

**STATUTORY POOLING AND UNITIZATION IN WEST VIRGINIA:  
THE CASE FOR PROTECTING PRIVATE LANDOWNERS**

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## I. INTRODUCTION

“Drainage! . . . Here, if you have a milkshake, and I have a milkshake, and I have a straw. . . . Now, my straw reaches across the room and starts to drink your milkshake. I drink your milkshake!”<sup>1</sup> This climactic quote occurs near the end of the 2007 film *There Will Be Blood*, when Daniel Plainview, an oil baron, explains to Eli Sunday, a longtime holdout on leasing his mineral interests, why Sunday’s property is now worthless.<sup>2</sup> Because of his stubbornness and desire for control, Eli had long refused to lease his church’s valuable mineral rights to Daniel.<sup>3</sup> Eli, however, had fallen on hard times, and after many years, he comes to beg Daniel to lease the property from him.<sup>4</sup> Eli is despondent at the news that his minerals are long gone because Daniel had drilled all the land surrounding Eli’s.<sup>5</sup> Despite the fact that Eli had decided not to lease his property, Daniel had recovered and profited from all Eli’s oil and gas anyway!<sup>6</sup> Even though Eli is set up as a manipulative villain in this particular movie, the above scene is a perfect and hyperbolic example of the effects of the “rule of capture,” which is the basis for much of oil and gas common law.<sup>7</sup> Because oil and gas gather underground in pools and deposits that often defy the boundaries of surface ownership, courts have long held that landowners may permissibly drain resources from neighboring properties.<sup>8</sup> In other words, a landowner acquires title to any oil and gas that he produces from wells drilled on his own property, even if the minerals migrated from adjacent tracts that lie over the same pool of minerals.<sup>9</sup>

Recently, technological developments such as directional drilling have provided the ability to economically produce natural gas from shale formations that have long been considered unfeasible for production.<sup>10</sup> This boom in production includes the Marcellus Shale underlying much of the Appalachian

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<sup>1</sup> *THERE WILL BE BLOOD* (Paramount Vantage 2007). For another piece that begins with this example, see Levi Rodgers, *Subsurface Trespass by Hydraulic Fracturing: Escaping Coastal v. Garza’s Disparate Jurisprudence Through Equitable Compromise*, 45 *Tex. Tech L. Rev. Online Edition* 99, 100 (2013).

<sup>2</sup> *THERE WILL BE BLOOD*, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; *see infra* Part II.A.

<sup>8</sup> *See infra* Part II.A.

<sup>9</sup> *Id.*

<sup>10</sup> MICHAEL RATNER & MARY TIEMANN, CONG. RESEARCH SERV., R43148, AN OVERVIEW OF UNCONVENTIONAL OIL AND NATURAL GAS: RESOURCES AND FEDERAL ACTIONS 1 (Apr. 22, 2015), <https://www.fas.org/sgp/crs/misc/R43148.pdf>.

Basin.<sup>11</sup> Because of these developments and increased production in the area, there has never been a more appropriate time to reexamine certain aspects of West Virginia's conservation law. Much like the rest of the country,<sup>12</sup> a majority of the state's oil and gas common law decisions are based on the rule of capture, an ancient doctrine considering its origins.<sup>13</sup> Esteemed scholars believe that the rule is too deeply embedded in American energy law to simply overturn after more than a century of effect, precedent, and reliance.<sup>14</sup> Although it may prove difficult to simply abandon the rule of capture and its progeny, if West Virginia wishes to continue as a prolific producer of oil and gas from the Marcellus Shale, it is certainly time to enact laws that limit the rule's effect in prominent drilling situations.

This Note argues that West Virginia should adopt a statutory pooling or unitization scheme for shallow oil and gas wells in order to ensure that correlative rights and conservation goals are satisfied in the continued development of the Marcellus Shale. Part II.A surveys the history and side effects of the rule of capture, while Part II.B discusses various common law and statutory responses meant to limit the rule. The history of the rule of capture and its limitations in West Virginia are embedded into those sections respectively. Part III.A and III.B analyze the substantial shortcomings of West Virginia common law and legislation to deal with the adverse effects of the rule of capture. They show that a statutory scheme for pooling or unitization of shallow wells would benefit landowners by giving them bargaining power and more options when negotiating leases with oil and gas operators. Lastly, Part III.C suggests how that legislation would benefit private landowners and the citizens of West Virginia.

## II. BACKGROUND

When the first oil well was drilled in the United States in 1859, it presented an interesting dilemma for systems of common law that understood mineral rights through the lens of the *ad coelum* doctrine.<sup>15</sup> *Ad coelum* is a shortening of the Latin maxim "cujus est solum, ejus est usque ad coelum et ad inferos," which is translated loosely as "whoever owns the soil owns up to the heavens and down to hell."<sup>16</sup> Although the maxim is phrased in Latin, the concept that ownership extended to the center of the earth did not exist in

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<sup>11</sup> ANTHONY ANDREWS ET AL., CONG. RESEARCH SERV., NATURAL GAS DRILLING IN THE MARCELLUS SHALE 1 (Sept. 9, 2009), [http://www.wvsoro.org/resources/marcellus/CRS\\_Marcellus\\_Shale\\_09\\_09\\_09.pdf](http://www.wvsoro.org/resources/marcellus/CRS_Marcellus_Shale_09_09_09.pdf).

<sup>12</sup> See *infra* Part II.A.

<sup>13</sup> See *Powers v. Union Drilling, Inc.*, 461 S.E.2d 844, 849 (W. Va. 1995).

<sup>14</sup> Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture—An Oil & Gas Perspective*, 35 ENVTL. L. 899, 951–54 (2005).

<sup>15</sup> See JOHN S. LOWE, OIL AND GAS LAW: IN A NUTSHELL 11 (6th ed. 2014).

<sup>16</sup> Laurie Ristino, *Resource Property Rights*, 25 NAT. RESOURCES & ENV'T 57, 58 (2011).

Roman law, but rather originated as a “hyperbole” in the Commentaries of William Blackstone.<sup>17</sup> Prior to Blackstone’s declaration that ownership extended to the center of the earth, English law seemed to limit subsurface ownership to that which was necessary for surface ownership, i.e. trees, crops, and near-surface resources.<sup>18</sup> In fact, “et ad infernos” (commonly translated as “to the center of the earth”) seems to have been added to the traditional maxim governing ownership “to the heavens” by courts that applied Blackstone’s theories of ownership.<sup>19</sup>

Due to the fact that early American courts relied extensively on Blackstone, this theory of ownership was adopted early in American jurisprudence and remains the accepted theory in current property law,<sup>20</sup> although it is subject to “many qualifications when actually applied.”<sup>21</sup> The remainder of Part II will address one of these qualifications called the rule of capture. Section A will describe the origins and effects of the rule, including its evolution in West Virginia law. Section B will explore various ways that the legislature and judiciary have attempted to limit the scope and effect of the rule.

#### A. *The “Rule of Capture”*

Minerals like coal fit neatly into the *ad coelum* theory of subsurface ownership because they do not move unless they are mined and removed.<sup>22</sup> Unfortunately, oil and gas are fugacious in nature and cannot be easily confined by artificially drawn boundaries of surface ownership; because oil and gas respond to pressure changes in their subsurface environment, a well that is drilled on a particular piece of property may predictably end up draining

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<sup>17</sup> John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979, 982–83 (2008); see also Yahuda Abramovitch, *The Maxim “Cujus Est Solum Ejus Usque Ad Coelum” as Applied in Aviation*, 8 MCGILL L. J. 247, 248–50 (1962) (summarizing scholarship which traces the origin of the idea to ancient Jewish law, including contracts for sale which granted “from the depth of the earth to the height of the sky,” and the Roman idea of absolute ownership). *But see* Abramovitch, *supra*, at 253–56 (tracing forms of the maxim back to the 13th century and pointing to a modified version of the maxim, which dealt with ownership to the heavens, developed by Lord Coke in the 16th century and adopted by William Blackstone in the 18th).

<sup>18</sup> Sprankling, *supra* note 17, at 982–84.

<sup>19</sup> *Id.* at 988.

<sup>20</sup> See *id.* at 989–91 (pointing out that the emergence of indefinite subsurface ownership in America was largely the result of the early courts’ blind reliance on Blackstone’s commentaries). John G. Sprankling suggests that this theory is hyperbole because it commonly encompasses far more subsurface use than is at issue and was dismissed as over-inclusive in regard to airspace ownership upon the advent of the airplane. *Id.* at 989, 1000.

<sup>21</sup> *Id.* at 991 n.63 (quoting 2 THOMPSON ON REAL PROPERTY § 14.04(a) (David A. Thomas ed., 2d ed. 2000)).

<sup>22</sup> Thomas A. Daily & W. 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).

resources from beneath neighboring tracts of land.<sup>23</sup> In response to this unique problem, courts turned to a doctrine called the “rule of capture,” which protects operators from liability when they recover the migrating minerals, which may have been located underneath a neighboring tract.<sup>24</sup>

The leading commentator Robert E. Hardwicke summarized the “fundamental” rule of capture, apart from its “refinements” and “corollaries,” as follows: “The owner of a tract of land acquires title to the oil or 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>25</sup> Although other rule of capture cases preceded it, the most commonly cited origin, or at least the clearest and earliest explanation, of the rule of capture in oil and gas is *Westmoreland & Cambria Natural Gas Co. v. De Witt*,<sup>26</sup> which involved a dispute between two lessees of a tract of land.<sup>27</sup> The court’s formulation in *De Witt* was essentially dicta<sup>28</sup> that explained the nature of oil and gas ownership in order to determine whether a particular lease had been forfeited by drilling a well and subsequently shutting it off.<sup>29</sup> However, the formulation elucidated the fact that gas, a mineral that has “peculiar attributes,” is more akin to water and must be treated differently than other minerals:

Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals [*ferae naturae*]. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their “fugitive and wandering existence within the limits of a particular tract [is] uncertain,” . . . They belong to the owner of the land, and are part of it, so long as they are on 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 a distant, owner, drills his

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<sup>23</sup> *Id.* at 240–42.

<sup>24</sup> See LOWE, *supra* note 15, at 13.

<sup>25</sup> Robert E. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 393 (1935); see also TERENCE DAINITH, *FINDERS KEEPERS?: HOW THE LAW OF CAPTURE SHAPED THE WORLD OIL INDUSTRY* 7 (2010) (“This rule has been perceived as essentially, one might say quintessentially, American: a rule that places a high value on vigor, on getting there first, on winning one’s wealth through free competition.”).

<sup>26</sup> 18 A. 724 (Pa. 1889).

<sup>27</sup> *Id.* at 724.

<sup>28</sup> Kramer & Anderson, *supra* note 14, at 906.

<sup>29</sup> *De Witt*, 18 A. at 724–25.

own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.<sup>30</sup>

These remarks by the court referring to oil and gas as *ferae naturae*<sup>31</sup> reflect the theory that though one might have the right to drill for oil and gas under his property, it is not his until he actually does drill and subject it to ownership. The court based its analysis on the treatment of property with similar attributes: groundwater and wild animals.<sup>32</sup> The following subsections will survey the theories of property ownership behind the rule of capture, the undesirable consequences of the rule, and the state of the common law in West Virginia.

