"Nay" to Forced Pooling: The Stagnation of West Virginia's Natural Gas Industry

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“NAY” TO FORCED POOLING: THE STAGNATION OF WEST VIRGINIA’S NATURAL GAS INDUSTRY

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I. INTRODUCTION

At 11:00 p.m., Delegate Pat McGeehan voted “no,” and House Bill 2688 failed; it was the last day of the West Virginia Legislature’s 2015 session.\(^1\) The Legislature was shocked because House Bill 2688, also known as the “forced pooling” bill, was widely expected to pass.\(^2\) But Delegate McGeehan had other plans, and the forced pooling bill failed for the fifth time in the last six years.\(^3\) Had the bill passed, it would have revolutionized the drilling industry in West Virginia.

While the above narrative may be perceived by some as politics as usual, the negative impact this bill’s failure has had on the state of West Virginia is very real. In 2014 alone, West Virginia lost 2,840 coal industry jobs.\(^4\) In that same timeframe, the entire Appalachian region lost 7,110 jobs.\(^5\) These numbers spell out a dire future for states like West Virginia that have historically depended on coal to fuel the economy. Instead, states like West Virginia must pivot and embrace other sources of energy, such as natural gas. However, until a forced pooling bill, like House Bill 2688, passes the West Virginia Legislature, drilling for natural gas in West Virginia will remain inefficient. Indeed, in the absence of a forced pooling statute, new and innovative ways to encourage pooling and unitization should be explored, encouraged and adopted so that the economic benefits of the natural gas industry may be fully utilized.

In order to stymie West Virginia’s economic downfall, it is imperative that the Legislature pass a forced pooling statute. However, if the politicians are unable to embrace forced pooling, then the judiciary should encourage natural gas development by interpreting an implied covenant in favor of drilling or a presumption in favor of drilling into the state’s common law.

Part I of this Note will explore the history of natural gas extraction in West Virginia, the economic benefits the natural gas industry has been proven to

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2 Id.


5 Id.
provide, West Virginia’s partition process, and the political future of forced pooling in the Jim Justice and Donald Trump administrations. Part II will then argue for the passage of a forced pooling bill in West Virginia and analyze how forced pooling should be implemented to best reap the economic benefits of the natural gas industry. Finally, because the West Virginia Legislature has rejected the idea of forced pooling on West Virginia’s Marcellus Shale, Part III will explore two alternative options that should be implemented in lieu of forced pooling. These options streamline the partition by sale process either by (1) installing a rebuttable presumption in favor of drilling, or (2) establishing an implied covenant that favors the extraction of natural resources.

II. BACKGROUND

This Part will begin with a brief outline of the hydraulic fracturing process. It will then summarize the various forced pooling schemes utilized throughout the United States. Next, this Part will summarize the partition and title search process as well as the use of an implied covenant in favor of the extraction of natural resources. Then it will explain the complicated history of natural gas extraction in the United States and in West Virginia. It will do this by first providing an overview of West Virginia’s current natural gas policy and then by providing a look at how forced pooling statutes can provide economic benefits to local state economies. Finally, it will explore the political future of forced pooling in West Virginia under the new Trump and Justice administrations.

A. Overview of Natural Gas Extraction Methods

Horizontal drilling is the industry’s preferred method of extraction for many reasons. The primary advantage of horizontal over vertical drilling is horizontal drilling has the ability to reach a greater area of a shale formation from a single well location. In contrast, it would take multiple vertical wells to reach the same area of the shale formation.

As a result, horizontal drilling provides less surface impact and maximum oil and gas production from a single well location. In addition,
horizontal drilling is more likely to keep groundwater from being contaminated by fracking fluids, gas, or produced water.  

1. Economic Impact of Horizontal Drilling

The discovery of horizontal drilling has had a massive impact on the drilling on West Virginia’s Marcellus Shale. This new method of extraction has extended the availability of natural gas in the Marcellus Shale region by decades. This, in turn, has provided long term stability to the oil and natural gas companies in the region. Indeed, the newfound access to the Marcellus Shale’s massive gas reserves has undoubtedly provided a boost to West Virginia’s economy and created thousands of new jobs. A West Virginia University study found that the oil and gas industry has already added $4.5 billion in direct impact earnings as well as 9,869 jobs to the economy. These jobs have, in turn, led to $551.9 million in wages.

West Virginia was better prepared than other states to weather the storm of the incoming fracking boom with the advent of horizontal and hydraulic drilling. This is due to West Virginia’s long history as an energy state. However, unlike other boom states, West Virginia harbors a 5% severance tax on natural resources that applies to oil, gas and coal. A severance tax is imposed

This Note will refer to the process as “fracking,” although the industry prefers to use “fracing.” Tom Knox, Will this settle it? Merriam-Webster picks ‘fracking’ over ‘fracing’, COLUMBUS BUS. FIRST (May 21, 2014, 12:26 PM), http://www.bizjournals.com/columbus/blog/ohio-energy-inc/2014/05/will-this-settle-it-merriam-webster-picks-fracking.html. This is because the media (and even Merriam-Webster) uses “fracking” rather than “fracing.” Id.

Holsinger & Lemke, supra note 6, at 6.


Id. at 30.

Id.

Id. at 27–28.

Id. at 28.


Fershee, supra note 11, at 30.

Id.

W. VA. CODE ANN. § 11-13A-3 (West 2017); see also Fershee, supra note 11, at 30. The West Virginia Legislature recently failed to enact Senate Bill 705, which would have reduced the severance tax from 5% to 3% by July 2019. See S.B. 705, 82d Leg., Reg. Sess. (W. Va. 2016); West Virginia Severance Tax Bill Stalls, COAL AGE (Mar. 10, 2016, 11:01 AM),
by states on companies that drill for non-renewable resources. Unlike West Virginia, Pennsylvania and New York have no such tax, which further monetarily incentivizes the extraction of natural gas and the economic benefits it brings with it. While there are certainly economic benefits to natural gas drilling, the practice has plenty of critics.

2. The Safety Concerns Surrounding Hydraulic Fracturing

The main criticism of natural gas drilling is the perceived environmental impact the extraction process has on the surrounding surface area. One study found that half of the trees in the Fernow Experimental Forest, located in the Monongahela National Forest, had perished two years after hydraulic wastewater was “legally” dumped in the forest. This led the United States Forest Service to conclude that more research was required to determine how to safely dispose of hydraulic fracturing wastewater.

In West Virginia, concerns around hydraulic fracturing have a long history. In 1987, the Environmental Protection Agency (“EPA”) issued a report regarding the drinking water in Jackson County, West Virginia. In particular, the report found that traces of natural gas were present in the water, rendering it unusable.

This incident serves as a reminder of the safety dangers that hydraulic fracturing can pose to the public; however, if proper precautions are taken, the safety concerns and potential damage are avoidable. These proper precautions are continuously promoted through the promulgation of new industry


22 Fershee, supra note 11, at 28–29.

23 Id. at 28. The Fernow Experimental Forest was a study conducted by forest researchers in 2008. Justine Chow, U.S. Forest Service: Fracking Killed Trees, ENVIROBLOG (July 13, 2011), http://www.ewg.org/enviroblog/2011/07/us-forest-service-fracking-killed-trees. The study involved dumping 80,000 gallons of fracking fluid into a half-acre of the Monongahela Forest in West Virginia. Id. The researchers observed immediate damage to the area’s surface vegetation, and after two years, over half of the area’s trees had perished. Id.

24 Fershee, supra note 11, at 28.

25 Id. at 29.

26 Id.

27 Id.
standards. Indeed, these new industry standards have been coupled with often overly onerous regulations and oversight procedures. The combination of regulations and new industry practices have ensured that hydraulic fracturing and horizontal drilling are safer than ever.

