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## The Co-Tenancy Act and the Modernization of West Virginia's Oil and Gas Law

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## I. INTRODUCTION

West Virginia is a state steeped in a history of extraction and production of natural resources. From coal, timber, and oil, to natural gas, West Virginia has long supplied the nation with resources that have fueled America’s needs.<sup>1</sup> While West Virginia is embedded with this history of producing valuable resources, the same has not always led to the state’s economic success.<sup>2</sup> Indeed, in the words of Governor Jim Justice, West Virginia’s current governor, the state “benefited from the extraction of coal and [the state] benefited from the extraction of timber, but [the state was] still dead last in everything.”<sup>3</sup>

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<sup>1</sup> William N. Grafton, *Natural Resources*, W. VA. ENCYCLOPEDIA, <https://www.wvencyclopedia.org/articles/1603> (last visited Oct. 21, 2019).

<sup>2</sup> *Id.*

<sup>3</sup> Ken Ward Jr., *West Virginia Is Grappling with Cost, Benefit of Natural Gas Industry. Some See a Warning in State’s History with Coal*, CHARLESTON GAZETTE-MAIL (Apr. 30, 2018, 12:00

West Virginia has been presented with a great opportunity with the Marcellus Shale boom.<sup>4</sup> Governor Justice, who lamented the shortcomings of the past, recently expressed optimism: “[N]ow we have this gas situation and we’re on fire, and we have a real opportunity again.”<sup>5</sup> The exploitation of the vast gas reserves within the Marcellus Shale has already proven to be a great benefit for West Virginia and has the potential to help transform the state and the nation.<sup>6</sup> However, West Virginia oil and gas law has lagged behind the booming industry and, thus, has led to a critical point.

Forced pooling has been called upon to help modernize West Virginia’s oil and gas industry.<sup>7</sup> Forced pooling, however, has been met with stiff opposition due to its controversial nature of compelling property owners to use their land because of how their neighbors have chosen to use theirs.<sup>8</sup> While states around West Virginia have continued to take advantage of the natural gas boom, West Virginia’s soaring activity began to stagnate.<sup>9</sup> Indeed, some companies, frustrated with the legal situation in the state, chose to suspend drilling operations in West Virginia.<sup>10</sup>

Then, on March 10, 2018, Governor Jim Justice signed House of Delegates Bill 4268, also known as the Co-Tenancy and Majority Protection Act (“the Co-Tenancy Act”), into law.<sup>11</sup> The Co-Tenancy Act will function to bring West Virginia’s oil and gas law into the 21st century—and thus help facilitate the continued exploration and extraction of the state’s massive natural gas reserves—by making it easier to lease mineral tracts in the state. While the Co-Tenancy Act may not push as far as some might wish,<sup>12</sup> and while it might

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PM), <https://stateimpact.npr.org/pennsylvania/2018/04/30/west-virginia-is-grappling-with-cost-benefit-of-natural-gas-industry-some-see-a-warning-in-states-history-with-coal/>.

<sup>4</sup> Robert M. Steptoe, Jr., *Firmly Rooted*, in *A CENTURY OF SERVICE* 27, 30 (2015).

<sup>5</sup> Ward, *supra* note 3.

<sup>6</sup> See Gregory Kozera, *Modern Times: 1990 to 2015 from West Virginia to the World*, in *A CENTURY OF SERVICE* 88, 88 (2015).

<sup>7</sup> Elizabeth Alford, *West Virginia Gives Up On Forced Pooling*, *MINERALWISE* (Nov. 2, 2017), [www.mineralweb.com/news/west-virginia-gives-up-on-forced-pooling/](http://www.mineralweb.com/news/west-virginia-gives-up-on-forced-pooling/) (reporting that the West Virginia Senate President Mitch Carmichael called for oil and gas statutes to be modernized to help reinvigorate the production of oil and gas in West Virginia).

<sup>8</sup> *Id.*

<sup>9</sup> See Jim Ross, *WVONGA to Push Again for Mineral Efficiency*, *ST. J.* (Aug. 14, 2017), [https://www.wvnews.com/statejournal/wvonga-to-push-again-for-mineral-efficiency/article\\_2ef64893-e2b0-5461-9c03-4e86651932d7.html](https://www.wvnews.com/statejournal/wvonga-to-push-again-for-mineral-efficiency/article_2ef64893-e2b0-5461-9c03-4e86651932d7.html).

<sup>10</sup> *Id.*

<sup>11</sup> Charles Young, *Co-Tenancy Legislation to Boost W. Va.’s Oil and Gas Industry, Experts Say*, *WVNEWS* (Mar. 18, 2018), [https://www.wvnews.com/news/wvnews/co-tenancy-legislation-to-boost-w-va-s-oil-and/article\\_78fcb49f-840a-55f0-b7a1-ddb24e6e0d77.html](https://www.wvnews.com/news/wvnews/co-tenancy-legislation-to-boost-w-va-s-oil-and/article_78fcb49f-840a-55f0-b7a1-ddb24e6e0d77.html).

<sup>12</sup> Rusty Marks, *Oil and Gas Association Urges Passage of Co-Tenancy Bill*, *WVNEWS* (Feb. 26, 2018), [https://www.wvnews.com/news/wvnews/oil-and-gas-association-urges-passage-of-co-tenancy-bill/article\\_11577fc9-2bd2-5813-94c9-69dbb7625b19.html](https://www.wvnews.com/news/wvnews/oil-and-gas-association-urges-passage-of-co-tenancy-bill/article_11577fc9-2bd2-5813-94c9-69dbb7625b19.html).

have pushed further than others have preferred,<sup>13</sup> the state's legislative representatives were able to craft a bill that appeased both sides of the aisle—and that will help propel the oil and gas industry forward.

This Note will analyze the effects that the Co-Tenancy Act will have on West Virginia oil and gas law. Additionally, this Note will argue that the Co-Tenancy Act caters to the interest of all stakeholders and that it will prove to modernize the oil and gas industry in a much-needed fashion. In light of this modernization, this Note will further argue a forced pooling statute no longer is necessary to keep West Virginia as an attractive location for oil and gas companies to drill new wells.

This Note will be organized as follows: Part II will present a brief history of the oil and gas industry in West Virginia, the many aspects of the legal landscape of oil and gas law in West Virginia, the failed efforts to implement a forced pooling statute in the state, and an introduction of the Co-Tenancy Act itself. Part III will begin by explaining the implications of the Co-Tenancy Act and then proceed to argue why the Co-Tenancy Act represents a balance between the oil and gas industry, landowners who wish to take advantage of their valuable mineral rights, and non-consenting owners. Part III will argue that the Co-Tenancy Act will benefit West Virginia as a whole. Finally, Part III will argue that in light of the Co-Tenancy Act, forced pooling should not be adopted in the state and how the Co-Tenancy Act will serve several functions of a forced pooling bill.

## II. BACKGROUND

### A. *Oil and Gas in West Virginia*

The oil and gas industry has a storied history and current presence in West Virginia. This Section will introduce the oil and gas industry's history in West Virginia and explore the present opportunity the state's oil and gas industry has been presented.

#### 1. The Industry's History in West Virginia

The saying goes in West Virginia that “coal is king”<sup>14</sup> and many believe that the recent boom in oil and gas is just that—a recent development in the state's long history in mineral production.<sup>15</sup> However, the oil and natural gas

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<sup>13</sup> Ward, *supra* note 3 (reporting that West Virginia State Senator Mike Romano claimed the bill would give away wealth to out of state companies).

<sup>14</sup> See Kozera, *supra* note 6, at 88.

<sup>15</sup> See Ward, *supra* note 3 (Governor Justice commented that “[n]atural gas just fell out of the sky on us, didn't it?”); see also Kozera, *supra* note 6 (explaining how natural gas has long flown under the radar in West Virginia).

industry has a storied history in West Virginia and has served a crucial role in the state's economy for over a century.<sup>16</sup> Indeed, oil and gas has been produced in the southern portion of the state since the mid-nineteenth century<sup>17</sup> when salt miners stumbled across these valuable resources at Burning Springs.<sup>18</sup> By 1906, West Virginia was the nation's leading producer of natural gas and would continue to lead the nation in production until 1917.<sup>19</sup>

## 2. Current Opportunity—The Marcellus Play and Horizontal Drilling

The Marcellus Shale lies under almost the entirety of West Virginia,<sup>20</sup> and experts believe that it will become the second largest natural gas field in the world—only behind formations underlying Qatar and Iran.<sup>21</sup> The Marcellus Shale is not a newly discovered shale formation, but its potential for development had not been unlocked until very recently.<sup>22</sup> The recent rush on production has been made possible by the combination of technological advances surrounding two pieces of technology: hydraulic fracturing and horizontal drilling.<sup>23</sup> Neither of these two pieces of technology, however, are new to the industry and West Virginia.<sup>24</sup> Indeed, the oil and gas industry has been utilizing fracturing techniques dating back to the 1940s, and horizontal drilling has been used since the 1960s.<sup>25</sup> Each individual piece of technology has proved important in contributing to the recent production of the Marcellus formation.

### *i. Horizontal Drilling*

Horizontal drilling, despite often being overlooked in the recent shale boom, has perhaps been the most important part of the boom.<sup>26</sup> A well which utilizes horizontal drilling begins with a vertically drilled well until it reaches a

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<sup>16</sup> See Joshua P. Fershee & S. Alex Shay, *Horizontal Drilling, Vertical Problems: Property Law Challenges from the Marcellus Shale Boom*, 49 J. MARSHALL L. REV. 413, 414 (2015).

<sup>17</sup> Joe Geiger, *Burning Springs Oil Field*, W. VA. ENCYCLOPEDIA, <https://www.wvencyclopedia.org/articles/726> (last revised Mar. 25, 2014).

<sup>18</sup> Steptoe, *supra* note 4, at 27.

<sup>19</sup> *Id.* at 28.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 30.

<sup>22</sup> *Id.*

<sup>23</sup> Kozera, *supra* note 6, at 89.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> David Blackmon, *Horizontal Drilling: A Technological Marvel Ignored*, FORBES (Jan. 28, 2013, 3:31 PM), <https://www.forbes.com/sites/davidblackmon/2013/01/28/horizontal-drilling-a-technological-marvel-ignored/#3d4c92a6f112>.