### 1. Theories of Ownership

There are two competing theories of oil and gas ownership that provide the basis for the rule of capture. The first, and perhaps most consistent with the rule of capture, is the “non-ownership” theory; under this view, landowners have an interest in the oil and gas underneath their properties, which might be accurately characterized as “the exclusive right to reduce them to possession.”<sup>33</sup> The non-ownership theory holds that landowners have an “incorporeal right to use” whereby the actual oil and gas cannot be possessed until produced and “captured” by someone holding the requisite right to do so.<sup>34</sup> A minority of states apply this non-ownership theory.<sup>35</sup>

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<sup>30</sup> *Id.* at 725. Only a few years after it was decided, *De Witt* was cited with approval by the Supreme Court in discussion of a West Virginia case involving ownership of certain leased oil and gas rights. *Brown v. Spilman*, 155 U.S. 665, 670 (1895).

<sup>31</sup> “*Ferae naturae*” is defined as “wild; untamed; undomesticated.” *Ferae Naturae*, BLACK’S LAW DICTIONARY (8th ed. 2005).

<sup>32</sup> For the most relevant cases establishing the rule of capture in regards to wild animals and groundwater, see *Pierson v. Post*, 3 Cai. R. 175, 175 (N.Y. 1805) (“Pursuit alone gives no right of property in animals *ferae naturae*, therefore an action will not lie against a man for killing and taking one pursued by, and in the view of, the person who originally found, started, chased it, and was on the point of seizing it. Occupancy in wild animals can be acquired only by possession . . .”), *Acton v. Blundell*, 152 Eng. Rep. 1223, 1236 (1840) (“[T]he person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour’s well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action.”).

<sup>33</sup> Colleen E. Lamarre, Note, *Owning the Center of the Earth: Hydraulic Fracturing and Subsurface Trespass in the Marcellus Shale Region*, 21 CORNELL J.L. & PUB. POL’Y 457, 469 (2011) (quoting Michelle D. Baldwin, Note, *Ownership of Coalbed Methane Gas: Recent Developments in Case Law*, 100 W. VA. L. REV. 673, 676 (1998)).

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

<sup>35</sup> *Id.*

The majority of states, including West Virginia, adhere to the *ad coelum* influenced “ownership-in-place” theory, which says that landowners have an actual possessory interest in the oil and gas beneath their property in addition to the right to make use of it.<sup>36</sup> In other words, landowners in ownership-in-place states have a corporeal interest in fugacious minerals unless they migrate from beneath the property.<sup>37</sup>

Practically speaking, the rule of capture functions the same under both theories.<sup>38</sup> “It is inherent in the non-ownership theory” where oil and gas are only owned once reduced to possession, and it “is a caveat to the ownership-in-place theory” where the ownership is “subject to the right of others to divest” that ownership by capture.<sup>39</sup> The nature of this similarity is illustrated by the fact that early West Virginia cases focused on the “inherently migratory or vagrant nature” of oil and gas while the later ones were based “upon the notion that each has a fixed situs until disturbed or released by the act of man.”<sup>40</sup> This demonstrates a shift in West Virginia from the “non-ownership” theory to the “ownership-in-place theory,” but with no way to prove that gas recovered from adjacent property originated beneath their own, current landowners in West Virginia still cannot recover damages for drained resources.<sup>41</sup>

## 2. Side Effects of the Rule of Capture

Under both theories of ownership, the rule led quickly to overproduction as landowners drilled wells to try to protect their interest in the minerals that were underneath their land.<sup>42</sup> The necessity of drilling to protect one’s interest has to do with the nature of oil and gas reservoirs.<sup>43</sup> As discussed earlier, an oil and gas reservoir may underlay numerous individually owned tracts of land, and if only one of those landowners drills a well, under the pure rule of capture, he owns all of the oil and gas that he recovers from the communally owned reservoir.<sup>44</sup> Therefore, the only way for each individual landowner to protect his interest in the reservoir is to drill his own well—this leads “to excessive well density, substantial over-drilling, and waste, which

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<sup>36</sup> *Id.* at 466–68; *see syl. pt. 3, Williamson v. Jones*, 19 S.E. 436 (W. Va. 1894) (“Petroleum or mineral oil in place is as much a part of the realty as timber, coal, iron ore, or salt water.”).

<sup>37</sup> Lamarre, *supra* note 33, at 467–68.

<sup>38</sup> *See* LOWE, *supra* note 15, at 34.

<sup>39</sup> *Id.* at 34–35.

<sup>40</sup> Boggess v. Milam, 34 S.E.2d 267, 269 (W. Va. 1945).

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

<sup>42</sup> Sharon O. Flanery & Ryan J. Morgan, *Overview of Pooling and Unitization Affecting Appalachian Shale Development*, 32 ENERGY & MIN. L. INST. 457, 460 (2011), [http://www.emlf.org/clientuploads/directory/whitepaper/Flanery\\_Morgan\\_11.pdf](http://www.emlf.org/clientuploads/directory/whitepaper/Flanery_Morgan_11.pdf).

<sup>43</sup> *See* Daily & Barrier, *supra* note 22, at 241.

<sup>44</sup> *See id.*

include[s] undue surface waste, waste of economic resources, and waste of oil and gas reserves through premature depletion.”<sup>45</sup> The drilling of superfluous wells causes damage and inconvenience to surface owners because by necessary implication, they are subject to use of their property for the extraction of minerals.<sup>46</sup>

### 3. The Rule of Capture in West Virginia

“The rule of capture has a long-standing history in West Virginia.”<sup>47</sup> The earliest state case thought to deal with the issue is the 1886 case of *Wood County Petroleum Co. v. West Virginia Transportation Co.*,<sup>48</sup> which involved a couple in Ritchie County who leased a portion of their land “for the purpose of mining and excavating for rock and carbon oil” and “for [that] purpose only.”<sup>49</sup> The lessors alleged that the lessees had drilled a well to recover natural gas and had been using the gas, in an amount valued at five dollars per day, to power

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<sup>45</sup> Flanery & Morgan, *supra* note 42, at 460. The detrimental economic effect is best illustrated by the following:

If it costs \$700,000 to drill, complete, and equip a well that is capable of producing one-half (1/2) million MCF of gas from under ten separately owned, contiguous tracts, and if the price of gas is five dollars per MCF, that well will yield a gross income of \$2,500,000, or a profit of \$1,800,000. However, if each tract owner protects himself by drilling his own \$700,000 well, the owners will collectively lose \$4,500,000.

Daily & Barrier, *supra* note 22, at 241–42. The industry and legislative responses to this problem will be discussed later in Part II.C.

<sup>46</sup> See *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725 (W. Va. 1980). For a good summary of West Virginia surface use precedent, see *Whiteman v. Chesapeake Appalachia, LLC*, 729 F.3d 381 (4th Cir. 2013). In *Whiteman*, the oil and gas operator disposed of drill cuttings in pits on the plaintiff’s land in accordance with its plans for permitting and the notice given to the plaintiff. *Id.* at 383–84. The plaintiff argued that this use of the surface was not reasonably necessary because alternatives existed and were in use elsewhere in the industry, including by the defendant in other parts of the country. *Id.* at 392–93. The court determined that the question of “what is necessary is a fluid concept that must be determined on a case by case basis.” *Id.* at 388. In addition, the case-by-case determinations of an oil and gas operator will be given weight in this analysis, and both nationwide and local industry practice are relevant. See *id.* at 392–93. Subjective fears alone do not constitute a substantial burden on the surface owner if there is no stronger evidence of burdens such as reduction in property value or high probability of future injury. *Id.* at 392. Most importantly, the court reasoned that “reasonable necessity” is not synonymous with “necessity”; therefore, the open pit method employed by the defendant was reasonably necessary because it was the “common and ordinary method of disposal” and “consistent with permitting requirements.” *Id.* at 392–93. The court held that the defendant had not committed a trespass because its disposal of the drill cuttings was reasonably necessary and did not impose a substantial burden. *Id.* at 394.

<sup>47</sup> *Powers v. Union Drilling, Inc.*, 461 S.E.2d 844, 849 (W. Va. 1995).

<sup>48</sup> 28 W. Va. 210 (1886).

<sup>49</sup> *Id.* at 211.

the machinery they were using to produce oil.<sup>50</sup> The lessors sought the value of that gas because the lessees had refused to pay them for it.<sup>51</sup> The lessees contended that the gas was produced from their oil well and that it was, and always had been, an incident to the production of oil that they could not have hoped to avoid.<sup>52</sup> The court noted that the grant of a lease for mineral development includes the incident use of elements such as light, air, and water.<sup>53</sup>

Therefore, the determinative question in *Wood County Petroleum Co.* was whether or not natural gas is capable of absolute ownership.<sup>54</sup> By examining the history of gas production and the current knowledge of gas reservoirs, the court found “that it partakes more nearly of the character of the elements, air and water, than it does of those things which are the subject of absolute property.”<sup>55</sup> Admitting that there was relative scientific uncertainty as to the exhaustibility of natural gas resources, the court concluded that the lessee “could not certainly be guilty of either legal or equitable waste in the use of said gas.”<sup>56</sup> The court concluded that as long as the lessee only produced the gas incident to its production of oil, the lessor could not recover the value of the gas without a provision for such compensation in the lease.<sup>57</sup> Just like water and air, the court considered the lessee’s use of the gas to be *damnum absque injuria*.<sup>58</sup>

Although *Wood County Petroleum Co.* was decided almost 60 years earlier, the Supreme Court of Appeals of West Virginia has cited the 1945 case *Boggess v. Milam*<sup>59</sup> as the origin of the rule in West Virginia.<sup>60</sup> *Boggess* involved a plaintiff who owned a one-tenth interest in the minerals underlying a certain 116-acre tract.<sup>61</sup> He was given the opportunity to lease his interest but

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<sup>50</sup> *Id.* at 212.

<sup>51</sup> *Id.* at 212–13.

<sup>52</sup> *Id.* at 213–14.

<sup>53</sup> *Id.* at 215.

<sup>54</sup> *Id.* at 215–16.

<sup>55</sup> *Id.* at 216–17 (discussing the longevity and production of known gas sources).

<sup>56</sup> *Id.* at 218.

<sup>57</sup> *Id.* at 219.

<sup>58</sup> *Id.* at 220. *Damnum absque injuria* translates as “damage without wrongful act” and is defined as “[l]oss or harm that is incurred from something other than a wrongful act and occasions no legal remedy.” *Damnum Absque Injuria*, BLACK’S LAW DICTIONARY (8th ed. 2005).

<sup>59</sup> *Boggess v. Milam*, 34 S.E.2d 267 (W. Va. 1945).

<sup>60</sup> *Powers v. Union Drilling, Inc.*, 461 S.E.2d 844, 849 (W. Va. 1995). Although earlier cases discussed the matter, *Boggess* involved a clear discussion of state cases based on both “non-ownership” and “ownership-in-place” theories, elucidating a clear statement of the state’s view on mineral interest ownership and the rule of capture. *See Boggess*, 34 S.E.2d at 267; *see also Gain v. S. Penn Oil Co.*, 86 S.E. 883 (W. Va. 1915) (involving a similar fact pattern which the court in *Boggess* discussed extensively).

