IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 16-0136

FILED
JUN 9 2016

PATRICK D. LEGGETT;
KATHERINE F. LEGGETT;
GEORGE D. MCKAIN, by his
attorney in fact, ANITA
KATHRYN MCKAIN GREER;
and ADELE S. MCDOUGAL,

Plaintiffs,

v.

Civil Action No. 1:13-cv-0004 FPS
(U.S. District Court, Northern District)

EQT PRODUCTION COMPANY,
a Pennsylvania corporation;
EQT CORPORATION,
a Pennsylvania corporation;
EQT ENERGY, LLC, a
Delaware limited liability company;
EQT INVESTMENTS HOLDINGS, LLC, a
Delaware limited liability company;
EQT GATHERING, LLC, a
Delaware limited liability company; and
EQT MIDSTREAM PARTNERS, LP,
a Delaware limited partnership,

Defendants.

PETITIONERS' BRIEF

Respectfully submitted:

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CERTIFIED QUESTIONS

1. Does *Tawney v. Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006), which was decided after the enactment of West Virginia Code § 22-6-8, have any effect upon the Court's decision as to whether a lessee of a flat-rate lease, converted pursuant to West Virginia Code § 22-6-8, may deduct post-production expenses from his lessor's royalty, particularly with respect to the language of "1/8 at the wellhead" found in West Virginia Code § 22-6-8(e)?

2. Does West Virginia Code § 22-6-8 prohibit flat-rate royalties only for wells drilled or reworked after the statute's enactment and modify only royalties paid on a per-well basis where permits for new wells or to modify existing wells are sought, or do the provisions of West Virginia Code § 22-6-8 abrogate flat-rate leases in their entirety?

STATEMENT OF THE CASE

PROCEDURAL HISTORY

This civil action was filed by plaintiffs in the Circuit Court of Doddridge County, West Virginia on December 7, 2012, Civil Action No. 12-C-37, and then removed by defendants on January 11, 2013, to the United States District Court for the Northern District of West Virginia, Civil Action No. 1:13-cv-0004 FPS. After some discovery took place, defendants filed motions for summary judgment upon which the United States District Court, Honorable Frederick P. Stamp, Jr., presiding, dismissed the claims against all defendants except EQT Production Company and then dismissed the fraud, breach of fiduciary duties, and punitive damage claims against EQT Production by Order dated January 22, 2016. (JA577.) The District Court then entered its Order dated February 10, 2016, certifying the two questions set forth above (JA1) and thereby stayed the civil action.

STATEMENT OF THE FACTS[1]

Parties:

Plaintiffs are Patrick D. Leggett and his wife, Katherine F. Leggett, of Charleston, West Virginia; George D. McKain, by his attorney in fact, Anita Katheryn McKain Greer, of Houston, Texas; and Adele S. McDougal of Ritchie County, West Virginia, referred to hereinafter as the plaintiffs or lessors and/or as royalty owners.

The original defendants included EQT Corporation, parent of all the other defendants, except EQT Midstream Partners, L.P. The remaining defendants were sister companies who provided various services to the ultimate goal of drilling, producing, transporting and marketing by EQT Production of natural gas on plaintiffs' leases.

Plaintiffs are the owners of certain undivided interests in oil and gas as set forth in a 106-year old "flat rate" lease dated October 31, 1906, which was later assigned to EQT Production. The case was filed against EQT Production and various sister companies and its parent, EQT Corporation. However, the United States District Court, as above stated, dismissed on summary judgment all entities other than EQT Production [hereinafter referred to as EQT].

THE LEASE

The 1906 lease (JA359) was a standard form lease which granted to the lessee the exclusive right to drill oil and gas wells on the lessors' property, to construct pipeline over the land and otherwise occupy the land to drill for and produce the landowners' oil and gas. The lease provides the term to be 6 years from the date thereof and as long as oil or gas is produced in paying quantities. The lease then provides for royalty:

> Lessee shall pay to the lessor for each and every well drilled upon said land which produces Natural Gas in a quantity sufficient to convey to market, a

[1] Included in the Statement of the Facts are historical references to both scholarly works and case law relating to the common law of West Virginia and the practice with respect to oil and gas leases.

> money royalty computed at the rate of Three Hundred Dollars ($300.00) per annum, payable quarterly in advance, beginning when the well is completed and continuing as long as the gas is piped away by the lessee. And if Petroleum Oil is found and saved, the lessee shall yield and give to the lessor the full equal 1/8 part or share of the same delivered, free of charge, in the pipeline and tanks of the company transporting and storing the oil produced upon said premises." (Emphasis added.)

As to natural gas, the lease is one commonly referred to as a "flat-rate" lease. Certain of the wells on this lease were converted by the lessee, EQT, to a 1/8 royalty provided for by filing affidavits as required by W. Va. Code, § 22-6-8. Other wells on the property were not converted and receive only the $300.00 flat-rate annually. (JA3.)

EQT has been and continues to pay less than the 1/8 provided for by W.Va.Code 22-6-8 by deducting significant sums from the royalty, as "post-production" expenses and claiming that they sell gas at the wellhead to a sister company.

THE DEDUCTIONS

The defendant took significant sums from plaintiffs' royalty each quarter as deductions for various expenses it claimed it had incurred in preparing the gas and for transportation to market. As plaintiffs learned in discovery in the case, the list of things deducted was extensive. In addition, however, EQT claimed that it never took any deductions and that it paid the plaintiffs a full 1/8 of the amount it received for the gas. EQT entered into a plan and design to sell its gas to its sister marketing company, EQT Energy, L.L.C. "at the wellhead." But, EQT Energy, who purchased all of the gas produced by EQT, paid a price which was calculated by estimating and deducting the costs of gathering and transporting the gas to the point of sale. However, EQT Energy did not transport the gas. It was transported and processed by EQT Gathering, another sister company of EQT. (JA185.) EQT paid royalty, not on the volume of natural gas which was extracted from plaintiffs' wells but only upon a lesser volume that reached the market. *Id.* p. 52. The charges were assembled by one of EQT Corporation's "groups." (JA275, 277, 290) Mr. Piccirilli is charged with the duty to assemble and calculate the charges which are then pro-rated proportionality for each of EQT's lessors across the three geographic districts of EQT. He then gathers it from a "variety of sources." (JA275) The charges include costs for administration including costs which are incurred by the parent and other sister companies. *Id.* 33. Mr. Piccirilli indicated that there "was a "laundry list" of specific costs. JA277-278) As an example, EQT Corporation's administration and cell phone expenses for employees would be an expense added to plaintiffs' portion of expenses. (JA282)

Importantly, the defendant's deductions were arrived at, not as actual costs, but as an "estimate," and there was no reconciliation at any time to refund the royalty owner the difference between the amount billed and the actual amount of the costs. (JA278)

HISTORY OF FLAT-RATE LEASES

For reasons to be discussed more fully below, in reviewing the intent of the Legislature with respect to the enactment of *W. Va. Code*, § 22-6-8, the common law and practices and rights of lessors are relevant to considering the Legislature's intention with respect to the certified questions.

In discussing the development of the fixed or flat-rate gas royalty clause as part of the evolution of the gas-royalty clause, Professor Eugene Kuntz, who became one of the leading scholars in the area of oil and gas law in the 1950s, has explained:

> The part of the royalty clause which provides for the royalty on gas has undergone significant changes in response to the development of the natural gas industry. In the early days of operations under the oil and gas lease, the primary objective of exploration and drilling operations was the discovery of oil, and **it was justifiably regarded as a major misfortune if gas alone were found. Although the gas had value, it was difficult to market.**

* * *

> The circumstances surrounding the use and the value of gas apparently had an effect upon the development of the part of the royalty clause which deals with gas. . . . If the lessee marketed the gas and thereby held the lease, the lessor undoubtedly thought that the lessee should be required to pay for the privilege, and accordingly, provision was made for the lessee to make a fixed periodic payment to the lessor while the lease was so held. Unmarketed gas from a gas well and gas from an oil well were regarded as being virtually valueless and subject to use without charge by the lessee for operations on the premises. It was apparently the general attitude that if such gas were to be used off of the premises or sold, then such gas had a demonstrated value and the lessee should be required to make a fixed periodic payment to the lessor while the gas was so used or sold. **At this stage of the development of the royalty clause, provision was made for fixed periodic payments for producing gas from a gas well and for selling or using any gas off of the premises.**
>
> **As the natural gas industry developed and natural gas pipelines were extended over the country creating and expanding the market for gas, the value of gas increased**. It also became apparent that the ultimate value of gas and the value of the right to extract and sell gas could not be foreseen or determined at any given time of leasing. **Accordingly, instead of merely increasing the amount of the fixed periodic payment to be made as the gas royalty, the parties to oil and gas leases changed their practices and began to provide for a royalty on gas which is measured either by volume or by the value of the gas produced**. There was a transition period in some areas during which provision was made for a fixed periodic rental after discovery of gas and before marketing and for a royalty based on production after marketing had begun. The result would be similar to the result now sought to be reached by use of a shut-in gas clause.

3 Kuntz, *A Treatise on the Law of Oil and Gas*, § 40.1 at pp. 311-12 (1990)[2] (emphases added; footnotes omitted). *See also* Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia*, § 156, at p. 219 (1951); *McGinnis v. Cayton*, 173 W.Va. 102, 107-09, 312 S.E.2d 765, 770-72 (1984) (Harshbarger, J., concurring).