“kickoff point.”<sup>27</sup> Once the well has reached this point, the wellbore is then maneuvered to penetrate the targeted formation, and then the wellbore drills through the formation horizontally.<sup>28</sup> From this initial pivot point, the well can then be drilled horizontally for over a mile, thus reaching a broader amount of gas than imaginable under traditional vertical wells.<sup>29</sup> While the process of horizontal drilling is more complex and expensive than drilling a traditional, vertical well, wells drilled with horizontal wellbores are able to produce a much higher amount of gas than vertical wells.<sup>30</sup>

ii. *Hydraulic Fracturing*

Hydraulic fracturing is used to increase the rate that oil and gas move through a formation—and therefore aids in the amount of the minerals that can be produced.<sup>31</sup> Following the completion of drilling,<sup>32</sup> a perforating gun (which shoots holes through the well casing into the shale rock) is placed within the horizontal section of the well.<sup>33</sup> This creates avenues for fluids to enter the previously tightly packed formation<sup>34</sup> and increases the area within the formation that the well can harvest gas from.<sup>35</sup> Next, operators inject fluids, sometimes referred to simply as “frac fluids,”<sup>36</sup> at high pressures to create and expand fractures within the formation.<sup>37</sup> The frac fluids will vary depending on the nature of the site, but they predominately include water and sand with some chemical additives.<sup>38</sup> After the initial injection of frac fluids, propellant material combined

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<sup>27</sup> Steptoe, *supra* note 4, at 30.

<sup>28</sup> *Id.*

<sup>29</sup> Blackmon, *supra* note 26.

<sup>30</sup> Troy Cook et al., *Hydraulically Fractured Horizontal Wells Account for Most New Oil and Natural Gas Wells*, U.S. ENERGY INFO. ADMIN. (Jan. 20, 2018), <https://www.eia.gov/todayinenergy/detail.php?id=34732>.

<sup>31</sup> Hannah Wiseman, *Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need for Revisit Regulation*, 20 FORDHAM ENVTL. L. REV. 115, 118 (2009).

<sup>32</sup> *Hydraulic Fracturing: The Process*, FRAC FOCUS, <https://fracfocus.org/hydraulic-fracturing-how-it-works/hydraulic-fracturing-process> (last visited Oct. 2, 2019) (invalidating the misconception that fracing is a method of drilling and rather explaining that it only begins after the drilling process is done).

<sup>33</sup> *Exploring the Hydraulic Fracturing Process*, CABOT OIL & GAS CORP., <http://www.cabotog.com/wp-content/uploads/2013/06/HydraulicFracturing-II.pdf> (last visited Oct. 2, 2019).

<sup>34</sup> *Id.*

<sup>35</sup> Cook et al., *supra* note 30.

<sup>36</sup> *See Hydraulic Fracturing: The Process*, *supra* note 32.

<sup>37</sup> *See Wiseman*, *supra* note 31, at 118.

<sup>38</sup> *See Hydraulic Fracturing: The Process*, *supra* note 32 (noting that 98 to 99.5% of frac fluid is comprised of water and sand); *see also Exploring the Hydraulic Fracturing Process*, *supra* note

with water is used to prop open fractures.<sup>39</sup> This process is then repeated across the length of the well in stages, and once complete, frac fluid is then removed from the well.<sup>40</sup> Finally, the now propped open fractures allow for natural gas to flow freely into the well.<sup>41</sup>

iii. *Unconventional Drilling and the Marcellus Play*

The merging of hydraulic fracturing and horizontal drilling in shale formations has resulted in what is known as “unconventional” natural gas production.<sup>42</sup> Conventional gas may be produced by simply drilling into oil and gas formations, and the oil and gas can then freely flow into the well and be commercially viable.<sup>43</sup> On the other hand, unconventional gas cannot be produced in economic quantities by merely drilling into the formations, and rather, some other stimulation is needed to generate a sufficient flow of the mineral.<sup>44</sup>

Tight shale formations, which are generally the formations that contain unconventional gas,<sup>45</sup> were once regarded by geologists as being impractical to utilize for the production of oil and gas.<sup>46</sup> Indeed, production of shale formations did not begin until the 1980s and was predominately done on a small scale because the production was not viewed as economically viable.<sup>47</sup> Oil and gas companies attempted to extract resources from these tight shale formations via vertical wells which utilized fracing, but it was simply not profitable enough to continue.<sup>48</sup>

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33 (noting that Cabot’s frac fluid includes 95.2% water, 4.7% white sand, and 0.1% “product package,” which includes anti-bacterial agent, iron control product, friction reducer, scale inhibitor, and corrosion inhibitor).

<sup>39</sup> See *Hydraulic Fracturing: The Process*, *supra* note 32.

<sup>40</sup> *Exploring the Hydraulic Fracturing Process*, *supra* note 33.

<sup>41</sup> *Id.*

<sup>42</sup> *The Process of Unconventional Natural Gas Production*, EPA, <https://www.epa.gov/uog/process-unconventional-natural-gas-production> (last visited Oct. 2, 2019).

<sup>43</sup> Paul Stevens, *The ‘Shale Gas Revolution’: Developments and Changes*, CHATHAM HOUSE (Aug. 2012), [https://www.chathamhouse.org/sites/default/files/public/Research/Energy%2C%20Environment%20and%20Development/bp0812\\_stevens.pdf](https://www.chathamhouse.org/sites/default/files/public/Research/Energy%2C%20Environment%20and%20Development/bp0812_stevens.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Hydraulic Fracturing: The Process*, *supra* note 32.

<sup>47</sup> *Hydraulic Fracturing Process*, EXXONMOBIL, <https://corporate.exxonmobil.com/en/Energy-and-environment/Tools-and-processes/Hydraulic-fracturing> (last visited Oct. 2, 2019); see also Robert A. Hefner III, *The United States of Gas: Why the Shale Revolution Could Have Happened Only in America*, 93 FOREIGN AFF. 9, 10 (2014).

<sup>48</sup> Hefner, *supra* note 47, at 10.



However, the use of modern horizontal drilling techniques combined with hydraulic fracturing has allowed oil and gas operators to produce massive shale reserves in an economical viable manner.<sup>49</sup> The marriage of the two technologies was consummated by Texan operators in the Barnett formation in the early 2000s.<sup>50</sup> Unconventional production has allowed reservoirs in tight shale formations, in which gas is distributed over a wide area within the formation, to be exploited.<sup>51</sup>

The Marcellus Shale is a rock formation which is characterized by its low permeability.<sup>52</sup> For many years, the Marcellus formation was believed by members of the oil and gas industry to not be directly producible because of its low permeability.<sup>53</sup> Thus, despite the large natural gas reserves known to be present in the Marcellus formation, it remained unproduced.<sup>54</sup> However, once the successful production of tight shale formations in the Barnett Shale were undertaken, the Marcellus was soon unlocked by using the same techniques that innovative Texan companies had used: advanced horizontal drilling and hydraulic fracturing.<sup>55</sup>

The immediate effects of the opportunity presented by the Marcellus boom has been astounding, as shown by a brief look at the uptick in production and employment. In 2012, near the height of the initial boom of Marcellus production, West Virginia returned to being one of the nation's top producing natural gas states.<sup>56</sup> Further, as production increased, so did employment within the natural gas sector.<sup>57</sup> In 2015, it was estimated by PricewaterhouseCoopers that the natural gas industry in West Virginia alone employed 38,200 workers directly, and 70,900 total when including indirect employment.<sup>58</sup> This represents

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<sup>49</sup> AM. PETROLEUM INST., HYDRAULIC FRACTURING: UNLOCKING AMERICA'S NATURAL GAS RESOURCES 1 (2017), <https://www.api.org/~media/Files/Oil-and-Natural-Gas/Hydraulic-Fracturing-primer/Hydraulic-Fracturing-Primer.pdf>.

<sup>50</sup> Hefner, *supra* note 47, at 10.

<sup>51</sup> *The Process of Unconventional Natural Gas Production*, *supra* note 42; *see also Hydraulic Fracturing: The Process*, *supra* note 32.

<sup>52</sup> Fershee & Shay, *supra* note 16, at 416.

<sup>53</sup> Kozera, *supra* note 6, at 89.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 88–89 (quoting a geologist at a 2002 conference, who after observing a Barnett log thought “that looks a lot like the Marcellus”).

<sup>56</sup> Cathy Dyson, ‘Almost Heaven’ or Fracking Hell in West Virginia?, FREDERICKSBURG.COM (Apr. 5, 2014), [https://www.fredericksburg.com/news/local/almost-heaven-or-fracking-hell-in-west-virginia/article\\_f31240bc-d08f-5275-919c-992881db93a3.html](https://www.fredericksburg.com/news/local/almost-heaven-or-fracking-hell-in-west-virginia/article_f31240bc-d08f-5275-919c-992881db93a3.html).

<sup>57</sup> *Report Finds Oil, Gas Industry Supports Over 70,000 Jobs in WV*, HERALD-DISPATCH (Aug. 4, 2017), [http://www.herald-dispatch.com/business/report-finds-oil-gas-industry-supports-over-jobs-in-wv/article\\_8aae8b60-df0f-5f63-abf4-3bdcf854f6c4.html](http://www.herald-dispatch.com/business/report-finds-oil-gas-industry-supports-over-jobs-in-wv/article_8aae8b60-df0f-5f63-abf4-3bdcf854f6c4.html).

<sup>58</sup> *Id.*

a massive uptick from a pre-boom employment figure estimated at 7,500 in 2006.<sup>59</sup>

### B. *West Virginia Oil and Gas Law—An Overview*

Coinciding with the long history of the production of oil and natural gas in West Virginia is a long legal tradition governing the same. This section synthesizes key areas of West Virginia oil and gas law that has helped lay the foundation for the Co-Tenancy Act.

#### 1. The Rule of Capture—The Defining Feature

The “rule of capture” is the cornerstone of oil and gas law.<sup>60</sup> Despite the rule’s long tradition of underpinning much of oil and gas law, it also has a long history of critics because of the harsh nature of the rule: the rule, in essence, operates to allow a mineral owner to take the property of an adjacent landowner.<sup>61</sup> Despite this long history of animosity, the rule has survived the test of time and has even been referred to as a “sacred, vested right.”<sup>62</sup> Indeed, the rule of capture remains an important baseline rule of ownership of oil and gas across the United States.<sup>63</sup>

Early courts relied on principles from percolating groundwater cases to determine ownership of the oil and gas because of the fugacious nature of the resources.<sup>64</sup> In the landmark *Westmoreland & Cambria Natural Gas Co. v. De Witt*<sup>65</sup> decision, the Pennsylvania Supreme Court laid out the often quoted and relied upon explanation and implications of the rule of capture:

Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feroe naturoe*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their ‘fugitive and wandering existence within the limits of a particular tract was uncertain,’ as stated by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. St. 147, 148.