<sup>61</sup> *Boggess*, 34 S.E.2d at 267.

did not consent to the development of the property.<sup>62</sup> The lessee held a majority interest in the 116-acre tract and chose to unitize that interest with a neighboring 53-acre tract on which it drilled a well.<sup>63</sup> Although he owned no interest in the 53-acre tract, the plaintiff contended that the two tracts were merged because of the unitization<sup>64</sup> and that he was owed a share of the oil and gas being recovered from beneath the 116-acre tract.<sup>65</sup> The court reasoned, however, that there was merely a merger of contractual obligations, not a merger of actual title in the two tracts.<sup>66</sup>

After summarizing the state precedent on the nature of mineral interest ownership as discussed above,<sup>67</sup> the court issued the following syllabus point, which “announced . . . the common law rule of capture”<sup>68</sup>:

The owner of a minority interest in the oil and gas underlying a tract of land, the other interests in which are under lease, who refuses to execute the lease binding his cotenants and a unitization agreement embracing the tract mentioned and an adjoining boundary in which he has no interest and which is under lease to the same lessee, neither the lease nor the unitization agreement being under attack, has no equitable interest in the production of a well drilled by the lessee upon the adjoining boundary.<sup>69</sup>

Although this holding and syllabus point are very fact specific, they are supported by the underlying reasoning of the court that mineral interest owners have no interest in oil or gas recovered from wells on adjacent properties in which they own no interest.<sup>70</sup>

The West Virginia Supreme Court affirmed this ruling in the 1995 case *Powers v. Union Drilling, Inc.*,<sup>71</sup> which ruled against a plaintiff who claimed the defendant had committed trespass because of drainage from the plaintiff’s property.<sup>72</sup> By rejecting the claim that certain voluntary pooling and unitization statutes had made the common law rule of capture “highly suspect,” the court

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<sup>62</sup> *Id.* at 270.

<sup>63</sup> *Id.* at 267.

<sup>64</sup> For a general discussion of unitization, see *infra* Part II.B.2.ii.b.

<sup>65</sup> *Bogges*, 34 S.E.2d at 267.

<sup>66</sup> *Id.* at 270.

<sup>67</sup> *See supra* notes 40–41 and accompanying text.

<sup>68</sup> *Powers v. Union Drilling, Inc.*, 461 S.E.2d 844, 849 (W. Va. 1995).

<sup>69</sup> *Bogges*, 34 S.E.2d at syl. pt. 1.

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

<sup>71</sup> 461 S.E.2d 844 (W. Va. 1995).

<sup>72</sup> *Id.* at 847.

reinforced the common law rule of capture announced in *Bogges*, making it clear that the pure rule of capture is still in force in West Virginia.<sup>73</sup>

### B. Limitations to the Rule of Capture

Over time, both courts and congresses have sought to limit the undesirable effects of the pure rule of capture.<sup>74</sup> Because of advances in scientific technology and the accuracy of geologists, oil and gas reservoirs, along with their quantity and productivity, are far less mysterious than they used to be.<sup>75</sup> Comparisons with wild animals, air, and water are no longer prevalent.<sup>76</sup> The introduction of delay rental clauses in oil and gas leases in the latter part of the 19th century is credited with “ma[king] possible a systematic approach to petroleum exploration.”<sup>77</sup> In addition, certain wasteful practices such as excessive flaring caught the attention of state governments.<sup>78</sup>

However, courts have continued to rely on the rule of capture as a basis for property concerns in oil and gas recovery because by the time a correct understanding of “reservoir geology . . . and areal drainage” might have allowed for litigation that prevented drainage, overturning the rule would have led to unpredictable problems in the industry.<sup>79</sup> Despite a reluctance to discard the rule of capture, both courts and legislatures have employed a number of responses to deal with the problems that it presents.<sup>80</sup> As explained below, the correlative rights doctrine and conservation law both attempt to ensure that owners receive their “fair share” of the minerals under their property.<sup>81</sup>

#### 1. Correlative Rights

As early as 1935, Robert Hardwicke noted that the rule of capture was viewed as responsible for “most of the evils thought to exist in the oil business” and that people assumed that “it authorize[d] the taking of another’s

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<sup>73</sup> *Id.* at 849. *Powers* involved a discussion of the voluntary nature and purpose behind West Virginia’s provisions for the pooling and unitization of deep wells. *Id.*

<sup>74</sup> LOWE, *supra* note 15, at 22.

<sup>75</sup> *Id.*

<sup>76</sup> M. K. Woodward, *Ownership of Interests in Oil and Gas*, 26 OHIO ST. L.J. 353, 355 (1965).

<sup>77</sup> DAINTITH, *supra* note 25, at 175.

<sup>78</sup> *Id.* at 177. For a more in-depth summary of these developments, see *id.* at ch. 7.

<sup>79</sup> Terence Daintith, *The Rule of Capture: The Least Worst Property Rule for Oil and Gas*, in PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES 140, 150 (Aileen McHarg et al. eds., 2010).

<sup>80</sup> LOWE, *supra* note 15, at 22.

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

property.”<sup>82</sup> One limitation on the rule of capture is the correlative rights doctrine.<sup>83</sup> Correlative rights have long limited the application of the rule of capture in order to ensure maximum recovery and give reservoir co-owners their fair share.<sup>84</sup> The doctrine of correlative rights contends that when someone has the right to produce oil and gas from their property, they should “have a fair and reasonable opportunity” to produce their “fair share” without interference from “the negligent or intentional actions of another party” or unjust deprivation by the state.<sup>85</sup> If the rule of capture is viewed as a rule of non-liability meant to encourage exploration and production of natural resources, the idea of correlative rights is a logical outgrowth of the rule because waste and negligence are inconsistent with an interest in efficient resource production.<sup>86</sup>

The idea of correlative rights stands in stark contrast to the pure rule of capture. The earliest decisions regarding correlative rights were decided in Indiana around the turn of the 20th century; at first, they involved due process challenges to conservation statutes that prohibited waste that would be injurious to others or the public at large, such as the waste of gas from a reservoir owned by multiple people.<sup>87</sup> However, the focus of the Indiana Supreme Court later shifted more toward a common law limitation to the rule.<sup>88</sup> In *Manufacturers’ Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*,<sup>89</sup> the court faced the question of whether one operator could pump oil and gas from a common supply, possibly recovering more than other operators.<sup>90</sup> Rather than comparing oil and gas to wild animals or groundwater, the court compared it to surface water, limiting an operator’s right to recovering only the natural flow of gas by reasonable means that do not injure or destroy a “common source of supply.”<sup>91</sup> Around the same time, the Kentucky Court of Appeals limited the pure rule of

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<sup>82</sup> Hardwicke, *supra* note 25, at 391–92. This notion was backed up by geologists such as Henry L. Doherty, who was in favor of a federal compulsory unitization statute to prevent the drilling of unnecessary wells. See Kramer & Anderson, *supra* note 14, at 900–01.

<sup>83</sup> LOWE, *supra* note 15, at 18.

<sup>84</sup> David E. Pierce, *Minimizing the Environmental Impact of Oil and Gas Development by Maximizing Production Conservation*, 85 N.D. L. REV. 759, 772 (2009).

<sup>85</sup> Brigid R. Landy & Michael B. Reese, Note, *Getting to “Yes”: A Proposal for a Statutory Approach to Compulsory Pooling in Pennsylvania*, 41 ENVTL. L. REP. NEWS & ANALYSIS 11044, 11049 (2011).

<sup>86</sup> See LOWE, *supra* note 15, at 18–19.

<sup>87</sup> See Kramer & Anderson, *supra* note 14, at 911–13.

<sup>88</sup> *Id.* at 915.

<sup>89</sup> 57 N.E. 912 (Ind. 1900).

<sup>90</sup> Kramer & Anderson, *supra* note 14, at 915–16.

<sup>91</sup> *Id.* at 916.

capture by requiring “due regard” for other owners in a common supply and condemning intentional waste and injury to other producers.<sup>92</sup>

While the Supreme Court of Appeals of West Virginia has not placed such a firm correlative rights limit as some states have on the rule of capture, there are several cases and doctrines that reflect a desire to limit the negative effects of the rule.<sup>93</sup> For instance, in *Atkinson v. Virginia Oil & Gas Co.*,<sup>94</sup> the plaintiff claimed injury when the defendant sunk a well a mere 100 feet from his own well on adjacent property.<sup>95</sup> The alleged injury arose when the defendant abandoned the well without plugging it, allowing water to seep into the common formation and obstruct production from the plaintiff’s well.<sup>96</sup> Reasoning that a landowner is “bound to use his property in such manner as not to injure the property of the adjacent owner, provided he could avoid such injury by the exercise of care and abstention from negligence,” the court considered that the pollution of an oil and gas well was similar to the pollution of a water well and provided a cause of action.<sup>97</sup> In addition to the statutory penalty for failing to plug an abandoned well,<sup>98</sup> the court concluded that the defendant could be held liable for negligent injury to another’s interest in oil and gas:

Though a gas well is not so essential to the enjoyment of premises as a water well, it is nevertheless valuable, and necessary, in the legal sense of the term, to the full enjoyment of the premises. Hence wanton or negligent injury to it ought, upon principle, to call for redress in the courts as in the case of such injury to wells supplying water for domestic purposes.<sup>99</sup>

The duties which are implied in oil and gas leases also serve as an attempt to protect lessors from the rule of capture by requiring that lessees develop and drill in such a manner so as to provide mutual benefit to the lessee and lessor and protect their leasehold from the drainage of adjacent operations.<sup>100</sup> In *Adkins v. Huntington Development & Gas Co.*,<sup>101</sup> the Supreme

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<sup>92</sup> *Id.* at 918. While Indiana declined to allow producers to use artificial means such as pumping or compressors, the courts in both Kentucky and Pennsylvania did not prohibit any production technique as unlawful for a common supply. *Id.* at 919.

<sup>93</sup> See *Atkinson v. Va. Oil & Gas Co.*, 79 S.E. 647 (W. Va. 1913); see also *Adkins v. Huntington Dev. & Gas Co.*, 168 S.E. 366 (W. Va. 1932). See generally Part III.C (describing the current state of conservation law in West Virginia).

<sup>94</sup> 79 S.E. 647 (W. Va. 1913).

<sup>95</sup> *Id.* at 647–48.

<sup>96</sup> *Id.* at 648.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 648–49.

<sup>99</sup> *Id.* at 648.

<sup>100</sup> *Jennings v. S. Carbon Co.*, 80 S.E. 368, 369 (W. Va. 1913) (“There is in every lease on land for the production of oil and gas a condition, implied when not expressed, that, when the

Court of Appeals of West Virginia demonstrated its application of these principles by forcing an operator to drill an offset well.<sup>102</sup> The plaintiffs alleged that the defendant operators had failed to drill a sufficient number of wells on their land despite the fact that the operators knew that oil and gas were being drained by wells and pumps also owned by the operator on adjacent lands.<sup>103</sup> Considering all the evidence, the court concluded that even in the absence of proof that an operator of ordinary prudence would drill an additional well on the plaintiff's property,<sup>104</sup> a court could require the drilling of an offset well to protect against drainage where the operator was fraudulently draining the plaintiff's land from adjacent tracts.<sup>105</sup>

## 2. The Legislative Response and Conservation Laws

When confronted with cases involving the rule of capture, some courts applied the correlative rights doctrine discussed above, and others appealed to the legislature to repeal the rule or limit it in an appropriate fashion.<sup>106</sup> In order to keep oil and gas from being wasted by the drilling of too many wells, resulting in premature reservoir depletion, legislatures across the country have responded to both the inherent problems of the rule and appeals from courts or interested parties by regulating the industry in various ways.<sup>107</sup> This regulation is largely regarded as desirable and serves the purposes of preventing waste and

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existence of either of these valuable mineral substances in paying quantities becomes apparent from operations on the premises leased or on adjoining lands, the lessee shall drill such number of wells as in the exercise of sound judgment he may deem reasonably necessary to secure either oil or gas, or both, for the mutual advantage of the owner of the land and of himself as operator under the lease, also for the protection of the lands leased from drainage through wells on adjoining or contiguous lands.”). The defects in this protection will be discussed later in Part III.

<sup>101</sup> 168 S.E. 366 (W. Va. 1932).

<sup>102</sup> *Id.* at 369.

<sup>103</sup> *Id.* at 367.

<sup>104</sup> This is the standard for requiring that an operator fulfill its implied covenant to develop by drilling an additional well. *Id.* at 369.

