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To conservation easement holders and applicants,

**Introduction.**

> *Should surface land that does not include ownership of underlying minerals be excluded from conservation easement programs due to concerns about oil and gas drilling?*

The question giving rise to this opinion letter is whether entry of land into a conservation easement program should be denied because the owner of the surface does not own the underlying oil and gas minerals.[1] That lack of ownership would give rise to the concern that the surface land therefore may be subject to oil and gas exploration and production activities on the surface that might disqualify the land from the program. The author of this letter has therefore been asked to give an opinion whether a tract of surface acreage, the ownership of which has been severed from ownership of the underlying oil and gas/mineral tract acreage, will be used for oil and gas drilling pads, roads, pipelines and other oil and gas exploration and production surface activities without the agreement of the surface owners. If the surface owner agreement (sometimes the term "consent" used) is required, then the surface owner/conservation easement owner can say no to oil and gas surface activities.

[1] The author's expertise is oil and gas exploration and production law and activities. **Similar questions arise if the surface ownership has also been severed from the coal ownership, which is common.** The likelihood of surface disturbance happening as a result of severed coal ownership should probably first be addressed by contacting the West Virginia Geological and Economic Survey and asking if there is "minable coal" under the property. If so, then other experts should be contacted to learn how much and what kind of disturbance to the particular surface tract would occur and whether that is inconsistent with the conservation easement programs' permissible disturbances. From the author's limited knowledge of this area, the likelihood of using the land for actual coal mine facilities would be very unlikely, although air vents are more common. It is possible that long wall mining under property could cause subsidence. Certainly subsidence can be damaging to building foundations and can affect water tables, but someone with more expertise on the subject than the author of this letter should be contacted if this is a possibility.

**Terminology.**

*These italicized subheadings simplify the subject matter of the heading for reading by non-lawyers and should not themselves be quoted as legal opinion.*

Lots and lots of different things can happen on the surface as part of exploring for and producing oil and gas. The most significant is the construction of a well pad where the actual drilling work is done and where a well head remains indefinitely. Probably the most common disturbances are pipelines. After that comes roads to well pads and other facilities. And there are compressors and pipeline drips and meters etc. For simplicity, for the rest of this letter the author is going to lump this all as "surface disturbance" which could include any of the above. Provisions in leases prohibiting surface disturbance are often called "no surface use" provisions which mean the same thing.

The surface of the land can be owned separately from the underlying minerals. This opinion is going to use the term "severed" minerals and surface to describe that situation.

The legal definition in law of what is "surface" is quite common sense.[2]

The meaning of "minerals" gets much more complicated. Coal can be owned separately from oil and gas. And then there are other minerals that can also be owned separately. And who owns the vacant porespace left when oil and gas are drained out of the porespace in sandstone? And the right to the royalty from the production of oil and gas can be owned separately from the oil and gas in the rocks where the oil and gas are found and the rocks themselves. And the "executive right" to sign a lease to explore for and produce oil or gas (and pay royalties to everyone who owns an interest in the tract) does not necessarily belong to everyone who shares ownership of the tract. And can a gas be a "mineral"? This letter is only about oil and gas and the right to produce oil and gas, though some principles may apply more broadly. Again for simplification, the author will use the terms "minerals" and that term for this letter will include, but only include, the oil and gas in the ground, the formations in which oil and gas is found and, what is more important, the right to sign the lease for its exploration and production.

[2] "The word 'surface,' when used in an instrument of conveyance, generally means the exposed area of land, improvements on the land, and any part of the underground actually used by a surface owner as an adjunct to surface use (for example, medium for the roots of growing plants, groundwater, water wells, roads, basements, or construction footings)." Syllabus Point 2, *Faith United Methodist Church v. Morgan,* 231 W.Va. 423, 745 S.E.2d 461 (W. Va. 2013)

**Opinion summary.**

*Surface land that does not include ownership of underlying minerals should not be excluded from conservation easement programs for due to concerns about oil and gas drilling!*

The 2019 West Virginia Supreme Court of Appeals decision in the *Crowder* case below said that unless the drillers get the written agreement of the surface owners, the owners of severed minerals and their lessee/drillers have no right to use a surface tract for a well pad or other facilities or rights of way or other disturbance for the drilling of horizontal well bore holes that go beyond the boundaries of the underlying mineral tract. As a practical matter, horizontal well bore holes always do go beyond mineral tract boundaries unless the mineral tract is many, many hundreds of acres. The case certainly applied to any activities after the decision, and is worded such that it could give rise to a trespass case for activities before the decision if no permission was obtained.

