



IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: MARCELLUS SHALE LITIGATION

CIVIL ACTION NO. 14-C-3000

THIS DOCUMENT APPLIES TO THE HALLS RUN ROAD TRIAL GROUP:

CHAD L. RICHARDS, et al. v. Antero Resources Corp., et al.	C.A. No. 15-C-179 KAN
CARLA J. SIDERS, et al. v. Antero Resources Corp., et al.	C.A. No. 15-C-92 KAN
BRITTANY M. STROTHER v. Antero Resources Corp., et al.	C.A. No. 15-C-93 KAN
LOREN B. STROTHER, et al. v. Antero Resources Corp., et al.	C.A. No. 14-C-282 HRR
SHARON A. STROTHER v. Antero Resources Corp., et al.	C.A. No. 15-C-94 KAN
RICKY LEE WATSON v. Antero Resources Corp., et al.	C.A. No. 14-C-23 DOD
ROBERTA G. ZWIEBEL v. Antero Resources Corp., et al.	C.A. No. 14-C-280 HRR
TESLA M. ZWIEBEL v. Antero Resources Corp., et al.	C.A. No. 14-C-281 HRR
ZACHARY V. ZWIEBEL v. Antero Resources Corp., et al.	C.A. No. 14-C-279 HRR

**FINAL ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Pending before the Court is *Defendants' Motion for Summary Judgment* (Transaction ID 66619165) filed by Antero Resources Corporation and Hall Drilling LLC (collectively referred to as "Defendants") on May 21, 2021. The Court has reviewed and considered the motion as well as all the extensive briefing and exhibits filed by Plaintiffs and Defendants (Transaction IDs 66662736 and 66682776), and the arguments of counsel. The Court **GRANTS** Defendants' motion for summary judgment because the Presiding Judges find these cases present the same material facts and issues as those decided by the Supreme Court of Appeals of West Virginia in *Andrews v. Antero Resources Corporation*, 241 W.Va. 796, 828 S.E.2d 858 (2019).

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs are residents and/or landowners in Doddridge County and Harrison County, West Virginia, who live close to one another in an area known as Halls Run Road. Plaintiffs consist of five households: (1) Chad Richards, Crystal Richards, A.L.R., a minor, and L.A.R., a minor; (2) Carla J. Siders, Brittany M. Strother, Sharon A. Strother, M.L.M., a minor, and

J.M.M., a minor; (3) Loren B. Strother, Lauren A. Strother, Trisha N. Strother, and Adam P. Strother; (4) Robert G. Zwiebel;, Tesla M. Zwiebel, and Zachary Zwiebel; and (5) Ricky Lee Watson. Defs. Mem. pp. 1, 5-6. Plaintiffs' claims arise from Defendants' oil and gas operations in North Central West Virginia involving three well pads – the Clarence Pad, Hubert Pad, and Varner West Pad – all located within one mile from the properties that are the subject of Plaintiffs' Complaints (“Subject Properties”). Id.

2. Plaintiffs filed their Complaints and amended Complaints at various times in 2014 and 2015. Like the Plaintiffs in *Andrews*, Plaintiffs in the Halls Run Road cases assert claims for “private temporary continuing abatable nuisance and negligence/recklessness against Defendants . . . for damages arising from Defendants’ oil and/or natural gas drilling, exploration, extraction, pipeline construction, transportation, and related acts and/or omissions” Complaints, ¶ 1. Plaintiffs allege they are no longer able to enjoy life and use and enjoy their homes and properties in ways prior to Defendants’ acts and/or omissions. Id., ¶ 2.

3. Plaintiffs allege Defendants’ activities have caused significant damage to Plaintiffs’ property, quality of life, and their rights to use and enjoy their property. Id., ¶¶ 14 and 27. However, Plaintiffs and their counsel admit they have no property damage claims or physical injury claims. Defs. Mem. p. 6; June 26, 2015 Hearing Transcript, 36:14-16; February 26, 2016, Hearing Transcript, 40:21-41:4; and Pltffs’ Mem. p. 58: “Plaintiffs voluntarily withdraw their claims for water contamination, air contamination, health, medical and mental claims.” Plaintiffs have also withdrawn their claims for punitive damages. Pltffs. Mem, p. 60.

4. As in *Andrews*, Defendant Antero Resources Corporation (“Antero”) is the owner of horizontal Marcellus Shale wells located on numerous well pads in Doddridge, Harrison, and

Ritchie Counties, among others. Antero contracted with third parties, including Defendant Hall Drilling, LLC (“Hall Drilling”), to construct the well pads and drill the wells. Defs. Mem. p. 5.

5. Like *Andrews*, the activity at issue in the Halls Run Road Complaints is horizontal well drilling and hydro-fracturing as part of the development of the Marcellus Shale in West Virginia. Plaintiffs also complain about a compressor station located more than one mile from the Subject Properties, although Antero contends it neither owns nor operates this facility. Defs. Mem. p. 5.

6. Also like *Andrews*: (1) Antero is the lessee of the minerals beneath the Subject Properties; (2) Plaintiffs only own the surface of the Subject Properties; (3) Antero has not built any structures on the Subject Properties; (4) Plaintiffs and their counsel have withdrawn any claims for property damage or personal injury; and (5) Plaintiffs’ primary complaints are noise, dust, lights, traffic and odors. Defs. Mem. p. 2.