<sup>105</sup> *Id.* The court also decreed that if no offset well was drilled or additional rental payment made by the operator, then the lease would be cancelled, and the plaintiff would have the opportunity to pursue an operator who would continue to develop his land. *See id.* A few years earlier, in 1913, the court had concluded that fraudulent drainage could result in partial or complete cancellation of a lease. *Jennings*, 80 S.E. at 372.

<sup>106</sup> For instance, the court in *Hague v. Wheeler*, 27 A. 714, 720 (Pa. 1893), described the rights of a landowner under the rule of capture as very much “absolute, until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute.” Fourteen years later, the Supreme Court of Pennsylvania affirmed an opinion in which the lower court again criticized the fact that the only response to the pure rule of capture was to drill a well on one’s own property; it opined that the rule of capture “may not be the best rule; but neither the Legislature nor our highest court has given us any better.” *Barnard v. Monongahela Nat. Gas Co.*, 65 A. 801, 801 (Pa. 1907).

<sup>107</sup> *See Daily & Barrier*, *supra* note 22, at 242.

protecting the rights of different landowners who reside over a certain pool of minerals.<sup>108</sup> However, the regulations usually take place on a well-by-well basis, rather than in consideration of a particular reservoir, and have been criticized as ineffective for the purpose of protecting correlative rights.<sup>109</sup> The following subsections will survey the different types of regulation—well density, spacing, pooling, and unitization—along with West Virginia’s current conservation law.

*i. Well Density and Spacing Requirements*

One of the ways in which legislatures have addressed the inherent wastefulness of the rule of capture is to regulate well spacing and density on a well-by-well basis.<sup>110</sup> This can be accomplished through either spacing requirements or the designation of drilling units on which no more than one well may be placed.<sup>111</sup> Well-spacing requirements address the most obvious problems of overproduction brought about by the rule of capture; they ensure that wells are spaced far enough from boundary lines and each other to avoid excessive drainage.<sup>112</sup> Such laws do no more than control well location and are generally applicable unless certain exceptions are made.<sup>113</sup> Exceptions include wells to prevent confiscation of oil and gas from a tract of land that is too small to meet the requirements of distance from all its boundaries.<sup>114</sup>

The alternative method of regulating well density is to appoint a state agency to designate drilling units and limit density.<sup>115</sup> This can be achieved either directly, by choosing well locations, or indirectly, by limiting the production that is allowed from the unit.<sup>116</sup> Typically, such units must overlie a common source of supply.<sup>117</sup> The direct method requires the appropriate state agency to make determinations about the number and size of spacing units—with one well per unit, which can be supplemented with “in fill”<sup>118</sup> wells later

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<sup>108</sup> *Id.*

<sup>109</sup> See Owen L. Anderson & Ernest E. Smith, *Exploratory Unitization Under the 2004 Model Oil and Gas Conservation Act: Leveling the Playing Field*, 24 J. LAND RESOURCES & ENVTL. L. 277, 283 (2004) (advocating for early unitization during the exploratory phase of drilling).

<sup>110</sup> *Id.* at 278–79. In addition, many states regulate production in order to “prevent production in excess of the scientifically determined maximum-efficient rate that may damage the reservoir and share it equitably among the common owners.” LOWE, *supra* note 15, at 29.

<sup>111</sup> 5 EUGENE KUNTZ, KUNTZ OIL AND GAS § 77.1 (1991).

<sup>112</sup> See LOWE, *supra* note 15, at 23.

<sup>113</sup> KUNTZ, *supra* note 111, § 77.2.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* § 77.3.

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

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

<sup>118</sup> An “in fill well” is “drilled into the same reservoir as known producing wells so that oil or natural gas does not have to travel as far through the formation, thereby helping to improve or

on—that are necessary to “efficiently and effectively” drain a particular reservoir.<sup>119</sup> Such units can be anywhere from 40 to 640 acres in size, and the conservation agency usually also has discretion to grant exceptions to the spacing units based on geologic conditions or pre-existing wells.<sup>120</sup> States have had to adapt these practices to the recent development of horizontal drilling techniques by adjusting unit size and shape.<sup>121</sup>

Many view this method of regulation as inadequate to deal with the correlative rights concerns because it ignores “the true nature of the typical oil and gas reservoir.”<sup>122</sup> By focusing on well spacing and density, legislatures base their regulation on geologic fictions of homogenous reservoirs, consistent radial drilling, and fair offset drilling of rectangular units.<sup>123</sup> Those who disagree with the well-by-well regulation of well spacing and density are advocates of unitization,<sup>124</sup> which will be discussed in the following subsection. In addition, the next subsection will explain statutory pooling, which is often implemented to complement existing well density regulation by apportioning production or forcing interest owners to participate in an operation.<sup>125</sup>

### *ii. Pooling and Unitization*

Pooling and unitization are separate concepts that are best understood in conjunction; each of these practices can be either voluntary or mandatory.<sup>126</sup> A good deal of confusion accompanies the use of the terms “pooling” and “unitization” as they are often used interchangeably when discussing the

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accelerate recovery.” CONOCOPHILLIPS, GLOSSARY OF OIL AND GAS TERMS 7, [http://www.conocophillips.com/investor-relations/company-reports/Documents/PDF/SMID\\_392-COP-Glossary-of-Terms-External-FINAL-5202013.pdf](http://www.conocophillips.com/investor-relations/company-reports/Documents/PDF/SMID_392-COP-Glossary-of-Terms-External-FINAL-5202013.pdf) (last visited Oct. 8, 2015).

<sup>119</sup> See Anderson & Smith, *supra* note 109, at 278–79.

<sup>120</sup> *Id.* at 279–80. This includes exceptions based on protecting correlative rights and preventing waste that may result from reservoir edges running through a particular unit. LOWE, *supra* note 15, at 27–28.

<sup>121</sup> LOWE, *supra* note 15, at 24–25.

<sup>122</sup> Anderson & Smith, *supra* note 109, at 281.

<sup>123</sup> *Id.* (“Well spacing and density rules are grounded on three assumptions that are largely false: first, that oil and reservoirs are homogeneous; that is, they have the same characteristics throughout; second, that all wells completed in such a reservoir will drain in a radial pattern; and third, that, although drilling units are usually square or rectangular, the drainage pattern of one well will be fairly offset by the drainage pattern of neighboring wells so that each unit well will recover a fair share of hydrocarbons.”).

<sup>124</sup> For a more in-depth discussion of the advantages of exploratory unitization and the disadvantages of well-by-well regulation, see *id.*

<sup>125</sup> KUNTZ, *supra* note 111, § 77.4(a).

<sup>126</sup> Bruce M. Kramer, *Compulsory Pooling and Unitization with an Emphasis on the Statutory and Common Law of the Eastern United States*, 27 ENERGY & MIN. L. FOUND. 223, 224–25 (2007), [http://www.emlf.org/clientuploads/directory/whitepaper/Kramer\\_07.pdf](http://www.emlf.org/clientuploads/directory/whitepaper/Kramer_07.pdf).

joining of interests into a unit.<sup>127</sup> Although both pooling and unitization have very similar legal effects, they are physically and operationally distinct.<sup>128</sup>

Generally speaking, pooling occurs when separately owned tracts of land are “pooled” or joined together in order to comply with spacing requirements or to have sufficient acreage with which to obtain a well permit.<sup>129</sup> In fact, most pooling law developed as a result of well spacing requirements in state conservation statutes.<sup>130</sup> As noted above, this has nothing to do with the underlying geologic formations, but rather it focuses on the spacing units, thus resulting in competition between units rather than landowners.<sup>131</sup>

On the other hand, unitization is “the consolidation of mineral, leasehold or royalty interests covering all or a portion of a common source of supply.”<sup>132</sup> The goal of unitization is to consolidate enough of the interests in a particular reservoir to allow production to be carried out in the most efficient manner without the interference of competition and well-by-well regulations.<sup>133</sup> This method of consolidation helps facilitate operations, such as waterflooding,<sup>134</sup> that lead to more effective production but are not easily confined to spacing units.<sup>135</sup>

#### a. Voluntary and Compulsory Pooling

Voluntary pooling may be accomplished by joining tracts into a single lease or “voluntar[ily] consolidat[ing]” interests.<sup>136</sup> Leases can create the right to pool, authorizing the lessee to make a unit subject to size and purpose restrictions.<sup>137</sup> Most pooling is carried out under such provisions.<sup>138</sup> Exercise of this right is usually fairly simple as leases will normally provide that the filing of a declaration of pooling, which outlines the acreage affected, is all that is required.<sup>139</sup> If a lessee pools in contravention of specific restrictions in the

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<sup>127</sup> See Flanery & Morgan, *supra* note 42, at 477; Landy & Reese, *supra* note 85, at 11048.

<sup>128</sup> 4 NANCY SAINT-PAUL, SUMMERS OIL AND GAS § 54:1 (3d ed. 2009).

<sup>129</sup> Kramer, *supra* note 126, at 225.

<sup>130</sup> *Id.*

<sup>131</sup> SAINT-PAUL, *supra* note 128, § 54:1.

<sup>132</sup> Kramer, *supra* note 126, at 224–25.

<sup>133</sup> See SAINT-PAUL, *supra* note 128, § 54:1.

<sup>134</sup> Waterflooding is “[a]n improved oil recovery technique that involves injecting water into a producing reservoir to enhance movement of oil to producing wells.” CONOCOPHILLIPS, *supra* note 118.

<sup>135</sup> KUNTZ, *supra* note 111, § 78.1.

<sup>136</sup> SAINT-PAUL, *supra* note 128, § 54:1.

<sup>137</sup> *Id.* § 56:1.

<sup>138</sup> RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 7.13 (2d ed. 1983).

<sup>139</sup> *Id.* § 7.13(C).

lease, the action is invalid and may be remedied by the lessors' ratification of the prohibited activity.<sup>140</sup> Operators frequently utilize voluntary pooling provisions to hold leased property.<sup>141</sup> They accomplish this by establishing a unit that will include portions of multiple leased tracts, thus holding all tracts in the pool with the production of a single well.<sup>142</sup>

In contrast, mandatory pooling consists of the compulsory joining of interests where applicable regulation will only allow one well.<sup>143</sup> The common goal of all statutory pooling provisions is to force owners to participate in the drilling of the only allowable well on a unit.<sup>144</sup> Statutory pooling is usually accomplished by applying to the appropriate conservation agency for a pooling order.<sup>145</sup> Such an order is discretionary and will often only be issued to "prevent waste or unnecessary drilling."<sup>146</sup> In addition, some states require that the applicant show that "fair and reasonable offer[s] to pool voluntarily" were made before resorting to forced statutory means.<sup>147</sup> Resulting pooling orders will provide non-operating parties with the option of whether to participate—and bear the relevant costs of production—or not participate.<sup>148</sup>

There are a number of options for compensating parties who elect not to participate.<sup>149</sup> These include a cash payment, an overriding royalty in lieu of cash payment, or the option to be carried with or without a penalty.<sup>150</sup> The cash payment is determined by the fair market value of the non-participating interests.<sup>151</sup> The possibility of an overriding royalty—if that option is offered and accepted—is based on the transfer of the working interest to the operator, and its value should also be determined based on the fair market value.<sup>152</sup> The third option, whereby the non-participating interest is carried, involves

<sup>140</sup> SAINT-PAUL, *supra* note 128, § 56:1, 56:4.

<sup>141</sup> See HEMINGWAY, *supra* note 138, § 7.13(B).

<sup>142</sup> *See id.*

<sup>143</sup> SAINT-PAUL, *supra* note 128, § 54:1.

