the bill as it passed the Legislature and was signed by the Governor. A copy of this "Enrolled" bill is attached as Appendix #1.

> "When any tract of mineral property where an interest in the oil or natural gas in place is owned by a nonconsenting cotenant is used or developed pursuant to §37B-1-4 of this code, in no event shall drilling be initiated upon, or other surfacedisturbance occur, without the surface owner's consent regardless of whether such surface owner possesses any actual ownership in the mineral interest . . ."[1]

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[1]Enrolled Committee Substitute for HB 4268 at page 13, section 6, lines 1 through 5 at http://www.wvlegislature.gov/Bill_Text_HTML/2018_SESSIONS/RS/bills/HB4268%20SUB%

While not a model of clarity, we believe that this means, and the Legislature intended, that the driller has to get the surface owner's consent for surface use for a pad or road etc. if the well to be drilled is going into or through or otherwise developing any tract of land where the driller relies upon the new 2018 Cotenancy statute to get consent to develop! Here is why:

As H.B. 4268, came out of the House Energy Committee, before it went to the House Judiciary Committee, the bill read as below. A copy of this "Introduced" bill is attached as Appendix #2.

> ***With respect to*** any tract of mineral property where an interest in the oil or natural gas in place is owned by a nonconsenting cotenant ***and*** is used or developed pursuant to §37B-1-4 of this code, in no event shall drilling be initiated upon, or other surface disturbance occur ***on, the surface of or above such tract of minerals*** without the surface owners consent . . .[Emphasis added.]

W.Va. Code §37B-1-6(a).

But when it passed out of House Judiciary as a "committee substitute" and after it was subsequently amended by Chairman Shott on the floor of the House of Delegates, and as finally passed by the House of Delegates, it read differently.

The following quotation shows changes as the bill was amended after the bill passed out of the House Energy Committee bill and was amended by the House Judiciary Committee and then again on the floor of the House of Delegates and became the "Engrossed Committee Substitute" that passed the House of Delegates. These provisions were NOT later amended by the Senate Judiciary Committee or the full Senate before they became the law. The changes indicated below clearly show that the changes were intended to make the bill say what we say it says.

> "~~With respect to~~ <u>When</u> any tract of mineral property where an interest in the oil or natural gas in place is owned by a nonconsenting cotenant ~~and~~ is used or developed pursuant to §37B-1-4 of this code, in no event shall drilling be initiated upon, or other surface disturbance occur ~~on, the surface of or above such tract of minerals~~ without the surface owners consent . . ."[2]

The biggest key is the deletion of the language, "on, the surface of or above such tract of minerals". Deleting "With respect to" and "and" are also significant.

That is how the bill was explained to the House of Delegates by John Shott, Chairman of House Judiciary, when the bill was up for passage on third reading. He said the surface owner consent

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[2]Note that the "Engrossed Committee Substitute" that passed the House uses underline and strikethrough to show changes from *current law*, and not changes between from the 'Introduced" version as this does.

was needed even if the mineral tract for which the Chapter was used was "maybe even a mile" from the mineral tract under the surface owners.[3]

So the intent of the respected Chairman of House Judiciary whose committee drafted the Committee Substitute and amended it on the floor, and who explained it to the House of Delegates, and whose substitute bill and its amendments which were not further amended by the Senate must be the intent of the Legislature's language.

Interestingly language of the bill was not amended in the Senate, and Judiciary Committee Chairman Trump explained that the surface owner consent prevision might apply only if the 2018 Cotenancy statue was used to develop the mineral tract under the well pad or other disturbed surface.[4] This confusion might be explained because Chairman Trump explained that provision as it was written in a bill the previous year with similar provisions that HB 4268 was modeled upon. That previous year's bill, SB 576 from 2017, started in the Senate the year before and went over to the House before it died[5]. A copy of SB 576 from 2017 is attached as Appendix #3. But again, that version of the bill upon which the version that came out of the House Energy Committee was modeled, was amended by the House Judiciary Committee as explained by its Chairman.

So the Legislature's intent was clear. If the 2018 Cotenancy Statute was used to be able to drill from a surface owner's land into any tract being developed from that surface owner's land the drill has to get the permission of the surface owner's tract that is being disturbed to drill the well before the surface owner's land can be used for that surface disturbance. After all, to drill the longer horizontal well bores, which was the goal of the legislation, that means that the driller will be drilling longer, using more trucks, making more noise, light and air emissions, than if it drilled a shorter well bore.

WVSORO takes the position that this is the law anyway – the right of the mineral owner to reasonable use of the surface does not extend to using the surface to drill into tracts neighboring the mineral tract that lies under the surface owner. One Circuit Court Judge has agreed with us. See attached Appendix #4. EQT has appealed the Circuit Court Judge's opinion to the West Virginia Supreme Court which has not yet decided the appeal.

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[3]See Chairman Shott's explanation at four hours and thirty minutes into the House Floor session of 02/15/1918 at https://www.youtube.com/watch?v=lgwOi1U_Ms8&list=PL2q3Wbz7wKWXbMV02AJO4PWL8PuZMKFs7&index=2 .

[4]That which would protect a surface owner who had relied on the state of the law and bought an interest in the underlying tract to protect himself from development without that surface owner's signature on a lease, so that the surface owner could negotiate to protect the surface owner's land.

[5]2017 S.B. 576 Page 10, Section 9, lines 3 and 4. http://www.wvlegislature.gov/Bill_Text_HTML/2017_SESSIONS/RS/bills/SB576%20SUB1%20eng.pdf