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<sup>59</sup> Ward, *supra* note 3.

<sup>60</sup> See Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture – An Oil and Gas Perspective*, 35 ENVTL. L. 899, 900 (2005).

<sup>61</sup> Robert E. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 392 (1935) (noting that the rule has been referred to by critics as “the law of piracy” or “the law of the jungle”).

<sup>62</sup> *Id.*

<sup>63</sup> Kramer & Anderson, *supra* note 60, at 904.

<sup>64</sup> *Id.* (examining *Acton v. Blundell*, 152 Eng. Rep. 1223 (1840)); see also *Dark v. Johnson*, 55 Pa. 164 (1867).

<sup>65</sup> 18 A. 724 (Pa. 1889).

They belong to the owner of the land, and are part of it, so long as they are on it or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even distant owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is not longer yours, but his.<sup>66</sup>

Oil and gas, like liquids, indeed move from place to place within rock formation.<sup>67</sup> Within the formations, the minerals move from areas of high pressure to areas of low pressure.<sup>68</sup> The rule of capture comes into play to help address how movement of gas interacts with the rights of adjacent landowners to develop the resources under their own property. When a well is drilled into a formation, it will change the pressure in the formation and thus cause movement of oil and gas to this new area of low pressure.<sup>69</sup> The ensuing change of pressure can in turn affect a very large area under the surface and thus implicate, potentially, oil and gas under tracts of land which have not been leased.<sup>70</sup>

The classic formation of the rule of capture is: “[t]he owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands.”<sup>71</sup> Accordingly, the rule of capture has often been referred to as a rule of “nonliability”<sup>72</sup> because it allows owners to effectively drain oil and gas from a well on their property, which might be flowing to the well from adjacent tracts.<sup>73</sup> Stated differently, a mineral owner is protected from liability when production of oil and gas under the owner's property has caused the drainage of another's

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<sup>66</sup> *Id.* at 725.

<sup>67</sup> Thomas A. Daily & Christopher Barrier, *Well, Now, Ain't that Just Fugacious!: A Basic Primer on Arkansas Oil and Gas Law*, 29 U. ARK. LITTLE ROCK L. REV. 211, 240 (2007).

<sup>68</sup> *Id.* at 241.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> Hardwicke, *supra* note 61, at 393.

<sup>72</sup> JOHN S. LOWE, *OIL AND GAS LAW IN A NUTSHELL* 13 (6th ed. 2009). Lowe comments how the rule is unusual in American law because it is a rule of liability. *Id.* Further, Lowe opines that because Professor Kunz described the rule as a “rule of convenience,” in the sense that while the rule may depart from other property law principles, it may be best viewed as a “judicial policy-making to encourage development of oil and gas resources.” *Id.*; *see also* Sidney J. Strong, *Application of the Doctrine of Correlative Rights by the State Conservation Agency in the Absence of Express Statutory Authorization*, 28 MONT. L. REV. 205, 208 (1966) (also referring to the rule of capture as a rule of convenience because courts were unable to determine where oil and gas had originated from after it was produced).

<sup>73</sup> *See* Daily & Barrier, *supra* note 67, at 241.

property as long as there is no trespass or interference with adjacent landowner's rights.<sup>74</sup>

Accordingly, the classic remedy available for landowners has been simple but harsh: go and do likewise by drilling your own wells.<sup>75</sup> Oil and gas owners responded by drilling offset wells, which are wells drilled on a landowner's tract in order to prevent drainage by wells on adjacent tracts.<sup>76</sup> If an owner failed to drill a well of their own to offset production on adjacent tracts, then the owner was left without a remedy.<sup>77</sup> Finally, the rule has been widely adopted by states across the country because it entices landowners to make beneficial use of their property; production is encouraged to avoid losing valuable minerals under one's property as a result of drainage by wells produced on adjacent or nearby properties.<sup>78</sup>

*i. Critiques of the Rule*

Two of the most commonly cited complaints as to the practical impact of the rule of capture upon the production of oil and gas in America have been over drilling and the lowering of the productivity of oil and gas reserves.<sup>79</sup> The rule of capture, and the remedy of drilling offset wells, led to what some have referred to as "unlimited production" because every landowner was encouraged to develop their property in order to reap as much of the minerals under their tract as possible before others did the same.<sup>80</sup> Inevitably, such a practice lends to waste and overproduction; but at a time of low demand and seemingly unlimited supply, these were not concerns prevalent when the rule of capture flourished.<sup>81</sup> Over time, however, the negative effects of the rule of capture's implications became plain: excessive drilling not only increased costs for landowners but also decreased pressure in the wells—which, in turn, lowered productivity.<sup>82</sup>

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<sup>74</sup> LOWE, *supra* note 72, at 13.

<sup>75</sup> Matthew F. Chase, *Pennsylvania Appellate Court Decides "Rule of Capture" Does Not Preclude Liability From Trespass Due to Hydraulic Fracturing*, JACKSON KELLY PLLC (June 12, 2018), <https://www.jacksonkelly.com/oil-gas-update-blog/pennsylvania-appellate-court-decides-rule-of-capture-does-not-preclude-liability-from-trespass-due-to-hydraulic-fracturing>; *see also* CORKY DEMARCO, W. VA. OIL & NAT. GAS ASS'N., *DIRECTIONAL DRILLING FORCED POOLING 4* (2015), [http://energywv.org/assets/files/Energy-Summit-Presentations/2015/06\\_WVONGA\\_Pooling.pdf](http://energywv.org/assets/files/Energy-Summit-Presentations/2015/06_WVONGA_Pooling.pdf) (commenting on the rule of capture, and stating "DRILL YOUR OWN DARN WELL!").

<sup>76</sup> Strong, *supra* note 72, at 208.

<sup>77</sup> *Id.*

<sup>78</sup> LOWE, *supra* note 72, at 101.

<sup>79</sup> Kramer & Anderson, *supra* note 60, at 902.

<sup>80</sup> Strong, *supra* note 72, at 208.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

ii. *The Rule of Capture in West Virginia*

Much like the rest of the country, West Virginia has a long legal tradition of applying the rule of capture to the production of oil and gas in the state. In *Wood County Petroleum Co. v. West Virginia Transportation Co.*,<sup>83</sup> the West Virginia Supreme Court of Appeals wrestled with the issue of whether natural gas was capable of absolute ownership or, if like animals *fera naturae* and percolating waters, it was not subject to absolute ownership.<sup>84</sup> The court held that natural gas was not subject to absolute ownership because it was more akin to air and water than it was to coal and oil.<sup>85</sup> Later, in *Williamson v. Jones*,<sup>86</sup> the court elaborated on its reasoning in *Wood* and stated:

[S]o long as [natural gas] is confined in the strata where it is found . . . it is only when it escapes out of the possession of the owner that the right of property is gone. This follows as an inevitable result of its fugitive nature.<sup>87</sup>

The court continued on to recognize the rule of capture as applied to oil and gas: “[B]ut from [natural gas’s] nature the title of such owner is gone when the gas escapes into the land of another, and comes under his control.”<sup>88</sup> Accordingly, the rule of capture is deeply entrenched in not only our nation’s law, but also in West Virginia’s common law.

iii. *The Rule’s Limitations*

Common law and statutory sources have developed over time to limit the application of the rule of capture. The doctrine of correlative rights is a prevalent limitation on the production of oil and gas under the rule of capture.<sup>89</sup> As defined by the West Virginia Code, correlative rights “means the reasonable opportunity of each person entitled thereto to recover and receive without waste the gas in and under a tract or tracts, or the equivalent thereof.”<sup>90</sup> Accordingly, while the rule of capture encourages production of oil and gas, correlative rights doctrine reigns in *how* this production occurs: oil and gas producers will be held liable for waste or negligent extraction of these valuable resources.<sup>91</sup>

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<sup>83</sup> 28 W. Va. 210 (1886).

<sup>84</sup> *Id.* at 213–14.

<sup>85</sup> *Id.* at 217.

<sup>86</sup> 19 S.E. 436 (W. Va. 1894).

<sup>87</sup> *Id.* at 442.

<sup>88</sup> *Id.*

<sup>89</sup> LOWE, *supra* note 72, at 18.

<sup>90</sup> W. VA. CODE ANN. § 22C-8-2 (West 2019).

<sup>91</sup> LOWE, *supra* note 72, at 18.

State legislatures have also resorted to conservation laws, in the form of pooling and well spacing requirements, to help counteract some of the drawbacks of the rule of capture.<sup>92</sup> State statutes generally require minimum setbacks between wells and property lines.<sup>93</sup> Additionally, states began to require a well to be located on a tract with a minimum amount of acreage before production could begin.<sup>94</sup> Accordingly, if a lease held by an oil and gas operator did not sit on a large enough tract, an operator would be required to create a drilling unit before production began.<sup>95</sup>

A drilling unit is the combination of several leases in order to reach the statutory mandated minimum acreage requirement for the production of oil and gas.<sup>96</sup> In West Virginia, an operator must form a drilling unit to produce oil and gas from formations such as the Marcellus.<sup>97</sup> In most states, drilling units must be a minimum of 640 acres.<sup>98</sup> West Virginia, however, has taken a different approach to drilling units: the unit must not be larger than 640 acres.<sup>99</sup> Operators, however, prefer to create drilling units because the units help (1) reduce waste, (2) increase production, (3) reduce surface impact, and (4) permit the development of small tracts that would normally not be developed because of economic considerations.<sup>100</sup>

## 2. West Virginia Partition Law

Partition actions are used in order to settle disputes between cotenants on a tract of land; and the judicial action serves to give each cotenant their fractional interest in the property.<sup>101</sup> Partition actions can be resolved in one of

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<sup>92</sup> Frank Sylvester & Robert W. Malmshemer, *Oil and Gas Spacing and Forced Pooling Requirements: How States Balance Energy Development and Landowner Rights*, 48 U. DAYTON L. REV. 47, 49 (2015) (noting that states began to pass these laws in the 1930s and 1940s to “protect their interest in market control, waste prevention, and resource development”).

<sup>93</sup> *Id.* West Virginia, for example, requires a deep gas well to be 400 feet from a property boundary and 3,000 feet from the nearest well. *Id.* at 57.

<sup>94</sup> *Id.* at 50.

<sup>95</sup> *Id.*

<sup>96</sup> See Chris LeCates, *How Are Federal Oil and Gas Leases Pooled and Unitized?*, HOLLAND & HART LLP (July 10, 2018), <https://www.theoilandgasreport.com/tag/drilling-or-spacing-units/>.

<sup>97</sup> W. VA. CODE ANN. § 22C-9-7 (West 2019).