Professor Kuntz has further acknowledged:

> **Although the fixed gas royalty provision is no longer in general use and although such provision has not been used generally for many years, the presence of such provision in old oil and gas leases continues to present a problem**. It is not uncommon for a very old oil and gas lease to be held for many years by production of oil followed by a recent discovery of gas. When such

[2] Professor Kuntz first published his multi-volume treatise on oil and gas law in the early 1950s.

event occurs, the lessor and lessee are frequently surprised to find that the royalty clause on gas provides for a small fixed annual rater per well. **Rather than take advantage of the windfall, many lessees have voluntarily modified their leases to provide for a one-eighth royalty.** Many other lessees have not been so inclined. In the latter instance, the lessors then search the oil and gas lease for some other provision under which they may assert a right to a gas royalty based on production. Such search may be expected to lead to a provision for a royalty on "other minerals."

Kuntz, *id.*, § 40.2 at pp. 315-16 (emphases added).

THE ENACTMENT OF WEST VIRGINIA'S FLAT-RATE STATUTE

In 1982, the Legislature declared flat rate leases to be against the public policy of this State. Section 22-6-8[3] provides, in pertinent part:

> (a) The Legislature hereby finds and declares:
>
> (1) That a significant portion of the oil and gas underlying this state is subject to development pursuant to leases or other continuing contractual agreements wherein the owners of such oil and gas are paid upon a royalty or rental basis known in the industry as the annual flat well royalty basis, in which the royalty is based solely on the existence of a producing well, and thus is not inherently related to the volume of the oil and gas produced or marketed;
>
> (2) **That continued exploitation of the natural resources of this state in exchange for such wholly inadequate compensation is <u>unfair, oppressive, works an unjust hardship on the owners of the oil and gas in place, and unreasonably deprives the economy of the state of West Virginia of the just benefit of the natural wealth of this state</u>**;
>
> (3) That a great portion, if not all, of such leases or other continuing contracts based upon or calling for an annual flat well royalty, have been in existence for a great many years and **were entered into at a time when the techniques by which oil and gas are currently extracted, produced or marketed, were not known or contemplated by the parties, nor was it contemplated by the parties that oil and gas would be recovered or extracted or produced or marketed from the depths and horizons currently being developed by the well operators;**
>
> (4) That while being fully cognizant that the provisions of section 10, article I of the United States Constitution and of section 4, article III of the Constitution of West Virginia, proscribe the enactment of any law impairing the obligation of a contract, **the Legislature further finds that it is a valid exercise of the police powers of this state and in the interest of the state of West Virginia and in furtherance of the welfare of its citizens, to discourage as far**

[3] The Act was initially codified at *W. Va. Code*, § 22-4-1, and later re-codified at § 22-6-8. *See McGinnis v. Cayton*, 173 W.Va. at 117 & 118 & n. 27, 312 S.E.2d at 781 & n. 27.

> **as constitutionality possible the production and marketing of oil and gas located in this state under the type of leases or other continuing contracts described above.**
>
> (b) In the light of the foregoing findings, **the Legislature hereby declares that <u>it is the policy of this state to the extent possible, to prevent the extraction, production or marketing of oil or gas under a lease or leases or other continuing contract or contracts providing a flat well royalty or any similar provisions for compensation to the owner of the oil and gas in place, which is not inherently related to the volume of the oil or gas produced or marketed</u>, and toward these ends, the Legislature further declares that it is the obligation of this state to prohibit the issuance of any permit required by it for the development of oil and gas where the right to develop, extract, produce or market the same is based upon such leases or other continuing contractual agreements.**
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> * * *
>
> (e) To avoid the permit prohibition of subsection (d), the applicant may file with such application an affidavit which certifies that the affiant is authorized by the owner of the working interest in the well to state that it shall tender to the owner of the oil or gas in place **not less than one eighth of the total amount paid to or received by or allowed to the owner of the working interest at the wellhead for the oil or gas so extracted, produced or marketed before deducting the amount to be paid to or set aside for the owner of the oil or gas in place, on all such oil or gas to be extracted, produced or marketed from the well.** If such affidavit be filed with such application, then such application for permit shall be treated as if such lease or leases or other continuing contract or contracts comply with the provisions of this section.
>
> (f) The owner of the oil or gas in place shall have a cause of action to enforce the owner's rights established by this section.

(Emphases added).

The defendant offered three exhibits related to the legislative history of the flat rate statute. The first was House Bill 1254 introduced on January 19, 1982. (JA375) The one page bill was described as a bill to amend Chapter 22, Article 4 by adding a new section one-1, which required that no permit may be issued for drilling or essentially doing any work on an existing well "unless the lessee by which such well is to be drilled shall provide for a royalty payment to mineral owner of at least one-eighth of the gross proceeds of any oil or natural gas produced pursuant to such lease." (JA376) The note attached to the bill stated:

> "The purpose of this bill is to require oil and gas royalties to provide a minimum payment of one-eighth of the gross proceeds of any oil or natural gas produced." *Id.*

Thereafter, the legislation was amended twice, resulting in a Senate Committee Substitute for House Bill 1254 (JA378) and then subsequently passed as an amended 6 page bill, the Engrossed Committee Substitute for House Bill 1254. (JA386) These documents say nothing to indicate that the Legislature intended that the owner of the working interest would have the right to deduct expenses from the one-eighth. They all say essentially the same thing, that the intent is the opposite, that the owner of the working interest pay the owner of the oil and gas in place "no less than one-eighth." It is also clear here that the Legislature wanted to secure the right of the owner of the gas in place to file suit against the operating interest owner to "enforce his rights established by this section." *W. Va. Code*, § 2-6-8(f). (JA386)

RELEVANT WEST VIRGINIA CASE LAW DISCUSSING "AT-THE-WELLHEAD"-TYPE LANGAUGE AND SCHOLARLY COMMENTARY

Importantly, in both *Wellman*[4] and *Tawney*,[5] the Court did not believe that it was creating new law but rather that its holdings flowed from our State's long-standing common law concerning the 1/8 royalty interest owed to landowners who retained their oil and natural gas rights. *See Tawney*, at 272, at 28 ("our generally recognized rule that the lessee must bear all costs of marketing and transporting the product to the point of sale"). Indeed, the decisions in *Wellman* and *Tawney* were premised upon this long-standing rule of law and not merely upon rules of contract construction. And, as will be addressed more fully below, the Court in both *Wellman* and *Tawney* certainly was charged with knowledge of the Flat-Rate Statute that had been adopted by our Legislature in 1982. And, similarly, our Legislature, in 1982, was charged with the knowledge of this long-accepted law. Simply stated, our Legislature is presumed to

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[4] *Wellman v. Energy Resources, Inc.*, 210 W.Va. 200, 557 S.E.2d 254 (2001).

[5] *Tawney v. Columbia Natural Resources, LLC*, 219 W.Va. 266, 633 S.E.2d 22 (2006).

know of and have full knowledge of all laws in the area in which it acts. *See W. Virginia Educ. Ass'n v. Preston Cty. Bd. of Educ.*, 171 W. Va. 38, 41, 297 S.E.2d 444, 447 (1982).

Oil and gas lessees paying lessors a royalty interest of 1/8 of the amount received, without deductions, is an age-old industry practice. Professor Maurice H. Merrill, who became a leading scholar in the field of oil and gas law in the 1920s,[6] acknowledged this premise in his renowned treatise at least as early as 1940.[7] "It is now settled that, in addition to the implied covenants for exploration and for development, there is an implied covenant for the diligent and efficient operation of the lease and marketing of the product." Maurice H. Merrill, *Covenants Implied In Oil and Gas Leases*, §72 at 184 (2d Ed. 1940). With the duty to market also comes the duty to bear all of the costs necessary to take the gas to market and make it a marketable product.

As set forth by Professor Merrill at §84:

> [I]n most cases the lessor thinks of his return solely in a sense of a fixed portion of the money realized from the operations and the lessee so treats it. From this factual background has evolved that the principle [the lessee] is under a duty 'to make diligent efforts to market the production in order that the lessor may realize his royalty interest.'

Id., §84 at 212.

Importantly, Professor Merrill acknowledged:

> If it is the lessee's obligation to market the product, it seems necessary to follow that his is the task also to prepare it for market, if it is unmerchantable in its natural form. **No part of the cost of marketing or of preparation for sale is chargeable to the lessor. This is supported by the general current of authority.**

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[6] "The subject of covenants implied in oil and gas leases was pre-empted many years ago by Professor Maurice H. Merrill when his first work on the subject was published. With the publication of the second edition of the work, Merrill became the recognized authority on the subject. His influence on the development of the law in this respect is so great that one engaged in research must not only consider cases decided on the subject but must also consider opinions expressed by Merrill." Kuntz, Oil and Gas §54.1.

[7] The first edition of Professor Merrill's single-volume treatise was published in 1926. The second edition was published in 1940 and last supplemented in 1967.

Id., §85 at 214-215 (emphasis added).

In discussing the evolution of gas-royalty clauses and the "long-established" expectation of lessors in this State, this Court has explained:

> In Robert Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* § 104 (1951), it is stated: "**From the very beginning of the oil and gas industry it has been the practice to compensate the landowner by** selling the oil by running it to a common carrier and **paying him [the landowner] one-eighth of the sale price received. This practice has, in recent years, been extended to the situations where gas is found . . . ." the one-eighth received is commonly referred to as the landowner's royalty.** In *Davis v. Hardman*, 148 W.Va. 82, 133 S.E.2d 77 (1963), this Court stated that **a distinguishing characteristic of such a royalty interest is that it is not chargeable with any of the costs of discovery and production. The Court believes that such a view has been widely adopted in the United States.**

Wellman v. Energy Resources, Inc., 210 W.Va. 200, 209-10, 557 S.E.2d 254, 263-64 (2001).