B. The Various Schemes Employed by Forced Pooling Statutes

While the technology behind hydraulic fracturing has continued to evolve, the schemes for implementing forced pooling have remained relatively the same. Essentially, forced pooling’s enforcement mechanisms employ one of three recognized approaches: the “costs-only approach,” the “risk-penalty” approach,” and the “options given” approach. This next Section will analyze the pros and cons of each method.

1. The “Costs-Only” Approach

The costs-only approach has been adopted in Alaska, Arizona, Indiana, and Missouri. This approach is favored by those who are mostly concerned with preserving the property rights of private landowners. Indeed, none of them are included in the top five natural gas producers in America. The basic premise of the costs-only approach is that non-consenting owners are only held liable for the costs associated with drilling if the extraction of oil or gas is successful. A non-consenting owner also benefits from the costs-only approach because he is not held liable for any of the risks associated with the extraction of oil and gas.

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29 Fershee, supra note 11, at 35.
30 Id.
32 Id.
33 Id.
34 Id.
35 Id.
37 Harder, supra note 31.
38 Id.
The costs-only approach also has the unique effect of not only prioritizing the best interests of the non-consenting owner, but also deterring voluntary pooling agreements because it creates advantageous incentives for owners to holdout. However, in the alternative, it can discourage drilling because the burden of risk is completely shifted to the drilling companies. Here is a snapshot of how Alaska utilizes the costs-only approach:

Alaska’s scheme is also unique in that it allows landowners to drill on their individual parcels in the event that a voluntary pooling agreement cannot be reached and the conditions are not met for a compulsory pooling order. In this case, a landowner would be allowed to extract only an amount of oil or gas proportionate to their share of the overall drilling area.

This distinctive wrinkle to the overall costs-only approach scheme further demonstrates how some states prefer to favor the private ownership rights of the holdout owners over the drilling companies. Some states shirk the costs-only method in favor of the decidedly more drilling company-friendly risk-penalty approach.

2. The “Risk-Penalty” Approach

The risk-penalty approach is the most commonly utilized method for pooling and unitization among the nation’s top oil and gas producing states. This method places a penalty on the non-consenting owner, which effectively compensates the drilling company for bearing the risks that come with drilling for gas and oil. The penalty is owed by the non-consenting landowner upon the successful extraction of oil and gas. It is generally calculated as a percentage of the non-consenting landowner’s compensation.

The motivation behind the risk-penalty approach, unlike the costs-only approach, is to encourage holdout owners to enter voluntary pooling agreements

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39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
45 Id.
46 Harder, supra note 31.
47 Id.
by penalizing them for holding out.48 Holdout owners are meant to be motivated to seek out voluntary pooling agreements rather than pay the penalty, which can be as high as 300% of the reasonable cost to produce the oil and gas;49 however, the risk-penalty percentage varies by state.50 The following describes how Colorado utilizes and calculates the risk-penalty:

Colorado uses a risk-penalty approach, wherein any non-consenting landowner must pay for 100 percent of his share of equipment and operating costs for the well[,] as well as 200 percent of his share of costs incurred in well exploration (this is the risk penalty).51

It is likely no coincidence that the nation’s largest oil and gas producing states typically utilize some form of the risk-penalty approach, as these states place a premium on extracting their natural resources.52 However, some states that are rich with natural resources choose to employ the options given approach.53

3. The “Options Given” Approach

West Virginia is among the states that have chosen to utilize the options given approach for forced pooling on the Utica Shale.54 The forced pooling scheme proposed in House Bill 2688 for the Marcellus Shale utilized the options given method as well.55 This method permits non-consenting owners to choose from a list of options when presented with a compulsory pooling order.56 The hope behind this method is that one of the options presented to the holdout owner will be well-suited for their specific needs.57

These options typically include an automatic option that kicks-in if a non-consenting owner does not make a timely decision.58 Proponents of this method tout the similarities between the options given approach and the actual

48 Baker, supra note 44, at 239.
49 Id.
50 Harder, supra note 31.
51 Id.
52 See id.
53 See id.
54 W. Va. CODE ANN. § 22C-9-7 (West 2017); see also Harder, supra note 31.
56 See Harder, supra note 31.
57 Id.
58 Id.
The major benefit of these similarities is that they allow landowners to choose the option that is best for them. The disadvantage of this method is that it can dissuade landowners from entering into voluntary pooling agreements. It also can cause lengthy delays in the drilling process as landowners may opt to take the “wait and see” approach, whereby they evaluate their options ad nauseam in an effort to find the perfect agreement. West Virginia’s options given approach operates as follows:

[1] In West Virginia, non-consenting landowners may either: 1) sell their mineral interests to participating landowners for just consideration or 2) elect to participate on a limited basis (without sharing full costs) on terms to be determined by the board entering the order. These terms may or may not include the payment of a risk-penalty.

Although West Virginia’s options given approach shares some common elements with the risk-penalty approach, these elements do not assuage the delays and inefficiencies that the overall options given scheme incurs on the drilling industry. These inefficiencies must be cured for West Virginia to fully reap the economic benefits that the natural gas industry can provide.

C. A Summary of the Partition Process

Partition actions are a legal remedy used to resolve disputes between co-owners of property. Partition actions often take quite a bit of time to get resolved; it can take anywhere from two to three months for a court to even schedule a partition hearing. Generally, an affirmative judgment in a partition action has two outcomes. One such outcome is that the property will be divided between the owners, thus, terminating co-ownership. This outcome is referred

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59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
65 Id.
67 Partition Law Primer, supra note 64.
to as partition in kind.\(^6\) The alternative outcome is that the land will be court-ordered to be sold.\(^6\) This outcome is called partition by sale.\(^7\) Not surprisingly, this is the outcome that natural gas companies usually pursue when bringing partition suits against mineral right owners who refuse to sell.\(^7\)

When the land in question is ordered to be sold, the court orders one or more co-owners to sell their interest in the property to one or more other co-owners at an appraised value.\(^7\) Typically, a judgment ordering a forced sale is fairly uncommon,\(^7\) but gas companies have managed to achieve forced partition sales at a much higher success rate.\(^7\) Indeed, the eventual partition judgment order has become almost inevitable.\(^7\) Some lawyers have started to advise mineral owners embroiled in partition suits to negotiate the most favorable lease terms and sign because it is not worth fighting the gas company and losing money.\(^7\)

The first step in the sales process is usually the appointment of a commissioner who will serve as the court's point of contact and decision maker throughout the sales process.\(^7\) The order that appoints the commissioner typically contains highly detailed instructions as to how the partition by sale is supposed to proceed.\(^7\)

However, when the land subject to the partition suit is being sold from one set of co-owners to another set of co-owners, the court typically oversees the sale directly.\(^7\) In these cases, the court typically orders a sale price of $2,500 per acre.\(^8\) This valuation is almost always exclusively based on evidence introduced

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68 Chang & Fennell, supra note 66.
69 Partition Law Primer, supra note 64.
70 Id.
72 W. VA. CODE ANN. § 37-4-3 (West 2017); Partition Law Primer, supra note 65.
73 Partition Law Primer, supra note 64.
74 Brown, supra note 71. More often than not, holdout mineral owners sign over their rights before judgment because they run out of money to finance their legal expenses. Id. Antero, one of the biggest gas producers in the Marcellus region, had 10 of 16 partition suits dismissed in Doddridge County because the holdout mineral right owners agreed to sign leases. Id.
75 Id.
76 Id.
78 W. VA. CODE ANN. § 37-4-3 (West 2017); Partition Law Primer, supra note 64.
79 § 37-4-3; see also Brown, supra note 71.
80 Brown, supra note 71.
by the gas companies because the mineral owners frequently lack the resources to challenge the gas companies’ assertions. As long as gas companies own some portion of the disputed mineral rights, they have standing to sue for partition by sale. Even the slightest amount of ownership is sufficient to bring suit. These are just some of the reasons why mineral rights owners feel that forced partition sales are not ideal solutions for dealing with land disputes involving gas companies.