In addition, with the advent of the drilling of horizontal well bore holes and their accompanying high volume frac'ing, new oil and gas wells are no longer drilled just vertically to only the underlying mineral tract.

So, as a practical matter, oil and gas wells will no longer be drilled on a surface tract for horizontal or vertical wells without the agreement of the surface owner. And if the right to agree to the use of the surface for oil and gas exploration and production is conveyed with the conservation easement, then there can be no agreement for surface use for drilling horizontal or vertical wells without the agreement of the easement holder who would in almost all cases not agree. This is certainly the case in West Virginia, and the opinion and other authority is so strong and well reasoned that a similar decision would most likely occur in other states.

The author of this letter is informed that the terms of art in conservation law may be "so remote as to be negligible" or just "mineral remoteness". The author of this letter is not a lawyer with expertise in the law of farm or other land preservation. However, just using the plain definitions of those words, this opinion concludes that use of surface disturbance for new oil and gas exploration and production activities is at least remote and at smaller than negligible.

**Disclaimers.**

This letter is not of course about the provisions in the title history of a particular tract or parcel of real property -- surface, mineral or both. The author of this letter has a long career representing and lobbying for surface owners and even small oil and gas mineral interest owners regarding surface use for oil and gas exploration and production and regarding leasing of minerals with or without surface use provisions. However, he does not practice in giving title opinions and so, of course, makes no representation about what recorded or un-recorded use issues there may be in the title history of a particular tract of real property of any kind. If a surface owner is not sure what they own and do not own, whether surface or minerals or both, they may get indications from looking at the deed that last conveyed the property and even from property tax records, and those records are usually, but not totally reliable. And a title examination done by an attorney at the time

the surface was purchased or was made subject to a mortgage/deed of trust on the property may be useful. However, to be certain, the surface owner should contact an attorney who regularly does title examinations. The conservation easement process may require that new opinion at some point anyway.

The author's opinion is of course based on the state of the statutes and court cases as of the date of this letter. And things could change. However, after the *Crowder* decision discussed below and after the passage of cotenancy and forced unitization/pooling statutes discussed below, the author would not expect much to change in the future.

**Single owner/all owners assumption.**

*This opinion may not apply to an owner's interest if there are other shared owners.*

This discussion assumes that there is only one owner of the interest in question or that all of the owners of the surface acreage ownership and usage rights in question are willing to sign the necessary document to place the acreage in conservation. If the acreage is owned by one person (or by one entity such as a trust or corporation) then the answer is a simple one as explained below. However, if there are co-owners (legally called "joint tenants" or "coparceners", or in the vernacular, "heirship" owners) the answer is not so clear. The answer is probably the same, but a definitive answer is beyond the scope of this opinion if one out of several owners will not sign or if an owner cannot be found to sign documents or if another owner may have signed documents that the other owners did not sign. [3]

**No historical surface use grants.**

*This opinion assumes that no documents that granted surface use grants were signed by the current owners or in the past by any owner.*

This discussion will also assume that the surface and minerals are separately owned now and, importantly, that nothing was signed either by the current owner or a previous owner in the past, either at the time of *or before* the ownership of the surface and minerals were severed, that granted surface use rights to oil and gas mineral owners or driller/lessees. To know for sure if they are owned together or have been severed, it is important to examine the historical chain of title until the deed (or the will or other document) is found which actually severed the ownership of the surface

[3]The cotenancy statute that allows minerals to be developed with the signature of only the owners of 75% of the minerals does not apply to surface use (W.Va. Code §37B-1-4(a)) as discussed in its own heading below.

and the minerals.[4] In addition, documents signed even before the severance of ownership will stay in effect after the separation unless specifically dealt with in the severance document.

Such severance deeds and documents commonly severed all the minerals from the surface. However, in some parts of the State, like the north-central area, only the coal (or sometimes only just a particular seam of coal) was severed, and those deeds usually specifically included some surface use rights with the coal ownership (including even subsidence and other damage waivers). It is less common for only oil and gas by itself to be severed from the surface, but when that did happen it was often the case, but not always, that specific surface use rights were conveyed with the oil and gas.