The Court noted, however, that

> **In spite of this, there has been an attempt on the part of the oil and gas producers in recent years to charge the landowner with a *pro rata* share of various expenses connected with the operation of an oil and gas lease such as the expense of transporting oil and gas to a point of sale, and the expense of treating or altering the oil and gas so as to put it in a marketable condition. To escape the rule that the lessee must pay the costs of discovery and production, these expenses have been referred to as "post-production expenses."** Two states, Texas and Louisiana, have recognized that a lessee may properly charge a lessor with a *pro rata* share of such "post-production" (as opposed to production or development) costs. On the other hand, it appears that a number of other states have rejected this position where a lease, such as the ones in the present case, calls for the payment of royalties on the basis of what the lessee receives from the sale of oil and gas.
>
> The rationale for holding that a lessee may not charge a lessor for "post-production" expenses appears to be most often predicated on the idea that the lessee not only has a right under an oil and gas lease to produce oil or gas, but he also has a duty, either express, or under an implied covenant, to market the oil or gas produced. The rationale proceeds to hold the duty to market embraces the responsibility to get the oil or gas in marketable condition and actually transport it to market.
>
> Typical of the thinking of courts which have adopted this view is that of the Supreme Court of Colorado in *Garman v. Conoco*, 886 P.2d 652 (Colo.1994).

In that case, the court stated that in Colorado a lessee impliedly covenanted to market oil and gas produced. It then stated: "Implied lease covenants related to operations typically impose a duty on the oil and gas lessee. *See, e.g.,* 5 Kuntz § 57.1 to 62.5. Accordingly, the lessee bears the cost of compliance with these promises. *Cf. Warfield Natural Gas Go. v. Allen,* 261 Ky. 840, 88 S.W.2d 989, 991 (1935)." *Id.* at 659.

The court went on to reason that since the lessee, under its covenant, had a duty to market oil and gas produced, and since under the law it was required to pay the costs to carry out its covenants, it had the duty to bear the cost of preparing the oil and gas for market and to pay the cost of transporting them to market. The court also noted that, in similar ways, other jurisdictions had adopted the rule that the lessee had to bear post-production costs. The court stated:

"In Kansas and Oklahoma a ... rule has developed based on an operator's implied duty to market gas produced under an oil and gas lease. *Wood v. TXO Production Corp.,* 854 P.2d 880, 882 (Okla.1992) ("[T]he implied duty to market means a duty to get the product to the place of sale in marketable form."); *Gilmore v. Superior Oil Company,* 192 Kan. 388, 388 P.2d 602, 606 (1964) ("Kansas has always recognized the duty of the lessee under an oil and gas lease not only to find if there is oil and gas but to use reasonable diligence in finding a market for the product."). Wyoming has codified the marketability approach. The Federal government also requires that a lessee "place gas in marketable condition at no cost to the Federal Government...." 30 C.F.R. § 206.153(I) (1993).

Arkansas and North Dakota have reached similar conclusions when considering lease royalty clauses which are silent as to allocation of post-production costs. A lease which provides for the lessor to receive "proceeds at the well for all gas" means gross proceeds when the lease is silent as to how post-production costs must be borne. *Hanna Oil & Gas Co. v. Taylor,* 297 Ark. 80, 759 S.W.2d 563, 565 (1988); *see also West v. Alpar Resources, Inc.,* 298 N.W.2d 484, 491 (N.D.1980) (when the lease does not state otherwise lessors are entitled to royalty payments based on percentage of total proceeds received by the lessee, without deduction for costs)."

Garman v. Conoco, Inc., 886 P.2d 652, 658 (1994).

Id., at 210-11, at 264-65 (emphases added; footnote omitted).

In response to such attempts, and after discussing these differences among jurisdictions, the Court held, in pertinent part, in *Wellman*:

This Court believes that the rationale employed by Colorado, Kansas, and Oklahoma in resolving the question of whether the lessor or the lessee should bear "post-production" costs is persuasive. Like those states, **West Virginia holds that**

> **a lessee impliedly covenants that he will market oil or gas produced.** *See* Robert Tucker Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* §§ 70 & 104 (1951). Like the courts of Colorado, Kansas, and Oklahoma, the Court also believes that **historically the lessee has had to bear the cost of complying with his covenants under the lease. It, therefore, reasonably should follow that the lessee should bear the costs associated with marketing products produced under a lease. Such a conclusion is also consistent with the long-established expectation of lessors in this State, that they would receive one-eighth of the sale price received by the lessor.**
>
> In view of all this, this Court concludes that **if an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale.**
>
> . . . In line with this, the Court concludes that if an oil and gas lease provides that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, the lessee shall be entitled to credit for those costs to the extent that they were actually incurred and they were reasonable. Before being entitled to such credit, however, the lessee must prove, by evidence of the type normally developed in legal proceedings requiring an accounting, that he, the lessee, actually incurred such costs and that they were reasonable.

Id., at 211, at 265.

Subsequently, in *Tawney v. Columbia Natural Resources, LLC*, 219 W.Va. 266, 268-69, 633 S.E.2d 22, 24-25 (2006), this Court utilized the same legal history and reasoning as in *Wellman,* and confirmed this State's "marketable-product rule." In *Tawney,* the oil and gas lessor argued that the "at the wellhead" language indicates that the gas is to be valued for the purpose of calculating the lessors' royalty at the wellhead. However, the Court found that the gas is not sold at the wellhead. In fact, gas is not sold until the lessee adds value to it by preparing it for market, processing it, and transporting it to the point of sale. *Id.* at 270, 26. The Court further found that, pursuant to the lessee's duty to market, the lessee must bear all costs of marketing and transporting the gas to the point of sale. *Id.*

There are two general rules that address whether lessees may take post-production deductions from a lessee's 1/8 royalty: the marketable-product rule and the at-the-well rule.

West Virginia is among the states that adhere to the marketable-product rule. States such as Texas and Louisiana adhere to the at-the-well rule which provides that the lessee may deduct all costs incurred after the gas is severed from the wellhead. Our Supreme Court, as set forth above, has rejected such a rule in favor of the marketable-product rule which mandates that the lessee bear all costs in obtaining a marketable product and disallows the deduction of post-production costs until a marketable product is obtained.

Accordingly, the line of cases cited by Defendant before the District Court[8] are in stark contrast to the long established law in our State and the *Wellman* and *Tawney* decisions.[9] The Court in *Wellman* and *Tawney* expressly rejected the theory and line of cases relied upon by Defendant here. Notably, the Court in *Tawney* framed the issue presented as "whether the 'at the wellhead'-type language at issue is sufficient to alter [the State's] generally recognized rule that the lessee must bear all costs of marketing and transporting the product to the point of sale." *Tawney*, at 272, 28. The Court concluded that it was not based upon West Virginia's well-settled law and traditional expectations of royalty owners. *Id.* at 274, 30. As the Court concluded in reformulating the certified question:

> In light of the fact that West Virginia recognizes that a lessee to an oil and gas lease must bear all costs incurred in marketing and transporting the product to the point of sale unless the oil and gas lease provides otherwise, is lease language that provides that the lessor's 1/8 royalty is to be calculated "at the well," "at the wellhead" or similar language, or that the royalty is an amount equal to 1/8 of the price, net of all costs beyond the "wellhead," or "less all taxes, assessments, and adjustments" sufficient to indicate that the lessee may deduct post-production expenses from the lessor's 1/8 royalty, presuming that such expenses are reasonable and actually incurred?
>
> Answer: No.

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[8] *See* Doc. No. 153 at pp. 13-15.

[9] Furthermore, in none of the West Virginia cases cited by Defendants (relating to taxation issues) is the meaning of "at the well" or "at the wellhead" in relation to deductions which may be taken specifically at issue. *See* Doc. No. 153 at pp. 12-13.

Certified question answered.

Id.

In reaching this conclusion, the Court reasoned:

> [T]he present dispute boils down to whether the "at the wellhead"-type language at issue is sufficient to alter our generally recognized rule that the lessee must bear all costs of marketing and transporting the product to the point of sale. We conclude that it is not.
>
> As noted by CNR, "[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." Syllabus Point 1, *Cotiga Development Co. v. United Fuel Gas Co.,* 147 W.Va. 484, 128 S.E.2d 626 (1962). However, when a contract is ambiguous, it is subject to construction. This Court has said that "[t]he term 'ambiguity' is defined as language 'reasonably susceptible of two different meanings' or language 'of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.' " *Payne v. Weston,* 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995), *quoting* Syllabus Point 1, in part, *Shamblin v. Nationwide Mut. Ins. Co.,* 175 W.Va. 337, 332 S.E.2d 639 (1985). We have also explained that "[a] contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction." *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 65 n. 23, 459 S.E.2d 329, 342 n. 23 (1995). Finally, "[t]he question as to whether a contract is ambiguous is a question of law to be determined by the court." Syllabus Point 1, in part, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am.,* 152 W.Va. 252, 162 S.E.2d 189 (1968).
>
> **We believe that the "wellhead"-type language at issue is ambiguous. First, the language lacks definiteness. In other words, it is imprecise.** While the language arguably indicates that the royalty is to be calculated at the well or the gas is to be valued at the well, the language does not indicate *how* or *by what method* the royalty is to be calculated or the gas is to be valued. For example, notably absent are any specific provisions pertaining to the marketing, transportation, or processing of the gas. In addition, **in light of our traditional rule that lessors are to receive a royalty of the sale price of gas, the general language at issue simply is inadequate to indicate an intent by the parties to agree to a contrary rule-that the lessors are not to receive 1/8 of the sale price but rather 1/8 of the sale price less a proportionate share of deductions for transporting and processing the gas.** Also of significance is the fact that although some of the leases below were executed several decades ago, apparently CNR did not begin deducting post-production costs from the lessors' royalty payments until about 1993. Under these circumstances, we are unable to conclude that the lease language at issue was originally intended by the parties, at the time

of execution, to allocate post-production costs between the lessor and the lessee.