Despite the mineral rights owners’ discontent with the practice, partitions by sale have been utilized as a legal remedy for quite some time. Partition suits were originally developed in England and were used exclusively to solve surface rights disputes between co-owners. Partition suits have just recently been re-appropriated to settle disputes between mineral rights co-owners. However, the partition as a legal remedy for mineral rights owners is not a perfect solution. The Honorable Timothy Sweeney, Circuit Judge for the Third Judicial Circuit in West Virginia, stated that using a partition suit to acquire mineral rights is like trying to fit a “round peg into a square hole.” However, in lieu of a forced pooling, partition suits have become natural gas companies’ most frequently utilized method for achieving unitization.

1. The Use of Partition Suits to Form Drilling Units

Recently, Judge Sweeney has shed doubt on the legal viability of partition suits as a method for natural gas companies to form drilling units. His judicial circuit covers Doddridge, Pleasants, and Ritchie Counties. While his decisions are not binding on other West Virginia courts, his opinions have not been overturned, and they may represent how other West Virginia judges feel

81 Id.
82 W. VA. CODE ANN. § 37-4-3 (West 2017); Brown, supra note 71.
83 § 37-4-3; Brown, supra note 71.
84 See Brown, supra note 71.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
about the utilization of partition actions in natural gas disputes. If his decisions are indicative of how the West Virginia judiciary feels, it could become more difficult for a petitioner to demonstrate the three necessary elements to achieve a partition by sale. These three elements are as follows: “(i) the property cannot be conveniently partitioned in kind, (ii) the interest of one or more party will be promoted by sale, and (iii) the interest of the other parties will not be prejudiced by [a partition] sale.”

As described by Spilman, Thomas & Battle, PLLC, in Judge Sweeney’s decision in Elder v. Diehl, Judge Sweeney decided that “partition is not an absolute and unqualified right.” Judge Sweeney went on to state that “absent satisfaction of the legal prerequisites to forced sale, there is no right to partition by sale[,] and the same is properly denied notwithstanding a finding that the subject property interest [is] not capable of a convenient partition in kind.”

Perhaps most significantly, Judge Sweeney found that due to the uncertain value of oil and gas mineral interests, “a public sale is deficient and inadequate to calculate and equitably reflect the value of such interests, thus creating substantial risk of prejudice to the owners of not realizing a fair value for their respective interests.” Until the Supreme Court of Appeals of West Virginia hears the case, or a case with a similar point of law, it is likely that the uncertainty around the viability of partition actions for mineral rights in West Virginia will continue.

D. Pennsylvania’s Implied Covenant

Like West Virginia, Pennsylvania is rich in natural gas and sits on large portions of both the Marcellus and Utica Shales. There are currently 66 operators working in the state and 7,788 active natural gas wells drilling on the Marcellus Shale throughout the state. However, in Pennsylvania, there is no uncertainty surrounding the viability of partition actions over mineral rights. This is because the Supreme Court of Pennsylvania has recognized an implied

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92 See Clark & Herlihy, supra note 90.
93 See id.
94 Id.
95 Id.
96 Id.
97 Id.
99 Id.
covenant between a lessee and a lessor to develop underground resources. This provides natural gas companies seeking a partition in sale a significant advantage because courts are inclined to decide in favor of drilling as long as the gas company is actively drilling and the mineral owners are adequately compensated.

Due to the complicated nature of partition suits, some may wonder why vast land units are required in order to drill. Prior to the discovery of hydraulic fracturing, the main method for oil and gas extraction was vertical drilling. Natural gas companies have since moved away from vertical drilling and adopted the latest method, horizontal drilling.

E. Overview of the Natural Gas Industry, Its Economic Benefits, and West Virginia’s Natural Gas Policy

West Virginia sits on top of one the richest natural gas regions in North America. This region is comprised of both the Marcellus and Utica Shales. Although the depth varies, the Utica Shale is typically located several thousands of feet below the Marcellus Shale. In West Virginia, a drilling unit must be formed before natural gas may be extracted from either of these shales. A drilling unit is the minimum amount of acreage required, usually by state law, before a natural gas drilling project is legally allowed to commence. These drilling units are usually not required to be larger than 640 acres. This acreage requirement is somewhat unique, as most states require a minimum of 640 acres to form a drilling unit. This is not the only drilling practice West Virginia employs that differs from most states.

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102 See Norm’s, 2015 WL 7112968, at *4.
103 Holsinger & Lemke, supra note 6, at 3–4.
104 Id. at 5–6.
107 Id.
108 W. VA. CODE ANN. § 22C-9-7 (West 2017).
111 Id.
Unlike most states, West Virginia requires drilling companies to acquire 100% of a proposed drilling unit’s mineral rights before a drilling project can commence on the Marcellus Shale.112 Drilling companies typically acquire the required rights by leasing mineral rights from the interest owner or interest owners.113 Due to this requirement, West Virginia landowners are being approached by natural gas companies in droves with offers to lease their mineral rights.114 As early as 2008, landowners in Wood County, West Virginia, were typically offered $100–$200 (sometimes up to $1,000) per acre and royalty payments of at least 16.66% on all the natural gas extracted from the land.115 In addition, right of way pipelines commanded a payment of $10 per foot.116 These payments provided a flush of income that many West Virginia mineral rights owners were not expecting.117

1. The Economic Benefits of the Natural Gas Boom & Forced Pooling Statutes

Indeed, local economies across the Marcellus Shale region have benefited greatly from the natural gas boom.118 In Big Flats, New York, a town of just 7,000, the local economy has been boosted by $30,000 to $40,000 in average royalty payments and more than a million dollars in bonus payments from the drilling companies.119 The promise of added revenue has caused many state legislatures to enact statutes which streamline the drilling process.120 Typically, states with forced pooling statutes do not require gas companies to reconcile 100% of the mineral rights before beginning to drill on the Marcellus

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112 W. VA. CODE ANN. § 22C-8-11 (West 2017).
113 See Baca, supra note 110.
114 Marcellus Shale in West Virginia, supra note 105.
115 Id. In 2013, most West Virginia lease offers went for $1,350 per acre and a 12.5% royalty. Duane Nichols, Marcellus Gas Royalties in PA and WV, FRACK CHECK WV (Nov. 21, 2013), http://www.frackcheckwv.net/2013/11/21/marcellus-gas-royalties-in-pa-and-wv/. The evolution in leasing offers can be attributed to the growth of the natural gas industry. Id. Pennsylvania even has a statutorily mandated minimum 12.5% royalty payment. Id.
116 Marcellus Shale in West Virginia, supra note 105.
117 Id.
118 See Baca, supra note 110.
119 Id.
120 See id.
Shale. West Virginia has no such statute, despite a median poverty rate of 18.5% in 2014 and the continued decline of the coal industry.

In contrast, New York only requires ownership of 60% of the mineral rights in order for New York’s oil and gas board to consider a driller’s request for compulsory pooling. Some states, like Virginia, require as little as 25% of the mineral rights to be leased before a pooling hearing may be scheduled with the state’s oil and gas board.