7. As the mineral lessee, Antero has express rights to use the surface of the Subject Properties to develop the oil and gas underlying the Subject Properties. Those development rights were retained by the oil and gas mineral owners in the severance deeds separating the surface estates from the mineral estates of the Subject Properties. The terms of the severance deeds and Antero’s mineral leases are summarized below:

Strothers, Siders and Zwiebel Households

Plaintiff Loren Strother owns only the surface of approximately 2.855 acres, upon which the Strothers’ and Siders’ household members have purportedly resided at various times.¹ Plaintiff Roberta Zwiebel owns only the surface of approximately 0.975 acres, upon which she and members of her household have resided at various times.² Neither the Strother nor the

¹ See Affidavit of J. Kevin Ellis, attached as Exhibit 16 to Defs. Mem, ¶ 8.

² *Id.*, ¶¶ 14-15.

Zwiebel household members own the oil and gas beneath the properties that are the subject of the Strother, Siders, and Zwiebel Plaintiffs' Complaints.³

Prior to Plaintiffs Loren Strother and Roberta Zwiebel acquiring their surface estates, the surface estates were severed from the oil and gas by deed dated July 17, 1905.⁴ The mineral owner retained "all the oil and gas in and under said land with the right to those entitled thereto to bore, produce and carry away the same," including the rights described in an oil and gas lease recorded in Harrison County, which leased the oil and gas:

together with the right and privilege . . . of entering upon said tract of land and drilling, mining, boring and operating for oil and gas, and operating an producing the oil and gas within and under the same, and of laying pipe lines either on top or underneath the surface of said land for the transportation of oil, gas and water and of erecting and building tanks, stations and structures on said land to take care of the said oil and gas, and of using sufficient water from said land to run all necessary machinery and of using gas from any well drilled thereon producing gas to run all necessary machinery, to drill and pump any other wells thereon, and the right and privilege at any time of removing any and all machinery, fixtures, engines, boilers, tanks, stations, structures, offices and buildings placed on said land[.]⁵

Antero, as successor in interest, has express leasehold rights to the oil and gas beneath the Strother and Zwiebel properties pursuant to 54 various leases known as the "285 Acre Leases."⁶

These leases expressly grant the following rights:

[A]ll of the oil and gas and all of the constituents of either in and under the land hereinafter described, together with the exclusive right to drill for, produce and market oil and gas and their constituents, and also the right to enter thereon at all times for the purpose of drilling and operating for oil, gas and water, laying pipelines, erecting tanks, machinery, towers and structures, and to possess, use and occupy so much of said premises and other lands of Lessor as is necessary and convenient for said purposes to convey the above named products therefrom or thereto by pipelines or otherwise.⁷

[T]he lands hereafter described for the purposes of prospecting, exploring by

³ Id., ¶¶ 8, 14-15.

⁴ Id., ¶¶ 11, 14.

⁵ Id.

⁶ Id., ¶¶ 12-13, 16-17.

⁷ Id., Exh. A, § A, ¶¶ 3-51.

geophysical and other methods, drilling, operating for, producing oil or gas, or both, together with the right and easement to construct, operate, repair, maintain and remove pipelines, telephone, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas water, brine and other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of the lands alone or conjointly with neighboring lands.⁸

[T]he lands hereinafter described for the purposes of exploring by geophysical and other methods, drilling either vertically or horizontally, operating for, producing oil or gas or both, together also with the right to drill, together with the right and easement to construct (in locations approved by Lessor), operate, repair, maintain and remove pipelines, telephone, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine or other fluids into the Target Formations and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of the lands, alone or conjointly with neighboring lands for these purposes.⁹

[E]xclusive possession and use for the purposes of exploring and operating for, producing, and marketing oil, gas, natural gasoline, casing-head gas, condensate, related hydrocarbons, and all products produced therewith or therefrom by methods now known or hereafter discovered, . . . of injecting gas, air, water, and other fluids into sands and formations for the purpose of recovering and producing said minerals The Lessor does also grant unto the Lessee during the term hereof the exclusive right to enter upon the above-described land to conduct geological and geophysical surveys and explorations, and to operate for, produce, and market oil, gas, natural gasoline, casing-head gas, condensate, related hydrocarbons, and all products produced therewith or therefrom and to inject and store any quantity of gas therein by pumping otherwise introducing the same into any and all formations in and under said land and other lands, and to withdraw the same by pumping or otherwise through any well or wells heretofore or hereafter drilled or re-drilled on said land and other lands and to use said land for protecting gas stored within and under adjoining and neighboring lands; together with the right to inject gas, air, water, and other fluids into the sands and formations in said land for the purpose of recovering and producing the minerals referred to above; together also with the right to pool said land or any part thereof with other lands as hereinafter provided; together also with the right to drill wells, recondition producing wells, redrill and use abandoned wells, and re-abandon wells on said land; together also with the right to drill, operate and maintain wells for the purpose of injecting, storing and disposing of waste fluids from within and under said land or other lands resulting from or incidental to the production of or injection, storage and removal of gas; together also with the rights of way and

⁸ *Id.*, Exh. A, § A, ¶¶ 52-53.