If this severance document is more than 5 or 10 years old, and if there are no oil and gas wells or other production facilities or roads or pipelines[5] on the surface, it is very unlikely that a lease was signed and is still in effect allowing surface use rights. However it is important to note that if such a lease was signed, and if at the time the lease was for a tract with much larger acreage than the acreage of the surface tract now in question, then an oil or gas well anywhere on the acreage of the original lease could hold all of the originally leased acreage and its surface use rights. This would be true even for the smaller subdivision of surface acreage now in question that has no disturbance on it at the present. There may be ways to defeat that, but they are not easy and a lawyer with knowledge of implied covenants in leases would be required to attempt to unravel that problem.

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[4]If the deed etc. was transferring ownership of the surface but holding onto and not transferring the minerals/everything else, the language in the deed would likely be an express "reservation" of the right to use the surface for mineral exploration and production. If the deed etc. was transferring ownership of the minerals but holding onto the surface/everything else, then any express surface use rights would have been transferred along with the mineral rights. Note as discussed elsewhere that unless the deed etc. stated otherwise, the mineral owner had an implied right to use the surface for exploration and production even if the deed etc. did not say so.

[5] The author is advised that the existence of previously laid small gathering pipelines is generally not a problem for farm or timberland protection. It is important to note that when a driller stops using a pipeline to a gas well, the driller rarely removes it. Particularly if it was buried, it is more trouble than it is worth to the driller to remove it and dispose of generally unusable pipe. This should be fine for the surface owner. It might be wise for there to be block or plug of some kind at the end of the pipeline heading toward the well, particularly if the well or wells have not been plugged. And the same at the end of the line that was heading to market. A well has been plugged if it is marked only by a single metal pipe (usually ) monument sticking four feet or so out of the ground. If there is more equipment or pipes than that, check with the author or the Office of Oil and Gas.

**Surface tracts cannot be used for drilling or other disturbance for horizontal oil or gas well bore holes crossing the boundary lines of the underlying mineral tract unless there is written agreement by the surface owner(s)!**

*Surface land cannot be used for horizontal wells without specific agreement.*

This statement is true even if minerals are owned by someone else.

Some general legal background first: Suppose Mr. Jones owned a100-acre parcel of land. And suppose he sold a 10-acre parcel/tract right in the middle of that 100 acres to Mr. Smith. And suppose the deed from Mr. Jones did not give Mr. Smith a right of way/easement to walk or drive across the remaining 90 acres so Mr. Smith could not get to the 10 acres. Highly unfair. So in that situation, the common law gives Mr. Smith an implied right of way/easement to get to the 10 acres.[6]

This principle of implied right of way/easement also applies when the ownership of minerals is severed from ownership of the surface. If the mineral owner cannot use the minerals without using the surface get to the minerals, the law implies that the mineral owner has an implied right of way/easement to use the surface to produce the minerals.[7] For minerals vs. surface this implied right is called the "reasonably necessary" or "fairly necessary" doctrine.

The reasonably necessary or fairly necessary doctrine has a few limitations. First, the mineral owner is allowed to whatever use of the surface is reasonably necessary to produce the minerals -- what is reasonably necessary *but not more*. So that is a limitation. In addition, another imitation is that the nature and extent of the use must have been "in the contemplation of the parties at the time of the severance".[8]

There is another limitation to the reasonable use doctrine, and this is the one that now makes all the difference in eliminating surface disturbance for horizontal oil and gas well drilling. The mineral owner has the right to use the surface to get to the minerals only in the mineral tract directly

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[6]The law calls this implied right of way/easement an easement by prescription.

[7]It is important to to note as explained above, if at the time of the severance the tract was 50 acres, the mineral owner has the right to reasonable use of all 50 acres of the surface even if after the severance the surface was divided by the surface owners into five smaller tracts/lots. The subdivision of the surface by the surface owners cannot diminish the rights of the mineral owners who was not in on the subdivision deal.

[8] The most famous and obvious example of the "contemplation of the parties" doctrine are the strip mine/mountain top removal cases. If the severance of the coal from the surface occurred before strip mining was known, when only deep/shaft mining and side-of-the-hill drift/punch mining were known, then the coal company does not have the right to do strip mining or mountaintop removal. The breadth and degree of damage to the surface was not contemplated by the parties to the original severance.

underlying the surface tract. The mineral owner has no right to use the surface overlying a mineral tract to drill down and then turn horizontal and drill past the boundaries of the underlying mineral tract into neighboring tens or hundreds of acres of mineral tracts! The West Virginia Supreme Court of Appeals has made this clear in 2019 the *Crowder* case.