<sup>144</sup> See KUNTZ, *supra* note 111, § 77.4(a).

<sup>145</sup> *Id.* § 77.4(b).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* § 77.4(c).

<sup>148</sup> *Id.* § 77.4(e).

<sup>149</sup> *See id.* § 77.4(f).

<sup>150</sup> *See id.* An overriding royalty is the "share of either production or revenue from production (free of the costs of production) carved out of a lessee's interest under an oil-and-gas lease. . . . Overriding-royalty interests are often used to compensate those who have helped structure a drilling venture. An overriding-royalty interest ends when the underlying lease terminates." *Overriding Royalty*, BLACK'S LAW DICTIONARY (8th ed. 2005).

<sup>151</sup> KUNTZ, *supra* note 111, § 77.4(f).

<sup>152</sup> *Id.* A working interest is defined as "[t]he rights to the mineral interest granted by an oil-and-gas lease, so called because the lessee acquires the right to work on the leased property to search, develop, and produce oil and gas, as well as the obligation to pay all costs." *Working Interest*, BLACK'S LAW DICTIONARY (8th ed. 2005).

allocating the risk of production to the pooling party.<sup>153</sup> When the drilling party assumes the risk, conservation statutes differ on whether the party should recover only the cost of production or some additional penalty “[t]o avoid burdening the drilling party with all . . . expenses at the outset.”<sup>154</sup>

Some scholars have been quick to point out the speculation problems that are inherent in compulsory pooling statutes.<sup>155</sup> Such statutes often have a positive effect by protecting owners of tracts that are too small to form a unit, but that effect is limited by the regulation’s focus on individual wells rather than an entire common source.<sup>156</sup> The limit arises because non-participating interests can take an overriding royalty in one well and transfer the risk to other parties.<sup>157</sup> Even though they might pay a penalty before recovering in that operation, the non-participating interests are now free to drill neighboring tracts or units over the same reservoir with little to no risk.<sup>158</sup>

#### b. Voluntary and Compulsory Unitization

Because pooling clauses are prevalent in oil and gas leases, agreements for voluntary pooling are usually carried out with only the consent of working interest owners.<sup>159</sup> However, most voluntary unitization requires the consent of both working<sup>160</sup> and royalty interests.<sup>161</sup> The process usually involves one agreement between all interests to establish the unit and a separate operating agreement between all working interests as to how production will be accomplished.<sup>162</sup> Before such a project can be approved, a “substantial amount[] of geological, geophysical, economic, financial, and other data must be collected and digested.”<sup>163</sup> Such efforts are worthwhile because unitization eliminates competition that stems from the rule of capture within a contiguous oil and gas reservoir: it can save the working interests—and, therefore, the royalty interests—more money the earlier a reservoir is unitized.<sup>164</sup> Unitization

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<sup>153</sup> See KUNTZ, *supra* note 111, § 77.4(f).

<sup>154</sup> SAINT-PAUL, *supra* note 128, § 55:2.

<sup>155</sup> Anderson & Smith, *supra* note 109, at 281.

<sup>156</sup> *See id.*

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

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

<sup>159</sup> Kramer, *supra* note 126, at 259–60.

<sup>160</sup> For a definition of “working interest,” see *supra* note 152.

<sup>161</sup> Kramer, *supra* note 126, at 259–60.

<sup>162</sup> *See id.* at 260.

<sup>163</sup> 1 BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION § 17.01, 17-2 (3d ed. 2004).

<sup>164</sup> *See id.* at 17-7.

often results in a lower number of wells, a lack of duplicative infrastructure, and the more efficient management of reservoir pressure.<sup>165</sup>

Compulsory unitization statutes typically require the applicant to show that some percentage of both working and royalty interest owners have agreed to formation of the proposed unit.<sup>166</sup> The applicant is normally responsible for defining the boundaries of the proposed unit and might consider the following factors: “the existence or non-existence of geophysical data, the ownership of the tracts, the consent or lack thereof by the owners, the amount of unleased acreage, the scale and uniformity of oil and gas development and differing interpretations of the underlying geophysical data.”<sup>167</sup> Problems can arise for the conservation agency when interest owners dispute their inclusion or exclusion from a proposed unit, citing incorrect consideration of the above factors.<sup>168</sup> Another “contentious issue” surrounding compulsory unitization is how profits from production will be shared, but the conservation agency typically defers to the plan made by consenting interest owners if the plan is “fair and reasonable.”<sup>169</sup>

### iii. *West Virginia Conservation Law*

West Virginia represents an interesting variety of the above regulatory methods. It has been said, “West Virginia, by far, has the longest and most complex series of oil and gas conservation statutes of all of the 50 states.”<sup>170</sup> West Virginia does not have any widely applicable well spacing or density regulation other than the requirement that wells within a certain distance be included for consideration with the application for a well permit.<sup>171</sup> Rather, the responsibility for overseeing the production of oil and gas is divided based on the depth and mineral classification of the wells themselves.<sup>172</sup> Each well classification is subject to the authority of a different governing body and statutory framework.<sup>173</sup> This means that there is no voluntary pooling as it is

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<sup>165</sup> *Id.* at 17-7 to 8.

<sup>166</sup> Kramer, *supra* note 126, at 260.

<sup>167</sup> *Id.* at 263.

<sup>168</sup> *See id.* at 263-64.

<sup>169</sup> *Id.* at 265.

<sup>170</sup> Kramer, *supra* note 126, at 237. For a comprehensive summary of the West Virginia regulatory framework, see Sharon O. Flanery & Ryan J. Morgan, *A National Survey of Statutory Pooling and Unitization*, STEPTOE & JOHNSON (2011), [http://www.stepto-johnson.com/sites/default/files/null/A\\_National\\_Survey\\_of\\_Statutory\\_Pooling\\_and\\_Unitization.pdf](http://www.stepto-johnson.com/sites/default/files/null/A_National_Survey_of_Statutory_Pooling_and_Unitization.pdf).

<sup>171</sup> Flanery & Morgan, *supra* note 170, at 740. See West Virginia Code § 22C-8-8(a) for spacing requirements that become applicable only when a well permit is approved over objection of an affected coal operator or owner.

<sup>172</sup> Flanery & Morgan, *supra* note 42, at 496-97.

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

traditionally understood and developed—a method of complying with applicable spacing and density requirements.<sup>174</sup>

The Secretary of the Department of Environmental Protection (“DEP”) is given the authority to promulgate rules, enforce relevant statutes, and “[p]erform all duties as the permit issuing authority for the state in all matters pertaining to the exploration, development, production, storage and recovery of th[e] state’s oil and gas.”<sup>175</sup> The Office of Oil and Gas within the DEP is responsible for the permitting of coal bed methane (“CBM”) wells in order to balance the preservation of mineable coal with the recovery of CBM.<sup>176</sup>

The Shallow Gas Well Review Board (“Review Board”) was formed in an effort to ensure the cooperative and “fullest practical . . . recovery” of the state’s coal and natural gas where they are produced from the same land.<sup>177</sup> To effectuate this goal, the Review Board has the limited authority to set spacing requirements and establish drilling units when a coal owner or operator objects to proposed shallow gas recovery efforts.<sup>178</sup>

Lastly, the Oil and Gas Conservation Commission (“Commission”) has the authority to set spacing requirements for deep wells and is charged with making rules that will prevent waste and protect correlative rights.<sup>179</sup> Deep wells are defined as wells that are completed at or below the top of the Onondaga Group.<sup>180</sup> In addition, the Commission has the authority to establish drilling units and issue pooling orders for both conventional deep wells and secondary recovery operations.<sup>181</sup> The Commission has promulgated rules requiring that deep wells be located at least 3,000 feet from another permitted location and 400 feet from unit and lease boundaries.<sup>182</sup>

In any of the above situations where pooling is a possibility, interest owners are given the option to participate on either a working or carried interest basis.<sup>183</sup> However, there is very little consideration for minimum operator

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<sup>174</sup> See text accompanying note 129.

<sup>175</sup> W. VA. CODE ANN. § 22-6-2 (West 2015).

<sup>176</sup> *Id.* § 22-21-4.

<sup>177</sup> *Id.* § 22C-8-1.

<sup>178</sup> *Id.* §§ 22C-8-5 to -11. Note that this is the only method by which a shallow gas well can be statutorily pooled; therefore, any well completed above the Onondaga Group—which is defined generally as the group below the Marcellus Shale—can only be pooled if there is objection by a coal owner. As of 2011, the Review Board had not exercised this authority. Flanery & Morgan, *supra* note 170, at 719.

<sup>179</sup> W. VA. CODE ANN. § 22C-9-4(f) (West 2015).

<sup>180</sup> *Id.* § 22C-9-2(a)(12). The Onondaga Group is the geologic layer that lies beneath the commonly known Marcellus Shale, which holds significant reserves of natural gas. See MARCELLUS SHALE COALITION, THE CURIOUS CASE OF THE ONONDAGA 1–2 (2010), <http://marcelluscoalition.org/wp-content/uploads/2010/05/msc-curious-case-of-onondaga.pdf>.

<sup>181</sup> W. VA. CODE ANN. §§ 22C-9-7 to -8.

<sup>182</sup> W. VA. CODE R. § 39-1-4.2 (2011).

<sup>183</sup> Flanery & Morgan, *supra* note 170, at 744–45.

control in the statutes.<sup>184</sup> Secondary recovery wells are the only wells for which a minimum percentage of operators and royalty owners must consent to the pooling of interests: 75% of each must consent.<sup>185</sup>

Over the past several years, bills attempting to implement additional unitization have been proposed and referred to committee.<sup>186</sup> The proposed legislation—a new section called § 22C-9-7a—would be the first compulsory unitization statute in the state, but the proposal only seeks to permit mandatory unitization of horizontally drilled wells in order to encourage their continuing use for efficient and effective recovery.<sup>187</sup> The proposal requires an operator to obtain the consent of 80% of executory interest royalty owners and 80% of the operator interest before filing.<sup>188</sup> It also provides that unleased interests in the unit may sell their interest, lease to the operators, surrender their interest, or participate on a limited or carried basis with a 200% penalty for their share of the costs of production.<sup>189</sup>

#### *iv. Developments in West Virginia Partition Law*

In West Virginia Code section 37-4-1, the West Virginia legislature makes it possible for a cotenant to sue for partition of commonly held property.<sup>190</sup> This practice has been utilized by oil and gas lessees to deal with both consenting and non-consenting mineral interest owners.<sup>191</sup> The statute states that “[t]enants in common, joint tenants and coparceners of real property, including minerals, [and] lessees of mineral rights . . . shall be compelled to make partition.”<sup>192</sup> However, “lessees of oil and gas minerals” are excepted from those parties that may take advantage of the court’s jurisdiction to partition.<sup>193</sup> The legislature also addresses instances in which partition in kind cannot be made conveniently.<sup>194</sup> It allows for one party to purchase another party’s interest, or it allows the court discretion to sell the entirety of the

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<sup>184</sup> See W. VA. CODE ANN. § 22C-9-8.

<sup>185</sup> *Id.*

<sup>186</sup> See H.B. 2688, 82nd Leg., Reg. Sess. (W. Va. 2015).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> W. VA. CODE ANN. § 37-4-1 (West 2015).

<sup>191</sup> See William M. Herlihy & Mark D. Clark, *Partition Suit Decision Could Be Problematic for W. Va. Oil and Gas Operators*, SPILMAN THOMAS & BATTLE (Sep. 26, 2014), <http://www.spilmanlaw.com/resources/attorney-authored-articles/environmental/partition-suit-decision-could-be-problematic-for>.