2. Forced Pooling in West Virginia

Pooling occurs when individual mineral right owners join their interests together in order to share profits and efficiently extract natural gas. Although pooling and unitization are used relatively interchangeably, the two terms are slightly different. Pooling is typically used to describe the incorporation of smaller tracts of land around a single well. Often, state spacing laws and drilling standards necessitate pooling. On the other hand, unitization describes the consolidation of mineral rights needed to cover an entire mutual source of natural gas or oil. These two practices do have slight differences; forced pooling statutes, however, can be used to compel both unitization and pooling.

As a corollary, these statutes effectively ease the burden of acquiring an entire unit’s mineral rights prior to drilling. Indeed, title searches in states like

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121 See id.

122 See Republicans, supra note 1.


124 N.Y. ENVT'L. CONSERV. LAW § 23-0901 (McKinney 2005); see also Baca, supra note 110 (stating that 39 states currently have some form of a forced pooling law).

125 VA. CODE ANN. § 45.1-361.21 (West 2017); see also Baca, supra note 110.


128 Id.

129 Id. There are often a myriad of drilling requirements with which a prospective project must comply before a drilling permit will be issued. See, e.g., Checklist for Horizontal 6A Permit, W. VA. DEP’T ENVT'L. PROT., http://dep.wv.gov/oil-and-gas/Permits/Horizontal%20Well%20Permit%20Packet/Documents/Individual%20Forms/Horizontal%206A%20Permit%20Checklist%2012-30-2013.pdf (last updated Aug. 20, 2013); Checklist for Completing an Application for a Permit to Drill, Operate or Alter an Oil or Gas Well, PA. DEP’T ENVT'L. PROT. (2012), http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-87985/8000-PM-OOGM0001%20Checklist.pdf.

130 Davis, supra note 127.

131 See Wright, supra note 109.
West Virginia can become quite complicated.\(^{132}\) Some of the mineral rights in West Virginia can be traced back to the heirship of the King of England.\(^{133}\) Still, in some instances West Virginia title examinations stall because a deed refers to someone’s unknown heirs.\(^{134}\) This is a problem because, as the former executive director of the West Virginia Oil and Natural Gas Association, Corky DeMarco, so poignantly stated, “How do you find someone’s unknown heirs?”\(^{135}\)

Some states have attempted to solve this issue through legislative action.\(^{136}\) In fact, West Virginia has established proceedings for the conveyance of mineral interests when an owner has gone missing or is simply unknown.\(^{137}\) The West Virginia Legislature justified this legislative action by explicitly stating that it is the state’s public policy to encourage the development of natural resources and remove certain barriers that inhibit this policy.\(^{138}\)

Despite this explicit policy, drilling companies argue that drilling projects have stalled in West Virginia.\(^{139}\) The consensus among the drilling companies is that West Virginia should follow the majority of states and pass its own version of a “forced pooling” bill.\(^{140}\) This would effectively ease the title search burden and facilitate drilling in West Virginia’s Marcellus Shale

\(^{132}\) See generally John W. Fisher, II, The Scope of Title Examinations in West Virginia Revisited, 111 W. VA. L. REV. 641, 644 (2009) (discussing the steps of the title examination process as it pertains to West Virginia).


\(^{134}\) See Forced Pooling, supra note 133.

\(^{135}\) Id.

\(^{136}\) See Harder, supra note 31.

\(^{137}\) W. VA. CODE ANN. § 55-12A-4 (West 2017).

\(^{138}\) Id. Ohio has a similar statute, which addresses the abandonment and preservation of mineral interests. OHIO REV. CODE ANN. § 5301.56 (West 2017). If a surface owner can prove that the owner of mineral interests that correspond with his surface rights has abandoned his rights, then the court will vest the mineral rights with the surface owner. Id.

\(^{139}\) Forced Pooling, supra note 133.

\(^{140}\) Id. Any possible forced pooling statute in West Virginia should take into consideration the recent ruling in Legget v. EQT Prod. Co., 800 S.E.2d 850, 868 (W. Va. 2017). In Legget, the court held that royalty payments under section § 22-6-8(e) of the West Virginia Code may be subject to pro-rata deduction or an allocation of reasonable post-production expenses actually incurred by the lessee. Id. This makes standard flat-rate lease agreements far less desirable for prospective oil and gas lessors.
region. In 2015, the West Virginia House of Delegates listened to the concerns of the drilling companies and introduced House Bill 2688.

3. Summary of the Failure of Forced Pooling in West Virginia

Much like Virginia and New York’s forced pooling law, House Bill 2688 would allow forced pooling if the driller owns or has leased the mineral rights below 80% of the proposed unit. However, the bill has been met with stiff resistance from a coalition of House Democrats and Republicans. Pat McGeehan, R-Hancock, is part of this coalition and perhaps the most adamant opponent of the bill. Delegate McGeehan views forced pooling as nothing more than “government price-fixing and eminent domain.” Apparently, he is not the only delegate that shares this view: 48 of his colleagues joined him in voting “no” on the forced pooling bill, effectively killing the measure.

Even in states that have been able to pass forced pooling bills, the debate still rages over whether these statutes comply with our constitutional guarantees. Indeed, the Court of Common Pleas of Allegheny County, Pennsylvania, recently ruled in EQT v. Opatkiewicz that Pennsylvania’s Oil and Gas Lease Act did not violate the Constitution’s 5th or 14th Amendments. The language of the Pennsylvania statute specifically allowed for the development of natural gas projects through horizontal drilling unless explicitly prohibited by the existing leases. Horizontal drilling was statutorily authorized

141 Forced Pooling, supra note 133.
143 Forced Pooling, supra note 133.
144 Id.
145 Id.
146 Id. Eminent domain is a tool used by the government to take property for public use. Eminent Domain, LEGAL INFO. INST. [hereinafter Eminent Domain], https://www.law.cornell.edu/wex/eminent_domain (last visited Nov. 2, 2017). The Fifth Amendment provides that eminent domain is only allowed when just compensation is given to the owners of the property in question. Id. Forced Pooling, supra note 133.
149 Id.
150 58 PA. STAT. AND CONS. STAT. ANN. § 34.1 (West 2017).
even in the absence of an agreement on royalties between all the interest owners. The EQT decision is one of many favorable rulings for the nation’s gas companies, as courts have consistently held throughout the years that forced pooling statutes are constitutional. Regardless, due to the current natural gas boom and the now rampant use of forced pooling, there will likely be more constitutional challenges to forced pooling statutes in the future. This means that the future of forced pooling statutes is not yet certain.

The future of forced pooling in West Virginia is even more uncertain. In the wake of the recent gubernatorial election in West Virginia, the fate of forced pooling now rests in the hands of Governor Jim Justice. Whether he supports a forced pooling statute, however, remains to be seen.

4. Governor Jim Justice’s Plans for Forced Pooling

How can we be 50th? Jim Justice posed this question frequently to the voters during his 2016 campaign for Governor of West Virginia. Jim Justice won the race and now is tasked with finding ways to boost West Virginia’s economy so that it is no longer 50th. Governor Justice aims to achieve this goal by creating jobs. Indeed, Jim Justice touted his heightened ability to create jobs throughout his campaign. However, it does not appear that passing a forced pooling bill in order to create jobs is on his legislative agenda. Rather,

152 Id.
157 McElhinny, supra note 155.
158 Id.
159 Id.
160 Id.
161 Id.
it appears that his plans for expanding West Virginia’s energy sector revolve around the coal industry. 162

This is not surprising. Prior to becoming Governor, Jim Justice was President and CEO of Bluestone Industries, Inc. and Bluestone Coal Corporation. 163 Given his familiarity and financial ties with the coal industry, it is likely that his administration will exert much of its energy on revitalizing coal. 164 Indeed, no one may be more aware of the coal industry’s downfall than Jim Justice. It was reported on the campaign trail that Governor Justice’s mining companies owed $15 million in taxes and fines to six different states. 165 Out of that total, $4.71 million is owed to the State of West Virginia. 166 The sources of these fines and taxes include mine safety penalties, federal excise and unemployment taxes, federal income taxes, unpaid property and mineral taxes, and state coal severance and withholding taxes. 167

When his campaign was asked about his companies’ considerable amount of delinquent debt, his spokesman cited “the downturn in the coal industry.” 168 This downturn has left many mines bankrupt and has even led to the closure of several of Governor Justice’s mining operations. 169 These facts may well offer the Governor extra incentive to target the mining industry over the natural gas industry in his efforts to create jobs and boost West Virginia’s economy. Indeed, the Governor’s perceived preference for coal continues to leave the future of forced pooling in doubt.

