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Implied Uses: Balancing the Rights of Operators and Surface Owners

The Supreme Court of Appeals of West Virginia affirmed the order of the Mass Litigation Panel (“MLP”) in *Andrews v. Antero Res. Corp.*, 2019 W. Va. Lexis 358, granting summary judgment in favor of Defendants, Antero Resources Corporation and Hall Drilling, LLC. This case highlights that, to successfully litigate a nuisance claim against operators, West Virginia landowners must prove that they have suffered damages that are not reasonable or necessarily incident to the development of minerals.

Plaintiffs, being surface estate landowners in Harrison County, alleged that the use and enjoyment of their land was being improperly and substantially burdened by horizontal well operations occurring on five (5) well pads located less than one mile away from their properties. No well pads were located on the Plaintiffs’ properties, and the oil and gas was severed from the surface estates in the early 1900s. The MLP found that Antero had the leasehold rights to develop the severed oil and gas.

The MLP concluded that the impacts of drilling operations alleged by the Plaintiffs, including annoyance, traffic, fumes, odors, noise, lights and dust, were within the Defendants’ implied rights to use the surface pursuant to the severance deeds and did not impose a substantial burden on the surface owners. The Supreme Court of Appeals affirmed the decision stating that mineral owners have the “implied right to ‘use the surface in such manner and with such means as would be fairly necessary for the enjoyment of their estates in the minerals’” (internal citation omitted) and rejecting Plaintiffs’ assertion that mineral owners do not have the right to extract natural gas using methods not contemplated at the time of the severance.

The Court also set forth that *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E. 2d 721 (1980), provides the test for balancing the rights of surface owners and mineral owners in relation to implied uses of the surface estate. The Court in *Buffalo Mining* explained that:

[W]here implied as opposed to express rights are sought, the test of what is reasonable and necessary becomes more exacting since the mineral owner is seeking a right that he claims not by virtue of any express language in the mineral severance deed, but by necessary implication as a correlative to those rights expressed in the deed. In order for such a claim to be successful, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner.

The Court explained that the Defendants would be within the proper exercise of their surface rights to enter upon the Plaintiffs’ properties to drill wells, construct roads, lay pipelines, etc. if doing so was reasonably necessary for the extraction of the minerals and was not substantial burden to the surface owner. The Court elaborated that complaints arising from drilling taking place on other properties (i.e. traffic, lights, noise, etc.) is not a substantial burden. In this case, the Plaintiffs failed to present evidence establishing that Defendants’ operations were unreasonable, excessive, or resulted in a substantial burden to the surface owners.

For questions regarding the *Andrews* decision or a copy thereof, please contact the Energy Group at Dickie, McCamey & Chilcote, P.C.



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