> A mineral owner or lessee has an implied right to use the surface of a tract in any way reasonable and necessary to the development of minerals underlying the tract. However, a mineral owner or lessee does not have the right to use the surface to benefit mining or drilling operation on other lands, in the absence of an express agreement with the surface owner permitting those operation.

Syllabus point 5. *EQT Production Co. v. Crowder*, 242 W.Va. 1, 828 S.E.2d 800 (W. Va. 2019)

This was a unanimous decision of the West Virginia Supreme Court of Appeals justices! It is clear and unequivocal and it is so well reasoned that it is incredibly unlikely to ever be changed. So surface owners, unless something was signed by them or a predecessor earlier, is safe from surface disturbance for horizontal well drilling.

Legislative enactments have not made a change, and the Legislature could not make a change that would affect the rights of the owners of surface or minerals in which the severance occurred before the date *Crowder* was decided. That would be a taking.

**New cotenancy legislation does not authorize surface use.**

*This new legislation specifically says it does not authorize surface use.*

Prior to May, 2018, if there were multiple owners of a single tract of minerals, then the driller could not drill into a mineral tract unless the driller had the signatures on a lease (with a pooling provision for horizontal drilling) from every single person or entity that owned a share of that particular mineral tract, no matter how small their share. The Cotenancy Modernization and Majority Protection Act passed the 2018 Legislature and took effect that May.[9] Under that Act, if the owners of 75% of the shared interest[10] in a mineral tract signed leases, then the best provisions of the leases signed by the 75% will be imposed on the owners who did not sign; and drilling could occur into the minerals. No longer is the signature of every single mineral owner required. The

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[9] West Virginia Code §37B-1-1 et seq.(2018)

[10] If five siblings own a 60% interest in a 100-acre mineral tract, but their only-child cousin owns a 40% interest, then the signatures of the five cousins do not satisfy the 75% interest ownership requirement of the cotenancy statute. It is not the number of signatures, but whether those signing own 75% or more of the shared interest. (In oil and gas parlance it is said that the only-cousin owns 40 "net acres". This is a little misleading. That cousin owns 40% of every rock and molecule of gas, it is just that using the "net acres" concept is a convention among oil and gas people for explaining shares of ownership of the whole tract's "gross acres".)

drilling could be done if the ownership of 75% of the acreage had signed, and those who did not sign would get an initial bonus and then royalties once production began.[11] But there is good news for surface owners in this legislation.

The good news is that the new cotenancy statute only applies to the mineral tracts. It specifically says that if the cotenancy statute is used to drill into the minerals, then "[I]n no event shall drilling be initiated upon, or other surface disturbance occur, without the surface owner's consent regardless of whether such surface owner possesses any actual ownership in the mineral interest."[12] (Of course the new statute states that if the surface owners sign something, or if the surface owner or a previous surface owner already signed something, or if something was signed before the ownership of the surface and menials were separated, then that earlier document that was signed would remain in effect if there was specific language in it about the issue.)

**New "forced pooling" legislation also does not authorize surface disturbance.**

*This new legislation specifically says it does not authorize surface use.*

A "drilling unit" is the acreage that will be drained by one horizontal oil or gas well bore hole. Usually the rock around the well bore hole itself is fractured by hydraulic pressure so that more gas will flow more quickly to the well bore hole through the cracks. So the acreage in the well bore hole's drilling unit includes the acreage actually penetrated by the well bore hole and penetrated by the fractures plus some small acreage beyond the end of the fractures that will also drain into the fractures.

Typical horizontal well bore holes are up to a mile long or much more; and the unit that the horizontal well bore hole drains contains from around 320 acres, more commonly around 640 acres, and more and more contain around 1280 acres or more. They are mostly in shale formations, and those are mostly west of the mountains in West Virginia. They are in the part of the State where individuals own mineral tracts that are anywhere from one or a few acres, to maybe a hundred or a couple hundred acres. (Mineral tracts of thousands of acres owned by big land companies are more common in the south of West Virginia where there is no shale drilling and those tracts are generally not used for residences.) So in order for a drilling unit in a shale formation to be efficiently and economically drained by a horizontal well bore hole, the unit almost always has to include more than one mineral tract -- commonly a dozen or more individually owned mineral tracts are included in a horizontal well bore hole drilling unit.