5. President Trump’s Pledge to Bring Back Coal

If Governor Justice plans to revitalize the coal industry, he may very well have a powerful ally in the White House. Indeed, coal-oriented states overwhelmingly voted for Donald Trump over Hillary Clinton in the 2016

163 Id.
164 See id.
166 Id.
167 Id.
168 Id.
169 Id.
presidential election. But critics of President Trump are already claiming that out of all of his campaign promises, his promise to bring back coal may be the hardest to keep. The difficulty of this pledge is largely in part due to the decades long decline in the industry; this is a trend that will not be easy to reverse.

Even coal company CEOs are skeptical of President Trump’s promise. Robert Murray, CEO of Murray Energy Corporation, has told President Trump several times, “Please temper your commitment to my coal miners and your expectations of bringing the coal industry back. It cannot be brought back to what it was.” It does not appear from his rhetoric that President Trump heeded Mr. Murray’s request. Rather, President Trump continued to promise throughout his campaign to put miners back to work and make them proud miners once again. Perhaps his most memorable campaign stop that revolved around coal occurred in West Virginia. It was there that he proudly donned a coal miner’s hat and proclaimed “Get ready, because you’re going to be working your a-- off.” His message must have resonated. President Trump won West Virginia by 42 points.

The President’s plans for achieving this goal seem to be wrapped up in a larger economic plan, which is focused on returning manufacturing jobs to America from overseas. He has also indicated that he plans to open up more federal land for mining in part of his overarching goal to utilize America’s enormous wealth of natural resources. Beyond coal, another natural resource President Trump plans to expand is natural gas.


172 Id.

173 Id.

174 Id.

175 Id.

176 Id.

177 Id.

178 Id.

179 Id.

However, some experts fear that his plans for natural gas may harm the industry. This is because nationally, natural gas has benefitted from two factors. One is the evolution of exploration techniques for crude oil. Another is the global effort to decrease greenhouse gas emissions, which overwhelmingly harms the oil industry. The United States currently has a massive supply of natural gas. President Trump has stipulated that he plans to further reduce the regulations currently in force on the natural gas industry. The fear is that any reduction in regulatory measures may lead to a spike in natural gas production. Experts fear this could be potentially catastrophic for the industry because the increased supply will simply not meet the demand. If this were to take place, it is likely that the largest benefactor would be the coal industry, which President Trump has made clear he intends to bring back. Thus, in West Virginia, and indeed nationally, the future of natural gas is unclear.

III. ANALYSIS

The West Virginia Legislature should examine new alternatives in order to facilitate drilling in the state. While West Virginia is not the only state to employ the options given approach, it is clear that the negative effect it has on the drilling companies makes this method far from ideal. West Virginia’s median poverty rate in 2014 was 18.5%, and as mining jobs continue to decrease, the poverty rate will likely continue to rise. It is imperative, therefore, that a new policy for pooling and unitization on the Marcellus Shale is implemented. In lieu of a forced pooling law, such as House Bill 2688, the Legislature should first explore the viability of other states drilling policies and determine if their methods would be well-suited for West Virginia.

Due to West Virginia’s failing economy, the Legislature must find a forced pooling method palpable to both Democrats and Republicans and pass a

182 Id.
183 Id.
184 See id.
185 See id.
186 Id.
187 Id.
188 See id.
189 See id.
190 See Brown, supra note 71.
191 Bertrand, supra note 123.
forced pooling statute. If this proves to be politically impossible, the state judiciary should follow the lead of other state judiciaries and encourage natural gas development by interpreting an implied covenant in favor of drilling or a presumption in favor of drilling into the state’s common law.

This Part will argue for the passage of a Marcellus Shale forced pooling bill in West Virginia. Then it will analyze the different approaches a forced pooling bill could take in order to best facilitate drilling and explain the economic benefits that go with efficient drilling procedures. Next, this Part examines some of West Virginia’s other options to facilitate drilling on the Marcellus Shale and, by extension, the state’s economy.

A. West Virginia Must Adopt a Forced Pooling Scheme

While forced pooling on West Virginia’s Marcellus Shale continues to be neglected,192 West Virginia has already passed an options given forced pooling bill for deep well projects on the Utica Shale.193 Should the West Virginia Legislature reconsider passing a forced pooling bill for the Marcellus Shale, it is likely that it will employ an options given approach as well. While this scheme would certainly boost the natural gas industry, a risk-penalty would be the state’s best option for the state’s economy. However, let us examine all three of the forced pooling schemes and how they may apply to West Virginia’s natural gas industry, starting with the costs-only approach.194

1. The Viability of the Costs-Only Approach in West Virginia

The costs-only approach has several distinct characteristics that lend itself favorably to West Virginia. Adopting this approach, however, would not be in the best interest of the state because it discourages companies to undertake ambitious drilling projects.195

Unfortunately, the fact that this approach favors private landowners over drilling companies is what makes it so attractive to the states that employ the costs-only approach. Indeed, there is evidence that a costs-only approach may find support in the West Virginia House of Delegates.196 The main criticism from those in the West Virginia Legislature who do not support forced pooling is that it shares too many similarities with eminent domain.197 A costs-only approach

192 Republicans, supra note 1.
193 W. VA. CODE ANN. § 22C-9-7 (West 2017).
194 Forced Pooling, supra note 133.
195 See generally Harder, supra note 31.
196 Forced Pooling, supra note 133.
197 Id.
may offer enough legal protection for holdout landowners, which could lead to a passable bill. However, it is far from certain that a costs-only approach could gain the support of Delegate McGeehan and the 48 other delegates who voted "no" on House Bill 2688.\textsuperscript{198}

Regardless, if it gains the support of Delegate McGeehan and his colleagues, it almost certainly will not have the support of the major gas companies. Drilling companies, such as Antero and EQT, which operate heavily in the state of West Virginia, can prove to be a powerful political lobby.\textsuperscript{199}

Needless to say, just because the bill can pass does not mean that it should pass. In this instance, any West Virginia bill proposing a costs-only drilling approach should be vehemently rejected. A costs-only approach would be even worse for the West Virginia economy than the already-in-place forced pooling statute on the Utica Shale. Because under the costs-only or options given approach the natural gas companies are forced to undertake all the risks and liability that accompany drilling projects, a costs-only approach would likely lead to less drilling in West Virginia.\textsuperscript{200} Less drilling would mean less drilling revenue for an already impoverished state.\textsuperscript{201} Denying the people of West Virginia the ability to reap the same economic benefits as the people of upstate New York and other natural gas rich regions would be the very definition of poor legislating.\textsuperscript{202}

Indeed, the states that do employ the costs-only approach would not be considered large gas producers. None of them are included in the top five natural gas producers in America.\textsuperscript{203} In fact, the top five producing natural gas states in America all employ either a "risks-only" approach or have some form of a forced pooling bill.\textsuperscript{204} West Virginia should consider following suit.