> CNR asserts, however, that when read with accompanying language such as "gross proceeds," "market price," and "net of all costs," the wellhead-type language clearly calls for allocation of post-production expenses. We disagree. First, we note that the word "gross" implies, contrary to CNR's interpretation, that there will be no deductions taken. Hence, the phrase "gross proceeds at the wellhead" could be construed to mean the gross price for the gas received by the lessee. On the other hand, the words "gross proceeds" when coupled with the phrase "at the wellhead" could be read to create an inherent conflict due to the fact that the lessees generally do not receive proceeds for the gas at the wellhead. Such an internal conflict results in an ambiguity. Likewise, the phrase "market price at the wellhead" is unclear since it contemplates the actual sale of gas at the physical location of the wellhead, although the gas generally is not sold at the wellhead. In addition, we believe that the phrase "net of all costs beyond the wellhead" could be interpreted to mean free of all costs or clear of all costs beyond the wellhead which is directly contrary to the interpretation urged by CNR. Finally, CNR also claims that the phrase "less all taxes, assessments, and adjustments" clearly indicates that post-production expenses can be deducted from the lessors' royalties. Again, we disagree. Absent additional language that clarifies what the parties intended by the words "assessments" and "adjustments," we believe these words to be ambiguous on the issue of the allocation of post-production expenses.

Id. at 272-73, at 28-29 (emphases added).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court by Order issued on April 6, 2016, has already determined that this matter will be scheduled for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure on Wednesday, September 14, 2016.

SUMMARY OF ARGUMENT

This case concerns a 1906, one hundred and ten year old lease of oil and gas interests in Doddridge County, West Virginia. The oil and gas interests at issue in this case are owned by Mr. and Mrs. Patrick Leggett of Charleston, Mr. and Mrs. McKain of Hughes Creek and Mr. and Mrs. McDougal of Ritchie County, West Virginia. EQT Production, hereinafter referred to as "EQT," was the lessee of these interests during all the relevant periods of time. The lease calls for a royalty on the oil produced of one-eighth free of charge in the pipeline and tanks and $300 per annum annually for natural gas for wells beginning when the well was completed and as long as the gas is piped away by the lessee. This lease is what is commonly referred as a flat-rate lease. This civil action, originally filed in Doddridge County, West Virginia, Circuit Court, was removed to the U.S. District Court for the Northern District of West Virginia. The Federal Court ruled on summary judgment motions and certified the two questions to this Court. The issues in this case arose as a result of EQT taking significant deductions from the lessors' one-eighth royalty. Wells drilled after 1982 were converted to a one-eighth royalty by virtue of W. Va. Code § 22-6-8, enacted in 1982. EQT continued to pay lessors a flat rate of $300 for some of the wells on the property.

The first certified question asks whether this Court's findings and holdings in *Tawney v. Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006), affect a decision as to whether the presence of the phrase "at the wellhead" in *W. Va. Code*, § 22-6-8(e) allows EQT to take deductions on wells converted pursuant to the statute's provisions. The second question asks whether all flat rate wells are abrogated due to the strong public policy against them as set forth in *W. Va. Code*, § 22-6-8(a)(b), 8 (a)-(d). The latter issue was previously ruled upon by the Circuit Court of Roane County, West Virginia, and was the subject of an appeal to this Court which was denied[10].

"One of the ancient canons of interpretation [of statutes] is that the old law, the mischief and the remedy must be considered, and be given an interpretation, if possible, which will suppress the mischief and advance the remedy." *Newton v. Employers Liability Assur.*

[10] Civil Action No. 03-C-10E, *Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. at p. 21

Corporation, 107 F.2d 164, 167 (4th Cir. 1939). *Accord State v. Abdella*, 139 W.Va. 428, 443, 82 S.E.2d 913, 921-22 (1954).

The evil or mischief that the West Virginia Legislature sought to remedy, in enacting § 22-6-8, was the oppression of lessors where working interest owners, lessees of oil and gas leases, retained the right to drill for, produce and market landowners' oil and natural gas pursuant to a claim under flat-rate leases. Lessees under these flat rate leases were producing large volumes of natural gas and making and paying lessors essentially nothing in return for their valuable resources. The Legislature declared the flat rate royalty as "wholly inadequate compensation" and described it as: "unfair, oppressive and works an unjust hardship on the owner of the oil and gas in place, and unreasonably deprives the economy of the State of West Virginia of the just benefit of the natural wealth of this State."[11]

Most flat rate wells are approximately 100 years or more old. In fact, in 1982, the Legislature declared that "a great portion, if not all, of such leases or other continuing contracts based upon or calling for an annual flat well royalty, have been in existence for a great many years and were entered into at a time when the techniques by which oil and gas are currently extracted, produced or marketed, were not known or contemplated by the parties, nor was it contemplated by the parties that oil and gas would be recovered or extracted or produced or marketed from the depths and horizons currently being developed by the well operators." *W. Va. Code*, § 22-6-8. Seventy-four years after the subject lease was bargained for, the West Virginia Legislature recognized the inequity for both landowners and the State and enacted *W. Va. Code*, § 22-6-8. Thirty-four years thereafter, defendant continues to pay plaintiffs less than the one-eighth that the Legislature determined must be paid to operate the well *See W. Va. Code*, § 22-6-8 and continues to pay plaintiffs a flat rate on the non-converted wells. EQT Production claims

[11] *W. Va. Code*, § 22-6-8(b).

it is selling its gas to another company "at the wellhead." However, the other company is a sister company, EQT Energy, who buys the gas from EQT Production. The price EQT Energy pays is a calculated price-not the price EQT Energy receives for the natural gas and it is not a fair market value price. EQT Energy pays the price they receive less the various costs that EQT Gathering, L.L.C., another sister company claims is the cost to transport and prepare the natural gas to get it to market. This cost includes a share of EQT Corporation's, the parent company's, administration costs and even a share of the cell phones of EQT's employees.[12] Plaintiffs claim that EQT did the above, and to circumvent the W. Va. Code § 22-6-8's requirement to pay plaintiffs "no less than one-eighth[13]."

The certified question No. 1 in this case asks whether this Court's findings and holdings in *Tawney*, affect the decision as to whether the presence of the phrase "at the wellhead" in *W. Va. Code*, § 22-6-8(e) allows EQT to take deductions. The phrase "at the wellhead" is identical to the phrases used in the leases considered in the *Tawney* decision. The *Tawney* decision does affect the decision because the Court found and reconfirmed that the common law and common practice in West Virginia was to require lessors to bear all costs to get the gas to market. In addition, the Court found that West Virginia was a "market rule" jurisdiction and not an "at the well" jurisdiction. An "at the well" jurisdiction allows for the lessor to take deductions. The market rule jurisdiction requires the lessor to bear the costs as stated above. The Court also determined that "at the well" was ambiguous. *Tawney*, in conjunction with *Wellman*, clarified what the common law had always been in West Virginia. The *Tawney* Court said "We simply look to our own settled law," quoting longtime professor of coal, oil and gas in West Virginia

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[12] See *McDonald v. EQT Production*, 983 F.Supp.2d 790, 816-817 (2013,) holding that a lessee is not permitted to take deductions for various personnel costs unless the lease identifies with particularity the specific deductions; meals, entertainment, uniforms, taxes, etc.