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[11] An explanation of the cotenancy law can be found on the website of the West Virginia Surface Owners' Rights Organization. But it is best to continue reading through the next heading on forced unitization also and visit the web pages it advises at the same time. There are lots of moving parts.
https://wvsoro.org/what-the-2018-cotenancy-law-means-for-wv-mineral-owners-leasing/

[12] West Virginia Code 37B-1-6 (2018)

(Note that the regular, rectangular shape of the boundaries of the drilling unit usually do not match up with the irregular boundaries of the mineral tracts which usually are or once were part of surface tracts. The boundaries of these original un-severed tracts of land were shaped often by roads, by streams, and by mountain ridge tops. So yes, a drilling unit almost always contains acreage from more than one mineral tract, but very often only part of the acreage of many those mineral tracts is included in the drilling unit.)

The author of this letter does not say that those people are wrong who believe that only renewable energy sources should be used, and only with high efficiency. However, if oil and gas is going to be used, horizontal drilling is the best way to obtain the gas. One horizontal shale well produces 60 times the gas of a conventional vertical well! That means fewer well pads and less surface disturbance. That also means fewer penetrations thought groundwater by the vertical part of the drilling process before the well bore hole turns horizontal. And each vertical penetration through groundwater has risks of contamination[13], and so on.

If the owners of some of the mineral tracts that would be necessary for a particular horizontal well bore hole's drilling unit hold out and refuse to sign leases, that is a problem for the drilling of the horizontal well bore hole. Not only is it a problem for the driller, but if the horizontal well will not be drilled at all because of the holdouts, it is a problem for the mineral owners who wanted to be paid the (quite large) royalty payments if the well is drilled. In addition, the longer the horizontal well bore holes can be drilled, the fewer horizontal well bore holes need to be drilled. So non-consenting mineral tract owners on the ends of proposed horizontal well bores that limit the length of horizontal well bore holes can also be considered a problem.

In response, the West Virginia Legislature in 2022 passed S.B. 694. It is generally referred to as "forced pooling" legislation.[14] Technically it has more to do with forced "unitization", which is assembling of mineral tracts or parts thereof into a drilling unit. Forced "pooling" comes into play if there is more than one driller with the right to drill wells in the same drilling unit.

The essence of S.B. 694 is similar to the cotenancy statute, except the cotenancy statute applies only to *individual tracts*. S.B. 694, however, applies to *drilling units that include many tracts*. In essence it provides that if the owners of 75% of the acreage to be included in a drilling unit have signed leases (or amendments to old leases that did not have provisions providing for unitization/pooling), then the driller may, with the approval of a commission, go ahead and drill the well bore hole into and for the whole drilling unit. Again, those who did not sign leases will be

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[13] For a slide show on how an oil and gas well is drilled and what can go wrong see https://wvsoro.org/gas-well-drilled-ground-can-go-wrong/ on the website of the West Virginia Surface Owner's Rights Organization.

[14] West Virginia Surface Owner's Rights Organization also has a web page explaining the forced pooling/unitization provisions of SB 694.
https://wvsoro.org/have-you-been-threatened-with-forced-pooling-unitization-have-your-received-papers-giving-you-notice-of-a-forced-pooling-unitization-hearing/

given the highest royalty in any of the leases that were signed, plus an average of the signing bonuses. Something similar is done if only an amendment to an existing lease is ordered by the commission.

The good news for surface owners is that, again, SB 694 only forces mineral tracts into drilling units. The new Code section explicitly says, "[I]n no event shall drilling be initiated upon, or other surface disturbance occur upon, the surface of or above a tract of minerals that was forced into the unit pursuant to this [law] with the owner's consent."[15]

So it is clear from the *Crowder* case and from explicit provisions of the new cotenancy and forced unitization laws that the drilling of, or other surface disturbance for, a horizontal well cannot occur on surface lands unless the current surface owner agrees, or in unusual cases, unless a previous surface owner agreed. And it is possible that even a pooling provision in an old lease would not have contemplated the effects of horizontal shale drilling and also may not count.[16]

But what about vertical wells?

