A Surface Lawyer's Take on
Andrews vs. Antero Resources Corporation

241 W.Va. 796, 828 S.E.2d 858 (2019)

Prepared November 1, 2019, by David McMahon. J.D.

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I. Principle Analysis

•After *Andrews*, these are the main questions:

Can surface owners bring *unreasonable use trespass* suits against drillers of horizontal wells?

Can surface owners bring *nuisance* suits against drillers of horizontal wells?

Sub-Questions -- which surface owners?

-What about the surface owners on whom the well site, road etc. were placed?
Not the facts of Andrews. See *Crowder* establishing a good cause of action in trespass plus Judge Sweeney opinion establishing a cause of action in unjust enrichment below in the same case. No contemplation of the parties analysis is necessary.

-What about the surface owners with horizontal well bores under their property, but no boots-on-the-ground surface use on their property?
These are the Andrews facts. The main questions above are good ones that these citizen surface owners have. More analysis below.

-What about the surface owners whose surface is not disturbed boots-on-the-ground surface use, and whose underlying minerals are beyond the reach of the horizontal well bores?

Not the facts of Andrews. Existing nuisance law would control and anything in Andrews regarding these surface owners would be *dicta*.

So the questions I am talking only about are limited to the situation where the surface owner does not own the underlying minerals, where there is a horizontal well bore through those minerals, and where the surface owner believes they are being imposed upon by noise, lights, dust, etc. caused by drilling, trucking etc. occurring on neighboring surface tracts.

•*The Andrews* holding is limited. It only says that in order for a complaining surface owner to establish trespass, the surface owner must show that burden on the surface was not reasonably necessary and that it did impose a substantial burden on the surface owner. *Andrews* held that the Plaintiffs in the case before the Court did not show that the actions were more than reasonably necessary and had a substantial impact on the surface.

Justice Walker said in the first paragraph of her concurrence that the decision did not determine the nuisance issue.

The decision had no new syllabus points and in fact only repeated one that is relatively favorable to surface owners.

1. "In order for a claim for an implied easement for surface rights in connection with mining activities to be successful, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner." Syllabus point 3, Buffalo Mining Co. v. Martin, 165 W. Va. 10, 267 S.E.2d 721 (1980).

•Surface owner position after Andrews:

-If a person owns the surface tract where the well pad, road, impoundment etc. were located on the surface owner's tract, then that person has a trespass/unjust enrichment cause of action under *Crowder*.

-If a person owns land beyond the reach of the horizontal well bores and their fractures, that person can have a nuisance or even maybe a trespass cause of action.

-If a person owns surface but not minerals, and if there is a horizontal well bore into the mineral tract under that person, then absent specific language in a severance (or a lease that took place before the severance) then:

1. Trespass: The driller has the implied right to do what was contemplated and is reasonably necessary on the surface in order to get the gas out of the mineral tract under the person. But if the noise, light, dust etc. on the property was more than was contemplated or reasonably necessary, the person has a trespass cause of action.

I believe that even if what is being done is less than the use that a conventional vertical well on the surface to get gas out of the mineral tract under the surface would have caused, but still more than is reasonably necessary, then the person has a trespass cause of action. The opinion points out that Antero clearly had the right to use and disturb the surface to do conventional drilling to the underlying mineral tract*, but that is less than saying that disturbance less than what would have been caused by conventional drilling will always be considered reasonably necessary.* (Note also that a vertical shale well has a lot more surface disturbance than a vertical conventional well -- disturbance that I say would not have been contemplated.)

Most importantly, I also believe that if what is being done on the surface is in part to produce gas from mineral tracts that are not under the person's surface, no matter how reasonable, then that cannot be done without the surface owner's agreement as established by Crowder.

So, in most cases there is going to be a good trespass claim against the driller by a neighboring surface owner even though there is only a horizontal well bore under them.

2. Nuisance. If the surface is not being used at all, but if the surface owner is being affected by noise, lights, dust, smells, traffic, (and ground water or even surface water problems) from activities on a neighboring surface tract, then the person has a nuisance cause of action. Even though a claim for trespass/unreasonable use may not exist because there is no strictly property interest affected by boots on the ground, the problem stems from the production of gas not only from the mineral tract under that surface owner, but in most all cases, from production of minerals from neighboring mineral tracts that do not underlie the surface tract that the driller has also bored or frac'ed into. And if the activity is caused by producing not just from the mineral tract under a person but from other mineral tracts, then under *Crowder* that person has a cause of action. And that it is almost always the case that a horizontal well pad is draining gas from more minerals tracts than just the tract under the surface owner plaintiff!

Again, Justice Walker said in the first paragraph of her concurrence that the decision did not determine the nuisance issue, but I think it is the law. And I think the current Court would agree.

•Counting votes: The current court would likely be more sympathetic to surface owners' property rights than the Court that decided *Andrews.*

Jenkins wrote the majority opinion.
Circuit Court Judge Howard sitting in temporally joined in Jenkins's opinion.
Justice Walker concurred but wrote a separate opinion saying the nuisance questions were not decided. She voted for the *Crowder* result.
Justice Workman wrote a dissent. She voted for the *Crowder* result.
Circuit Court Judge Clawges sitting in temporarily joined in the dissent.
Justice Hutchison disqualified himself in *Andrews*. He wrote *Crowder*.
(He had participated in mediation of the case.)
Justice Armstead disqualified himself. He voted for the result in *Crowder*.
(Probably disqualified himself because he was Speaker of the House when it considered the Horizontal Well Act etc. and perhaps even proposed nuisance legislation.)