[13] EQT also does not pay plaintiffs for volumes extracted and they do not pay plaintiffs for any of the liquid components of the gas.

and a former Supreme Court Justice, Robert Donley, in his 1951 work. The common law in West Virginia as confirmed in the cases and authorities, has always included the implied duty of the lessee, before the costs, to get the gas to market. This was the common law in 1982 when *W. Va. Code*, § 22-6-8 was considered and enacted, and it is presumed that the West Virginia Legislature knew the common law and relied upon it. Certainly, the strong words such as "no less than 1/8" and on all gas extracted "from the lessor's lands" demonstrates the Legislature's intent which was to not permit the "continued exploitation" of West Virginia's natural resources. If the phrase "at the wellhead" was found ambiguous by the West Virginia Supreme Court, then it should also be ambiguous in a statute that converts a lease's royalty clause. This should be particularly true with respect to the statute whose purpose was to remedy the unfair payment to the owner of gas. The Tawney Court held that it was "ambiguous," "lacks definiteness" and "it is imprecise." The language "does not indicate how or by what method the royalty is to be calculated or the gas is to be valued," there are "no provisions pertaining to marketing, transportation or processing the gas. Also, the language is inadequate to indicate an "intent...to agree to a contrary rule," that is "that lessors are not to receive 1/8," or that the lessee would be allowed to take deductions. The Court concluded that at the wellhead, or similar language, is insufficient to indicate that lessee may deduct post-production expenses from the lessor's royalty, even presuming the expenses are reasonable. *Tawney, supra. Id.*

Interpreting the phrase "at the wellhead" in a way which allows for deductions from plaintiffs' 1/8 royalty, conflicts with the statute's mandatory "shall" language, conflicts with the phrase in the statute that requires "not less than 1/8," "before deducting," and the phrase "on all such oil or gas to be extracted." When combined with the longtime, pre-1982, implied duty of the lessee in West Virginia to prepare the gas for market and then transport it to market at lessees' own cost and the West Virginia Supreme Court's findings and holdings in *Tawney* that "at the wellhead" is ambiguous and not effective to permit the lessee to deduct from the lessor "one-eighth royalty and percentage of the costs," then the statute should be interpreted as not allowing deductions. This statute is a remedial statute and it should be construed liberally to advance the remedy. The Court should consider that the Legislature was aware of West Virginia common law and that this state is a "market rule" jurisdiction not like Texas or Louisiana which are "at the wellhead" states. The Court should hold that this statute is a remedial statute which was designed to remedy and eliminate the "evil" and "mischief" of flat rate leases, to assure that the state and its landowners are not to be taken advantage of by the lessee. When the statute states no less than, it means what it says, and that "at the wellhead" is ambiguous and does not give a lessee an excuse to reduce the 1/8 by charging the lessor for their own costs. The Court should hold that "at the wellhead" in this statute is designed to convert the royalty clause of a landowners' lease to a one-eighth lease, not less than one-eighth.

As to the second certified question, the Court should, once and for all, put to rest the issue of flat rate leases in West Virginia. It was thirty-four years ago that the Legislature recognized the evil of flat rate leases. *W. Va. Code*, § 22-6-8(a)-(d). No further words need to be added to the strong and resolute findings and declarations of the West Virginia Legislature in the 1982 legislation. As stated above, in 2006, the issue was addressed by the Roane County Circuit Court in the *Tawney v. Columbia Natural Resources* case. The Circuit Court of Roane County, Honorable Thomas C. Evans, III authored a 42 page well-reasoned opinion holding flat rate leases to be void and against public policy. The issue was appealed to the Supreme Court and the appeal was denied. Regardless of the stated policy of the state of West Virginia, EQT and a few other gas companies continue to hold leases by paying a 100 year old flat rate and even if they convert, they aren't paying a true one-eighth. This Court has a duty to and should abrogate flat rate leases given that the policy has been in effect for thirty-four years.

ARGUMENT

CERTIFIED QUESTION NO. 1:

> Does *Tawney v. Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006), which was decided after the enactment of West Virginia Code § 22-6-8, have any effect upon the Court's decision as to whether a lessee of a flat-rate lease, converted pursuant to West Virginia Code § 22-6-8, may deduct post-production expenses from his lessor's royalty, particularly with respect to the language of "1/8 at the wellhead" found in West Virginia Code § 22-6-8(e)?

Defendant EQT Production has asserted before the District Court that "[t]he reasoning and holding in *Tawney* are inapposite here where the issues do not involve consideration of lease/contract terms or the application of principles of contract law, but, instead, the application and interpretation of a statute." (Doc. No. 153, at p. 1). Defendant's argument misconstrues the relevance of the holdings in *Tawney* to Plaintiffs' claims and ignores the similarity of the rules of construction that apply to statutes and contracts.

EQT Production took this same exact position with respect to lessors in the *McDonald Land Co. v. EQT Production Company*, 983 F.Supp. 2d 790 (2014.) The United States District Court, Southern District of West Virginia held:

> "The defendants cannot calculate royalties based on a sale between subsidiaries at the wellhead when the defendants later sell the gas in an open market at a higher price. Otherwise gas producers could always reduce royalties by spinning off portions of their business and making nominal sale at the wellhead. I predict with confidence that if confronted with this issue, the Supreme Court of Appeals would hold the same." 983 F.Supp. at 804, citing *Howell v. Texaco,* 112 P.3d 1154 (Okla. 2004.)

EQT also argued in the McDonald case that *Tawney* was decided after many of the claimed damages of lessors and therefore, the case could not applied retroactively. The McDonald Court stated:

"The defendants argue that *Tawney*'s heightened specificity requirements should not apply to their leases because they were executed decades before *Tawney* was decided. This retroactivity argument is without merit. "As a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases." *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 690 S.E.2d 322, 350.

In order to demonstrate the fallacy of EQT Production's arguments it is important to first consider the history of flat-rate leases and the law of West Virginia that has developed around such leases as well as the evolution of gas-royalty clauses in general, which has been set forth above in the Statement of the Case. Such consideration is necessary because, as alluded to above and more fully discussed below, the enactment of statutes do not occur in a vacuum. When enacting statutes, our Legislature is presumed to know the existing law in the field in which it is acting.

While it is true that the Court in *Tawney* also noted that any ambiguous language in the leases must be strictly construed against the lessees who drafted the leases, *Tawney*, 219 W.Va. at 273-74, 633 S.E.2d at 29-30, the finding of ambiguity discussed above was a necessary precedent to this application of well-established rules of contractual construction. However, the same test for determining whether language is ambiguous in a contract also applies to the same determination in statutes.

WEST VIRGINIA's FLAT-RATE STATUTE AND PRINCIPLES OF STATUTORY CONSTRUCTION

As a preliminary matter, it should be noted:

As aptly expressed by the United States Supreme Court in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994),

"It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. *A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.*"

> *Id.* at 312–313, 114 S.Ct. 1510 (emphasis added). It was further explained in *Rivers* that "when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 313, 114 S.Ct. 1510, n. 12. As the highest judicial authority in this State, the same holds true for this Court's pronouncements regarding state statutes.

Harrison v. Commissioner, Div. of Motor Vehicles, 226 W.Va. 23, 30-31, 697 S.E.2d 59, 66-67 (2010). *See also People v. Garcia,* 36 Cal.3d 539, 549, 205 Cal.Rptr. 265, 270, 684 P.2d 826, 831 (Cal.1984) ("Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim. . . . If in addition, ... the decision represents the first authoritative construction of the enactment, no history of extended and justified reliance upon a contrary interpretation will arise to argue against retroactivity." (citation omitted)); *Dardarian v. OfficeMax North America, Inc.*, 875 F. Supp.2d 1084, 1090-91 (N.D.Cal. 2012) (same).

In addressing principles of statutory construction, this Court has explained:

> In deciding the meaning of a statutory provision, "[w]e look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't,* 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995). *See also* Syl. pt. 2, *Crockett v. Andrews,* 153 W.Va. 714, 172 S.E.2d 384 (1970) ("[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); Syl. pt. 2, *State v. Epperly,* 135 W.Va. 877, 65 S.E.2d 488 (1951) ("[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.").
>
> Indeed, this Court has held that "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Sizemore v. State Farm Gen. Ins. Co.,* 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted).
>
> . . . "A statute that is ambiguous must be construed before it can be applied." Syl. pt. 1, *Farley v. Buckalew,* 186 W.Va. 693, 414 S.E.2d 454 (1992). *See also United Bank, Inc. v. Stone Gate Homeowners Ass'n, Inc.,* 220 W.Va. 375, 379, 647

S.E.2d 811, 815 (2007) ("statutory language that is ambiguous must be construed before it can be applied.").

> When endeavoring to construe the meaning of an ambiguous statute, we must be mindful that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r,* 159 W.Va. 108, 219 S.E.2d 361 (1975). *See also* Syl. pt. 1, *Ohio County Comm'n v. Manchin,* 171 W.Va. 552, 301 S.E.2d 183 (1983) ("Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.").

Davis Memorial Hosp. v. West Virginia State Tax Com'r, 222 W.Va. 677, 682, 671 S.E.2d 682-83, 687-88 (2008), *compare with Tawney*, 219 W.Va. at 272, 633 S.E.2d at 28 ("[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." Syllabus Point 1, *Cotiga Development Co. v. United Fuel Gas Co.,* 147 W.Va. 484, 128 S.E.2d 626 (1962). However, when a contract is ambiguous, it is subject to construction. This Court has said that "[t]he term 'ambiguity' is defined as language 'reasonably susceptible of two different meanings' or language 'of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.' " *Payne v. Weston,* 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995), *quoting* Syllabus Point 1, in part, *Shamblin v. Nationwide Mut. Ins. Co.,* 175 W.Va. 337, 332 S.E.2d 639 (1985)."). *Accord Mace v. Mylan Pharmaceuticals, Inc.*, 227 W.Va. 666, 673, 714 S.E.2d 223, 230 (2011).

At least two other principles of statutory construction are also important for purposes of this case. First,

> "'[a] statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and

> design thereof, if its terms are consistent therewith.' Syllabus Point 5, *State v. Snyder,* 64 W.Va. 659, 63 S.E. 385 (1908)." Syllabus point 3, *Buda v. Town of Masontown,* 217 W.Va. 284, 617 S.E.2d 831 (2005).