**New pads for new vertical wells are a thing of the past.**

*Surface use for well pads for new conventional vertical wells no longer occurs.*

Earlier it was pointed out that a mineral owner/driller has had the legal implied reasonably necessary use easement/right to use the surface for drilling into the mineral tract under the surface tract. That would be using a vertical well bore hole that did not cross out of the underlying mineral tract's boundaries. Can that still happen without the surface owners agreement? Maybe technically it could -- but it will not.

According to the Office of Oil and Gas of the West Virginia Department of Environmental Protection (the OOG of the DEP), in the year 2007, the OOG granted 2378 drilling permits for vertical wells. Then along came the discovery of high volume frac'ing of shale formations using horizontal well bore holes. As a result, in 2022, there were only 9 requests for permits for vertical wells! And the OOG believes those 9 permits were for secondary recovery injection or recovery wells that were drilled to boost production in existing oil (usually) fields. For all practical purposes, vertical wells only to underlying formations are no longer drilled. Period.

Surface owner agreement is needed for horizontal wells, and no more new vertical oil or gas production wells are going to be drilled that would put disturbance on surface lands. Here is some

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[15] W.Va. Code §22C-9-7a(h)

[16] The author of this opinion believes that a pooling provision in a lease signed before 2008 might be held by a court not to include the kind of forced pooling done with horizontal wells. !Feel free to contact the author if you are in that position and might want to consider challenging ability to use a history pooling provision for a horizontal well.

data to convince the reader that this is the case. The facts: (And the facts lead to the finances.) One horizontal well produces something on the order of 60 times the amount of gas that a vertical well does.[17] The finances: It is true that drilling a horizontal well costs $3 to $6 Million, while drilling a conventional vertical well costs maybe $300,000. But for 10 times the cost the horizontal well produces 60 times the gas. No driller will now invest someone else's or their own money to drill a vertical gas well.

**Ways to block vertical wells in the incredibly unlikely event one is proposed.**

*Should an attempt be made to use the surface for a vertical well pad, there are almost always ways to block it.*

This part of this opinion is, really, superfluous. But to be complete, this opinion will now lay out other ways that a mineral owner/lessee-driller could be blocked if it tried to put disturbance on a surface owner in order to drill a vertical oil or gas well.

If a mineral owner or the mineral owner's lessee/driller proposes to drill a vertical well, there are ways to potentially block the drilling even though the mineral owner generally has a right to reasonable use of the surface for exploration and production. The explanations below of the potential blocks will be very abbreviated. That is because this is unlikely to happen and some of them are very complicated. If you have this problem, please feel free to contact the author for more information.

First, this one isn't really a block. It is a way not to worry. Not all areas of West Virginia have any oil and gas under them. Particularly in the eastern mountains and eastern panhandle oil and gas drilling has always been rare. If you want to be sure there is no potential under a particular tract, contact the West Virginia Geological and Economic Survey in Morgantown. They have always been very helpful to the author with what lies where.

Second, if the driller is proposing to drill a statutory "deep" well, the driller has to get the surface owners permission.[18] "Deep" in common parlance is a relative term. A statutory "deep" well for the purpose of requiring surface owner consent is defined as "any well, other than a shallow well, deep horizontal well, or a coalbed methane well, drilled to a formation below the top of the uppermost member of the 'Onondaga Group';..."[19] They are more than a couple thousand feet in the ground, though that determining formation's depth varies from place to place. These wells were

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[17] This is because much more well bore hole is exposed to the formation to give the gas a way out. The gas bearing formation is only tens of feet thick vertically for a vertical well bore. But horizontal wells can be drilled horizontally through ten feet thick formations for miles of well bore.

[18] W.Va. Code 22C-9-4(b)(4)

[19] WV Code 22C-9-2

uncommon are not in particular parts of the State. But in the incredibly unlikely event that a new one is proposed, it is clear that surface owner consent is required, and the State will not grant a drilling permit unless if the consent has not been given.

