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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 16-0136

PATRICK D. LEGGETT, et al.,

Plaintiffs/Petitioners,

v.

EQT PRODUCTION COMPANY, et al.,

Defendants/Respondents.

Upon Certified Questions from the United States District Court
for the Northern District of West Virginia
Case No. 1:13-cv-00004-FPS

RESPONDENT'S BRIEF

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I. STATEMENT OF CASE

A. PROCEDURAL HISTORY

The plaintiffs are owners of a 75% undivided interest of the gas estate in a 2000 acre tract in Doddridge County, West Virginia. Joint Appendix ("JA") at 8-9. The owners of the remaining 25% undivided interest have not joined the case.

Originally, the defendants were EQT Production Company ("EQT" or "EQT Production") and its parent company, EQT Corporation, as well as a number of other subsidiaries of EQT Corporation, including EQT Energy, LLC ("EQT Energy"), EQT Investment Holdings, LLC, EQT Gathering, LLC ("EQT Gathering"), and EQT Midstream Partners, LP. JA at 8. EQT Production, which holds the lease on the property, is the only remaining defendant. All of the claims against the other defendants have been dismissed. JA at 577-613.

The case involves a lease dated October 31, 1906 ("Lease"). The Lease provides for a flat-rate royalty—$300 per gas well per year. In their Amended Complaint, plaintiffs do not allege that the Lease is invalid or unenforceable. Indeed, only a few years before this suit was filed, plaintiffs ratified the Lease, stipulating that the Lease "is valid and in effect" and affirming "all of the terms and provisions of the Lease." JA at 447, 449, 451. Although plaintiffs have ratified the Lease, they claim that they are due additional payments under the flat-rate lease statute, W. Va. Code § 22-6-8, for the wells that have been drilled or reworked on the property since the statute was enacted. JA at 23, 521.

Specifically, plaintiffs contend that EQT has wrongfully taken deductions from the price on which the statutory payments have been made. JA at 17 ¶ 30. The deductions are for a portion of the costs of gathering and transporting the gas from the wells to the interstate pipeline. JA at 140-142, 187-188, 194, 283. Plaintiffs argue that this method of calculating and making payments violates EQT's "contractual, legal, statutory and common law duties." JA at 17 ¶ 30. Plaintiffs seek both compensatory and punitive damages. JA at 23.

EQT moved the District Court for summary judgment on the ground that deductions are allowed under the statute because payments are required to be based on the proceeds at the wellhead, not at the interstate pipeline or some other downstream location. JA 355, 467. Plaintiffs opposed the motion, contending that this Court's decision in *Estate of Tawney v. Columbia Natural Res., L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006), requires EQT to make payments on the downstream price with no deductions for the costs of getting the gas there. JA at 508, 520-22.

After considering the parties' arguments, the District Court decided to certify two questions to this Court for decision. JA at 4, 577, 607. The Court therefore deferred ruling on EQT's motion and stayed the case pending a decision by this Court on the certified questions. JA at 4, 613.

B. CERTIFIED QUESTIONS

The District Court certified the following 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?

JA at 4. The District Court acknowledged the right of this Court to reformulate the questions as it deems appropriate. JA at 6; see W. Va. Code § 51-1A-4.

C. STATEMENT OF FACTS

On October 31, 1906, plaintiffs' predecessors in title entered into the Lease with The Philadelphia Company of West Virginia, EQT's predecessor in title. JA at 558-576. The Lease was for the purpose of "drilling and operating for Natural Gas and Petroleum Oil" on the tract. JA at 570. The term of Lease was six years "and as much longer as oil or gas is produced in paying quantities." *Id.* The Lease remains held by production. JA at 3.

For royalties, the Lease provides for a $300 annual payment for each gas well and one-eighth share of any oil produced.

> And it is Agreed, that the 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 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 lessors the full equal one-eighth (1/8) part or share of the same, delivered free of charge, in the pipe lines and tanks of the company transporting and storing the oil produced upon the said premises.

JA at 570. The Lease also provided for a "carrying rent" of $500 for each quarter until a well was completed. JA at 571.

In 1982, the Legislature enacted the flat-rate lease statute. W. Va. Code § 22-6-8 (originally codified as § 22-4-1). In this statute, the Legislature prohibited the issuance of permits for new wells or reworked wells on flat-rate leases, or what the Legislature called "flat well royalty leases." By this, the Legislature meant leases "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 or gas produced or marketed." § 22-6-8(a)(1).

Where the property is subject to a flat-rate lease, the statute allows the working interest owner (the operator) to obtain permits for new wells or reworked wells by paying the gas owner "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 . . . ." § 22-6-8(e).