Syl. Pt. 4, *Davis Memorial Hosp., supra. Accord* Syl. Pt. 4, *Kessel v. Monongalia County General Hosp. Co.*, 220 W.Va. 602, 648 S.E.2d 366 (2007); Syl. Pt. 2, *State ex rel. Morrisey v. West Virginia Office of Disciplinary Counsel*, 234 W.Va. 238, 764 S.E.2d 769 (2014); Syl. Pt. 6, *Mace v. Mylan Pharmaceuticals, Inc., supra. See also Phillips v. Larry's Drive-In Pharmacy, Inc.,* 220 W. Va. 484, 491-92, 647 S.E.2d 920, 927-28 (2007) (Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law.); Syl. Pt. 4, *State ex rel. Van Nguyen v. Berger*, 199 W.Va. 71, 483 S.E.2d 71 (1996) ("'The common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested.'" (citations omitted)) .

Stated similarly,

> "'[w]hen the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. By borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.' Syl. pt. 2, in part, *Stephen L.H. v. Sherry L.H.,* 195 W.Va. 384, 465 S.E.2d 841 (1995)." Syllabus Point 3, *CB&T Operations Company, Inc. v. Tax Commissioner of the State of West Virginia,* 211 W.Va. 198, 564 S.E.2d 408 (2002).

Syl. Pt. 5, *Kessel v. Monongalia County General Hosp. Co., supra.*

Second, "[w]here an act is clearly remedial, we must construe the statute liberally so as to furnish and accomplish all the purposes intended." *State ex rel. McGraw v. Scot Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995). *Accord Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 399, 582 S.E.2d 841, 846 (2003); *Bradshaw v. Soulsby*, 210

W.Va. 682, 687, 558 S.E.2d 681, 686 (2001); *McDavid v. U.S.*, 213 W.Va. 592, 596, 584 S.E.2d 226, 230 (2003); *Lee-Norse Co. v. Rutledge*, 170 W.Va. 162, 166, 291 S.E.2d 477, 481 (1982) (quoting Vol. II, Lewis' Sutherland Statutory Construction, (2d ed.) §§ 582, 589, 590 ("'The law favors a liberal construction of certain statutes to give them the most beneficial operation. . . . Two classes of statutes are liberally construed-remedial statutes, and statutes which concern the public good or the general welfare. . . . The modern doctrine is that to construe a statute liberally or according to its equity is nothing more than to give effect to it according to the intention of the lawmaker, as indicated by its terms and purposes. This construction may be carried beyond the natural import of the words when essential to answer the evident purpose of the act; so it may restrain the general words to exclude a case not within that purpose. . . . Where the intent of the act is manifest, particular words may have an effect quite beyond their natural signification in aid of that intent."); *Davis v. Hix*, 140 W.Va. 398, 417, 84 S.E.2d 404, 420 (1954).

As made clear by the above rules of construction, the same test for ambiguity exists between contractual language and statutory language. Accordingly, if at-the-wellhead-type language is ambiguous in a contractual lease as to its meaning, such language is also ambiguous when contained in a statute unless the Legislature expressly defines its meaning, which our Legislature did not do in § 22-6-8. As the above rules of statutory construction also make clear, the Legislature is presumed to know the existing state of the law, including common law, statutory law, and constitutional law, and to intend statutes it enacts to be in harmony with our existing law. Certainly, the Legislature could have provided definitions for relevant words or terminology within the statute, but it did not. Moreover, it cannot be disputed that this Court is also presumed to know the state of its existing law. If the Court believed that the West Virginia Legislature intended the "at-the-wellhead"-type language contained within the West Virginia

Flat-Rate Statute to allow for the deduction of post-production expenses it could and would have expressly stated so in its decision in *Tawney*, *supra*, when discussing the meaning of such language within West Virginia.

Moreover, it cannot be disputed that the West Virginia Flat-Rate Stature is a remedial statute designed to benefit landowners who retain their natural-gas, mineral rights and to correct the past injustices and inequities created by flat-rate leases. If the use of such language, alone, in leases is ambiguous and cannot be held to demonstrate an intent to permit the deduction of post-production expenses from the landowner's 1/8 royalty interest, it would be absurd to suggest that the Legislature intended the use of such language, alone, in a remedial statute-designed to benefit landowners-to lead to a different result. *See State v. Kerns*, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990) (noting it is the "duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results"); *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W.Va. 90, 98, 529 S.E.2d 110, 118 (2000) (same). When viewed in this proper light, it is clear that Defendant EQT Production's arguments to the contrary are incorrect and red herrings at best.

For instance, EQT Production argues that existing case law such as *Wellman* and *Cotiga* support its position. While the Court in *Wellman* had alluded that the language at issue therein "might be language indicating that the parties intended" to have the lessors share in the costs of post-production expenses, it concluded that it need not determine "whether that was actually the intent and the effect of the language of the lease" because the lessees had not submitted any proof that such costs had actually been incurred and were reasonable. *Wellman*, 210 W.Va. at 211, 557 S.E.2d at 265. In *Tawney*, when actually faced with this question, the Court found that such language in *Wellman* was merely *dicta* and did not support the argument of CNR as to the actual meaning and intent of the language at issue in that case. *Tawney*, 219 W.Va. at 273, 633 S.E.2d at 29. Similarly, the *Tawney* Court found that nothing in its decision in *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962), supported CNR's position. *Tawney*, 219 W.Va. at 273, 633 S.E.2d at 29. The Court explained:

> [In *Cotiga*,] this Court distinguished the wellhead or field price of gas from the price received by the lessee when the gas is marketed. However, while we did distinguish between the wellhead price and the actual selling price of gas, we did not define wellhead price, determine how it is calculated, or decide the specific question currently before us. Therefore, we find our discussion in *Cotiga* unhelpful in deciding the present issue. Accordingly, in light of the above,[14] we conclude that the 'at the wellhead' type language at issue is ambiguous because it is susceptible to more than one construction and reasonable people can differ as to its meaning.

Id. (footnoted added). Accordingly, for these same reasons, EQT Production's reliance on *Wellman* and *Cotiga* is also similarly misplaced here.

EQT Production's reference to the "legislative history" of the Flat-Rate Statute also is not persuasive in support of its position. Simply stated, the fact that "at the wellhead" language was added to an earlier draft of the proposed statute does nothing to advance the Defendant's position, because there is nothing in the so-called legislative history that discusses the purpose for adding such language, let alone that indicates the intent of the Legislature in adding such language was to permit lessees to deduct post-production expenses from the landowner's 1/8-royalty payment. As earlier explained, it defies both logic and reason to suggest that the Legislature in enacting legislation--meant to rectify the century-old injustices and inequities of flat-rate leases--sought at the same time to award lessees to the detriment of lessor landowners by allowing the deduction of post-production expenses through the adoption of language insufficient to accomplish this objective in leases.

[14] The Court was here referring to its earlier discussion which has been quoted and discussed in this brief above.

Defendant's reference to the opinions of two of the individual legislators is also unpersuasive in establishing the Legislature's intent as to the meaning of the inclusion of "at the wellhead" language. Numerous courts have acknowledged that the intention of the draftsmen of a statute or the individual members of the legislature who voted for and passed it, if not properly expressed in the act, has nothing to do with its construction. The meaning of the statute should be arrived at from its own language and not from the declaration of the draftsmen. *See, e.g., Walker v. Boggess,* 41 W.Va. 588, 23 S.E. 550, 551 (1895) ("'Its meaning must be arrived at from its own language, and not from the declaration of its draftsman.'" (citation omitted)); *City of Richmond v. Supervisors of Henrico Co.*, 83 Va. 204, 2 S.E. 26, 30 (1887) ("The intention of the draughtsman of the act, or the individual members of the legislature who voted for and passed it, has nothing to do with its construction."); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("And ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." (citation omitted)); *Blanchette v. Connecticut General Ins. Corporations*, 419 U.S. 102, 131 (1974) ("But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. . . . Such statements 'represent only the personal views of these legislators, since the statements were (made) after passage of the Act.'" (citations omitted)); *Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 474 (1921) ("By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body." (citations omitted)); *Roy v. County of Lexington, South Carolina*, 141 F.3d 533, 539 (4th Cir. 1998) ("The remarks of individual legislators, even sponsors of legislation, however, are not regarded as a reliable measure of congressional intent." (citations omitted)); *United States v. Charleston County School Dist.*, 960 F.2d 1227, 1233 (4th Cir. 1992) ("The fact that South Carolina does not keep records of its legislative history makes it impossible to determine what exactly motivated the 1951 action. . . . In any event, reliance upon legislators' statements and candidate speeches in divining the intent of a legislative body is a step to be taken cautiously and the statements of individual legislators should not be given controlling effect." (citations omitted)).

Similarly, EQT Production's discussion of Pennsylvania statutory and decisional law does not carry the day. Plaintiffs agree that West Virginia's Flat-Rate statute is more detailed and descriptive than the 1979 legislation adopted in Pennsylvania. *Compare and contrast* W.Va. Code § 22-6-8 *with* 58 P.S. §§ 33.3 & 34.[15] However, Plaintiffs submit that the more detailed language contained within West Virginia's enactment supports Plaintiffs' position rather than that of the Defendant. Why? Because, as explained above, the language contained therein expresses the public policy of West Virginia in enacting the statute. Such language and expressed public policy clearly reveals that the Statute is a remedial statute that must be liberally construed to benefit those parties sought to be protected and benefitted by the enactment, i.e., landowners and the State of West Virginia as opposed to the lessees. No language contained in any West Virginia statute, including the Flat-Rate Statute, states that "at the wellhead"-type language means that post-production expenses must be deducted from a landowner's 1/8 royalty. And, no decision of the West Virginia Supreme Court of Appeals holds so. Indeed, that Court's decision in *Tawney* expressly holds such language to be ambiguous in such very regard. A comparison of the Court's reasoning and holdings in *Tawney* with the reasoning and holdings of

[15] The Pennsylvania Statute originally adopted in 1979 was amended in 2013. However, the sections most relevant here appear to have been merely recodified rather than altered substantively by any change of language.

the Pennsylvania Supreme Court in *Kilmer v. Elexco Land Services, Inc.*, 605 Pa. 413, 990 A.2d 1147 (2010), undoubtedly reveals that the two courts are at odds as to their interpretation of the meaning of such language. Accordingly, *Kilmer* cannot be found persuasive, let alone controlling, in this case.