2. The Viability of the Risk-Penalty Approach in West Virginia

It is clear that drilling companies prefer the risk-penalty approach over the costs-only and options given approaches.\textsuperscript{205} However, instituting a risk-penalty forced pooling bill faces a significant barrier—passage in the West Virginia House of Delegates.

\textsuperscript{198} Id.
\textsuperscript{199} See generally Brown, supra note 71.
\textsuperscript{200} See generally Harder, supra note 31.
\textsuperscript{201} Bertrand, supra note 123.
\textsuperscript{202} See Baca, supra note 110.
\textsuperscript{203} U.S. ENERGY, supra note 36.
\textsuperscript{204} Harder, supra note 31.
\textsuperscript{205} See generally id.
Despite the legislative headwind, a risk-penalty approach has undeniable economic benefits.\textsuperscript{206} This is because the threat of paying a penalty incentivizes many holdout mineral owners to negotiate and eventually contract with gas companies.\textsuperscript{207} This clear incentive to make a deal yields desirable results.

First, if landowners are encouraged to end their holdouts and deal with the gas companies, then both sides will negotiate their own terms. This is a positive because it increases the chance of arm’s length negotiation and reduces the involvement of West Virginia’s Oil and Gas Conservation Commission.\textsuperscript{208} Again, this is a positive because the less government resources that are devoted to resolving mineral rights disputes means that the Commission’s time can be spent elsewhere, such as approving more drilling permits.

Second, fewer holdouts means more drilling, which, of course, means more economic benefits. Indeed, the economic benefits of the risk-penalty approach can already be seen in the states that employ this method.\textsuperscript{209} If West Virginia were to join these states in using the risk-penalty approach, it would certainly rise in the ranks of the nation’s top gas producers.\textsuperscript{210} This is because West Virginia sits on top of two of the richest natural gas shales in America.\textsuperscript{211} Unfettered access to it would go far toward improving West Virginia’s failing economy.\textsuperscript{212} The increase in active drilling projects would undoubtedly lead to an increase in industry jobs as well as an influx of cash for West Virginia’s mineral rights owners, similar to the economic impact seen in Big Flatts, New York.\textsuperscript{213}

In spite of the benefits, a forced pooling bill that is based on a risk-penalty scheme will likely be a tough sell in the West Virginia Legislature. This is a safe assumption because the Legislature just recently refused to pass a forced pooling scheme employing the options given approach.\textsuperscript{214} Again, most industry experts believe that the risk-penalty approach is the most advantageous to extraction companies.\textsuperscript{215} But it has also garnered criticism for being too favorable to drillers.\textsuperscript{216}

\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} W. Va. Code Ann. § 22C-9-7 (West 2017). Under the current statutory scheme for drilling the Utica Shale, West Virginia’s Commission on Oil and Gas is heavily involved. Id.
\textsuperscript{209} Id.
\textsuperscript{210} Harder, supra note 31.
\textsuperscript{211} King, supra note 106.
\textsuperscript{212} Bertrand, supra note 123.
\textsuperscript{213} See Baca, supra note 110.
\textsuperscript{214} H.B. 2688, 81st Leg., Reg. Sess. (W. Va. 2015); see also Republicans, supra note 1.
\textsuperscript{215} Harder, supra note 31.
\textsuperscript{216} Id.
Delegate Pat McGeehan and some others like him in the Legislature would likely agree with the criticism.\textsuperscript{217} It was Delegate McGeehan who likened the options given method proposed in House Bill 2688 to eminent domain.\textsuperscript{218} This was also a motivating factor for why Delegate McGeehan and his colleagues voted no on the bill.\textsuperscript{219} A proposed forced pooling bill with a risk-penalty scheme would likely meet the same fate as House Bill 2688 in the Legislature. This is because a risk-penalty scheme is just an options given scheme with more teeth. Thus, the eminent domain comparisons and concerns would likely persist to the detriment of West Virginia's economy.

Of course, there is a counter argument to Delegate McGeehan's comparison of forced pooling and eminent domain. Eminent domain is employed by the government against a private landowner.\textsuperscript{220} Here, the dispute is between two co-owners of a parcel of land's mineral rights.\textsuperscript{221} In contrast, the government requires no ownership prior to bringing an eminent domain action.\textsuperscript{222} Furthermore, forced pooling statutes have a requisite percentage of ownership that must be met before a forced pooling action can be taken.\textsuperscript{223} A majority of these forced pooling statutes require more than 50% ownership of a proposed unit prior to a forced pooling action being brought.\textsuperscript{224}

In the instances where a majority is required before a forced pooling action can be brought, such as the proposed forced pooling law in House Bill 2688,\textsuperscript{225} it only seems fair that holdout owners can be compelled to pool their interests with other consenting mineral owners. From a pure equity stand point, the ability of minority interest owners to hold up an entire drilling project and, as a corollary, the economic benefits that the consenting interest owners are owed, is unfair. This is because vesting a complete and total veto power in a minority interest owner is contrary to our entire "majority rules" system of government. It is also contrary to the West Virginia Legislature's express

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  \item \textsuperscript{217} Republicans, supra note 1.
  \item \textsuperscript{218} Id.
  \item \textsuperscript{219} Id.
  \item \textsuperscript{220} Eminent Domain, supra note 146.
  \item \textsuperscript{221} See Baca, supra note 110.
  \item \textsuperscript{222} Eminent Domain, supra note 146.
  \item \textsuperscript{223} See, e.g., N.Y. ENVTL. CONSERV. LAW § 23-0901 (Consol. 2005); VA. CODE ANN. § 45.1-361.21 (West 2017); W. VA. CODE ANN. § 22C-9-7 (West 2017).
  \item \textsuperscript{224} See, e.g., N.Y. ENVTL. CONSERV. LAW § 23-0901 (Consol. 2005); W. VA. CODE ANN. § 22C-9-7 (West 2017); see also Baca, supra note 110. But see VA. CODE ANN. § 45.1-361.21 (West 2017).
  \item \textsuperscript{225} H.B. 2688, 81st Leg., Reg. Sess. (W. Va. 2015), http://www.wvlegislature.gov/Bill_Text_HTML/2015_SESSIONS/RS/bills/hb2688%20intr.pdf. The proposed requisite amount of ownership needed in House Bill 2688 was 80%. Id.
\end{itemize}
mission of encouraging the development and extraction of natural resources by removing barriers that inhibit this stated interest.\textsuperscript{226}

Finally, eminent domain is a much more apt comparison to the current method being utilized by drilling companies to forced pooling, partition by sale.\textsuperscript{227} However, Delegate McGeehan and the West Virginia Legislature have continued to allow this to be utilized as an alternative method to forced pooling.\textsuperscript{228} In partition suits, West Virginia gas companies only need to have the slightest of ownership rights to bring a suit,\textsuperscript{229} not 80\% as was proposed.\textsuperscript{230} In addition, in partition suits, holdout landowners are required to spend money on legal fees,\textsuperscript{231} whereas with forced pooling statutes, the process is much more streamlined, so legal fees are not nearly as exorbitant.\textsuperscript{232} All in all, forced pooling, especially with a risk-penalty scheme, provides for a much more efficient drilling process.\textsuperscript{233} This allows for fewer wasted resources and a faster realization of the economic benefits of natural gas.

