

SURFACE OWNERS' NEWS

The latest news and updates from WV Surface Owners' Rights Organization



WVSORO co-founder Dave McMahon and the Grubb Law Group argue the case in the Supreme Court.
Photo by Craig Hudson, Charleston Gazette-Mail

IN THIS ISSUE

WE WON! SUPREME COURT UPHOLDS SURFACE OWNERS' PROPERTY RIGHTS

Page 1

ORPHANED WELLS: THE WIDESPREAD PROBLEM AND THE POTENTIAL SOLUTIONS

Page 2

SURFACE NEIGHBORS CAN STILL SUE

Page 3

PROVISIONS NEEDED IN SURFACE USE AGREEMENTS

Page 4

2020 LEGISLATIVE PRIORITIES

Page 7

WE WON! SUPREME COURT UPHOLDS SURFACE OWNERS' PROPERTY RIGHTS

WVSORO believes that the opinion is so strongly written that many surface owner's who signed surface use agreements under duress can also now file suits for more money and maybe better protections.

The West Virginia Supreme Court has issued a much anticipated decision upholding the property rights of surface owners when well drillers try to use their surface for the enormous well pads necessary to drill horizontally. The Court said that the driller has no right, without the surface owner's consent, to use a surface tract for a well pad etc. to drill well bores horizontally into neighboring mineral tracts which do not underlie the surface owner's property. Horizontal bores almost always do that, so it is a ruling that will affect surface use for almost all horizontal well pads, well roads, etc.

We think this is the most important case for surface land owners since the "broad form deed" cases that said strip mining could not be done on surface tracts where ownership of the coal was separated before strip mining was contemplated.

WVSORO thought the law was always obvious based on court decisions in similar cases. The Supreme Court agreed saying, "[P]recedent from this Court has repeatedly noted that a mineral owner does not have an implied right to use the overlying surface lands to benefit mining or drilling on other property."

WVSORO filed an amicus "friend of the court" brief which the opinion recognized and praised. WVSORO would also like to thank the West Virginia Farm Bureau for its amicus brief and thank Margot Crowder and David Wentz for hanging tough during the long drawn out case.

The decision was a strong, unanimous opinion written by Justice Hutchison called *EQT Production Company vs. Crowder*, 828 S.E.2nd 800 (June 2019). WVSORO believes that the opinion is so strongly written that many surface owner's who already signed surface use agreements under duress can also now file suits for more money and maybe better protections. The decision said, "Our opinion merely restates a bright-line rule founded long ago in the common law[.]" If you signed such an agreement or had a well pad, road etc. put on you without your agreement, contact us or have your lawyer do so.

Before the decision, when the drillers approached surface owners the drillers would say or imply that they could come onto the surface owner's land with or without their permission. They cannot do that anymore! The surface owner can just say "No!"



Donate to WV-SORO to sustain our work with surface owners in West Virginia! See the back of this newsletter for more information.

In the past when surface owners did sign surface use agreements, they often agreed to be paid only what the land was worth to the surface owner as a meadow or wood lot, or maybe a little more than that. Now they can insist on being paid what having the well pad is worth to the driller. We think that is \$640,000 or more.

In addition to getting paid more fairly, surface owners can insist on surface use and environmental protections they want, like those recommended by WVU studies.

For a lot more information go to our website and look under "New Resources and Advice" for our web page "The Provisions Needed by Surface Owners in Surface Use Agreements".

ORPHANED WELLS: WIDESPREAD PROBLEMS AND POTENTIAL SOLUTIONS

When an oil and gas well is no longer producing in paying quantities, it needs to be plugged. These wells produce in large amounts at first, but quickly produce less and less -- though they can produce a trickle for a hundred years or more. When they age, the casing of the well bore will go bad, and that can often cause problems. If the well bore is not plugged full of clay and cement, then surface pollution, like from cow droppings and septic systems, can get down into groundwater. In addition, gas or oil or close-by iron water can get into groundwater. Methane can leak up and out into the atmosphere. Oil and brine water can flow up and out onto the surface.

Drillers do not like to plug wells that should be plugged. Plugging the well will release the lease from the mineral owner; so to drill the same tract again the driller will have to renegotiate more modern signing bonuses and royalties. Plus the well is no longer even making enough money to pay the overhead to operate it, and it costs from \$10,000 to \$50,000 or more to plug it.

Drillers, at least in the past, have had huge political clout, so the plugging laws are weak and seldom enforced. Drillers are only required to plug a well that has entirely stopped producing for a year. The requirement to plug those is so under-enforced that there are more than 12,000 of these unplugged wells in our State. Of those, 4,500 have gone unplugged so long that the driller is out of business leaving what we call "orphaned" wells. Drillers with the money to plug their wells can transfer the wells to drillers who cannot afford to plug them -- they just milk them for a while and go out of business. Drillers only have to post a \$50,000 blanket bond no matter how many wells they own, so that can be less than \$50 per well. Fees paid by current drillers when they get new permits only generate enough to plug five orphaned wells a year, if that.