Just like the parties in *Tawney* had not expressly stated in the leases that "at the wellhead"-type language meant that parties intended that post-production expenses be deducted from the lessor's 1/8 royalty, the West Virginia Legislature did not expressly state in the Flat-Rate Statute that "at the wellhead" language meant that it intended that post-production expenses be deducted from the landowner's 1/8 royalty. And, similarly, to the canon of construction that contracts/leases must be strictly construed against the drafter, the canon of statutory construction that remedial statutes must be liberally construed in favor of those sought to be benefitted, all benefit the lessor landowners in these cases. Indeed, it would be unjust and inequitable to have landowner lessors receive a greater amount as royalty as a result of a lease using the same "at the wellhead"-type of language than a landowner lessor would receive as a result of a conversion dictated by the West Virginia Flat-Rate Statute.

Certified Question No. 2:

> Does West Virginia Code § 22-6-8 prohibit flat-rate royalties only for wells drilled or reworked after the statute's enactment and modify only royalties paid on a per-well basis where permits for new wells or to modify existing wells are sought, or do the provisions of West Virginia Code § 22-6-8 abrogate flat-rate leases in their entirety?

This particular issue was fully briefed and thoroughly addressed by the Circuit Court of Roane County, West Virginia (The Honorable Thomas C. Evans, III, presiding), on cross motions for summary judgment in the *Tawney* litigation. *Estate of Tawney v. Columbia Natural Resources, LLC*, Civil Action No. 03-C-10E, 2006 WL 6056969 (W.Va.Cir.Ct. Aug. 4, 2006).

The circuit court's resolution of this issue was also raised in the petition for appeal filed by the Columbia Defendants in that litigation following a jury verdict awarding significant compensatory and punitive damages and the resolution of post-trial motions by Judge Evans. After thoroughly reviewing the issues presented, this Court refused the Petition for Appeal.[16] *See* Article 8, Section 4, West Virginia Constitution ("A writ of error, supersedeas or appeal shall be allowed by the supreme court of appeals, or a justice thereof, only upon a petition assigning error in the judgment or proceedings of a court and then only after the court, or a justice thereof, shall have examined and considered the record and is satisfied that there probably is error in the record, or that it presents a point proper for the consideration of the court."). *See also Pote v. Jarrell*, 186 W.Va. 369, 376, 412 S.E.2d 770, 777 (1991) (per curiam) (Court noting that not every petition for appeal regarding an award of punitive damages will automatically be granted if the court upon reviewing the record and petition determines that issues have been waived, that no error has occurred, or that any error was harmless).

Plaintiffs submit that Judge Evans' opinion on this issue was thorough, well-reasoned, and correct. As noted by Judge Evans, the facts found and declared in W.Va. Code § 22-6-8 by the West Virginia Legislature in 1982 are binding on courts. Courts will presume that the legislature has made the fullest investigation before declaring a "fact." Accordingly, a legislative declaration of fact relating to a matter within the Legislature's police power, if not arbitrary, is final and binding on the judiciary.[17] *See Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *, Slip Op. at p. 4. Plaintiffs presume that Defendant will not dispute the

[16] Indeed, under its prior practice, this Court had an Office of Counsel with a staff of attorneys which reviewed all petitions for appeal and their accompanying record and which then forwarded the petitions along with counsel notes and recommendations to the individual justices who then along with their own staff reviewed each petition and the record before the vote on whether to grant or refuse the petition was made.

[17] *E.g., Lemon v. Rumsey*, 108 W.Va. 242, 150 S.E. 725 (1929); *Woodall v. Durst*, 71 W.Va. 350, 77 S.E. 264, 80 S.E. 367 (1912); *Verba v. Ghaphery*, 552 S.E.2d 406 (W.Va. 2001).

Legislature's use of its police powers in § 22-6-8 to declare the public policy of our state and to prevent the creation of new flat-rate leases or the performance of new drilling under existing flat-rate leases without converting them to 1/8 royalty leases. However, Defendant will likely submit that this was all the Legislature intended to accomplish by enacting the Statute and that utilizing the public policy set forth in the Act by requiring the conversion of all preexisting flat-rate leases to 1/8 royalty leases as of the date of the Act's enactment would violate the Contract Clauses of the United States and West Virginia Constitutions. Plaintiffs submit that any such argument by Defendant would misconstrue both the scope of the Legislature's intention in adopting the Act and declaring our public policy and the reasonableness of applying it to preexisting flat-rate leases.

The relevant language of the Act has been quoted *supra*. The portion of the Act prohibiting the issuance of permits for new flat-rate leases or for new drilling under preexisting flat-rate leases are part of a *further* declaration of the Act to assist in accomplishing its desired ends.[18] Prior to issuing such further declaration, the Legislature declared that it is a valid exercise of the police powers of this State and in the interest of the State of West Virginia and in furtherance of the welfare of its citizens, to discourage as far as constitutionality possible the production and marketing of oil and gas located in this State under such continuing flat-rate leases and that it is the public policy of West Virginia to the extent possible, to prevent the extraction, production or marketing of oil or gas under such flat-rate leases. W.Va.Code §§ 22-6-8(a)(4) & (b).

There is nothing contained in such earlier declarations which indicates that they are not intended to apply to preexisting flat-rate leases. Rather, upon describing the evils inherent in all

[18] There is nothing in the statute indicating that such remedy is the exclusive means by which royalty owners can vindicate their rights and enforce our public policy.

such flat-rate leases and acknowledging the existence of the Contract Clauses of the United States and West Virginia Constitutions, the Legislature expressed its intention that its public policy be applied to all such leases to the fullest extent constitutionally permitted. Accordingly, consistent with the Separation of Powers Doctrine, the Legislature has recognized its power to declare the public policy of the State and the power of the courts to determine the constitutional boundaries of such public policy.

The separation of powers provision of the West Virginia Constitution is not violated when a court determines the constitutional boundaries of a public policy. Article 5, Section 1 of the West Virginia Constitution does not prohibit this Court from applying a public policy set forth by the Legislature. To the contrary, "judicial power," is defined as the power conferred on courts to administer law, the authority exercised by the department of government charged with the declaration of what the law is and construction of written law, or the power to construe and expound law. *State ex rel. Richardson v. County Court of Kanawha County*, 138 W.Va. 885, 78 S.E.2d 569 (1953). Construction and application of statutes are functions peculiarly for the judicial branch. *Morgan v. Grace Hospital Inc.*, 149 W.Va. 783, 144 S.E.2d 156 (1965); *Bennett v. Hix*, 139 W.Va. 75, 79 S.E.2d 114 (1953). *See Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. at pp. 29-35.[19] As noted by Judge Evans, "to declare that the subject flat-rate royalty clauses are void and unenforceable by being in contravention of public policy as expressed in the statute, is not expanding or enlarging upon the statute itself. It is the simple, everyday function of the judicial branch of government to refuse in

[19] Judge Evans also explained that legal questions concerning mineral and natural resource leases have never been the exclusive domain of the Legislature, and that courts have intervened in mineral and natural resource leases and contracts where supervening, unforeseen events have occurred which make enforcement of a lease or contract beyond the reasonable expectations of the contracting parties. *Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. at pp. 30-32 (discussing *McGinnis v. Cayton*, 173 W.Va. 102, 312 S.E.2d 765, 769-72 (W.Va. 1984), and cases cited therein).

individual cases to enforce a contract term in violation of the public policy of this state." *Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. at p. 30.[20]

The West Virginia Legislature's declaration of public policy in this case is free from doubt. The continued "exploitation" of natural resources in exchange for "wholly inadequate compensation" is "unfair," "oppressive" and works an "undue hardship" on the oil and gas lessors, and "unreasonably deprives" West Virginia's economy of the just benefit of the natural wealth of the state. The Legislature expressly declared that it is the policy of this state "**to the extent possible** to prevent the extraction, production or marketing of oil or gas under a lease or leases or other continuing contract or contracts providing a flat well royalty or any similar provisions for compensation to the owner of oil and gas in place, which is not inherently related to the volume of the oil or gas produced or marketed . . . ." W.Va.Code § 22-6-8 (1982) (emphasis added). The Legislature did not limit this public policy to those leases that require the issuance of new permits. The statement of public policy set forth in W.Va.Code §22-6- 8 applies to all flat-rate leases.

In determining the fullest extent to which said public policy constitutionally may be applied, it is paramount to recognize that the protection afforded by the Contract Clauses of the United States Constitution, Article I, § 10, and West Virginia Constitution, Article III, § 4, are not absolute but may be overridden by a compelling public policy. *See* Syl. Pt. 3, *Shell v. Metropolitan Life Ins. Co.*, 380 S.E.2d 183 (W.Va. 1989) ("Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people."). This Court has held:

> In determining whether a Contract Clause violation has occurred, a three-step test is utilized. The initial inquiry is whether the statute has substantially

[20] As to a sample of cases in which this Court has invalidated contracts as being violative of public policy, *see Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op., at pp. 11-12 n. 3.

impaired the contractual rights of the parties. If a substantial impairment is shown, the second step of the test is to determine whether there is a significant and legitimate public purpose behind the legislation. Finally, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Syl. Pt. 4, *Shell v. Metropolitan Life Ins. Co., id. See also Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410-12 (1983) (applying the same analysis to protection afforded by Contract Clause in United States Constitution).