⁹ *Id.*, Exh. A, § A, ¶¶ 55.

servitudes on, over, and through said land for roads, pipelines, telephone and electric power lines, structures, plants, houses and buildings for employees, drips, tanks, stations, cathodic protection devices, houses for gates, meters, and regulators, and all other rights and privileges necessary, incident to, and convenient for the economical operation of said land alone and conjointly with other lands for the production and transportation of said minerals and for the injection, storage, and withdrawal of gas; together also with the right to use oil, gas, and water from said land free of cost to the Lessee for all such purposes; together also with the right of removing either during or after the term hereof all and any property and improvements placed or located on said land by the Lessee; and together also with the right of ingress and egress upon and over said land and adjoining or neighboring lands now owned by the Lessor for all of the aforesaid purposes[.]¹⁰

[E]xclusive right to enter upon the above-described land to conduct geological and geophysical surveys and explorations, and to operate for, produce, and market oil, gas, natural gasoline, casing-head gas, condensate, related hydrocarbons, and all products produced therewith or therefrom and to inject and store any quantity of gas therein by pumping or otherwise introducing the same not any and all formations in and under said land and other lands, and to withdraw the same by pumping or otherwise through any well or wells heretofore or hereafter drilled or re-drilled on said land and other lands and to use said land for protecting gas stored within and under adjoining and neighboring lands; together with the right to inject gas, air, water, and other fluids into the sands and formations in said land for the purpose of recovering and producing the minerals referred to above; together also with the right to pool said land or any part thereof with other lands as hereinafter provided; together also with the right to drill wells, recondition producing wells, re-drill and use abandoned wells, and re-abandon wells on said land; together also with the right to drill, operate and maintain wells for the purpose of injecting, storing and disposing of waste fluids from within and under said land or other lands resulting from or incidental to the production of, or injection, storage and removal of gas; together also with the rights of way and servitudes on, over, and through said land for roads, pipelines, telephone and electric power lines, structures, plants, houses and buildings for employees, drips, tanks, stations, cathodic protection devices, houses for gates, meters, and regulators, and all other rights and privileges necessary, incident to, and convenient for the economical operation of said land alone and conjointly with other lands for the production and transportation of said minerals and for the injection, storage, and withdrawal of gas; together also with the right to use oil, gas, and water from said land free of cost to the Lessee for all such purposes; and any property and improvements placed or located on said land by the Lessee; and together also with the right of ingress and egress upon and over said land and adjoining or neighboring lands now owned by the Lessor for all of the aforesaid

¹⁰ Id., Exh. A, § A, ¶ 56.

purposes.¹¹

[E]xploring by geological and geophysical and other methods, (including, but not limited to, conducting seismic surveys), drilling either vertically or horizontally, operating for, producing oil or gas or both including methane gas present in or associated with any formations, horizons, strata or zones and/or, together with the right and easement to construct, operate, repair, maintain, resize and remove pipelines, telephone, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine or other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of the lands, alone or jointly with neighboring lands for these purposes.¹²

Richards Household

At the time the Complaint was filed, Plaintiff Chad Richards owned only the surface of 9.35 acres, more or less, upon which the Richards household members resided.¹³ Subsequent to filing the Complaint, Plaintiff Chad Richards sold his property to Plaintiff Ricky Lee Watson.¹⁴ None of the Richards household members owned the oil and gas beneath the property that is the subject of the Richards Plaintiffs' Complaint.¹⁵

Prior to Plaintiff Chad Richards acquiring his surface estate, the surface estate was severed from the oil and gas by deeds dated April 8, 1901, and November 24, 1958.¹⁶ By deed dated April 8, 1901, the surface overlying the northern portion of the property was severed and the mineral owner acquired the oil and gas beneath the northern portion of the property “together with the right of ingress and egress in, through and upon said land for oil and gas purposes[.]”¹⁷ By deed dated November 24, 1958, the surface overlying the southern portion of the property was severed and the mineral owner retained all of the oil and gas and “the right to lease, drill and

¹¹ Id., Exh. A, § A, ¶ 57.

¹² Id., Exh. A, § A, ¶ 61.

¹³ Ellis Affidavit, ¶ 18.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id., ¶¶ 19-20.

¹⁷ Id., ¶ 20.

bore for said oil and gas.”¹⁸

Antero, as successor in interest, has express leasehold rights to the oil and gas beneath the property that is the subject of the Richards Plaintiffs’ Complaint pursuant to various leases known as the Southern and Northern Leases.¹⁹ These leases expressly grant the following rights:

[E]xclusive possession and use for the purposes of exploring and operating for, producing and marketing oil, gas, natural gasoline, casing-head gas, condensate, related hydrocarbons, and all products produced therewith or therefrom by methods now known or hereafter discovered, of injecting, storing, and withdrawing any kind of gas regardless of the source, of protecting stored gas, of injecting gas, air, water, and other fluids into sands and formations for the purpose of recovering and producing said minerals, and of pooling with other lands for such purposes Lessor does also grant unto the Lessee during the term hereof the exclusive right to enter upon the above-described land to conduct geological and geophysical surveys and explorations, and to operate for, produce, and market oil, gas, natural gasoline, casing-head gas, condensate, related hydrocarbons, and all products produced therewith or therefrom and to inject and store any quantity of gas therein by pumping or otherwise introducing the same into any and all formations in and under said land and other lands, and to withdraw the same by pumping or otherwise through any well or wells heretofore or hereafter drilled or re-drilled on said land and other lands and to use said land for protecting gas stored within and adjoining and neighboring lands; together with the right to inject gas, air, water, and other fluids into the sands and formations in said land for the purpose of recovering and producing the minerals referred to above; together also with the right to pool said land or any part thereof with other lands as hereinafter provided; together also with the right to drill wells, recondition producing wells, re-drill and use abandoned wells, and re-abandon wells on said land; together also with the rights of way and servitudes on, over, and through said land for roads, pipelines, telephone and electric power lines, structures, plants houses, and buildings for employees, drips, tanks, stations, cathodic protection devices, houses for gates, meters, and regulators, and all other rights and privileges necessary, incident to, and convenient for the economical operation of said land alone and conjointly with other lands for the production and transportation of said minerals and for the injection, storage, and withdrawal of gas; together also with the right to use oil, gas, and water from said land free of cost to the Lessee for all such purposes; together also with the right of removing either during or after the term hereof all and any property and improvements placed or located on said land by the Lessee; and together also with the right of ingress and egress upon and over said land and adjoining or neighboring lands

¹⁸ *Id.*, ¶ 19.

¹⁹ *Id.*, ¶¶ 21-23.

now owned by the Lessor for all of the aforesaid purposes.²⁰

[E]xploring by geological and geophysical and other methods, (including, but not limited to, conducting seismic surveys), drilling either vertically or horizontally, operating for, producing oil or gas or both including methane gas present in or associated with any formations, horizons, strata or zones . . . together with the right and easement to construct, operate, repair, maintain, resize and remove pipelines, telephone, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine or other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of the lands, alone or conjointly with neighboring lands for these purposes.²¹

[E]xploring by geological and geophysical and other methods, (with the right to conduct surveys including, but not limited to, conducting seismic surveys), drilling either vertically or horizontally, operating for, producing and removing oil, gas and/or coalbed methane gas including all the constituents thereof and/or associated hydrocarbons, including but not limited to: oil, gas, liquid hydrocarbons, casinghead gas, condensate, methane gas and coalbed methane gas, present in or associated with any formations, horizons, strata or zones; and/or together with the right and easement to construct, operate, repair, maintain and remove pipelines, telephone, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine or other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of the lands, alone or conjointly with neighboring lands for these purposes[.]²²

Watson Household

When Plaintiff Ricky Lee Watson's Complaint was filed in 2014, he owned only the surface of approximately 30.99 acres, upon which he resided.²³ He does not own the oil and gas beneath the property that is the subject of his Complaint.²⁴ Prior to Ricky Watson acquiring his surface estate, the surface estate was severed from the oil and gas by deed dated May 7, 1959.²⁵ The mineral owner retained, "all of the coal, oil, gas and other minerals within the property and

²⁰ Id., Exh. A, § D, ¶ 5.

²¹ Id., Exh. A, § D, ¶ 6.

²² Id., Exh. A, § D, ¶¶ 8-14.

²³ Id., ¶ 24.

Plaintiff Ricky Lee Watson has since acquired a joint tenancy interest in an additional 9.35 acres. Id. ¶¶ 18, 24.

²⁴ Id., ¶¶ 24-25.

²⁵ Id., ¶ 26.

under the property herein conveyed.”²⁶

Antero has express leasehold rights to the oil and gas beneath Plaintiff Ricky Lee Watson’s property.²⁷ These leases grant the following rights:

[E]xploring by geological and geophysical and other methods, (including, but not limited to, conducting seismic surveys), drilling either vertically or horizontally, operating for, producing oil or gas or both including methane gas present in or associated with any formations, horizons, strata or zones and/or; and together with the right and easement to construct, operate, repair, maintain, resize and remove pipelines, telephone, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine or other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of the lands, alone or conjointly with neighboring lands for these purposes.²⁸

(a) [E]xploring by geological and geophysical and other methods, (with the right to conduct surveys, including, but not limited to, conducting seismic surveys), drilling either vertically or horizontally, operating for, producing and removing oil, gas and/or coal methane gas including all the constituents thereof and/or associated hydrocarbons, including but not limited to oil, gas, liquid hydrocarbons, casinghead gas, condensate, methane gas and coal bed methane gas, present in or associated with any formations, horizons, strata or zones; and/or (b) for the further purpose and with the exclusive right in the Lessee, as it may see fit, to store any kind of gas therein by pumping or otherwise introducing the same into any sand or sands, substrata or horizon in and under said land, and the right to remove the same by pumping or otherwise through any well or wells on said land or other lands, and to use said land for protecting gas stored within and under adjoining and neighboring lands, together also with the right to drill, operate and maintain wells for the purpose of injecting, storing and disposing of waste fluids from within and under said land or other lands resulting from or incidental to the production of or injection, storage and removal of gas, together with the right and easement to construct, operate, repair, maintain and remove pipelines, telephone, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine or other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of the lands, alone or conjointly with neighboring lands for these purposes, said lands being situated as described above.²⁹

²⁶ Id.

²⁷ Id., ¶¶ 27-28.

²⁸ Id., Exh. A, § E, ¶¶ 3-4.

²⁹ Id., Exh. A, § E, ¶ 5.