<sup>98</sup> Marie C. Baca, *Forced Pooling: When Landowners Can't Say No to Drilling*, PROPUBLICA (May 18, 2011, 11:01 PM), <https://propublica.org/article/forced-pooling-when-landowners-cant-say-no-to-drilling>; see also LOWE, *supra* note 72, at 24 (commenting that these 640 acre requirements are commonly imposed upon horizontal drilling operations as well).

<sup>99</sup> W. VA. CODE ANN. § 22C-9-7.

<sup>100</sup> DEMARCO, *supra* note 75, at 9.

<sup>101</sup> 7 POWELL ON REAL PROPERTY § 50.07 (2018).

two manners: either partition by sale or partition in kind.<sup>102</sup> Partition in kind is a division of the property itself into specific portions to each interest holder; and partition by sale is simply the sale of the property and the allocation of the cash proceeds to each cotenant in accordance with the interest held.<sup>103</sup>

Traditionally, the law has favored partition by kind due to the unique nature of property (i.e., land is not easily replaced).<sup>104</sup> However, when a partition suit is sought in an oil and gas producing property, partition in kind is not often utilized by courts because it can be difficult to partition the land in proportion to the minerals' location under the tract.<sup>105</sup> Conversely, courts have generally looked upon partition by sale disdainfully—and accordingly, a cotenant seeking such relief must satisfy a heavy burden.<sup>106</sup>

At common law, partition was only available to cotenants who came into their fractional share of ownership via inheritance.<sup>107</sup> West Virginia, however, has adopted a partition statute,<sup>108</sup> which modified the common-law rule to permit cotenants—including cotenants of a mineral estate<sup>109</sup>—to seek partition by sale or kind to settle disagreements between cotenants.<sup>110</sup> In order for a cotenant to be granted partition by sale, the moving party must show that (1) the property cannot be partitioned easily in kind; (2) the interest of one or more parties would be promoted by a sale;<sup>111</sup> and (3) the interests of other owners' are not prejudiced

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<sup>102</sup> See generally *id.*

<sup>103</sup> LOWE, *supra* note 72, at 101.

<sup>104</sup> Ark Land Co. v. Harper, 599 S.E.2d 754, 759 (W. Va. 2004). The court recognized that “partition in kind . . . is the preferred method of partition because it leaves cotenants holding the same estates as before and does not force a sale on unwilling co-tenants.” *Id.* (quoting 7 POWELL ON REAL PROPERTY § 50.07[4][a]).

<sup>105</sup> LOWE, *supra* note 72, at 101.

<sup>106</sup> *Id.*

<sup>107</sup> Consol. Gas Supply Corp. v. Riley, 247 S.E.2d 712, 714 (W. Va. 1978).

<sup>108</sup> W. VA. CODE ANN. § 37-4-1 (West 2019).

<sup>109</sup> *Consol. Gas Supply Corp.*, 247 S.E.2d at 716 (recognizing that prior versions of West Virginia Code did not include language which allowed mineral owners to seek partition suits).

<sup>110</sup> W. VA. CODE ANN. § 37-4-1.

<sup>111</sup> *Consol. Gas Supply Corp.*, 247 S.E.2d at 714–15. Critically, not all parties' interests must be advanced; rather, the West Virginia Code merely requires that some interests will be promoted, while the others will not be prejudiced. *Id.* (citations omitted).

by a sale.<sup>112</sup> A cotenant must have an ownership interest—no matter how small it might be<sup>113</sup>—before initiating suit.<sup>114</sup>

Partition suits are both lengthy and expensive for all parties involved.<sup>115</sup> Indeed, some suits can last up to over a year, and production cannot begin until the partition process has been concluded.<sup>116</sup> In the absence of another statutory remedy, oil and gas operators have leaned on partition by sale actions to unitize tracts.<sup>117</sup> Further, oil and gas operators have become accustomed to having to use partitions suits; indeed, one operator filed 200 partition actions in 2017 alone.<sup>118</sup>

### 3. Forced Pooling—A Failed Venture

Forced pooling is a statutory tool which requires owners of oil and gas within a proposed well-spacing unit to join into the unit even if they do not wish to produce minerals.<sup>119</sup> Thus, forced pooling can require adjacent landowners to join a drilling unit even if they do not consent.<sup>120</sup> States have the authority under their police power to enact these regulations, and the statutes are justified in order to “protect its citizens from over-drilling and correlative-rights owners from drainage” created by adjacent tracts.<sup>121</sup> Thus, forced pooling can be seen as a way to help counteract the drawbacks created by the enforcement of the rule of capture. West Virginia does not have a forced pooling statute for shallow wells; consequently, operators working within the Marcellus formation cannot use mandatory pooling to create a drilling unit (for now).<sup>122</sup>

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<sup>112</sup> Ark Land Co. v. Harper, 599 S.E.2d 754, 759 (W. Va. 2004) (quoting Syl. Pt. 3, *Consol. Gas Supply Corp.*, 247 S.E.2d at 712).

<sup>113</sup> Andrew Brown, *Without Forced-Pooling Law, WV Gas Industry Sues Landowners to Gain Access*, CHARLESTON GAZETTE-MAIL (June 21, 2015), [https://www.wvgazette.com/news/without-forced-pooling-law-wv-gas-industry-sues-landowners-to/article\\_04f4b234-17f6-576e-8c1d-e27ec0f0c6ab.html](https://www.wvgazette.com/news/without-forced-pooling-law-wv-gas-industry-sues-landowners-to/article_04f4b234-17f6-576e-8c1d-e27ec0f0c6ab.html) (noting that some oil and gas operators will acquire a tiny interest in a tract of land and then file suit in order to expand pooling areas).

<sup>114</sup> *Harper*, 599 S.E.2d at 759.

<sup>115</sup> Brown, *supra* note 113.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Jamison Cocklin, *West Virginia's Milestone Co-Tenancy Legislation Expected to Have Varying Impacts*, NAT. GAS INTELLIGENCE: SHALE DAILY (Apr. 2, 2018), <http://www.naturalgasintel.com/articles/113885-west-virginias-milestone-co-tenancy-legislation-expected-to-have-varying-impacts>.

<sup>119</sup> LOWE, *supra* note 72, at 100.

<sup>120</sup> *Forced Pooling*, EARTHWORKS, [https://earthworks.org/issues/forced\\_pooling/](https://earthworks.org/issues/forced_pooling/) (last visited Oct. 2, 2019).

<sup>121</sup> LOWE, *supra* note 72, at 100.

<sup>122</sup> William M. Herlihy, *An Overview of Pooling in W. Va.*, SPILMAN THOMAS & BATTLE (Dec. 31, 1969), <https://www.spilmanlaw.com/dataentry/resources/attorney-articles/labor->



Forced pooling is the preferred way for oil and gas operators to acquire non-consenting interests to join into a development unit.<sup>123</sup> The most commonly employed argument by oil and gas producers is that forced pooling helps increase drilling efficiency and, therefore, brings positive benefits to all parties involved in mineral extraction.<sup>124</sup> Indeed, in a forced pooling bill introduced to the West Virginia Legislature, one of the justifications of the bill was to increase efficiency of natural gas and oil production.<sup>125</sup>

West Virginia is no stranger to forced pooling bills being introduced for the state's shallow wells. For example, in 2015, House Bill 2688, known as "the forced pooling bill," passed in the West Virginia House of Delegates by a 60–40 vote.<sup>126</sup> The bill would have allowed for oil and gas operators—once they had acquired 80% of the oil and gas rights within a pooling unit but were still faced with nonconsenting cotenants—to apply for a pooling order; first, however, the operator must have negotiated in good faith with the remaining interest owners in the drilling unit.<sup>127</sup> The State Senate then passed an amended version of the bill—only to have it die on the floor of the House of Delegates on a 49–49 tie.<sup>128</sup>

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employment/an-overview-of-pooling-in-w-va. Conversely, West Virginia does have forced pooling for deep wells. *Id.*; see also W. VA. CODE ANN. § 22C-9-1 (West 2019). The state code defines a deep well as "a well, other than a shallow well or coalbed methane well, drilled to a formation below the top of the uppermost member of the 'Onondaga Group.'" *Id.* § 22C-9-2. A shallow well, on the other hand, is defined as "any well other than a coalbed methane well, drilled no deeper than one hundred feet below the top of the 'Onondaga Group': *Provided*, That in no event may the 'Onondaga Group' formation or any formation below the 'Onondaga Group' be produced, perforated or stimulated in any manner." *Id.* The Marcellus Shale, under West Virginia law, is considered a shallow well and accordingly, the existing statutory pooling measures are not applicable to production in it. See Anne Blankenship, *Maximizing the Marcellus Shale: Benefits of Shallow Well Pooling*, W. VA. EXECUTIVE (June 5, 2015), <http://www.wvexecutive.com/maximizing-the-marcellus-shale/>.

<sup>123</sup> LOWE, *supra* note 72, at 95.

<sup>124</sup> See DEMARCO, *supra* note 75.

<sup>125</sup> H.D. 2688, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>126</sup> Natalie Belville, 'Forced Pooling' Bill Failure Disappoints Industry, ST. J. (Mar. 20, 2015), [https://www.wvnews.com/statejournal/news/forced-pooling-bill-failure-disappoints-industry/article\\_e268aca3-849a-5f7c-bdc7-f27b6e0a989e.html](https://www.wvnews.com/statejournal/news/forced-pooling-bill-failure-disappoints-industry/article_e268aca3-849a-5f7c-bdc7-f27b6e0a989e.html).

<sup>127</sup> H.D. 2688, 2015 Leg., Reg. Sess. (W. Va. 2015). The bill emphasized horizontal drilling and how it "effectively and efficiently recovers natural resources and should be encouraged as a means of production of oil and gas." *Id.* Further, the bill proposed that it would be in the public policy interest of the state to prevent the waste of natural gas and encouraged its production via horizontal drilling—and this policy would be furthered by allowing for forced pooling in shallow wells. See *id.*

<sup>128</sup> Belville, *supra* note 126.