<sup>192</sup> W. VA. CODE ANN. § 37-4-1.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* § 37-4-3. Partition in kind is the physical division of the property at issue; this is distinguished from partition by sale where the piece of property is sold, either by consent of all cotenants or by court order, and the proceeds divided up according to the cotenants’ interests.

property and divide the proceeds if such sale will benefit at least one party and not prejudice the rest.<sup>195</sup>

In *Consolidated Gas Supply Corp. v. Riley*,<sup>196</sup> the West Virginia Supreme Court provided the clearest explanation of partition law as it relates to oil and gas interests. In a syllabus point, the Court held as follows:

By virtue of W.Va. Code, 37-4-3, a party desiring to compel partition through sale is required to demonstrate [1] that the property cannot be conveniently partitioned in kind, [2] that the interests of one or more of the parties will be promoted by the sale, and [3] that the interests of the other parties will not be prejudiced by the sale.<sup>197</sup>

The plaintiff oil and gas company alleged that it was the owner of eleven-twentieths of the oil and gas under three tracts of land.<sup>198</sup> Certain facts also indicated that it was the lessee of all the oil and gas interest.<sup>199</sup> The plaintiff sought partition by sale because it argued that the interests could not be partitioned in kind.<sup>200</sup> However, the defendants contended that the interests could, in fact, be partitioned in kind and “that their interests would be materially prejudiced by a sale.”<sup>201</sup> The court reasoned that the promotion or prejudice of the parties’ interests is a factual issue to be determined by the court.<sup>202</sup>

Despite the plaintiff’s arguments to the contrary, the court concluded that the language of West Virginia Code section 37-4-1 was meant to ensure the right to have partition in kind of oil and gas interests considered.<sup>203</sup> The court also rejected previous case law where partition was “not available where there [was] a subsisting lease,” and held that partition may be compelled but will be subject to existing leases.<sup>204</sup> The court reversed the summary judgment granted to the plaintiff by the trial court and remanded the case for consideration of factual issues related to feasibility of partition in kind and the prejudice or promotion of interests attendant to a partition by sale.<sup>205</sup>

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<sup>195</sup> *Id.*

<sup>196</sup> 247 S.E.2d 712 (W. Va. 1978).

<sup>197</sup> *Id.* at syl. pt. 3.

<sup>198</sup> *Id.* at 713.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 713.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 715.

<sup>203</sup> *Id.* at 716.

<sup>204</sup> *Id.* at 717.

<sup>205</sup> *Id.* at 716.

Justice Neely dissented, raising concerns that the majority should have directed summary judgment in favor of the defendants.<sup>206</sup> His concerns stemmed from the fact that the plaintiff was the eleven-twentieths owner and also the lessee of all removal rights.<sup>207</sup> Because of this, the plaintiff would most likely have been the only party interested in purchasing the property at sale and could then have profited from any advance in extraction techniques.<sup>208</sup> According to Justice Neely, the defendants were doing no harm to the plaintiff other than enjoying ownership of their property and possibly reaping the benefits of the leases they had executed with the plaintiff.<sup>209</sup> To allow the plaintiff partition by sale would only unjustly enrich them because they may hold out on profitable extraction until the parties agree to a sale or a sale is forced.<sup>210</sup>

### III. ANALYSIS

Currently, West Virginia does not have an appropriate means of statutory pooling in relation to Marcellus Shale development.<sup>211</sup> Most of the statutes are concerned with the resolution of conflicts between coal owners and those who would seek to develop the shallow gas or CBM.<sup>212</sup> There is a gaping hole in state regulation as it relates to establishing reservoir wide units for shallow wells, and this shortcoming affects the basic “policy goals of correlative rights protection and waste prevention.”<sup>213</sup> In order to overcome these deficiencies for the purpose of horizontal well development, other sources have made suggestions relating to the spacing, notice and approval, costs and election, and surface use requirements for Appalachian pooling statutes.<sup>214</sup> Beyond these proposals, however, in order to ensure that correlative rights and conservation goals are satisfied in the continued development of the Marcellus Shale, West Virginia should adopt a statutory pooling and unitization scheme for shallow oil and gas wells.

The debate about compulsory pooling and unitization has been circulating in this country for years, and many oil and gas producing states have adopted statutes that impose some permutation of them.<sup>215</sup> As mentioned

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<sup>206</sup> *Id.* at 718 (Neely, J., dissenting).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 719

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Flanery & Morgan, *supra* note 42, at 505.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See id.* at 505–11. *See generally* Landy & Reese, *supra* note 85 (proposing that Pennsylvania adopt a statutory pooling scheme).

<sup>215</sup> Flanery & Morgan, *supra* note 42, at 468.

above, the topic has been thoroughly discussed by other sources, both regionally and in West Virginia's neighboring states.<sup>216</sup> In contribution to that discussion, this Note analyzes specific West Virginia common law and statistics in order to determine how the state and its citizens might benefit from a compulsory pooling or unitization statute.

Part III.A below discusses several examples from West Virginia case law that demonstrate why compulsory pooling and unitization are consistent with West Virginia case law and how they promote the rights that West Virginia's legislature and Court value. Part III.B then examines how compulsory pooling or unitization can act as an appealing alternative to unjust and inequitable present practices such as partition suits, which may give oil and gas companies the upper hand—a charge frequently leveled against compulsory statutes as well. Lastly, Part III.C uses land ownership data to analyze how such a statute might have a positive affect by helping private landowners in addition to large corporate owners, and it outlines certain important provisions that should be included in such a statute.

A. *West Virginia Should Limit the Rule of Capture with Legislation Because Present Law Does Not Adequately Address Landowner Concerns*

West Virginia should further limit the rule of capture and focus on correlative rights with its legislation. In 1994, the West Virginia legislature found that oil and gas had been continuously produced in the state for over a century and that the best way to continue to encourage the production of oil and natural gas from shallow formations was not to impose regulation on the pooling and unitization of such wells except in specific circumstances.<sup>217</sup> This policy may be designed to encourage shallow well exploration and production through limited regulation in much the same way as the rule of capture is often meant to encourage operations by limiting liability.<sup>218</sup> However, since that time, exploiting the shallow formation of the Marcellus Shale has been made much more viable by the advent of economic horizontal drilling along with hydraulic fracturing.<sup>219</sup> The time has come for the legislature to reconsider the law concerning pooling and unitization of shallow oil and gas wells in light of developments in technology, case law, and land ownership.

The rule of capture has become, in the words of the seminal Pennsylvania case *De Witt*, “too fanciful,” and it is in need of further limitation by legislative action.<sup>220</sup> The pure rule of capture encourages every landowner

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<sup>216</sup> See, e.g., Landy & Reese, *supra* note 85.

<sup>217</sup> W. VA. CODE ANN. § 22C-9-1 (West 2015).

<sup>218</sup> See LOWE, *supra* note 15, at 13.

<sup>219</sup> See Jason A. Proctor, Note, *The Legality of Drilling Sideways: Horizontal Drilling and Its Future in West Virginia*, 115 W. VA. L. REV. 491, 494–95 (2012).

<sup>220</sup> *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 18 A. 724, 725 (Pa. 1889).

and operator to drill on his or her land to avoid losing valuable resources to neighboring operations.<sup>221</sup> Left unchecked, this leads to waste of resources by premature reservoir pressure depletion due to overproduction.<sup>222</sup> In addition, the overproduction means that a disproportionate amount of the surface is unnecessarily used where fewer wells would have been sufficient.<sup>223</sup> Such a waste of both surface and mineral resources is detrimental to the wealth of individual landowners and the economy of the state.<sup>224</sup> Because of the proliferation of shallow gas wells resulting from hydraulic fracturing, the legislature should consider ways to further hamper the unjust effects of the pure rule of capture.

The case law has left unsatisfactory holes in its correlative rights decisions that attempt to limit the rule, and while bills have been proposed and referred to committee,<sup>225</sup> both houses of the legislature have yet to pass a statutory scheme for compulsory pooling or unitization. While they have significantly limited the scope of the rule, cases concerning the rule of capture, waste, and implied duties leave concerns for landowners that would best be addressed by the legislature. The following subsections consider these shortcomings in more detail. Subsection 1 analyzes how mandatory pooling would be a superior solution to voluntary pooling in terms of limiting the rule of capture. Subsections 2 and 3 show that waste prevention decisions and the implied duties of oil and gas lessees are insufficient to protect landowners.

#### 1. Voluntary Pooling Is an Insufficient Solution as Compared to Compulsory Pooling

A compulsory pooling statute would eliminate many of the problems that have been associated with West Virginia's current voluntary statute. In the West Virginia rule-of-capture cases *Bogges*<sup>226</sup> and *Powers*,<sup>227</sup> the court was limited in its authority to assist unleased fractional interests because the legislature allows for voluntary pooling of an adjacent tract where only a part of the interest in that adjacent tract has been leased.<sup>228</sup> In similar situations where a partially leased tract sits next to a wholly leased tract, the oil and gas

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<sup>221</sup> Flanery & Morgan, *supra* note 42, at 460.

<sup>222</sup> *Id.*

<sup>223</sup> See *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980) (outlining the “reasonable and necessary” right for operators to use the surface).

<sup>224</sup> For a discussion of the effects of the rule of capture and pooling/unitization from the perspective of a surface owner, see *Well Spacing and Royalty Sharing*, W. VA. SURFACE OWNERS' RIGHTS ORG., [http://www.wvsoro.org/resources/pooling\\_unitization/index.html](http://www.wvsoro.org/resources/pooling_unitization/index.html) (last visited Oct. 8, 2015).

<sup>225</sup> H.B. 2688, 82nd Leg., Reg. Sess. (W. Va. 2015).

<sup>226</sup> *Bogges v. Milam*, 34 S.E.2d 267 (W. Va. 1945).

<sup>227</sup> *Powers v. Union Drilling, Inc.*, 461 S.E.2d 844 (W. Va. 1995).

<sup>228</sup> *Id.* at 849.

companies hold an unacceptable amount of power over the unleased interest owners during negotiations. This is because they have better knowledge of both where they intend to drill and what interests they need to acquire in order to do so.

Therefore, unleased landowners lose a substantial amount of bargaining power if an operator decides to drill on a wholly leased tract after only partially leasing the unleased owner's adjacent tract. The unleased partial interest is faced with two equally unappealing alternatives. First, if the unleased party holds out for better terms or decides not to lease at all, that party keeps the operator from drilling on the tract that is partially leased.<sup>229</sup> However, the operator may not need to drill on the unleased party's land in order to make economic recovery. Because no one will want to lease a partially pooled tract, the operator may successfully keep other interested parties from leasing the land simply by pooling the leased interest of the partially leased tract. On the other hand, if an unleased partial interest owner decides to lease for fear that an opportunity may pass or the operator will drain him from adjacent lands, he may agree to terms that are less favorable than the actual value of his interest and what he could have bargained for.

In either of the above scenarios, the oil and gas company has all the requisite information, and the private landowner is left to guess and gamble about what he should do. In order to protect private landowners, the state should enact a compulsory pooling statute that requires the leasing or pooling of every interest in a tract that an oil and gas company intends to include in a unit. In addition, the application process should require a showing that all the executory interests were offered a fair and reasonable lease agreement.<sup>230</sup>

These requirements would give landowners the bargaining power to ask for better terms because even if negotiations fail with an interested operator, the landowners will be able to fall back on statutory minimums if a fractional interest in their tract has already been leased. A compulsory pooling statute gives an advantage to landowners because in order to drill on one tract that it intends to use to drain neighboring properties, an oil and gas company is faced with a choice. It must choose between pooling neighboring properties to avoid violating the implied duty to protect against drainage—and thus having to pool all interests—or surrendering its leases on adjacent lands. The latter option is unwise because it risks exploitation by another operator once the field is proven to provide economic recovery.