The comparison of forced pooling to eminent domain is a baseless one, especially when the current methods employed by gas companies are much more akin to the accused practice. This, coupled with the fact that partition by sale is an imperfect tool to achieve drilling units,\textsuperscript{234} makes it unclear why Delegate McGeehan and his colleagues voted no on House Bill 2688.\textsuperscript{235}

3. The Viability of the Options Given Approach

At first glance, the options given method of forced pooling appears to be the most palatable version for West Virginia legislators.\textsuperscript{236} After all, there is

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\item[\textsuperscript{226}] W. VA. CODE ANN. § 55-12A-1 (West 2017).
\item[\textsuperscript{227}] Brown, supra note 71.
\item[\textsuperscript{228}] Id.
\item[\textsuperscript{229}] W. VA. CODE ANN. § 37-4-3 (West 2017); see also Partition Law Primer, supra note 65; see generally Chang & Fennell, supra note 66.
\item[\textsuperscript{231}] Brown, supra note 71.
\item[\textsuperscript{232}] See, e.g., N.Y. ENVT. CONSERV. LAW § 23-0901 (Consol. 2005); W. VA. CODE ANN. § 22C-9-7 (West 2017); compare Brown, supra note 71, with Baca, supra note 110.
\item[\textsuperscript{233}] Harder, supra note 31.
\item[\textsuperscript{234}] See Clark & Herlihy, supra note 90; see also Brown, supra note 71.
\item[\textsuperscript{235}] Republicans, supra note 1.
\item[\textsuperscript{236}] See, e.g., W. VA. CODE ANN. § 22C-9-7 (West 2017); H.B. 2688, 81st Leg., Reg. Sess. (W. Va. 2015), http://www.wvlegislature.gov/Bill_Text_HTML/2015_SESSIONS/RS/bills/hb2688%20intr.pdf; see also Republicans, supra note 1.
\end{enumerate}
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already a deep shale forced pooling bill on the books.\textsuperscript{237} And, of course, the proposed forced pooling bill for the Marcellus Shale bill also utilized an options given approach.\textsuperscript{238} But this bill failed to pass.\textsuperscript{239} So, in reality, while it may be the most viable scheme for West Virginia, it still has its detractors.\textsuperscript{240} Furthermore, these detractors have successfully kept the options given approach from utilization on West Virginia’s Marcellus Shale.\textsuperscript{241} This is a problem for those who wish to reap the economic benefits that go along with efficient drilling.

However, the options given method does not necessarily guarantee the economic benefits and streamlined approach to drilling that a risk-penalty method does.\textsuperscript{242} The main reason for this is because the options given method fails to incentivize arm’s length negotiations between gas companies and mineral interest owners.\textsuperscript{243} Rather, the options given method encourages holdout mineral rights owners to wait and assess all their options before selling.\textsuperscript{244} Thus, this method may fail to adequately address the problem plaguing West Virginia’s drillers.

Drillers have already voiced their concerns that West Virginia’s laws have stagnated drilling in the state and staved off the related economic benefits.\textsuperscript{245} Indeed, some major companies have gone as far as to suspend their drilling operations in the state.\textsuperscript{246} If a forced pooling bill is passed that utilizes an options given scheme, then the issue of hold-outs biding their time and weighing their options may not assuage the problem of stalled projects in West Virginia.

That being said, forced pooling is better than no forced pooling. After all, the alternative is the continued use of partition by sale to compel landowners to sell their mineral rights.\textsuperscript{247} The partition process can take two to three years to complete\textsuperscript{248} and requires mineral owners to devote their time and money to

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  \item \textsuperscript{237} W. Va. Code Ann. § 22C-9-7 (West 2017).
  \item \textsuperscript{238} H.B. 2688, 81st Leg., Reg. Sess. (W. Va. 2015).
  \item \textsuperscript{239} Republicans, supra note 1.
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} Id.
  \item \textsuperscript{242} Harder, supra note 31.
  \item \textsuperscript{243} Id.
  \item \textsuperscript{244} Id.
  \item \textsuperscript{246} Buurma, supra note 245.
  \item \textsuperscript{247} Brown, supra note 71.
  \item \textsuperscript{248} Partition Law Primer, supra note 64.
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defend their claim in a court of law.\textsuperscript{249} This is not a desirable alternative; thus, if an options given method is the only forced pooling scheme that can pass in West Virginia, pass it.

4. Forced Pooling Is a Must for West Virginia

In conclusion, West Virginia needs a forced pooling bill in order to boost the struggling local economy and simplify the drilling process. However, the scenarios by which forced pooling yields these results are varied. For instance, a forced pooling bill should not be passed if it employs a cost-based scheme. This is because a cost-based approach shifts all the risks associated with drilling on the drill companies.\textsuperscript{250} This could have the disastrous effect of discouraging even more drilling companies to suspend operation on West Virginia’s Marcellus Shale.\textsuperscript{251}

Rather, a forced pooling bill should only be considered if it enacts an options given or risk-penalty method. A risk-penalty approach would be most advantageous to the West Virginia economy. This is because it incentivizes holdout mineral owners to negotiate, rather than tie up the court system with partition litigation and stall drilling projects.\textsuperscript{252} However, this approach is not likely to pass the West Virginia Legislature.\textsuperscript{253} Thus, if an options given forced pooling statute is the only form of forced pooling that can pass, it should be passed. While it is not perfect, mainly because it continues to encourage holdout owners to holdout,\textsuperscript{254} it is better than the alternative of partition by sale.

B. If West Virginia Cannot Adopt Forced Pooling, Then Alternatives to Forced Pooling Must Be Explored and Implemented

If forced pooling cannot pass the West Virginia Legislature, then another alternative must be adopted because the status quo is not working. The West Virginia Legislature and Judiciary could consider streamlining the partition process in drilling suits. This can be achieved in a myriad of ways, but this Note will explore two options. The first option is recognizing an implied covenant to drill, much as West Virginia’s neighbor, Pennsylvania, has done. The second is installing a rebuttable presumption that favors drilling companies in partition by sale suits.

\textsuperscript{249} Brown, supra note 71.
\textsuperscript{250} Harder, supra note 31.
\textsuperscript{251} Buurma, supra note 245; see also Ross, supra note 245.
\textsuperscript{252} Harder, supra note 31.
\textsuperscript{253} See generally Republicans, supra note 1.
\textsuperscript{254} Harder, supra note 31.
1. The Judiciary Must Consider an Implied Covenant in Favor of Drilling in West Virginia

Until the Legislature passes a forced pooling bill that adequately addresses the problem natural gas companies face in forming drilling units in West Virginia, it would behoove the state of West Virginia to adopt an implied covenant to develop underground resources similar to Pennsylvania’s implied covenant. This would facilitate drilling and economic growth so that communities in West Virginia can reap the same benefits from natural gas drilling as other states located on the Marcellus Shale. In 2011, oil and gas created 10% of all the new jobs in the United States. If West Virginia were to adopt Pennsylvania’s implied covenant for underground resources, then job creation has the potential to soar beyond 10%.

In addition, an implied covenant may have an alternative effect on holdout mineral owners. It may dissuade holdouts from going to court over partition suits. This would be advantageous because it would promote negotiations and ease the judicial burden on the holdout owners much like risk-penalty forced pooling has the potential to accomplish. Ultimately, this might effectively assuage the stagnation of drilling on West Virginia’s Marcellus Shale.

2. The Judiciary Should Implement a Rebuttable Presumption in Favor of Drilling

Another method worth exploring is the idea of installing a rebuttable presumption in partition by sale suits involving drilling companies and holdout mineral rights owners. This could be accomplished by allowing juries to presume that certain elements have been met unless the mineral owner can rebut the presumption by introducing sufficient evidence to the contrary. It would allow this presumption for the first two of the three required elements necessary before a partition by sale can be ordered. The three required elements are as follows:

(i) the property cannot be conveniently partitioned in kind, (ii) the interest of one or more party will be promoted by sale, and (iii) the interest of the other parties will not be prejudiced by sale.