Third, ask whoever says they want to drill the well show you proof that 75% of the mineral owners have agreed to lease the drilling rights as is required by the cotenancy law discussed above. Without that 75% they cannot drill the minerals. And due to some common patterns of passing surface vs. mineral land through wills, many surface owners also have ownership of a share of the minerals under them. And if the surface owners own a 26% interest or more of the mineral interest, that could result in a block by the surface owner refusing to sign. And if the surface owner owns less than 26%, or maybe none at all, there may be mineral owners who are sympathetic, or want cash right now, who would convey enough ownership to the surface owner for the surface owner to get to 26%. There is more explanation of the cotenancy law above. And if the driller tries a partition suit instead there are ways to defend that.[20]

Fourth, the reason that the courts historically gave the mineral owner a common law implied right to reasonable use of the surface to produce the minerals was that, when those old court decisions were made, it was only vertical wells that were being drilled at the time and that were the only way to produce the minerals. No law suits have been made to reverse those court decisions yet, but with the advent of horizontal drilling it is no longer true that vertical wells are the only way to reach the minerals. The mineral owners can get to the minerals under a surface tract by drilling horizontally from miles away. The author of this letter would be interested in assisting any law suits challenging vertical well drilling on this basis.

Fifth, before there was horizontal drilling there was rotary drill bit vertical drilling. Before there was rotary drill bit vertical drilling there was only cable tool bit vertical drilling. Rotary drill bit drilling does considerably more surface disturbance than cable tool bit drilling did. The Legislature found in 1983 that if the severance of the ownership of the surface and minerals was before 1960 then the extra disturbance caused by rotary drilling was not in the contemplation of the parties to the mineral severance![21] If the surface disturbance for rotary drilling was not in the contemplation of the parties then the driller should not be able to use rotary drilling. (See explanation of that concept in a footnote above particularly regarding strip-mining.) The Legislature made that finding in order to pass a surface owner compensation act. But that legislative finding might also influence a court to find that the use of rotary drilling was not contemplated and so block

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[20] Before the new cotenancy statute and the new forced unitization/pooling statute, horizontal well drillers who did not have all or 75% ownership sometimes tried "partition" suits to get a way to have everyone sign. If that happens in your situation feel free to contact the author, but if the partition suit is just of the minerals, there is information about how to stop the suit on the WVSORO website at https://wvsoro.org/included-threatened-partition-suit/ and a sample answer that may be useful where the partiion suit also includes surface property https://wvsoro.org/wvsoro-sample-answer-to-a-partition-suit/ .

[21] West Virginia Code §22-7-1.

use of the surface for any modern drilling. Cable tool drilling essentially used a chisel to slowly pound a hole in the ground and is long gone. Even if the severance of ownership of the surface and minerals was between 1960 and 1983, a careful reading of the article of the Code in the footnote above might be useful.

Sixth and finally, when the driller applies for a permit to drill a vertical well, the surface owner will get notice of the permit application and a chance to comment on the proposed well work (but you have to act quickly!). Based on surface owner comments the permit can be modified or denied. Unfortunately the surface owners right to comment is limited. The reasonably necessary rule does not apply. However, the surface owner can comment if the proposed permit work will constitute a hazard to the safety of persons, or if the plan for soil erosion and sediment control is not adequate or effective, or if damage would occur to publicly owned lands or resources, or if it would fail to protect freshwater sources or supplies. If the surface owner complaints fell into those categories the surface owner could at least affect how the work was done, though blocking such a permit is a long shot. WVSORO has a guidebook on how to file comments etc.[22] Also the driller has to comply with the State Soil Erosion and Sediment Control Manual[23] in its permit application and in its maintenance of the well site. And if the driller knows that the surface owner knows that, they may decide to drill somewhere else -- again a long shot -- but the surface owner can at least get the work done right -- and a properly reclaimed gas well pad is not the worst thing in the world. It's hard to find one properly reclaimed because not many surface owners pester the OOG enough to get the driller to do it right. Oil well pads are a little worse because trucks have to come in to take out the oil periodically.

**Conclusion.**

The advent of horizontal well bore hole drilling into shale (almost always) formations, plus the *Crowder* decision requires the driller to get the agreement of the surface owner for drilling those wells, and the surface owner (or the holder of the conservation easement) does not have to agree. Vertical conventional wells that might try to use the "reasonably necessary" doctrine to put disturbance on the surface are for all intents and purposes no longer drilled, and if one was tried there are myriad ways to discourage if not block the disturbance. The severance of oil and gas mineral ownership from surface ownership should not interfere with the placing of the surface into conservation.

Very truly yours,

*David B. McMahon* [intended as signature]

David B. McMahon[24]

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[22] https://wvsoro.org/west-virginia-surface-owners-guide-oil-gas/choice/

[23] https://wvsoro.org/importance-wv-erosion-and-sediment-control-field-manual/

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