At the same time, by forcing certain unleased parties to participate, a compulsory pooling provision would protect lessors from having to surrender partially leased tracts as suggested above. In order to keep lessees from abusing this method of pooling, it is important to ensure that the statute requires a high

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<sup>229</sup> Gain v. S. Penn Oil Co., 86 S.E. 883, 884 (W. Va. 1915).

<sup>230</sup> See KUNTZ, *supra* note 111, § 77.4(c). A fair and reasonable offer to lease might be proven by evidence that similar offers are commonplace—that they are made and accepted regularly either throughout the industry or the geographic area. See *id.*

percentage of consenting executory interests. In addition, requiring a showing of reasonable efforts to lease the unleased interests would keep lessees from simply compelling the participation of unleased interests above the minimum threshold.

Critics of statutory pooling argue that a compulsory pooling statute like the one suggested above does nothing more than exacerbate the inherent problems of a system based in the rule of capture.<sup>231</sup> They argue that while compulsory pooling does prevent waste and help protect correlative rights,<sup>232</sup> it does so by ignoring “the true nature of the typical oil and gas reservoir,” which is nonhomogeneous and drains inconsistently.<sup>233</sup> According to those critics, it follows that the problems inherent in the rule of capture—overproduction and waste—are simply promoted to a larger scale by a system that focuses on competition between spaced or pooled units rather than competition on a well-by-well basis.<sup>234</sup> This analysis leads many scholars to favor unitization over pooling.<sup>235</sup> Unitization is a reservoir-wide process that requires substantial data collection and planning in order to be successful.<sup>236</sup> Unitization has its benefits, as explained in the next section, but compulsory pooling would effectively help eliminate some of the correlative rights concerns of individual landowners as discussed above.

## 2. The West Virginia Court’s Decisions Focused on Waste Protect the State in General but Do Not Adequately Protect Private Landowners

Developing a system of compulsory unitization would supplement and greatly enhance the court’s concern for limiting the waste of oil and gas resources. *Atkinson v. Virginia Oil and Gas Co.*<sup>237</sup> provides a good example of how case law meant to prevent waste and encourage correlative rights falls short without the proper legislation. In *Atkinson*, the court allowed for a landowner to recover damages when the defendant drilled a well on adjacent property a mere 100 feet from the boundary line and abandoned the well without plugging it.<sup>238</sup> This caused injury to the plaintiff because water seeping into the well obstructed his production from the common reservoir.<sup>239</sup> The court

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<sup>231</sup> See Pierce, *supra* note 84, at 765.

<sup>232</sup> *Id.*

<sup>233</sup> Anderson & Smith, *supra* note 109, at 281.

<sup>234</sup> See *id.*

<sup>235</sup> *Id.* at 284.

<sup>236</sup> KRAMER & MARTIN, *supra* note 163, at 17-2.

<sup>237</sup> *Atkinson v. Va. Oil & Gas Co.*, 79 S.E. 647 (W. Va. 1913); see *supra* text accompanying notes 93–99.

<sup>238</sup> *Id.* at 647–48.

<sup>239</sup> *Id.* at 648.

allowed for recovery of damages because of the defendant's negligent maintenance of a condition that affected the plaintiff's recovery.<sup>240</sup> Consider, on the other hand, that the pure rule of capture would not have stopped the defendant from draining every last drop of oil and gas from beneath the plaintiff's land if it had continued its operation rather than abandoning the well.<sup>241</sup> By attempting to provide for the enjoyment of the plaintiff's land without negligent interference, the court creates a puzzling contradiction.

In other cases, the court unfailingly holds to the rule of capture; it does not matter to the court who recovers oil and gas as long as it is not wasted.<sup>242</sup> At first, providing each party with a fair chance to recover seems like the best way to prevent waste, but prohibitions against negligence and waste only apply to instances such as *Atkinson* where waste or injury to other parties is not beneficial individually or economically. Therefore, policing negligence is helpful for ensuring that each party gets a chance to recover its fair share, but such enforcement does little to stem the effects of overproduction and premature depletion when the rule of capture is allowed to rule the competition to drill.

While the correlative rights decisions such as *Atkinson* do prevent waste and allow a fair chance, they are not an effective way to ensure that private landowners can recover the value of their minerals if competitive drilling resulting from the rule of capture leads to overproduction. By requiring operators to define a workable field and unitize it accordingly, the legislature could more effectively ensure that the Department of Energy supervises the efficient and economic recovery from entire pools of minerals. More efficient and economic recovery provides each interest owner with as much of a recovered interest—monetary profit—as possible.

### 3. Implied Duties of an Oil and Gas Lease Protect Landowners but Also Encourage Overproduction from Commonly Owned Reservoirs

By requiring the pooling of commonly leased interests, the legislature could combat the overproduction that is encouraged by the implied duties to develop under an oil and gas lease. *Adkins v. Huntington Development & Gas Co.*<sup>243</sup> provides a good example of how the case law falls short when it applies the implied duties of an oil and gas lease. In *Adkins*, the court forced the defendant to drill an offset well—even though it was not clear that a reasonably prudent operator would have done so—because the defendant was draining the

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<sup>240</sup> *Id.*

<sup>241</sup> See Hardwicke, *supra* note 25, at 393.

<sup>242</sup> See Powers v. Union Drilling, Inc., 461 S.E.2d 844, 849 (W. Va. 1995).

<sup>243</sup> 168 S.E. 366 (W. Va. 1932).

plaintiff lessor's land from adjacent tracts.<sup>244</sup> Such a situation would be unlikely to arise today due to the prevalence of voluntary pooling clauses in oil and gas leases,<sup>245</sup> but the case does demonstrate the limited benefits that court-imposed duties can provide.

For each individual lessor, such as the one in *Adkins*, the implied duties to develop and protect against drainage are beneficial and force operators to act for the benefit of the lessor.<sup>246</sup> In addition, these duties ensure that an operator who holds leases over much of a reservoir is fair and balanced in its maintenance of operations and payments of royalties to all lessors.<sup>247</sup> However, in reservoirs where more than one lessee owns the right to develop different tracts or portions, the duties may lead to competition between lessors and have the additional effect of encouraging overproduction where such overproduction still produces economic, while not optimal, results.

Therefore, in certain circumstances, the implied duties to develop, which seek to protect lessors and ensure that they have a chance to recover the value of their interest, serve only to exacerbate the problems inherent with the rule of capture by effecting overproduction. In order to limit such effects, the legislature could require that commonly leased adjacent properties be pooled. This would eliminate concerns about fraudulent drainage from adjacent properties, and it would lead to more efficient production. However, the better option would be to require that separate lessees over a reservoir develop the reservoir under joint operating agreements. Requiring unitization would eliminate the undesirable competition among different lessees<sup>248</sup> and ensure that each landowner receives the maximum amount of value from their share in the commonly owned reservoir.<sup>249</sup>

As demonstrated above, the current case law cannot adequately protect landowners from the practices available to oil and gas operators and lessees. In order to alleviate these negative effects on landowners—and provide benefit to the state through more efficient production—it would be wise for West Virginia to consider the benefits of a compulsory pooling statute. The legislature should also weigh the benefits of switching from a regulatory scheme focused well-by-well on the rule of capture to one focused on defining reservoirs for unitization.<sup>250</sup> In large part, the state court's correlative rights decisions have already limited the rule of capture, but the focus on limitation through legislative action needs to be more pronounced in order to satisfy the

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<sup>244</sup> *Id.* at 369.

<sup>245</sup> SAINT-PAUL, *supra* note 128, § 56:1; HEMINGWAY, *supra* note 138, § 7.13.

<sup>246</sup> *See* Jennings v. S. Carbon Co., 80 S.E. 368, 369 (W. Va. 1913).

<sup>247</sup> *Adkins*, 168 S.E. at 369.

<sup>248</sup> Anderson & Smith, *supra* note 109, at 281.

<sup>249</sup> *See* SAINT-PAUL, *supra* note 128, § 54:1; *see also* KRAMER & MARTIN, *supra* note 163, at 17-7.

<sup>250</sup> *See* Pierce, *supra* note 84, at 775.

needs of mineral interest owners, surface owners, the state, and operators.<sup>251</sup> Therefore, the legislature should use a system of statutory pooling or unitization to better protect the correlative rights of its citizens.

*B. A Compulsory Statute Would Provide Alternatives for Non-Consenting Interests*

Compulsory pooling or unitization would satisfy correlative rights concerns because they allow consenting mineral interest owners to produce their minerals and provide the most workable solution for non-consenting executory interests.<sup>252</sup> Most obviously, a system of compulsory pooling or unitization would be beneficial to consenting mineral interest owners—and therefore operators—because it allows them to recover the monetary value of their interest, which they have a right to do. At the same time, compulsory pooling can also protect the interest of non-consenting interest owners who are negotiating for better lease terms as discussed in Section A.<sup>253</sup>

However, because of certain provisions, such compulsory legislation often comes under attack as an unconstitutional taking or an unfair way to deal with non-consenting owners.<sup>254</sup> While these concerns have been raised in other states, the constitutional validity of a well-written statute “is beyond dispute” as such mechanisms have been in use across the country for many years.<sup>255</sup> This section addresses the reality that although there is understandable resistance to forcing executory interests to produce their minerals, enactment of a statutory scheme for pooling or unitization in shallow wells is the only readily available alternative to current undesirable methods of dealing with non-consenting executor interests.

While it is well settled that the state has the authority to force pool or unitize interests,<sup>256</sup> in the absence of such legislation, the legislative and judicial branches in West Virginia have put forth woefully inconsistent views on the permissibility of forcing non-consenting interest owners to either lease, sell, or develop their interest. On the one hand, the court has held that executory interests cannot be forced to convert their interest in real property into a monetary interest.<sup>257</sup> Cotenants cannot perpetrate waste by drilling without the consent of the others, even if the non-consenting interest is very small and would be paid the full value of their oil and gas in place rather than a

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<sup>251</sup> See *id.* at 779.

<sup>252</sup> See *supra* text accompanying notes 150–54.

<sup>253</sup> See *supra* Part III.A.

<sup>254</sup> For an example of this attitude, see *Well Spacing and Royalty Sharing*, *supra* note 224.

<sup>255</sup> Flanery & Morgan, *supra* note 42, at 472.

<sup>256</sup> *Id.*

<sup>257</sup> *S. Penn Oil Co. v. Haught*, 78 S.E. 759, 762 (W. Va. 1913).

royalty.<sup>258</sup> On the other hand, the legislature has allowed for the partition by sale of real property interests, when requested by cotenants who would benefit from the partition, as long as it will not prejudice any of the other cotenants.<sup>259</sup> Combined with the legislature's refusal to enact statutory schemes for pooling or unitization, the partition statute has led oil and gas companies and interest owners to file suit for partition by sale of mineral interests.<sup>260</sup> Whether used as a threat or actually effectuated, these suits serve to force a mineral interest owner to part with his interest in real property in exchange for economic benefit, a method of dealing with non-consenting interests that was decried by the court almost a century ago.<sup>261</sup>

Although a statutory scheme for compulsory pooling or unitization would also force executory interests to accept some benefit in exchange for their interest in real property,<sup>262</sup> such a scheme is preferable to the current option of partition. When a party seeks partition by sale of a partially leased tract, there is no incentive for any party to purchase the partitioned interest at a judicial sale unless they might profit in excess of what they spent on it.<sup>263</sup> While it is possible that speculators could purchase the interest with plans to consent to its development, it seems more likely that the interest will be purchased by the oil and gas company who wants to drill over the protests of a non-consenting interest-owner. The latter case raises the concerns voiced by Justice Neely in *Consolidated Gas Supply Corp. v. Riley*.<sup>264</sup> In that case, an oil and gas company was eleven-twentieths owner of the mineral interests on a particular tract as well as the lessee of all the mineral interest and sought to partition the interest by sale because it could not be conveniently partitioned in kind.<sup>265</sup> The court remanded the case for consideration of the feasibility of partition in kind and whether interests would be prejudiced or promoted in a partition by sale.<sup>266</sup> On the other hand, Justice Neely argued that this gave too much power to oil and gas companies who held ownership interests in mineral tracts.<sup>267</sup>

Justice Neely's concerns certainly seem well founded when the plaintiff cotenant is also the lessee of the entire tract.<sup>268</sup> However, even when a

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<sup>258</sup> *Id.*

<sup>259</sup> W. VA. CODE ANN. § 37-4-3 (West 2015).