The defeat came as a surprise to many in the state,<sup>129</sup> but it did not stop efforts to pass a bill. Indeed, in 2017, Senate Bill 576 was introduced which, similarly to House Bill 2688, attempted to introduce forced pooling to shallow wells in West Virginia.<sup>130</sup> However, the bill met a similar fate as its predecessors and failed to garner the required votes to become enacted into law, leading to then State Senate President Mitch Carmichael commenting that “[f]orced pooling has no chance” in West Virginia.<sup>131</sup>

#### 4. Co-Tenancy Law in West Virginia

Following the failure of forced pooling measures in West Virginia, interest groups moved to another target—co-tenancy mineral development.<sup>132</sup> Co-tenancy involves situations in which more than one person owns an interest in a property (whether it be in the mineral, surface, or fee simple estate) and can take the form of tenancy in common, joint tenancy, or tenancy by the entirety.<sup>133</sup> Mineral ownership is often divided into several miniscule interests as tenants in common.<sup>134</sup> Indeed, in West Virginia, oil and gas has been produced for well over 100 years, and over that time span, mineral estates have been severed from the surface.<sup>135</sup> The severance of these estates have often led to a single property being divided several times over the course of generations; and accordingly, a single parcel of land may have dozens of cotenants in the mineral estate.<sup>136</sup>

As cotenants, whether it be tenants in common, joint-tenants, or tenants in the entirety, each individual has concurrent ownership and the right to possess the property in its entirety.<sup>137</sup> The scope of what a cotenant was entitled to in terms of mineral development, however, has been limited by West Virginia law.<sup>138</sup>

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<sup>129</sup> *Id.*; see also Stephen Skinner (@delegateskinner), TWITTER (Mar. 14, 2015, 10:06 PM), <https://twitter.com/delegateskinner/status/576942613326094336> (calling the failure of the forced pooling bill “truly stunning”).

<sup>130</sup> S. 576, 2017 Leg., Reg. Sess. (W. Va. 2017).

<sup>131</sup> Rusty Marks, *Senate Gives Up on Forced Pooling, May Consider Other Gas Industry Reform Bills*, ST. J. (Nov. 6, 2017), [https://www.wvnews.com/statejournal/senate-gives-up-on-forced-pooling-may-consider-other-gas/article\\_39e8bf7a-b151-511c-b749-6d2a1de2f8f1.html](https://www.wvnews.com/statejournal/senate-gives-up-on-forced-pooling-may-consider-other-gas/article_39e8bf7a-b151-511c-b749-6d2a1de2f8f1.html).

<sup>132</sup> Ross, *supra* note 9.

<sup>133</sup> LOWE, *supra* note 72, at 93–94.

<sup>134</sup> *Id.* at 93.

<sup>135</sup> Cocklin, *supra* note 118.

<sup>136</sup> *See id.*

<sup>137</sup> LOWE, *supra* note 72, at 93.

<sup>138</sup> *Id.* at 95.

Developers and lawmakers alike have called for West Virginia to modernize its oil and gas law in regard to cotenant development.<sup>139</sup> Indeed, developers—in the wake of the failure of forced pooling as well as the antiquated nature of West Virginia’s laws regarding co-tenancy production of oil and gas—began to contemplate shifting new production to surrounding states rather than West Virginia due to more favorable laws.<sup>140</sup>

Previously, West Virginia law required that all cotenants must consent to production of oil and gas upon a tract with multiple owners.<sup>141</sup> In *Law v. Heck Oil Co.*,<sup>142</sup> an owner with a minuscule 1/768th interest in a parcel sued an oil and gas company for drilling a well on his land without his consent.<sup>143</sup> The oil and gas company claimed that the owner, who demanded a high price for his small interest, was preventing development on the tract that would prevent drainage of the oil and gas under the owners’ tract caused by activities on adjacent tracts.<sup>144</sup> The West Virginia Supreme Court of Appeals held that the owner of the undivided 1/768th interest in oil and gas could stop the production of oil and gas even if all remaining interest owners—compromising the 768th interest out of the total 768th—wished to produce the oil and gas under the tract.<sup>145</sup> The court reasoned that forcing a cotenant to produce oil and gas amounted to waste, and the court would not force a cotenant to convert valuable real property to personal property.<sup>146</sup>

The *Heck* decision planted West Virginia among the minority of states when it came to oil and gas development and cotenant consent.<sup>147</sup> The minority view holds that the production of oil and gas by a cotenant is waste when one cotenant has objected to production.<sup>148</sup> Thus, one cotenant cannot develop oil and gas without the consent of all other cotenants, or else the cotenant will incur

<sup>139</sup> Ross, *supra* note 9.

<sup>140</sup> *Id.* In fact, representatives of EQT, a major natural gas producer in West Virginia, commented at a conference that the “antiquated” West Virginia law pertaining to co-tenancy and joint development was the reason for a move away from development in the state in favor of Pennsylvania and Ohio, two states with more modern law regulating this area of production. *Id.*

<sup>141</sup> *Mineral Extraction Efficiency: Co-Tenancy*, W. VA. OIL & NAT. GAS ASS’N., <http://www.wvonga.com/legislative/mineral-extraction-efficiency-co-tenancy.html> (last visited Oct. 2, 2019).

<sup>142</sup> 145 S.E. 601 (W. Va. 1928).

<sup>143</sup> *Id.* at 601–02.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 601–02.

<sup>147</sup> LOWE, *supra* note 72, at 95. Lowe recognizes West Virginia and Louisiana as states which adhere to this minority rule. *Id.* However, Lowe distinguishes the state of Louisiana’s law by commenting that Louisiana allows for production of oil and gas by a cotenant on a single tract when 80% of the mineral rights have been leased by an operator. *Id.*

<sup>148</sup> *Id.*

liability for wasting the oil and gas.<sup>149</sup> Courts have upheld the minority rule on the basis that “any action that changes the nature or character of jointly owned land is waste, *even if the action improves it.*”<sup>150</sup>

However, *Heck* did not bar a cotenant from entering into an individual lease with an oil and gas operator as to the fractional interest held by the individual tenant—it only bars *production* of the tract without the consent of *all* cotenants.<sup>151</sup> Accordingly, if a cotenant signed a lease without the consent of all cotenants, and subsequently an oil and gas company began producing the tract, cotenants may object to the production or permit the lessee to continue production and receive an accounting for their share.<sup>152</sup> If a cotenant elects to object to the lessee’s operations, the cotenant can move for damages and an injunction to stop the production of oil or gas as waste.<sup>153</sup>

On the other hand, the majority rule allows any cotenant to remove minerals from a property which is jointly owned for their development.<sup>154</sup> Under the majority rule, the development of minerals is not waste because the only way to enjoy the minerals as a property owner is to extract them.<sup>155</sup> Thus, in jurisdictions which adhere to the majority rule, a cotenant can develop the oil and gas without the consent of all cotenants and not be liable for trespass.<sup>156</sup> However, once production costs have been repaid and recouped, the developing owner must make an accounting to the nonconsenting owners for their pro rata share.<sup>157</sup>

Major oil and gas producing states (including states such as Oklahoma, Texas, North Dakota, and Kansas) and also states within the Marcellus Shale (for example, Pennsylvania), all follow the majority rule on cotenant production.<sup>158</sup> While many approve of the rule because it helps promote the production of oil and gas—and thus imbuing economic benefit for all parties—others argue that the “non-consenting cotenants should be able to insist that their share of recoverable minerals be left in the ground.”<sup>159</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (emphasis added).

<sup>151</sup> *Devon Corp. v. Miller*, 280 S.E.2d 108, 113 (W. Va. 1981) (citing *Trees v. Eclipse Oil Co.*, 34 S.E. 933 (W. Va. 1899)).

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

<sup>154</sup> *LOWE*, *supra* note 72, at 96.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

### 5. The Co-Tenancy and Majority Production Act—A Watershed Moment

On March 5, 2018, the Co-Tenancy Act was passed in the West Virginia Legislature,<sup>160</sup> and eventually was signed into law by Governor Justice.<sup>161</sup> Under the Co-Tenancy Act, when an oil and gas operator has acquired three-fourths interest in a tract with seven or more cotenants, and has engaged in reasonable efforts to negotiate with the remaining cotenants, the operator may begin production without signing the remaining one-fourth interest in the oil or gas held by nonconsenting cotenants.<sup>162</sup> Despite the Co-Tenancy Act's allowance of production without the consent of all cotenants, non-consenting cotenants are still entitled to an accounting for their interest and to compensation for the production of oil and gas.<sup>163</sup>

Non-consenting cotenants may elect one of two remedies: (1) pro rata share of production royalty based on proceeds from sale, free of post-production expenses, and equal to the highest royalty percentage which was paid to cotenants who elected to participate in the lease; or (2) participate in the development of the oil and gas under the tract and receive a “prorata share of the revenue and cost equal to his or her share of production attributable to the tract or tracts being developed according to the interest . . . of such nonconsenting cotenant, exclusive of any royalty or overriding royalty in any lease.”<sup>164</sup> Additionally, interest holders in the oil and gas estate that are unknown, or unlocatable, are entitled to receive a 12.5% royalty.<sup>165</sup> If after seven years a missing owner fails to come forward to claim royalties, then the surface owner may reclaim title to the oil and gas held by said missing owners.<sup>166</sup>

### III. ANALYSIS

The Co-Tenancy Act is legislation that helps address a great need in the state of West Virginia: the modernization of the state's oil and gas law. Moreover, the Co-Tenancy Act could not have come at a better time because of

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<sup>160</sup> Christopher J. Haselhoff & Brant T. Miller, *West Virginia Legislature Passes Bill Relaxing Co-Tenancy Requirements*, GORDON & REES (Mar. 2018), <https://www.gordonrees.com/publications/2018/west-virginia-legislature-passes-bill-relaxing-co-tenancy-leasing-requirements>.

<sup>161</sup> See Jason Zoeller, *Co-Tenancy Bill Signed by Governor Jim Justice*, BABST CALLAND: SHALE ENERGY L. BLOG (Mar. 12, 2018), <http://www.babstcalland.com/shale-energy/co-tenancy-bill-signed-governor-jim-justice/>.

<sup>162</sup> W. VA. CODE ANN. § 37B-1-4(a) (West 2019).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* § 37B-1-4(b).

<sup>165</sup> *Id.* § 37B-1-4(d).

<sup>166</sup> *Id.* § 37B-1-4(g).

the current boom in the oil and gas industry,<sup>167</sup> but also a time of questioning whether West Virginia's oil and gas law could continue to support increased exploitation of the Marcellus Shale.<sup>168</sup> Legislators in Charleston were able to craft the Co-Tenancy Act in a way that will help stimulate the production of oil and gas in West Virginia while at the same time protecting the rights of the cotenant owners of oil and gas. This Part will first examine the Co-Tenancy Act to reveal what has changed in West Virginia law in regard to the production of oil and gas. Subsequently, this Part will argue that the Co-Tenancy Act represents a compromise between operators and nonconsenting landowners. Finally, this Part will conclude by arguing that in light of the Co-Tenancy Act, West Virginia should continue to abstain from passing a forced pooling measure.