8. The noise, traffic, dust, lights and odors of which Plaintiffs complain are reasonable and necessarily incident to Antero's development of the underlying minerals.

9. Plaintiffs have not offered any admissible evidence of record to establish that Defendants' use of Plaintiffs' property has exceeded the scope of Antero's lease agreements, or what is reasonable and necessary to develop the underlying minerals, other than self-serving assertions that Defendants' activities, although within the scope of the lease agreements, are excessive.

10. Despite counsel's argument that Antero was not developing oil and gas under the Subject Properties, Plaintiffs' expert witness admits that Antero's development of natural gas from the Marcellus formation is near and beneath complainants' residences. As Mr. Ingraffea has opined, "[t]o a reasonable degree of engineering certainty, I conclude the unconventional development of natural gas from the Marcellus formation *near and beneath complainants' residences, as pursued by Antero*, is a heavy industrial activity necessarily involving large, constructed, above-ground facilities, use of heavy machinery, emissions of noise/light/dust pollution, and emissions of gaseous pollutants during construction and normal operations." Expert Report of Anthony R. Ingraffea, Ph.D., P.E., p. 26 (emphasis added).

CONCLUSIONS OF LAW

11. Summary judgment must be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(c). See also Syl. Pt. 2, *Angelucci v. Fairmont Gen. Hosp., Inc.*, 217 W. Va. 364, 618 S.E.2d 373 (2005); and Syl. Pt. 2, *Harrison v. Town of Eleanor*, 191 W. Va. 611, 447 S.E.2d 546 (1994).

12. “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995)(citations and internal quotation marks omitted). Thus,

[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Id., Syl. Pt. 2.

13. “A party seeking summary judgment bears the initial burden of showing that no genuine issue of material fact exists. Once the movant makes this showing, the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue” to avoid summary judgment. Syl. Pt. 2, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). “To be specific, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” *Williams*, 194 W. Va. at 60, 459 S.E.2d at 337 (citation omitted).

14. Although a trial court considering a summary judgment motion must view the underlying facts and all inferences in the light most favorable to the party opposing summary judgment, the trial court should consider only “reasonable inferences.” Id. at 60 n. 10, 459 S.E.2d at 337 n.10. Moreover, the nonmoving party “cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.” Id. at 61 n.14, 459 S.E.2d at 338 n.14, citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

15. “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be

no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S. Ct. 2505, 2510 (1986)(emphasis in original).

16. “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). This includes suits alleging nuisance. *See Acord v. Colane Co.*, 228 W. Va. 291, 719 S.E.2d 761 (2011) (affirming summary judgment in public nuisance case); *Browning v. Halle*, 219 W. Va. 89, 632 S.E.2d 29 (2005) (affirming summary judgment in private nuisance case); *Booker v. Foose*, 216 W. Va. 727, 613 S.E.2d 94 (2005) (affirming summary judgment in private nuisance case).

17. Under West Virginia law, “[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” *Id.* at Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 490, 128 S.E.2d 626, 631(1962). The terms of the written instrument must be enforced as written: “It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as plainly expressed in their written contract or to make a new and different contract for them.” *Id.* at 493, 128 S.E.2d at 633. Furthermore, the parties to the agreement, and their successors-in-interest, are bound by the terms of the agreement. *Id.* at 491, 128 S.E.2d at 632.

18. Like *Andrews*, the severance deeds at issue in these cases granted to the mineral owner

the right to produce oil and gas. The July 17, 1905 severance deed at issue in the Strothers, Siders and Zwiebel cases granted the mineral owner “all the oil and gas in and under said land with the right to those entitled thereto to bore, produce and carry away the same.”³⁰ In the Richards case, the April 8, 1901, severance deed granted the mineral owner the oil and gas beneath the northern portion of the property “together with the right of ingress and egress in, through and upon said land for oil and gas purposes,”³¹ and the November 24, 1958, severance deed granted the mineral owner all of the oil and gas beneath the southern portion of the property and “the right to lease, drill and bore for said oil and gas.”³² In the Watson case, the May 7, 1959 severance deed granted the mineral owner “all of the coal, oil, gas and other minerals within the property and under the property herein conveyed.”³³

19. As the mineral lessee, Antero has express rights to use the surface of Plaintiffs’ properties for mineral development and extraction pursuant to mineral severance deeds and oil and gas leases, as summarized above. See Syl. Pt. 1, *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90, 91 (1924) (“The owner of the mineral underlying land possesses, as incident to this ownership, the right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.”) and *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E. 137, 138 (1907) (“A lease granting minerals carries with it, by necessary implication, the right to enter upon the property and do all things necessary for the purpose of acquiring and enjoying the estate granted.”)

20. “The actions or inactions of the owner of an easement, which otherwise meet the legal definition of a nuisance, do not create a nuisance as to the estate servient to the easement unless

³⁰ Ellis Affidavit, ¶¶ 11, 14.

³¹ *Id.*, ¶ 20.

³² *Id.*, ¶ 19.

³³ *Id.*, ¶ 26.

those actions or inactions exceed the scope of the easement.” Syl. p. 5, *Quintain Development LLC v. Columbia Nat. Res. Inc.*, 210 W. Va. 128, 556 S.E.2d 95 (2001). Determining whether an owner of a property right has exceeded his rights is a question of law for the Court. *Id.* at 136, 103 (citing *Westchester Associates, Inc. v. Boston Edison Co.*, 712 N.E.2d 1145, 1149 (Mass. App. Ct. 1999) (Court of Appeals concluded Edison had not created a nuisance because its use of easement was of same amount and character as authorized, agreeing with Superior Court that Edison’s use of easement was reasonable as a matter of law).