<sup>260</sup> See Herlihy & Clark, *supra* note 191.

<sup>261</sup> *S. Penn Oil Co.*, 78 S.E. at 762.

<sup>262</sup> SAINT-PAUL, *supra* note 128, § 54:11.

<sup>263</sup> See *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712, 719 (W. Va. 1978) (Neely, J., dissenting).

<sup>264</sup> *Id.* at 718–19.

<sup>265</sup> *Id.* at 713 (majority opinion).

<sup>266</sup> *Id.* at 716.

<sup>267</sup> *Id.* at 719 (Neely, J., dissenting).

<sup>268</sup> *Id.* at 718.

non-lessee cotenant brings a partition suit against a non-consenting interest, the non-consenting interest owner is denied the possibility that the royalty or value of the oil and gas in place under his land will exceed what he paid for the interest or what he might receive for it at a judicial sale.<sup>269</sup> Because partition is currently the only option for overcoming a non-consenting interest that will not accept reasonable offers to lease,<sup>270</sup> the threat of such suit leads to an unjust compulsion for landowners to lease or sell their property for fear of being forced to litigate their interest. Compulsory pooling or unitization would be an equitable way to encourage production, thus providing jobs and contributing to the state's economy, by affording a final option for operators who run up against small factions of non-consenting interests. Although it provides lessees with an avenue for overcoming the desire of a private landowner,<sup>271</sup> such a statutory scheme would properly balance the interests of landowners by affording them better options than they currently face with the prevalence of partition suits.<sup>272</sup>

Compulsory pooling or unitization is an imperfect solution because, in a way, it forces the non-consenting owners to convert their interest in real property into a monetary interest.<sup>273</sup> However, it provides a non-consenting interest with a larger variety of options than the threat of partition suit currently does.<sup>274</sup> If the traditional model is followed, a compulsory pooling and unitization statute would allow non-consenting interests to sell their interest, receive an overriding royalty, or participate as a carried working interest with a penalty.<sup>275</sup>

There are plenty of good reasons for a landowner to decide that they do not want to lease their land, whether it be to negotiate a better lease or because of environmental concerns. A statute that requires a considerable portion of landowners to consent to the lease and production of their interest before the application can be made to force pool non-consenting interests would provide those non-consenting landowners the opportunity to profit from the production of their mineral interest even if they did not consent at first or if they were holding out for better lease terms from the operator. In addition, it would lean the balance of negotiating power more in the favor of small landowners, allowing them to decide whether to sell or risk participation. Therefore, a statutory scheme for pooling or unitization would promote correlative rights by providing more options and opportunities for non-consenting interests.

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<sup>269</sup> See *id.* at 719.

<sup>270</sup> See Herlihy & Clark, *supra* note 191.

<sup>271</sup> KUNTZ, *supra* note 111, § 77.4(e).

<sup>272</sup> See *supra* text accompanying notes 149–54.

<sup>273</sup> See *S. Penn Oil Co. v. Haught*, 78 S.E. 759, 762 (W. Va. 1913).

<sup>274</sup> See KUNTZ, *supra* note 111, § 77.4(f).

<sup>275</sup> See *id.*

### C. Ensuring Benefit to West Virginians

When a state legislature considers proposed legislation and regulation, its chief concern should be how the laws will benefit the citizens of its state. It is important to provide a legislative climate that is attractive to businesses and corporate actors who will bring economic and employment benefits to the citizens of West Virginia. One can imagine that these statewide benefits might sometimes take a priority position over laws that focus on individuals. However, that has not been the focus of this Note. For the most part, this Note argues that present case law, statutes, and regulations are insufficient to adequately protect the rights of mineral interest owners.<sup>276</sup> It also attempts to demonstrate how a statutory scheme for pooling or unitization has the potential to better protect those interests.<sup>277</sup> The following subsections will discuss more specifically how such laws can benefit private landowners—as opposed to corporate landowners—and how the presently proposed legislation should be altered.

#### 1. Land Ownership Statistics Provide Evidence of a Potential Benefit

Forty or 50 years ago, if advanced drilling technology existed, a statutory scheme for compulsory pooling or unitization might only have benefited large out-of-state corporations.<sup>278</sup> In 1974, a study found that only 24 out-of-state private companies owned roughly a third of the state's privately held land; in addition, it found that out-of-state companies owned at least half the land in almost half the state's counties.<sup>279</sup> Another research effort in 1978, which sampled 15 counties, found that “[l]arge corporations owned 40 percent of the land and 70 percent of the minerals.”<sup>280</sup> However, big energy companies do not own nearly as much property as they used to; large timber companies have replaced them as the top owners, and now the top 25 private landowners hold interest in only 17.6% of the state's land.<sup>281</sup> In eight of the top ten oil and gas producing counties, the top ten private landowners own less than 25% of the privately held land.<sup>282</sup> For instance, Harrison County produces more than a

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<sup>276</sup> See *supra* Part III.A–B.

<sup>277</sup> *Id.*

<sup>278</sup> See BETH SPENCE ET AL., W. VA. CENTER ON BUDGET & POLICY, WHO OWNS WEST VIRGINIA? (Dec. 2013), <http://www.wvpolicy.org/wp-content/uploads/2013/12/land-study-paper-final3.pdf>.

<sup>279</sup> *Id.* at 8.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 6.

<sup>282</sup> *Id.* at 12–13.

fifth of the state's natural gas, but the top ten landowners in Harrison County own only 7.2% of the surface acreage.<sup>283</sup>

Due to the unavailability or inadequacy of tax data, the 2013 study cited above did not examine ownership of minerals interests.<sup>284</sup> Therefore, it is difficult to postulate about the percentage of mineral interests that are owned by individuals rather than corporations. A more detailed study concerning those interests would be beneficial in determining the extent to which a statutory pooling or unitization scheme would provide benefit to companies and out-of-state owners in comparison to in-state individuals who are non-consenting or need to be protected from the effects of the rule of capture.

However, if ownership of mineral interests parallels ownership of surface acreage at all, then the ownership of mineral interests is far less concentrated than it used to be, and it is especially low in some of the most productive oil and gas counties. Regardless of whether mineral interests are more prevalently owned by individuals than corporations, a compulsory pooling or unitization statute would help ensure efficient production and protect unleased interests in addition to providing more options for non-consenting interest owners than the current practice of partition by sale.

## 2. Current Proposal and Recommendations

The primary focus of a statutory scheme for pooling and unitization of shallow wells should be to protect the interests of West Virginians in addition to promoting production that will benefit the state's economy and tax income. To that end, any statute purporting to authorize the forced pooling or unitization of parties that have elected not to participate should require the consent of a relatively high number of executory interest owners as well as operator interests. Doing so would ensure that most interest owners are given a fair opportunity to negotiate lease terms with prospective lessees.

At present, the only pooling statute to provide for minimum operator and interest owner consent in West Virginia is the statute relating to secondary recovery operations; it requires that 75% of operators and 75% of interest owners consent to formation of the pool before an order will be issued.<sup>285</sup> The current legislative proposal, which attempts to implement unitization for horizontal wells rather than shallow wells in general, requires 80% of executory interest owners and 80% of operators to consent.<sup>286</sup> However, previously introduced bills required as much as 85% of operators consent to unitization.<sup>287</sup>

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<sup>283</sup> *Id.* at 12, 38.

<sup>284</sup> *Id.* at 43.

<sup>285</sup> W. VA. CODE ANN. § 22C-9-8 (West 2015).

<sup>286</sup> H.B. 2688, 82nd Leg., Reg. Sess. (W. Va. 2015).

<sup>287</sup> S.B. 578, 81st Leg., Reg. Sess. (W. Va. 2014) (referred to the Committee on Energy, Industry and Mining).

In an effort to protect the free negotiation of lease terms, the requirement for both consenting interest owners and operators in the statutory proposal should be raised to 85%.<sup>288</sup>

#### IV. CONCLUSION

West Virginia's conservation law is plenteous and complex.<sup>289</sup> Considering the recent boom in Marcellus Shale production resulting from horizontal drilling techniques,<sup>290</sup> it is surprising that the legislature has neglected to enact a statutory mechanism for pooling or unitization. Such a statute would encourage the efficient and economic recovery of the state's resources while better protecting the rights of both executory interest owners and operators.<sup>291</sup> The time has come for the West Virginia legislature to consider a statutory scheme for compulsory pooling and unitization that would encompass horizontal drilling of shallow wells in the Marcellus Shale made possible by advances in technology.

Consider how a compulsory pooling or unitization statute would change the example from *There Will Be Blood* discussed at the beginning of this Note.<sup>292</sup> In that film, a landowner did not want to lease his mineral rights, but because of the rule of capture, the operator had permissibly drained the landowner of all his oil.<sup>293</sup> If the operator had been under the constraints of statutory pooling or unitization, the landowner—a non-consenting interest owner—might have been forced to include his land in a proposed pool or unit.<sup>294</sup> Although this participation would have been forced, the landowner would have received the value of his interest rather than having it drained without his consent.<sup>295</sup>

Because of similar situations taking place in West Virginia—as well as less dramatic ones—the legislature must act to ensure that the state's law remains current with available resource removal technology.<sup>296</sup> Such legislation would limit the negative effects of the rule of capture that have not sufficiently been negated by the common law.<sup>297</sup> In addition, it would provide an increased set of options and a regulatory framework for non-consenting executory

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<sup>288</sup> *Id.*

<sup>289</sup> Kramer, *supra* note 126, at 237.

<sup>290</sup> RATNER & TIEMANN, *supra* note 10, at 1.

<sup>291</sup> *See supra* Part III.

<sup>292</sup> *THERE WILL BE BLOOD* (Paramount Vantage 2007).

<sup>293</sup> *Id.*

<sup>294</sup> *See supra* Part II.B.2.ii.

<sup>295</sup> *See supra* Part II.B.2.ii.

<sup>296</sup> *See Kramer, supra* note 126, at 237.

<sup>297</sup> *See supra* Part III.A.

interests that are presently threatened by partition suits.<sup>298</sup> If recent studies are reliable, a trend in private ownership of West Virginia's land would mean that such legislation has the potential to positively affect more in-state landowners than it would have in the recent past.<sup>299</sup> In any event, if the legislature focuses on the consent of and options available to the executory interests, the statute would provide an avenue for efficient and economic recovery of minerals while safeguarding the interests of private landowners. Therefore, in order to ensure that correlative rights and conservation goals are satisfied in the continued development of the Marcellus Shale, West Virginia should adopt a statutory pooling or unitization scheme for shallow oil and gas wells.

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<sup>298</sup> See *supra* Part III.B.

<sup>299</sup> See *supra* Part III.C.

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