#### A. *Examining the Co-Tenancy Act*

The Co-Tenancy Act operates to change important aspects of West Virginia law as it relates to the production of mineral estates. This Section will analyze the Co-Tenancy Act by looking at the types of mineral estates affected, explaining the requirements for production, summarizing the changes in the law the Act has made, and finally, clarifying that the Co-Tenancy Act is not a forced pooling measure despite how it has been portrayed.

##### 1. Mineral Estates Affected

The Co-Tenancy Act has a far-reaching effect on West Virginia's co-tenancy and oil and gas law. However, the scope of the estates affected by the new legislation is limited. First, and importantly, the Co-Tenancy Act only affects co-tenancy law as it relates to oil and gas production—not, for example, the production of coal estates held in co-tenancy.<sup>169</sup> Thus, while the Co-Tenancy Act, as discussed *infra*, vastly changes West Virginia law as it pertains to oil and gas production of certain tracts held by cotenants, it only applies to a limited scope of mineral law. Second, the Co-Tenancy Act only applies to tracts that have seven or more cotenants and thus further checks its application in mineral law.<sup>170</sup> Accordingly, the Co-Tenancy Act only applies in limited circumstances: the development of an oil and gas tract with seven or more cotenants.

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<sup>167</sup> See *supra* Section II.A.2.iii.

<sup>168</sup> See Ross, *supra* note 9.

<sup>169</sup> See W. VA. CODE ANN. § 37B-1-4(a).

<sup>170</sup> See *id.*

## 2. Requirements Imposed Upon Operators

First, the Co-Tenancy Act requires operators to make reasonable efforts to negotiate with all cotenants.<sup>171</sup> Following negotiations, the Co-Tenancy Act allows for production to begin without the consent of all cotenants when the oil and gas operator has acquired 75% of the interest held by the cotenants.<sup>172</sup> An important distinction, however, is that the Co-Tenancy Act does not require the operator to acquire the interest of 75% of the cotenants.<sup>173</sup> Indeed, the Co-Tenancy Act merely requires that an operator and cotenant who wish to develop a tract held by seven or more cotenants acquire 75% of the ownership interest.<sup>174</sup>

Accordingly, the Co-Tenancy Act does not impose a head-count upon operators to develop a tract held by cotenants. The Co-Tenancy Act instead operates to impose an interest based requirement upon operators: production can commence once 75% of the oil or gas rights have been acquired by the party that wishes to develop the resource.<sup>175</sup> Thus, for example, under the Co-Tenancy Act, if one cotenant owns 75% or more of the oil or gas rights, then that sole cotenant's interest is all that is needed before a tract can be developed.

Importantly, however, the Co-Tenancy Act has not defined what constitutes a "reasonable effort to negotiate with all royalty owners."<sup>176</sup> Thus, as the statute presently stands, after an oil and gas operator has acquired a super-majority of the oil and gas interest, it is unclear to what extent the operator must negotiate with cotenants who hold the remaining 25% or less interest in the oil and gas. The issue of what constitutes a reasonable effort will certainly come to the forefront of discussion as oil and gas operators begin to use the Co-Tenancy Act to begin production on certain tracts.

## 3. Changes to West Virginia's Oil and Gas Law

Despite the limited scope of the Co-Tenancy Act, it significantly changes oil and gas law in West Virginia. West Virginia, in regard to the co-tenancy production of all mineral interests, previously followed the minority rule of co-tenancy mineral production.<sup>177</sup> The minority rule requires all interest owners to consent before production of minerals can begin.<sup>178</sup> The majority rule,

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<sup>171</sup> *See id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* (emphasis added).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *See* LOWE, *supra* note 72, at 95.

<sup>178</sup> *See id.*

on the other hand, allows a cotenant to begin the extraction of minerals even if all cotenants have not consented.<sup>179</sup>

The Co-Tenancy Act, however, has moved West Virginia—in regard to the oil and gas law—closer to the majority rule. Indeed, under the Co-Tenancy Act, an oil and gas operator or cotenant in West Virginia must only acquire 75% of all the cotenants' interest in the oil or gas to begin extracting the resources under the tract.<sup>180</sup> Accordingly, an operator no longer needs 100% of the cotenants to agree to produce a certain tract as previously required. While the Co-Tenancy Act has moved West Virginia away from the minority rule, the move was not a total departure. Indeed, once again, West Virginia has only strayed from the minority rule regarding the production of oil and gas.

Moreover, the minority rule still applies in West Virginia when a tract has six or fewer cotenants because the Co-Tenancy Act only applies when there are seven or more cotenants.<sup>181</sup> Accordingly, in the realm of mineral law, the minority rule will still apply in a wide variety of settings: when the oil and gas rights are owned by six or fewer cotenants and when other minerals, such as coal, are desired to be produced by a cotenant.

Further, the Co-Tenancy Act makes another important change to West Virginia law surrounding oil and gas production by changing what constitutes the waste of oil and gas. Previously, in West Virginia, the production of oil and gas was defined as waste.<sup>182</sup> Accordingly, when paired with the minority rule, a cotenant's or oil and gas operator's production of minerals under a tract held by multiple cotenants, without consent from all cotenants, would constitute waste—and thus expose the producers to liability.<sup>183</sup> Under the Co-Tenancy Act, however, the production of oil and gas is no longer defined as waste.<sup>184</sup> Therefore, the Co-Tenancy Act has changed key aspects of oil and gas law in respect to cotenants in West Virginia by moving—in certain aspects—West Virginia law away from the minority rule for cotenant production of oil and gas and no longer defining the production of oil and gas as waste.

#### 4. The Act is Not Forced Pooling

The Co-Tenancy Act is not a forced pooling measure—despite being labeled as forced pooling by some.<sup>185</sup> Indeed, the Co-Tenancy Act applies only

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<sup>179</sup> *Id.* at 96–97.

<sup>180</sup> W. VA. CODE ANN. § 37B-1-4(a) (West 2019).

<sup>181</sup> *Id.*

<sup>182</sup> *See* LOWE, *supra* note 72, at 95.

<sup>183</sup> *See id.*

<sup>184</sup> W. VA. CODE ANN. § 37B-1-4(a).

<sup>185</sup> *See, e.g.,* William Beckley, *West Virginia Passes Law Permitting Forced Pooling*, BUS. ADVOC. (Apr. 10, 2018), <https://mcdonaldhopkins.com/Insights/Blog/Energy->



to situations in which cotenants wish to produce oil and gas, and permits the development of oil and gas to begin without the consent of all cotenants.<sup>186</sup> Accordingly, the Co-Tenancy Act only applies to disagreements over production as they pertain to a single mineral tract.<sup>187</sup>

Forced pooling acts, on the other hand, operate to bring in non-consenting interest owners from adjacent tracts to create a drilling unit.<sup>188</sup> Indeed, the focus of forced pooling acts is not disagreements between cotenants, but rather addressing landowners that are needed to form a drilling unit but do not wish to produce minerals under their tracts.<sup>189</sup> Thus, the Co-Tenancy Act is not a forced pooling act because it does not directly affect adjacent tracts, but rather operates only to streamline disagreements between cotenants on a single tract.<sup>190</sup>

*B. The Co-Tenancy Act Presents a Balance Between the Oil and Gas Industry and Landowners Who Want Production and Landowners Who Do Not Want Production*

The Co-Tenancy Act is a product of compromise between those who have pushed for further development, and those who do not want to be forced into producing minerals owned by them. Indeed, the Co-Tenancy Act can fairly be characterized as a “win-win” measure to help modernize West Virginia’s oil and gas industry while at the same time protecting the rights of landowners. This Section will analyze stakeholders affected—and benefited—to explain why the Co-Tenancy Act represents a compromise between the several stakeholders.

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Insights/2018/04/10/West-Virginia-passes-law-permitting-forced-pooling (referring to the Co-Tenancy Act as allowing for operators to utilize forced pooling for shallow wells); Hoppy Kercheval, *Legislature, Governor, Make Right Call on Co-Tenancy Drilling Bill*, W. VA. METRONews (Mar. 8, 2018, 12:34 AM), <http://wvmetronews.com/2018/03/08/legislature-governor-make-right-call-on-co-tenancy-drilling-bill/> (recognizing that some state legislative representatives labeled the Co-Tenancy Act as a forced pooling bill to try and rally support against it).

<sup>186</sup> See W. VA. CODE ANN. § 37B-1-4.

<sup>187</sup> See *id.*

<sup>188</sup> See *Forced Pooling*, *supra* note 120 and accompanying text.

<sup>189</sup> See *id.*

<sup>190</sup> See *infra* Section III.C.1 for a discussion on how the Co-Tenancy Act can—in a way—function similarly to forced pooling by allowing operators to more easily create drilling units.

1. The Co-Tenancy Act Will Help Reinvigorate Oil and Gas Production in West Virginia and Thus Will Benefit Several Stakeholders

Prior to the passage of the Co-Tenancy Act, West Virginia's co-tenancy law—in regard to oil and gas production—proved to be a hindrance on the production of some because all interest owners were required to consent to development.<sup>191</sup> If an owner or operator could not get the consent of all interest owners, then the only remedy to begin production would be to resort to a lengthy partition suit.<sup>192</sup> Such factors are what led to industry representatives calling for West Virginia's co-tenancy law to be changed<sup>193</sup>—a call that has been answered with the passage of the Co-Tenancy Act.

The passage of the Co-Tenancy Act will likely lead to increased production of oil and gas in West Virginia because of the increased ease in leasing and developing oil and gas estates held by cotenants. Indeed, industry representatives believe that the passage of the Co-Tenancy Act will lead to increased development of oil and gas in West Virginia.<sup>194</sup> The Co-Tenancy Act will accomplish this increase in production predominately because it will be easier to form drilling units.<sup>195</sup>

*i. New Drilling Units Will Be Easier to Form*

In West Virginia, to produce oil and gas, drilling units are encouraged to help efficiently develop the state's natural resources.<sup>196</sup> First, the Co-Tenancy Act will likely help increase production in the state because it will allow for operators to form longer laterals in drilling units more easily.<sup>197</sup> With horizontal drilling being utilized in West Virginia, operators can now drill for miles horizontally from one well,<sup>198</sup> and accumulating longer laterals for drilling units is a pressing need. When discussing how the Co-Tenancy Act will affect the natural gas industry in West Virginia, Charlie Burd, the executive director of the West Virginia Independent Oil and Gas Association, stated, "Co-tenancy absolutely moves the needle. It moves the needle in favor of producers' need to

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<sup>191</sup> See *supra* Section II.B.4.