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255 Baca, supra note 110.
256 Holsinger & Lemke, supra note 6.
257 Harder, supra note 31.
258 Buurma, supra note 245.
259 W. VA. CODE ANN. § 37-4-3 (West 2017); see also Clark & Herlihy, supra note 90.
The rebuttable presumption would only come into play if (1) the drilling company has standing to bring the suit, and (2) it can be proven that the mineral rights sought by the drilling company are needed to sufficiently drill the proposed area. If these prerequisites can be shown, then elements one and two will have a rebuttable presumption in favor of the drilling company. By giving elements one and two a rebuttable presumption, the cost of litigation may be reduced for holdout mineral owners. This is because most cases will only be litigated over the question of third element of partition by sale. It also should reduce the length of time it takes for partitions by sale to be finalized. Another, and more desirable, effect may be that more holdout mineral owners will be persuaded to negotiate, so the number of partition by sale suits can be reduced all together. This new method of litigating petitions by sale would go a long way towards making the drilling of West Virginia’s Marcellus Shale more efficient.

3. Streamlining the Partition by Sale

In the absence of forced pooling on West Virginia’s Marcellus Shale, streamlining the partition by sale process should be an area of serious consideration. The drilling industry and West Virginia’s economy are in dire need of better procedures for extracting natural gas from the Marcellus Shale. By introducing an implied covenant to drill, much like Pennsylvania’s already in place implied covenant, West Virginia could accomplish this goal. This is because an implied covenant could effectively dissuade holdout owners from going to court and instead negotiate with drilling companies. This could also lead to less stalling of drilling projects and, of course, more economic benefits to the local economy.

Another method worth exploring is installing a rebuttable presumption in favor of ordering a partition by sale in suits involving drilling companies and holdout mineral owners. The rebuttable presumption would only favor the first two elements required in order to justify a partition by sale. This too could be a desirable and effective method for streamlining the drilling process because it could persuade more holdout mineral interest owners to negotiate and lease their rights to drilling companies. Thus, this method would pave the way for more drilling projects to be initiated and more money to flow into the borders of the State of West Virginia.

Ultimately, both of these alternatives pale in comparison to the option of a forced pooling statute. This is because if there is no forced pooling, partitions by sale would remain the only viable option to form sizeable enough units to drill

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260 Partition Law Primer, supra note 64.
261 Buurma, supra note 245; Bertrand, supra note 123.
efficiently on West Virginia’s Marcellus Shale.\textsuperscript{263} As aforementioned, partitions by sale are not viewed as the perfect alternative to forced pooling.\textsuperscript{264} They are time consuming,\textsuperscript{265} require money for legal fees, and of course, prevent drilling projects from commencing.\textsuperscript{266} However, in the wake of no forced pooling it would behoove West Virginia to explore implementing a rebuttable presumption for qualifying partition suits or an implied covenant. One thing is certain, the current system is not working.\textsuperscript{267}

IV. Conclusion

West Virginia’s economy is in shambles. As a result, economic stimulation via the enactment of a forced polling statute is essential. Thus, West Virginia’s state politicians must craft a bill that can pass the Legislature while also sufficiently stimulating the natural gas industry. If the Legislature fails to do so, then the state judiciary should encourage natural gas development by interpreting an implied covenant in favor of drilling or a presumption in favor of drilling into the state’s common law.

One thing is clear: West Virginia needs forced pooling on the Marcellus Shale. Forced pooling is required because West Virginia’s economy is failing,\textsuperscript{268} and the expansion of the natural gas industry in the State has the ability to provide an economic boost.\textsuperscript{269} However, forced pooling should only be introduced if it employs an options given or risk-penalty scheme. This is because these two options sufficiently address the problem of stalled drilling projects due to holdout mineral owners. A cost-based forced pooling scheme would be an undesirable alternative and should not be considered. This is because it dissuades drillers from attempting drilling projects by shifting all the risk of drilling to the gas companies.\textsuperscript{270} This would likely go even further in stagnating the drilling projects in West Virginia.

Delegate Pat McGeehan and his colleagues have refused to accept forced pooling on West Virginia’s Marcellus Shale by advancing a false comparison between forced pooling and eminent domain.\textsuperscript{271} Due to Delegate McGeehan’s and other state legislators’ resistance, the future of forced pooling in West

\textsuperscript{263} Brown, supra note 71.
\textsuperscript{264} Id.
\textsuperscript{265} Partition Law Primer, supra note 64; Brown, supra note 71.
\textsuperscript{266} Brown, supra note 71.
\textsuperscript{267} Buurma, supra note 245.
\textsuperscript{268} Bertrand, supra note 123.
\textsuperscript{269} Baca, supra note 110.
\textsuperscript{270} Harder, supra note 31.
\textsuperscript{271} Forced Pooling, supra note 133.
Virginia is uncertain. This uncertainty is only compounded by the policies and agendas that have yet to take shape both in the Governor’s Mansion in Charleston, West Virginia, and the White House. Governor Jim Justice has deep ties to the coal industry.\(^{272}\) He ran on the idea that revitalizing the coal industry is crucial to creating jobs in West Virginia.\(^{273}\) Furthermore, he has accumulated large amounts of debt due to the economic downturn of coal.\(^{274}\) Thus, it is not a stretch to surmise that Governor Justice’s allegiance is to coal and that his legislative agenda will largely revolve around pro-coal measures. This will leave little room for pro-natural gas bills because the two industries are in direct competition.\(^{275}\)

President Trump and Governor Justice may share the same vision for coal, which again threatens the future viability of the natural gas industry.\(^{276}\) President Trump ran up huge electoral numbers in traditional coal mining states.\(^{277}\) Thus, his presidency will always be tied to coal country and his insistence that he will bring back coal.\(^{278}\) President Trump’s Administration is likely aware of this fact, which is why it will probably pursue a largely pro-coal agenda.\(^{279}\) In contrast, President Trump’s plans for natural gas remain unclear, but some fear that his ambition may serve to cripple the industry, rather than boost it.\(^{280}\) Thus, given the political climate and the preference for coal, it is far from certain that forced pooling will become a reality in West Virginia.

However, other options should be explored. In the absence of forced pooling, most gas companies have turned to partition by sale in order to advance their drilling projects.\(^{281}\) A rebuttable presumption in favor or an implied covenant in favor of drilling would be two viable alternatives worth considering. Both would help ease the burden of uniting 100% of a drilling unit’s mineral interests before an extraction project may commence on the Marcellus Shale.\(^{282}\) However, partitions by sale are not an effective ways to compel owners to join a


\(^{273}\) See McElhinney, *supra* note 155.

\(^{274}\) Berkes, *supra* note 165.

\(^{275}\) Upadhyay, *supra* note 181.


\(^{277}\) Paterson, *supra* note 170.

\(^{278}\) *Id.*

\(^{279}\) See Wolfgang, *supra* note 171.

\(^{280}\) Upadhyay, *supra* note 181.

\(^{281}\) Brown, *supra* note 71.

\(^{282}\) *Id.*
particular drilling unit. They unnecessarily stall drilling projects and eat up legal fees.

Indeed, it is clear that uninhibited drilling on West Virginia’s Marcellus Shale would be a quick and easy way to boost West Virginia’s economy. Until Governor Jim Justice, Delegate McGeehan, and all of McGeehan’s colleagues who voted no on House Bill 2688 realize this, it will be West Virginia’s economy and, by extension, its citizens, who will suffer.

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283 Id.
284 Id.

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