Diversified Gas and Oil is the new poster child for buying and milking wells it will not eventually have the money to plug. In a disclosure to attract investors on a British stock exchange it stated that its wells will "end their economic lives" in thirty years, but its plugging program will leave 50,000 wells unplugged and so eventually orphaned across Appalachia. WVSORO managed to almost get three bills passed in the last Legislative session that would generate money to at least start to plug at least the currently orphaned wells. Two died on the last night of the session. One was vetoed by Governor Justice.

We will be back! And we hope to get a fourth, different bill also introduced that would replace blanket bonding with required plugging money set asides.

Read more about orphaned wells on our website! Read more about what happened to last year's bills in our last newsletter also on the web site!

Help us by making sure we have your email addresses so we can keep you up to date with the happenings during the Legislative session.

MORE SUPREME COURT NEWS: SURFACE OWNERS CAN STILL SUE FOR NUISANCES & DAMAGES

Elsewhere in this newsletter is an article explaining that as a result of a West Virginia Supreme Court decision, in almost all cases, surface owners can sue for substantial money if a driller uses their surface for a pad, road etc. for a horizontal well -- even sometimes if the surface owner already signed an agreement.

Happy Holidays from all of us at WV-SORO!

Elsewhere in this newsletter is an article explaining that as a result of a West Virginia Supreme Court decision, in almost all cases, surface owners can sue for substantial money if a driller uses their surface for a pad, road etc. for a horizontal well -- even sometimes if the surface owner already signed an agreement. But what if the surface owner's land was not actually used, but the surface owners were subject to noise, lights, dust, bad ground water etc? WVSORO believes that these surface owners can also sue, despite a recent West Virginia Supreme Court decision that at first blush seems to go against those surface owners.

This decision, *Andrews vs. Antero Resources Corporation*, 828 S.E.2d 858 (June, 2019) ruled against the surface owners in that particular case saying they had not proven their case. But it left the door open for surface owners who, now that they understand the law better, can prove their cases.

First, if there is no use of the surface owner's land, and if there are no well bores from that pad going under the surface owner's land, it is clear that a nuisance suit can be brought to get resulting damages and maybe even to get an injunction reducing the noise etc.

Second, even if a horizontal well bore from the well pad travels through the mineral tract underlying the surface owner's land, WVSORO believes that the surface owner can sue. It is true that the owner/lessee of a mineral tract has the right to do what is reasonably necessary to the surface to produce the minerals (as long as that level of disturbance was contemplated by the parties at the time of the original severance). But horizontal well bores almost always bore through more than just one mineral tract. So, because the problem on the surface owner's tract was caused by a well pad etc. producing gas from not just the underlying mineral tract, but from other neighboring mineral tracts, the surface owner above a well bore can sue for the additional problems caused by the impact on their surface from drilling into and producing from the neighboring mineral tracts.

In addition, the driller can only do what is reasonably necessary. So if the noise, for example, was more than having even a conventional well on the neighboring surface's owners tract, but building a simple noise wall along one side of the pad next door would lessen it, then only the level of noise with the wall is reasonably necessary. Finally, surface owners everywhere can always sue if drilling harms their groundwater and affects their wells. There are even some presumptions in the law for certain distances.

So if you are having problems with noise, lights, dust, traffic, water contamination, you should see a lawyer, and we have a list on our website.

Go to our website and look under "New Resources and Advice" for our web page "A driller is putting a well pad near my house/land. What can I do about it?" for more information.

PROVISIONS NEEDED IN SURFACE USE AGREEMENTS

In the Crowder case, the Supreme Court has ruled that the mineral owner (including the mineral owner's "lessee"/driller who together we will call the "driller") has to have the agreement of the surface owner in order to use the surface owner's land for a well site to drill well bores into a mineral tract that is not the mineral tract that underlies the surface tract of land! So in essence the driller needs your consent to use your surface to drill horizontal wells.

However, if you are OK (for the right amount of money) for the driller to use your surface land for their purposes (with the surface protections you want!), then they will need you to sign papers giving them that permission and setting out the payment and the other terms of the agreement between you and the driller for their use of your surface. Sometimes these papers are named "surface use agreement" or just "agreement", sometimes they are called a "consent".

Let us first say that in almost every instance we know of before now where the surface owner has signed a surface use agreement, once the well site preparation and well drilling get going, they have regretted allowing the driller on their land, or at least thought they did not get enough money. Particularly this has been true if the surface owner actually lives on the land or farms it or spends a lot of time caring for it. We hope that will now change because the surface owner is now clearly on an equal or better bargaining position with the driller.



The Google Earth photo snip above shows farms surrounded by horizontal well pads in Marshall County.

Here is a list of provisions to consider.