<sup>192</sup> See *id.*

<sup>193</sup> See Ross, *supra* note 9.

<sup>194</sup> See Cocklin, *supra* note 118.

<sup>195</sup> See *id.*

<sup>196</sup> See W. VA. CODE ANN. § 22C-9-1(b) (West 2019); see also *Croston v. Emax Oil Co.*, 464 S.E.2d 728, 735 (W. Va. 1995).

<sup>197</sup> See Cocklin, *supra* note 118.

<sup>198</sup> *Drilling for Miles in the Marcellus: Laterals Reach New Lengths*, J. PETROLEUM TECH. (Aug. 8, 2018), <https://pubs.spe.org/en/jpt/jpt-article-detail/?art=4465>.

accumulate more individual tracts to be able to get larger drilling units, not just larger units, but longer drilling units.”<sup>199</sup>

Further, the passage of the Co-Tenancy Act will likely bring back into the fold companies who had moved production elsewhere because of the lack of modern laws in the state.<sup>200</sup> Companies such as EQT, one of the biggest players in the West Virginia natural gas industry, had begun to focus on production in other states in the region, predominately Pennsylvania.<sup>201</sup> EQT made this shift specifically because of the lack of modern co-tenancy legislation in West Virginia.<sup>202</sup> Pennsylvania, for example, abides by the majority rule for co-tenancy production of oil and gas: one cotenant cannot hold back other cotenants from developing the oil and gas under a single tract.<sup>203</sup> The passage of the Co-Tenancy Act, however, has lowered the prior roadblocks to production in West Virginia to development of parcels held by several cotenants. Indeed, CNX Resources Corp., another major player in the West Virginia natural gas play, stated that the Co-Tenancy Act has kept West Virginia in its plans for future development—and plans to drill 30 new wells in the state by 2020.<sup>204</sup>

Under the Co-Tenancy Act, operators will now be able to more easily accumulate mineral tracts held by cotenants because an operator will no longer have to meet the incredibly high threshold of accumulating 100% of the oil and gas rights—and rather will only have to acquire 75%.<sup>205</sup> The lower threshold not only will make it easier to create drilling units, but it will also help create longer drilling units, or laterals, and thus increase efficiency.<sup>206</sup> Accordingly, West Virginia will once again be seen as a friendly state for the development of natural gas for formations such as the Marcellus. The Co-Tenancy Act will facilitate greater production of natural gas in the Mountain State and will therefore help grant benefits across the board for West Virginians.<sup>207</sup>

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<sup>199</sup> Cocklin, *supra* note 118.

<sup>200</sup> See Ross, *supra* note 9.

<sup>201</sup> See *id.*

<sup>202</sup> *Id.*

<sup>203</sup> G. Brian Wells, *Selected Issues in the Law of Co-Tenancy*, 28 ENERGY & MIN. L. INST. 155, 165 (2008).

<sup>204</sup> Cocklin, *supra* note 118.

<sup>205</sup> See W. VA. CODE ANN. § 37B-1-4 (West 2019).

<sup>206</sup> See Cocklin, *supra* note 118. Once again, this is a very important point to help account for the technological advances represented by horizontal drilling: new units can be drilled longer than before, and the easier it is to create longer units, the more production that can happen from a single well.

<sup>207</sup> See Kozera, *supra* note 6.

ii. *The Co-Tenancy Act Is a New Alternative to Lengthy Partition by Sale Actions*

The Co-Tenancy Act will likely help alleviate partition suits to begin mineral development because it represents a new tool to begin production of oil and gas on tracts held by several cotenants. Prior to the passage of the Co-Tenancy Act, the only recourse for oil and gas operators or cotenants that wished to produce when other cotenants did not wish to produce was partition actions.<sup>208</sup> Now, under the Co-Tenancy Act, operators—when faced with a tract with seven or more owners in the mineral estate—will be able to avoid partition actions if they can acquire 75% of the oil and gas interest. Accordingly, industry representatives believe that production should increase due to another avenue being available aside from partition actions.<sup>209</sup>

By alleviating the amount of partition suits, production will increase for two reasons. First, the cost of beginning production on a tract with cotenants will be lowered if the oil and gas company is faced with nonconsenting interest owners. Partition suits are an expensive and lengthy endeavor,<sup>210</sup> and even though they lead to production when successful<sup>211</sup>—and the oil and gas companies almost always succeed—they are not a perfect remedy.<sup>212</sup> While the Co-Tenancy Act may not be perfect either, it represents a new—and more cost-effective—avenue to begin production when faced with nonconsenting cotenants.

Second, the Co-Tenancy Act will help production begin more quickly when there is a dispute between cotenants as to whether the tract should be produced. Under the Co-Tenancy Act, once an oil and gas operator has acquired 75% of the mineral rights for the parcel, production can begin immediately.<sup>213</sup> This is in stark contrast to the prior remedy of partition suits: production could not begin until the end of the suit—which could last for upwards of a year.<sup>214</sup> Put another way, the Co-Tenancy Act operates to streamline oil and gas production in the state because tracts with disagreeing cotenants will no longer *always* be held back by partition actions. Thus, oil and gas operators will be able to begin

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<sup>208</sup> *See id.*

<sup>209</sup> Cocklin, *supra* note 118.

<sup>210</sup> Brown, *supra* note 113.

<sup>211</sup> Brown notes that, commonly, the oil and gas producers win partition actions. *Id.* Moreover, many attorneys in the state will advise clients to take the lease offered rather than hold out and fight the companies because of the success they have had and the cost of litigating the actions. *See id.*

<sup>212</sup> *See id.* Judge Timothy Sweeney of the Pleasant County Circuit Court likened using partition suits in mineral cases to trying to place a “round peg into a square hole.” *Id.*

<sup>213</sup> *See* W. VA. CODE ANN. § 37B-1-4 (West 2019).

<sup>214</sup> Brown, *supra* note 113.

production more quickly—and accordingly, this is likely to lead to producers refocusing on West Virginia.

## 2. Benefit for Interest Owners Who Wish to Produce and Surface Owners

Cotenants who wish to develop their valuable oil and gas resources will greatly benefit from the Co-Tenancy Act because production will likely increase and begin more quickly. Moreover, surface owners will also benefit under the Co-Tenancy Act because of the same.

### *i. Benefit for Cotenants Seeking Production of Mineral Estate*

The Co-Tenancy Act will also help cotenants who wish to produce oil and gas they own an interest in. First, the Co-Tenancy Act will allow interest owners to use their property—the valuable oil and gas rights held by them—in a way that they want to: the production of the minerals. Importantly, the Co-Tenancy Act will make this more feasible for interest owners. Unlike previously, one cotenant cannot block the production of resources when a super majority of the interest is held by cotenants who wish to produce.

These changes will not only allow for some cotenants to use their property in a beneficial way—but will also help ensure that owners receive the beneficial *value* of their property in a timelier manner. Indeed, the Co-Tenancy Act makes it less likely that cotenants—and the oil and gas companies—will need to resort to partition suits. With production being able to start sooner, cotenants who wish to produce—and who potentially desperately need the royalty income—will realize the monetary fruits of their valuable mineral rights in a timelier fashion.

### *ii. Benefit to Surface Owners and West Virginia as a Whole*

Second, the Co-Tenancy Act will lead to an economic impact from increased production that will benefit all West Virginians. The economic impact extends past the oil and gas owners and operators, and also applies to surface owners who will benefit from increased drilling that will result from the Co-Tenancy Act.<sup>215</sup> Indeed, surface owners will be compensated for having well pads placed on their land.<sup>216</sup> Further, the Co-Tenancy Act allows surface owners

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<sup>215</sup> See DEMARCO, *supra* note 75.

<sup>216</sup> *The 2018 Cotenancy Law (HB 4268) Does Good Things for Surface Owners*, W. VA. SURFACE OWNERS' RTS. ORG. (June 6, 2018), <https://wvsoro.org/the-2018-cotenancy-law-does-good-things-for-surface-owners/> [hereinafter *Surface Owners*].

to reclaim mineral interests of missing owners who, after seven years of production, have not come forward to accept royalties owed to them as the result of production.<sup>217</sup>

Additionally, surface owners will be benefited in non-financial ways. First, surface owners will benefit because if more, larger, or longer drilling units can be successfully made, then this means less wells overall will be drilled to develop larger areas.<sup>218</sup> Accordingly, a smaller amount of wells needed to be drilled will mean that there will be less overall surface disruption.<sup>219</sup> The Co-Tenancy Act requires oil and gas operators to obtain permission from surface owners before an operator uses the Act to drill a well or construct other structures to facilitate the production of gas—and therefore protecting the surface owner's property.<sup>220</sup>

The Co-Tenancy Act will also help West Virginia as a whole. The recent boom in natural gas production has led to direct and indirect employment for West Virginians,<sup>221</sup> and the increased production that will likely result from the passage of the Co-Tenancy Act will only help expand upon this. The increase in employment will put more money in the pockets of West Virginians and help lead to an overall, positive impact on business volume in the state.<sup>222</sup> Finally, the state will benefit from increased severance tax revenue as a result of increased production.<sup>223</sup>

### 3. Interest Owners Who Do Not Wish to Develop Their Interest Are Also Benefited by the Co-Tenancy Act

The Co-Tenancy Act fairly accounts for nonconsenting cotenants while still allowing for increased ease of production. Nonconsenting cotenants are afforded reasonable compensation under the Co-Tenancy Act, which brings them other benefits as well.

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<sup>217</sup> W. VA. CODE ANN. § 37B-1-4.

<sup>218</sup> *Surface Owners*, *supra* note 216.

<sup>219</sup> *Id.* While at the same time, increased drilling on larger and longer laterals will result in economic benefit to surface owners. *Id.* Thus, it appears to be a win-win for surface owners as a group.

<sup>220</sup> *Id.*

<sup>221</sup> *See Report Finds Oil & Gas Industry Supports Over 70,000 WV Jobs*, *supra* note 57.

<sup>222</sup> *See* Joshua P. Fershee, *The Oil and Gas Evolution: Learning from the Hydraulic Fracturing Experiences in North Dakota and West Virginia*, 19 TEX. WESLEYAN L. REV. 23, 27–28 (2012).

<sup>223</sup> *Id.* at 28.