21. The Court finds that Defendants Antero and Hall were operating within the scope of Antero’s leasehold rights to develop oil and gas underlying the properties that are the subject of Plaintiffs’ Complaints. See Syl. Pt. 5, *Quintain*, 210 W. Va. 128, 556 S.E.2d 95 (2001). In light of the express rights arising under the severance deeds and the oil and gas leases whereby Antero, as mineral lessee, has the express right to use the Subject Properties in the course of mineral development, Plaintiffs’ claims fail as a matter of law.

22. The very noise, traffic, dust, lights, and odors of which Plaintiffs complain are reasonable and necessarily incident to mineral development. The unambiguous terms of the oil and gas leases grant Defendants express rights to use Plaintiffs’ properties in the course of their mineral development, and the terms of those agreements must be applied in accordance with their plain language. Application of these agreements completely resolves this litigation as a matter of law in Defendants’ favor.

23. In addition to its express contractual rights, Antero has an implied surface easement for the Plaintiffs’ properties. Under West Virginia law, a surface owner does not have “an unrestricted right to enjoyment in their property.” *Martin v. Hamblet*, 230 W. Va. 183, 191, 737 S.E.2d 80, 88 (2012). “A mineral owner generally has the right to utilize the surface for

‘purposes reasonably necessary for the extraction of minerals.’” *Id.*, quoting *Buffalo Mining Co. v. Martin*, 165 W.Va. 10, 14, 267 S.E.2d 721, 723 (1980).

24. As the Supreme Court of Appeals of West Virginia has recognized, “[i]n order for a claim for an implied easement for surface rights in connection with mining activities to be successful, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner.” Syl. Pt. 1, *Andrews v. Antero Resources Corporation*, 241 W.Va. 796, 828 S.E.2d at 859 (2019), quoting, Syllabus point 3, *Buffalo Mining Co. v. Martin*, 165 W.Va. 10, 267 S.E.2d 721(1980). For Plaintiffs to recover against Defendants, they must show Antero’s activities: (1) exceeded that which were reasonably necessary to extract the minerals; and (2) imposed a substantial burden on the surface owner.

25. Whether a mineral owner has exceeded its implied right to reasonable use of the surface is a question of law determined by the court. *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 724, 61 S.E.2d 633, 636 (1950). This rule is one of state property law. *Justice v. Pennzoil*, 598 F.2d 1339, 1342 (4th Cir. 1979) (construing West Virginia law). That is:

Unreasonable use of land by a mineral owner is not measured by the tort standard of the ordinary reasonable man; rather, it is measured by concrete legal standards rooted in the common law. It is not a matter readily susceptible of jury determination. [This rule] assures the continuity of those substantive rights and obligations of the parties which were defined generations ago.

Id. at 1342–43 (internal citations omitted). Only if disputes exist as to the nature and extent of an operator’s use of a surface should those questions be submitted to a jury. *Id.* at 1343. Here, no jury determination is required because Defendants have accepted all of Plaintiffs’ factual allegations as true for purposes of summary judgment. Defs Mem. p. 30, n. 64.

26. Furthermore, Plaintiffs bear the burden to prove that Antero’s activities to develop its minerals exceeded that which is reasonably necessary. *Andrews*, 241 W.Va. at 808, 828 S.E.2d

at 870, (citing *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 391-92 (4th Cir. 2013)(recognizing that a plaintiff bears the burden of demonstrating what is reasonably necessary for the development of minerals))).

27. Plaintiffs have not offered any admissible evidence of record to establish that Defendants' use of Plaintiffs' property has exceeded the scope of Antero's lease agreements, or what is reasonable and necessary to develop the underlying minerals, other than self-serving assertions that Defendants' activities, although within the scope of the lease agreements, are excessive.

28. Despite counsel's argument that Antero was not developing oil and gas under the Subject Properties, Plaintiffs' expert witness admits that Antero's development of natural gas from the Marcellus formation is near and beneath complainants' residences. Plaintiffs' expert, Anthony R. Ingraffea, Ph.D., P.E., opines that, "development of natural gas from the Marcellus formation near and beneath complainants' residences, as pursued by Antero, is a heavy industrial activity necessarily involving large, constructed, above-ground facilities, use of heavy machinery, emissions of noise/light/dust pollution, and emission of gaseous pollutants during construction and normal operations." Ingraffea Expert Report, p. 26. He further opines, that "shale gas development pursued by Antero invariably creates nuisance impacts to residents forced to live within its industrial footprint." *Id.* However, these opinions do not address either the "reasonably necessary" or "substantial burden" prongs of the *Buffalo Mining* test.