- First, this agreement will be in effect and binding on the driller and on you and on your generations that follow you. Take your time and get it right!
- Second, you should have a lawyer read any papers over before you sign them. Legal concepts are going to be buried in the language – particularly if negotiations start out using the driller's form papers.
- Third, get it in writing! If there is something you want, and the driller's agent says, "Oh don't worry about that. We'll do that without putting it in the agreement" or "Don't worry we always/never do that," then you should worry about that.
- Fourth, remember this is business. West Virginians like you generally are wonderful, trusting people who want to be polite and friendly and neighborly and get along. We have known land agents in the industry that believe that is being a sucker! And you can still be polite.
- Fifth, the Crowder case has changed the surface use agreement negotiation dynamic drastically in your direction! WVSORO's job it believes is to impress this upon surface owners – that they are now in the strong bargaining position and can make demands for what they want.
- Sixth, there is strength, and leverage, in numbers.
- Seventh, negotiate the surface protections first.
- Eighth, the industry argued against the West Virginia Supreme Court's ruling saying that the common law says that it is OK to use new technologies that were not in use at the time the papers were signed.
- Ninth, the driller will need pipelines that transport gas from the wells to market.
- Tenth, go look at a well site if you haven't seen one.

As a WV Surface Owner, we want to represent your voice in the Legislature this January. We are surveying our members to find out which issues matter most to you! Thank you for your time.

1. Name

Check all that apply.

- ☐ I do not own land in West Virginia, but I am interested in these issues.
- ☐ I own surface land that does NOT include an interest in owning the minerals under it.
- ☐ I own surface land that DOES include some interest in owning the minerals under it.
- ☐ I own minerals that are not under my surface land.
- ☐ My land is where Marcellus Shale/horizontal drilling is going on now.

<https://wvsoro.org/wv-soro-2020-legislative-priorities/>

Mark only one oval.

	1	2	3	4	5	
Most Important	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	Least Important

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Most Important	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	Least Important

9. Pass legislation so when pipeline companies condemn/use eminent domain to take pipeline rights of way across citizens land, the pipeline companies have to pay the citizens not what the land was worth to the citizens before the pipeline company showed up, but what it is worth to the company to use the surface owner's land for a pipeline right of way.

Mark only one oval.

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Most Important	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	Least Important

Unknown Mineral Owners

10. Right now if there are missing or unknown mineral owners whose mineral tracts are included in horizontal drilling units in partition cases or missing lessor cases, then the missing and unknown owners' royalties are held in the Circuit Clerk's office. After seven years if no one is found, in some of the cases, the money and the interest in the land goes to the surface owner. Should some or all of that back royalty money go to plug orphaned wells? What do you think should happen? It is one way to help to start plugging orphaned wells.

Check all that apply.

- ☐ Take all the royalty money for the first seven years (if there was no pad or other disturbance on the surface owner), and use it to plug some of the orphaned wells on citizens across the state. Then continue to let the surface owner receive all future royalties after the first seven years, and continue to let the surface owner be given title to the mineral land of the missing or unknown mineral owners.
- ☐ Take one half of the royalty money for the first seven years (if there was no pad or other disturbance on the surface owner), and use it to plug some of the orphaned wells on citizens across the state. Then continue to let the surface owner receive all future royalties after the first seven years, and continue to let the surface owner be given title to the mineral land of the missing or unknown mineral owners.
- ☐ Do not use any of the money to plug orphaned wells. Keep the law the way it is. Let the surface owner have all of the first seven years of royalties, plus future royalties, plus title to the mineral land of the missing or unknown mineral owners.

This survey helps us set priorities to best represent our members! Thank you for being a part of the process!



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2020 WVSORO LEGISLATIVE PRIORITIES

Legislation to have the property rights of surface owners recognized, to increase their chances of owning some of the minerals under them, and to deal with thousands and thousands of orphaned wells and other environmental problems, will continue to be WV-SORO's legislative priorities for 2020.

We will also be active opposing legislation the industry introduces (out of its sense of entitlement) which will harm the interests of surface owners (including some fortunate few of whom are also small mineral interest owners).

Some think that the recent election results will hurt our chances on those fronts. We disagree. WVSORO has always tried to be non-partisan. Rural Republican legislators have generally been supporters of our positions. Our issues are in essence property rights issues favored by many of those just elected.

Here are the legislative priorities:

Orphaned Wells Plugging Money: Begin to Fund Plugging of Existing Orphaned Wells.

Orphaned Well Prevention: Prevent Thousands and Thousands More Wells from Becoming Orphaned.

Protect Surface Owners: Implement the Recommendations of the WVU Studies Required by the 2011 Horizontal Well Act.

Land Reunion: Let Surface Owners Step into the Shoes of the High Bidder If an Interest In Their Minerals Is Sold at a Tax Sale

Pipelines: Require Compensation Paid to Landowners in Eminent Domain Proceedings for Pipelines to Be Based on Its Value/Worth to the Pipeline Company

WV Surface Owners' Rights

Organization

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Orphaned wells like the one hidden in the Christmas yard display below still sit in citizens' yards and threaten their groundwater.



On pages 5 & 6 of this newsletter, you will find a member survey! Please fill it out and mail it in OR visit our website www.wvsoro.org to fill it out online. Knowing the priorities of our members is important to representing you in Charleston at the Legislature this session!