Conducting such inquiry in the instant case readily demonstrates that applying the public policy of West Virginia as set forth in W.Va.Code § 22-6-8 does not result in a violation of the Contract Clauses of the United States and West Virginia Constitutions. *See Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. at pp. 16-22.[21] First, any argument that applying our public policy would constitute a substantial impairment of the parties' contractual rights is simply without merit when one considers the equities of the situation as well as the reasonably presumed intention of the parties at the time such antiquated flat-rate leases were entered. The importance of honoring contracts is the goal of protecting the reasonable expectations of the parties. It is simply ridiculous to suggest that lessees who drafted and entered into these antiquated flat-rate leases intended, reasonably or otherwise, to receive the windfall profits they and their successors have obtained as a result of a drastic, unforeseen and unintended change of circumstance concerning the value of natural gas.

Just as our Legislature has declared in W.Va.Code §22-6-8(a)(3), numerous scholars and commentators have acknowledged (and it cannot be reasonably disputed) that when such antiquated flat-rate leases were entered natural gas had little if any value and its discovery was

[21] At the outset, Judge Evans held that the Contract Clauses are directed only against impairment of the obligation of contracts by legislation and not by judgments of courts. *Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. at p. 18 (citing cases).

considered more of a burden than blessing.[22] *See Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. at pp. 6-9. Accordingly, if it was never the reasonable expectation or intention of lessees to obtain such windfall profits, then how can it be a substantial impairment of their rights to modify or adjust the contract to reflect the realities of the modern world and to achieve what the parties desired and intended all along—a reasonable price and consideration for the production and marketing of any natural gas? *See Energy Resources Group*, 459 U.S. at 411 ("state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment"); *Shell*, 380 S.E.2d at 188 (same, quoting *Energy Resources Group*).

Additionally, "[i]n determining the extent of the impairment, [courts] are to consider whether the industry the complaining party has entered has been regulated in the past." *Energy Resources Group*, 459 U.S. at 411. *Accord* Syl. Pt. 5, *Shell*, *supra*. "'In areas where there is regulation and the possibility of future regulation exists, state action affecting private contracts is less likely to be found violative of the contracts clause.'" *Shell*, 380 S.E.2d at 189 (citations omitted). Certainly, the oil and gas industry is one which has been and continues to be heavily regulated. Judge Evans correctly determined that these factors weighed against a finding that the contracts clause would be violated. *Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. at p. 21.

"To suggest that preventing lessees and their successors from obtaining unexpected and unintended windfall profits is a substantial impairment of their rights, is to elevate form over substance and inequity over justice—results which the law should never countenance." *Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. 21.

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[22] 3 Kuntz, *A Treatise on the Law of Oil and Gas*, § 40.1 at pp. 311-12, and § 40.2 at pp. 315-316; Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia*, 436 (1951); *McGinnis v. Cayton*, 173 W.Va. 102, 312 S.E.2d 765, 770-72 (W.Va. 1984) (Harshbarger, J., concurring).

As held by Judge Evans,

> [b]ecause applying the public policy of West Virginia does not result in a substantial impairment of lessees' rights, the inquiry ends there and the Contract Clauses of the United States and West Virginia Constitutions are not violated. However, even if one assumes that a substantial impairment does occur, the Contract Clauses are still not violated because a significant and legitimate public purpose exists behind the legislation and the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Estate of Tawney v. Columbia Natural Resources, LLC, 2006 WL 6056969 at *__, Slip Op. at p. 21.

As noted above, the findings and declarations of the West Virginia Legislature clearly set forth a significant and legitimate public purpose behind the existence of the policy set forth in the legislation. Consistent with the views of scholars previously cited by plaintiffs, the Legislature has expressly recognized that a majority of flat-rate leases in the oil and gas industry, if not all of them, were created a great number of years ago when neither the current technologies for the extraction, production and marketing of oil and natural gas nor the degree of their production and marketing was known or contemplated by the parties.

> The Legislature has found not only that the continued exploitation of the natural resources of this state in exchange for such wholly inadequate compensation is unfair, oppressive, and works an unjust hardship on the owners of the oil and gas in place, but that it unreasonably deprives the economy of the state of West Virginia of the just benefit of the natural wealth of this state. W.Va.Code §§ 22-6-8(a)(2) & (3). *See Energy Resources Group*, 459 U.S. at 412 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31, n. 30 (1977)) ("One legitimate state interest is the elimination of unforeseen windfall profits.").

Estate of Tawney v. Columbia Natural Resources, LLC, 2006 WL 6056969 at *__, Slip Op. at pp. 21-22.

As to the last prong of the contracts-clause analysis, a trial court's adjustment of the rights and responsibilities of the contracting parties by converting flat-rate leases to 1/8 royalty leases is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. As already noted, the history of the development and evolution of natural gas royalty clauses demonstrates that it was the intention of the parties to such contracts to achieve a reasonable consideration for the value of natural gas. The lessees clearly neither foresaw nor intended the windfall profits which they have received as a result of advancing technologies and increased markets for the sale of natural gas. Accordingly, adjusting the rights and responsibilities of the contracting parties by converting such flat-rate leases to 1/8 royalty leases is accomplishing what the parties intended upon entering such contracts, i.e., achieving a reasonable compensation for the value of the natural gas. Therefore, such an adjustment is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Judge Evans also discussed other, related equitable and legal principles which support converting flat-rate natural gas leases to 1/8 royalty leases. *Estate of Tawney v. Columbia Natural Resources, LLC*, 2006 WL 6056969 at *__, Slip Op. at pp. 37-40. By way of example, in *McGinnis v. Cayton, supra*, Justice Harshbarger noted in his concurring opinion that in the historical development of common law contracts concepts "there has been a positive movement away from strict and rigid rules of law in order to accommodate long-term contracts that have become manifestly unfair: ***evenness and equity should prevail over form, and justice demands whatever flexibility is necessary to fill in contractual gaps and adapt to unexpected changes.***" *Id.*, 312 S.E.2d at 772 (emphasis added).[23] *See also Buffalo Coal & Coke Co. v.*

[23] Justice Harshbarger also noted in *McGinnis* that in 1982 the West Virginia Legislature had adopted W.Va.Code 22-4-1(l) (subsequently codified at § 22-6-8), thereby recognizing "the inequities of retaining the terms of these leases that predated anyone's understanding of the value of natural gas. . . . [and] also acknowledg[ing] its police power to prevent overt oppression." *McGinnis*, 312 S.E.2d at 781 (footnotes omitted). However, the McGinnises did not cite or rely upon such legislative enactment because the recency of it being enacted made it unavailable to them. Id., at 781 n. 28.

Vance, 71 W.Va. 148, 76 S.E. 177, 179-80 (1912) (Court refusing to grant specific performance of a *five-year-old* executory contract to lease minerals, utilizing equitable principles to evaluate what was fair and just and concluding that it would not permit the appellees to "**reap where they have not sown**" to the disadvantage and injury of the other party to the contract; also noting "**we may take judicial notice that the value of all mineral and timber land in this state had greatly enhanced in value within the five years intervening between the date of the contract and the date of the suit.**" (emphases added)).

CONCLUSION

Petitioners hereby request and petition the Court to rule as follows with regard to each of the certified questions:

(1) That the Court rule that the findings and holdings of the Supreme Court of Appeals of West Virginia in *Tawney* are relevant and/or controlling in consideration of whether the "at the wellhead" phrases in W.Va. Code § 22-6-8 allows lessees the right to charge and deduct post-production costs from lessors' one-eight royalty required by the statute and that based upon West Virginia's common law as described in *Tawney* and the precedent and the policies described therein that "at the well head language" is ambiguous and that the statute therefore requires the lessees to pay no less than one-eighth of all the gas extracted from his property.

(2) Petitioners request the Court to rule that W.Va. Code § 22-6-8 sets forth the public policy of West Virginia with respect to flat rate leases and consequently, that this Court finds and orders that flat rate leases in West Virginia are "abrogated" and null and void as a result of being against West Virginia's public policy.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 16-0136

PATRICK D. LEGGETT;
KATHERINE F. LEGGETT;
GEORGE D. MCKAIN, by his
attorney in fact, ANITA
KATHRYN MCKAIN GREER;
and ADELE S. MCDOUGAL,

Plaintiffs,

v.

Civil Action No. 1:13-cv-0004 FPS
(U.S. District Court, Northern District)

EQT PRODUCTION COMPANY,
a Pennsylvania corporation;
EQT CORPORATION,
a Pennsylvania corporation;
EQT ENERGY, LLC, a
Delaware limited liability company;
EQT INVESTMENTS HOLDINGS, LLC, a
Delaware limited liability company;
EQT GATHERING, LLC, a
Delaware limited liability company; and
EQT MIDSTREAM PARTNERS, LP,
a Delaware limited partnership,

Defendants.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for plaintiffs, do hereby certify that on June 9, 2016, true and exact copies of the foregoing "Petitioners' Brief" and "Joint Appendix" were served upon:

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