29. On the other hand, Defendants' expert, Robert W. Chase, Ph.D., opines that, "Antero's methods for extraction of minerals were reasonable and necessary to extract natural gas and natural gas liquids from the Marcellus shale formation in commercially viable volumes in conformance with modern petroleum industry standards." Affidavit of Robert W. Chase, Ph.D.,

at Exh. B, ¶ 88. Furthermore, “[h]orizontal drilling and multi-stage hydraulic fracturing facilitate the extraction of natural gas from the Marcellus shale formation in commercially viable quantities because they allow the well bore to penetrate the formation over much greater horizontal distances dramatically decreasing the burden on the surface estates compared to conventional vertical wells.” *Id.*, ¶ 89. “The burden on the surface estates created by horizontal drilling conducted in the vicinity of the subject properties is significantly lesser than the burden that would be endured from the construction of a multitude of traditional vertical wells directly on the surface owners’ properties. . . .” *Id.*, ¶ 27. With horizontal drilling, a single well pad is used to drill multiple wells. *Id.*, ¶ 29. That single well pad “requires only one pad or location, one lease road, and one pipeline; conventional vertical well drilling requires a location, lease road and pipeline for every single vertical well.” *Id.*

30. West Virginia precedent makes clear that the noise, traffic, vibrations, dust, lights, and odors of which Plaintiffs complain are well within the bounds of what is reasonable and necessary use to develop minerals. *See Adkins*, 134 W. Va. at 725, 61 S.E.2d at 636 (holding that an oil and gas developer did not act unreasonably or unnecessarily where it constructed a road to bring machinery to drill the gas well, laid pipeline over the surface of the land, constructed an open ditch for drainage of sand, water, and other refuse from the well, and caused the plaintiff to suffer damages that were *damnum absque injuria* because the plaintiff’s acquisition of the land was “subject to the rights of the owner of the minerals, who by virtue of owning such minerals also possessed the rights necessary to produce and transport the same as an incident to such ownership”). *See also Adams v. Cabot Oil & Gas Corp.*, No. 13-1299, 2014 WL 6634396 (W. Va. Nov. 24, 2014) (holding that a mineral owner’s construction of a new access road over a surface owner’s property was reasonable); *Coffindaffer v. Hope Nat. Gas Co.*,

74 W. Va. 107, 81 S.E. 966 (1914) (holding that the building of a road was necessary to enable the operator to haul material for its rig and tools and machinery for drilling); *Teel v. Chesapeake Appalachia, LLC*, 906 F. Supp. 2d 519 (N.D. W. Va. 2012), aff'd, 542 F. App'x 255 (4th Cir. 2013) (holding that defendant's depositing of drilling waste and other materials in pits on plaintiffs' property was reasonable and therefore not trespass). Because the operations of Antero, and its contractors, were reasonable and necessary to its mineral development, Defendants are entitled to summary judgment as a matter of law.

31. Antero's development of the minerals underlying Plaintiffs' properties through horizontal wells rather than vertical wells does not diminish its rights to use Plaintiffs' surface property in the course of that development. Under West Virginia law, parties to contracts are held to contemplate advancements in technology, absent specific language to the contrary. *Phillips v. Fox*, 193 W. Va. 657, 662, 458 S.E.2d 327, 332 (1995); *Bassell v. W. Va. Central Gas Co.*, 86 W. Va. 198, 103 S.E. 116 (1920); *Armstrong v. Md. Coal Co.*, 67 W. Va. 589, 69 S.E. 195, 203 (1910); *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90, 91 (1924).

32. Defendants are entitled to make use of reasonable and necessary methods to develop the minerals underlying Plaintiffs' properties. Only where methods have been shown to be wholly incompatible with the surface estate due to total destruction of the surface may those methods be found to be beyond the contemplation of the parties. See *Quintain Dev., LLC v. Columbia Nat. Res., Inc.*, 210 W. Va. 128, 133, 556 S.E.2d 95, 100 (2001); *Buffalo Mining*, 267 S.E.2d 721, 725, 165 W. Va. 10, 15 (1980). There is no evidence in the record indicating Antero's methods are "materially different" from the extraction methods contemplated at the time the minerals were severed or acquired or are incompatible or destructive to the surface estate.

33. Business activity related to development of the Marcellus Shale, including horizontal

well drilling and its related infrastructure, is encouraged and supported by the West Virginia Legislature. See Marcellus Gas and Manufacturing Development Act, W.Va. Code § 5B-2H-1, et seq. (effective July 1, 2011)(“facilitating the development of business activity directly and indirectly related to development of the Marcellus shale serves the public interest of the citizens of this state by promoting economic development and improving economic opportunities of this state.” W.Va. Code § 5B-2H-2(b)); Horizontal Well Act, West Virginia Code § 22-6A-1, et seq. (effective December 14, 2011)(“advancement of new and existing technologies and drilling practices have created the opportunity for the efficient development of natural gas contained in underground shales” W. Va. Code § 22-6A-2(a)(1)). In fact, the Legislature has even stated that, “[i]t is in the interest of national security to encourage post-production uses of natural gas and its various components as a replacement for oil imported from other countries.” W.Va. Code § 5B-2H-2(a)(3).

34. The Legislature expressly acknowledged the use of a single surface location to develop minerals on a unit basis in the Horizontal Well Act: “[t]hese practices have resulted in a new type and scale of natural gas development that utilize horizontal drilling techniques, *allow the development of multiple wells from a single surface location*, and may involve fracturing processes that use and produce large amounts of water.” (emphasis added) W. Va. Code § 22-6A-2(a) (2).