*i. Nonconsenting Cotenants Are Fairly Compensated Under the Co-Tenancy Act*

The Co-Tenancy Act will ultimately lead some cotenants who own interests in oil and gas to develop the minerals without their consent to do so. The Co-Tenancy Act, however, fairly compensates such cotenants. Under the Co-Tenancy Act, a non-consenting cotenant will be able to elect their remedy. The first option available to a nonconsenting cotenant is to elect to receive the highest royalty signed by a consenting cotenant and receive a signing bonus as to the average cotenant.<sup>224</sup> A nonconsenting cotenant, in the alternative, can elect to do nothing—and after 45 days will be deemed to have accepted the first option.<sup>225</sup> Finally, a nonconsenting cotenant can elect to receive a pro rata share of the total revenue generated from the production after costs are deducted.<sup>226</sup>

The compensation offered to nonconsenting cotenants is fair because it allows these cotenants to choose their remedy and receive a royalty equal to the highest offered to consenting cotenants.<sup>227</sup> Before the passage of the Co-Tenancy Act, nonconsenting cotenants would have likely been subject to compensation from partition suits—a much less favorable outcome. Indeed, when compared to compensation that would be offered under partition by sale—which normally is set by the gas companies and is often less than what the cotenant would realize from the production of minerals<sup>228</sup>—the Co-Tenancy Act provides an excellent remedy.

*ii. Nonconsenting Cotenants Benefit in Other Manners as Well*

Further, the Co-Tenancy Act benefits nonconsenting owners in a multitude of other aspects. First, because oil and gas operators now have another method to begin development other than partition suits when faced with nonconsenting cotenants, it is likely that less suits will happen—and this will save money for owners that do not wish to produce. In return, these owners will likely realize a greater share of the proceeds from production. Also, the Co-Tenancy Act's limited nature in scope further helps to protect interest owners. Because the Co-Tenancy Act only applies to tracts with seven or more cotenants in an oil and gas estate, not all tracts that an operator, or cotenant, wishes to develop will be affected.<sup>229</sup> Finally, the high burden that is placed upon

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<sup>224</sup> W. VA. CODE ANN. § 37B-1-4(b)(1) (West 2019).

<sup>225</sup> *Id.* § 37B-1-4(c).

<sup>226</sup> *Id.* § 37B-1-4(b)(2).

<sup>227</sup> *Id.* § 37B-1-4.

<sup>228</sup> *See* Brown, *supra* note 113.

<sup>229</sup> *See* W. VA. CODE ANN. § 37B-1-4.

the oil and gas operators (75%),<sup>230</sup> sufficiently protects interest owners. Indeed, the Co-Tenancy Act requires the highest interest percentage in the nation in regard to other co-tenancy legislation—with most states only requiring an operator to accumulate 51% of the oil and gas rights.<sup>231</sup> Accordingly, while the Co-Tenancy Act will undoubtedly effect a large portion of tracts held by cotenants, it does not affect all—and therefore serves as a compromise between stakeholders. Thus, the Co-Tenancy Act clearly operates as a balance between protecting the rights of cotenants who do not wish to produce by applying to a narrow scope of tracts and requiring a heavy burden on operators, while at the same time helping oil and gas operators begin production more easily.

*C. In Light of the Passage of the Co-Tenancy Act, West Virginia Should Continue to Abstain from Passing a Forced Pooling Bill*

Forced pooling has been declared a moot point in West Virginia by some legislators following the continued failure of forced pooling bills to pass in Charleston.<sup>232</sup> However, industry representatives will undoubtedly look to extend the victory represented by the Co-Tenancy Act to another, more drastic measure: a newly crafted forced pooling bill. Indeed, forced pooling would represent a larger victory for oil and gas operators, and some companies—even in light of the Co-Tenancy Act—still believe that West Virginia needs more favorable laws to motivate production.<sup>233</sup> Thus, despite claims to the contrary, forced pooling will likely—once again—be an issue faced by West Virginia's legislature.

1. The Co-Tenancy Act Sufficiently Modernizes West Virginia's Oil and Gas Law, and the Benefits of the Co-Tenancy Act Make Forced Pooling Unneeded

Forced pooling is regarded as one of the preferred ways to help alleviate the many problems created by the rule of capture.<sup>234</sup> There are a number of

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<sup>230</sup> See *id.*

<sup>231</sup> Dwayne O'Dell, *New WV Laws Enable Gas Development, Protect Farms, Other Interests* CHARLESTON GAZETTE-MAIL (May 31, 2018), [https://www.wvgazette.com/opinion/gazette\\_opinion/op\\_ed\\_commentaries/dwayne-o-dell-new-wv-laws-enable-gas-development-protect/article\\_71lead517-71a1-5593-957b-d5c36da64ded.html](https://www.wvgazette.com/opinion/gazette_opinion/op_ed_commentaries/dwayne-o-dell-new-wv-laws-enable-gas-development-protect/article_71lead517-71a1-5593-957b-d5c36da64ded.html).

<sup>232</sup> Marks, *supra* note 131.

<sup>233</sup> See Cocklin, *supra* note 118.

<sup>234</sup> See Sylvester & Malmshemer, *supra* note 92, at 49. The rule of capture resulted in the loss of millions of dollars due to inefficient and unnecessary drilling, and forced pooling laws were one of several measures implemented to help combat these issues. *Id.* See generally James E. McDaniel, Note, *Statutory Pooling and Unitization in West Virginia: The Case for Protecting Private Landowners*, 118 W. VA. L. REV. 439 (2015).



arguments in favor of forced pooling including: it creates greater efficiency in production,<sup>235</sup> it represents a more efficient manner of forming drilling units,<sup>236</sup> and it helps protect the correlative rights of landowners.<sup>237</sup> The Co-Tenancy Act, however, operates to achieve all of these goals.

Indeed, the Co-Tenancy Act has been hailed as an effective way to make production more efficient by needing fewer wells,<sup>238</sup> helping create larger—and longer—drilling units,<sup>239</sup> and allowing landowners to develop the resources under their property while simultaneously protecting cotenants who do not want to produce.<sup>240</sup> While it will not be possible to force adjacent tracts to pool in, it will be easier for oil and gas producers to create these units because when an individual holds out in neighboring tracts, the Co-Tenancy Act will apply (in circumstances with seven or more cotenants—a likely scenario). Accordingly, the cumulative effect will be similar to forced pooling. Thus, the Co-Tenancy Act offers many of the desired benefits of a forced pooling bill, while at the same time not going as far as forcing adjacent landowners to comply with the desires of owners who wish to produce.

## 2. The Co-Tenancy Act Serves as a Viable Alternative to Partition by Sale and Thus Lessens the Need for a Forced Pooling Bill

Further, the Co-Tenancy Act will likely help lower the amount of partition suits necessary and thus alleviate the industry's and state's resources in this area.<sup>241</sup> One of the strongest calls for forced pooling to be adopted is that the only alternative measure to help further production, when there are nonconsenting interest owners, has been partition actions.<sup>242</sup> Others have argued that West Virginia's partition by sale process lacks efficiency, and a forced pooling measure should be adopted to help stimulate production.<sup>243</sup> Indeed, previously, developers could only rely on partition suits when there was a disagreement among cotenants on whether to produce; now, however, the Co-Tenancy Act serves as a viable alternative to the use of partition suits. Therefore, it stands, that the argument for forced pooling to help alleviate the use

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<sup>235</sup> See DEMARCO, *supra* note 75.

<sup>236</sup> *See id.*

<sup>237</sup> Sylvester & Malmsheimer, *supra* note 92, at 48.

<sup>238</sup> *See supra* Section III.B.2.ii.

<sup>239</sup> Young, *supra* note 11.

<sup>240</sup> *See supra* Section III.B.2.ii.

<sup>241</sup> *See supra* Section III.B.1.ii.

<sup>242</sup> *See Brown, supra* note 113.

<sup>243</sup> See Zachary H. Warder, Note, "Nay" to Forced Pooling: The Stagnation of West Virginia's Natural Gas Industry, 120 W. VA. L. REV. 689, 718–19 (2017).

of partition actions is less persuasive because of the impact the Co-Tenancy Act will have on the oil and gas industry.

### 3. The Co-Tenancy Act Serves as a Compromise, and Forced Pooling Would Push the Boundaries of This Compromise

Finally, the Co-Tenancy Act is understood to be the product of compromise between stakeholders to modernize West Virginia's oil and gas industry.<sup>244</sup> Indeed, even though the Co-Tenancy Act is a way to help jumpstart the production of oil and gas, it is also seen to protect the property rights of West Virginia's landowners.<sup>245</sup> A forced pooling bill would only infringe more on the rights of landowners who do not want to produce—and betray the compromise, and happy medium, found in the Co-Tenancy Act. West Virginia should continue to abstain from resorting to requiring oil and gas owners to be forced into production merely because the mineral owners of nearby tracts wish to produce. Efficiency of production is undoubtedly important, but it should also have its bounds.

## IV. CONCLUSION

The Co-Tenancy Act represents a much-needed change in West Virginia's oil and gas law. The passage of the Co-Tenancy Act has brought West Virginia closer in line with other major producing oil and gas states by modernizing West Virginia's co-tenancy law in regard to oil and gas production. Thanks to the Co-Tenancy Act, West Virginia now falls under the majority rule for cotenant production of oil and gas. This will likely lead to increased production and hopefully continue the infusion of economic activity in the state.

While the Co-Tenancy Act has moved West Virginia law forward to help cater to the increased production, it still respects the rights of landowners. Indeed, the Co-Tenancy Act's limited scope illustrates this compromise, along with the high threshold that operators must reach to begin production without 100% agreement among landowners. Moreover, the Co-Tenancy Act gives nonconsenting cotenants fair remedies if the oil and gas operator has acquired the required percentage of ownership to begin production without the minority's consent.

Finally, the compromise of the Co-Tenancy Act also imbues benefits across a wide spectrum of stakeholders. Oil and gas operators, consenting and nonconsenting cotenants, surface owners, and the state will see some benefit from the Co-Tenancy Act. In light of this compromise—and the remedy of issues posed by the rule of capture—West Virginia should continue to abstain from passing a forced pooling bill. A forced pooling bill would push the boundaries

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<sup>244</sup> See Kercheval, *supra* note 185.

<sup>245</sup> See *id.*

of the compromise embodied by the Co-Tenancy Act and should be avoided as the Co-Tenancy Act addresses many of the concerns that predicate why many call for forced pooling. In closing, the Co-Tenancy Act represents a victory in some capacity to all stakeholders—and should be celebrated as such—but forced pooling would be a bridge too far.

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\* J.D., West Virginia University College of Law, 2019; B.A. History, West Virginia University, 2016. The Author would like to thank the members of the *West Virginia Law Review* for their hard work and dedication in preparing this Note for the Volume 122 publication. He would also like to thank his family and friends for their constant support during this process. Any errors contained herein are the Author's alone.