II. Other Observations and Thoughts

Thoughts on contemplation of the parties: The Plaintiffs argued that te second step of the test set out by *Andrews*, "substantial burden" was met because the process used was not in the contemplation of the parties. The *Andrews* opinion nixed that citing a line of cases that the opinion said held that a new process does not exceed the contemplation of the parties so long as it does not totally destroy the surface. True, in many of those cases cited the proposed mining method did totally destroy the surface. That exaggerates the holding of those cases and this is illustrated by the *Kell*[1] case. In that case the power company wanted to maintain it's right of way by using herbicide sprayed from helicopters.

The discussion on contemplation was all only indirectly about contemplation of the parties and only as a sub-question of reasonable use, substantial burden, so therefore arguably *dicta*. Contemplation was never alleged by Plaintiffs as a primary cause of action.

Does there have to be total destruction of the surface? The opinion seems to conclude that the case law says yes, but I say that is not what the line of cases says. The first case cited was *Strong*[2]*,* the strip-mining case in which total destruction did occur. The next case cited was *Brown*[3] which was auger mining and only "a considerable amount of surface was removed in obtaining the coal" p. 18. But then there was the *Kell* case. Aerial power line spraying would "destroy all living vegetation within the area sprayed or adjoining areas where these deadly herbicides could drift." That is not "total destruction" of the surface tract. The decision's

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[1]*Kell v. Appalachian Power Co.*, 170 W. Va. 14, 19, 289 S.E.2d 450, 456 (1982)

[2]*West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S.E.2d 46 (1947).

[3]*Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296, 107 S.E.2d 777 (1959),

conclusion that the damage in *Kell*, ". . . amounted to the destruction thereof and was utterly incompatible with any use the surface owner may have engaged in or anticipated as a future surface use," was a wrong conclusion. Even *Quintain*[4] says "materially different" is the standard for contemplation.

Observation on importance of reading severance deeds: One of the two deeds of the parties in the case which was quoted in the opinion expressly states the right of surface use and states it conveys "all the oil and gas *underlying the land* herein conveyed together with the privilege of operating for and marketing *same*." Not other lands. At p. 864

Observation that mineral owner is no longer dominant: As Workman's dissent points out, historically the mineral interest has been argued to be superior over the surface interest in the balancing of interests. This was expressed by using the terms "dominant" and "servient". (I am not sure the use of those words says which participant is more important, just which is inserting its rights into the bundle of sticks of rights of the other.) Nevertheless, that changed in the early 1980's when the Legislature enacted the Surface Damage Compensation Act and later in 2011 when similar legislation was enacted for horizontal wells. In those statutes it says that they are equal.[5] That certainly applies to any severance that occurred after the enactment of the statute. Does it apply to court actions over severances that occurred before? I have not researched or thought through this issue. It certainly established a State public policy, having been enacted twice. See also footnote 13 of the *Crowder* decision quoting *Faith United Methodist*[6].

Observation on effect of surface damage compensation statutes: There are two surface damage compensation statutes.[7] They were intended to be a quick and easy process to promote quick determination of compensation through arbitration. They both expressly preserved

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[4]*Quintain Development, LLC v. Columbia Natural Resources, Inc*., 210 W. Va. 128, 556 S.E.2d 95 (2001),

[5]W. Va. Code § 22-7-1. **Legislative findings and purpose.**

(a) The Legislature finds the following:

(1) Exploration for and development of oil and gas reserves in this state must coexist with the use, agricultural or otherwise, of the surface of certain land and that each constitutes a right equal to the other.

W.Va. Code § 22-6B-1. **Legislative findings and purpose; applicability.**

(a) The Legislature finds the following:

(1) Exploration for and development of oil and gas reserves in this state must coexist with the use, agricultural or otherwise, of the surface of certain land and that each constitutes a right equal to the other.

[6]*Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013)

[7] See footnote 3

commonly law rights.[8] I always advise to use the common law rights in civil actions and not use these arbitration statutes because the process is arbitration on a fairly tight schedule and for the reason plaintiffs' lawyers do not like arbitration. And, more importantly, the scope of the interest for which compensation can be awarded is arguably limited.

Observation that not all vertical wells are created equal: The decision says, "Thus, insofar as vertical wells would have been the normal method of extracting oil and gas contemplated by the parties at the time the relevant severance deeds were executed, it clearly would be a fairly necessary method for Antero to enjoy the mineral estate it has leased." Not all vertical wells were created equal/contemplated by the parties. The productivity of the Marcellus Shale using high volume water frac'ing was discovered and used before horizontal drilling was also used. Lots more water was used to drill vertical Marcellus wells than any well to any other formation. And as the contemplation statutes state, rotary drilling, as opposed to cable tool drilling that essentially chiseled a bore hole into the ground, was not even contemplated before 1960[9].

Observation that the "rule of capture" is not applicable to shale formations: Natural gas does not move through shale formations the way it moves through sand formations because the porosity and permeability of shale is so low. One expert explained it to me like this: In the amount of time it takes gas to flow one kilometer through a sand formation, it will only flow 1 meter through a shale formation. More technically, under conditions in which a conventional sandstone reservoir rock would allow a cubic centimeter of fluid to flow through it in seventeen minutes, a shale rock would only allow the same volume to flow through in thirty-two years in the absence of a fracture. Soeder, Daniel J., "The successful development of gas and oil resources from shales in North America," *Journal of Petroleum Science and Engineering (Vol 163, Apr. 2018) at 405.*

[8] W. Va. Code §22-7-1 and §22-6B-4

[9] W. Va. Code §22-7-1(a)(2) through (4)