35. The Horizontal Well Act is also consistent with case law from the United States District Court for the Northern District of West Virginia. See *Miller v. N.R.M. Petroleum Corp.*, 570 F. Supp. 28, 30 (N.D. W. Va. 1983) (holding that “[i]t seems only reasonable that the surface area of each tract in a pool should be available for use in connection with the construction and operation of a well, as long as the use is reasonably necessary”).

36. As in *Andrews*, Antero has contractual and property rights to develop the oil and gas beneath the Plaintiffs' properties. The Court finds that Plaintiffs have failed to establish any significant evidence, in the record in this case, that Antero's activities have exceeded that which are reasonably necessary to develop its minerals, or have imposed a substantial burden on the Subject Properties, which would constitute a private nuisance under common law principles. Syl. Pt. 1, *Andrews v. Antero Resources Corporation*, 241 W.Va. 796, 828 S.E.2d at 859 (2019), quoting, Syllabus point 3, *Buffalo Mining Co. v. Martin*, 165 W.Va. 10, 267 S.E.2d 721(1980).

37. Plaintiffs contend that *EQT Production Company v. Crowder*, 241 W.Va. 738, 828 S.E.2d 800 (2019) applies to Plaintiffs' cases. However, the Court concludes that *Crowder*, which was decided prior to *Andrews*, is not applicable to Plaintiffs' cases for several reasons. First, the *Crowder* case asserted claims of trespass. The operator in that case constructed a well pad on the plaintiff's surface estate without an agreement with the surface owner. The trial court granted partial summary judgment to plaintiffs on the trespass claim and a jury trial for damages was held with a verdict of \$190,000. The operator appealed. On appeal, the Supreme Court held that:

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

Crowder, Syl. Pt. 5, 828 S.E.2d at 802. Unlike *Crowder*, in these cases there are no allegations of trespass on any of the Plaintiffs' surface estates to benefit mining or drilling operations on other lands. It is undisputed that Antero has not built any structures on the Subject Properties. Antero is not using Plaintiffs' surface estates for mineral development. Second, despite counsel's argument to the contrary, Plaintiffs' expert witness opines that Antero's development of natural gas from the Marcellus formation is near and beneath complainants' residences.

Third, the material facts and legal issues presented in Plaintiffs' cases are the same as those presented in *Andrews*, which the Court finds controlling.

38. Plaintiffs do not dispute their claims are substantially the same as the claims brought by the Plaintiffs in *Andrews*. In *Andrews*, this Court "declined to apply principles of nuisance law, and instead ruled on the summary judgment based on Antero's contractual and property rights." *Andrews*, 214 W.Va. at 800, 828 S.E.2d at 862. This Court found that Antero had leasehold rights to develop the oil and gas underlying the properties that are the subject of the Plaintiffs' complaint, and the noise, traffic, dust, light and odors about which Plaintiffs complained were reasonable and necessarily incident to Antero's development of the underlying minerals. *Id.* at 800-801, 828 S.E.2d at 862-863. The West Virginia Supreme Court affirmed this Court on appeal. *Id.* at 808, 828 S.E.2d at 870.

39. The same issues are before this Court now. Based on its review of the record, the Court concludes there are no disputed issues of material fact and Defendants Antero Resources Corporation and Hall Drilling LLC are entitled to summary judgment as a matter of law. Antero, as the lessee of the mineral estates, and its contractors have the express right to use the Plaintiffs' surface estates for production of Antero's minerals.

40. The Court further concludes that Antero has an implied surface easement for the Subject Properties, and that under the *Buffalo Mining* test, as approved in *Andrews*, Antero's activities have neither exceeded that which are reasonably necessary to develop its minerals, nor imposed a substantial burden on the Subject Properties. Syl. Pt. 1, *Andrews v. Antero Resources Corporation*, 241 W.Va. 796, 828 S.E.2d at 859 (2019), quoting, Syllabus point 3, *Buffalo Mining Co. v. Martin*, 165 W.Va. 10, 267 S.E.2d 721(1980).

It is therefore **ORDERED** that *Defendants' Motion for Summary Judgment* (Transaction

ID 66619165) filed by Antero Resources Corporation and Hall Drilling LLC is **GRANTED**.
The Parties' exceptions and objections are noted and preserved for the record.

The Court **FINDS** upon **EXPRESS DETERMINATION** that this is a final order available for the proper application of the appellate process pursuant to Rule 54(b) of the Rules of Civil Procedure and the Rules of Appellate Procedure. Accordingly, this order is subject to immediate appellate review. The parties are hereby advised: (1) that this is a final order; (2) that any party aggrieved by this order may file an appeal directly to the Supreme Court of Appeals of West Virginia; and (3) that a notice of appeal and the attachments required in the notice of appeal must be filed within thirty (30) days after the entry of this Order, as required by Rule 5(b) of the West Virginia Rules of Appellate Procedure.

The Clerk is directed to close the above-captioned cases and place them among the cases ended. A copy of this Order is this day served on the parties of record via *File & ServeXpress*.

It is so **ORDERED**.

ENTERED: July 7, 2021.

/s/ Jack Alsop
Lead Presiding Judge
Marcellus Shale Litigation
Well Pad Cases

/s/ Derek C. Swope
Lead Presiding Judge
Marcellus Shale Litigation
Midstream Cases

/s/ Alan D. Moats
Presiding Judge
Marcellus Shale Litigation