Most of the wells on the property were drilled after the flat-rate statute was enacted. JA at 3. These wells represent the great bulk of the production on the property. EQT has made the statutory payments for all wells drilled or reworked since 1982.

For the wells that are subject to the statute, EQT makes payments to plaintiffs based on the price it receives at the wellhead. JA 122-25, 140-43, 184-86, 223. The price at the wellhead is determined by taking the price for the gas at the interstate pipeline and deducting some—but not all—of the costs of getting the gas there. *Id.* The deductions from the downstream price include operation and maintenance costs for the gathering system. JA at 231-32, 275, 282. No deductions are taken for depreciation, return, or taxes. JA at 193-94, 313.

Given the different work involved, EQT Corporation has formed separate subsidiaries to carry out each operation. EQT Production is the drilling and production company. JA at 188, 270. It acquires the leases, drills the wells, and produces all the gas—and it bears all of the costs of doing so. *Id.* None of these development and production costs are charged to royalty owners. *Id.*

EQT Gathering is the midstream company. JA at 118, 123, 188, 270. It constructs and operates the gathering lines and compressors necessary to move the gas from the wells to the interstate pipeline. *Id.*

EQT Energy is the sales company. JA at 121-23, 185. It buys gas from EQT Production and others and sells it to third parties. *Id.*

EQT Production sells gas to EQT Energy at the wellhead. The price is based upon the index price for the gas at the interstate pipeline less the midstream costs.

JA at 140-41, 188, 223. As noted, EQT Production also uses this index price in making statutory payments. From this price, EQT Production deducts a portion of the midstream costs. JA at 193-94, 231-32, 275, 282, 313. In its statements to lessors, EQT Production reports both the index price and the deductions from that price. JA at 242, 244.

EQT pays lessors for the volume of gas that is actually sold at the interstate pipeline. JA at 186. During transportation, a certain amount of gas is lost or used as fuel for compression. JA at 195, 198, 226. EQT does not make statutory payments on this gas. *Id.* EQT only makes payments on the gas for which it is paid.

In their brief, plaintiffs claim—with zero evidentiary support—that the defendants entered into a "plan and design" to "circumvent" the requirements of the flat-rate statute by paying on less than one-eighth of proceeds. Petitioners' Brief at 3, 18. The record shows, however, that EQT's method of paying royalties is entirely consistent with the statute, which requires the use of a wellhead price, not the price at the interstate pipeline or some other downstream location. Further, the statute only requires payments based on proceeds; the operator does not have to make payments on volumes for which it is not paid.

Plaintiffs also complain that the deductions are based on an "estimate" of the midstream costs, not the "actual costs." Petitioners' Brief at 4, 18. Again, plaintiffs leave the record behind them. While the midstream costs are calculated in advance, the record shows that the costs represent the company's best judgment of what the actual costs will be in the coming year and that the figure takes into account actual costs from years past. JA at 124-25, 181, 186. Moreover, because only a portion of these costs are used to determine the wellhead price on which statutory payments are made, the costs are inevitably less than actual costs—a fact never mentioned by plaintiffs in their brief. JA at 124, 140-41, 181, 186, 194, 313.

Citing selected cases and treatises, plaintiffs also describe what they call the "history of flat-rate leases" and "common law concerning the 1/8 royalty." Petitioners' Brief at 4, 8. Of course, none of this discussion is actually a fact in the case, and much of it is simply wrong.

While EQT will leave the discussion of history and the common law to the argument section of its brief, EQT does wish to respond to one "fact" stated by plaintiffs. Plaintiffs claim that there is "an age-old industry practice" of paying royalties based on "1/8 of the amount received, without deductions." Petitioners' Brief at 9. This claim, of course, ignores an even older industry practice of using flat-rate leases. It also ignores the changes that occurred in the industry with deregulation in the 1980s and 1990s. *Appalachian Land Co. v. EQT Prod. Co.*, 468 S.W.3d 841, 853 n.5 (Ky. 2015); *Kilmer v. Elexco Land Servs., Inc.*, 990 A.2d 1147, 1155 (Pa. 2010); *Clough v. Williams Prod. RMT Co.*, 179 P.3d 32, 35-36 (Colo. Ct. App. 2007).

Until the late-1980s, producers generally sold their gas to pipeline companies at the wellhead. *Appalachian Land Co.,* 468 S.W.3d at 853 n.5; *Kilmer*, 990 A.2d at 1155; John S. Lowe, *Defining the Royalty Obligation*, 49 SMU L. Rev. 223, 224 (1996). The pipeline companies bore all the costs of transporting the gas to downstream buyers. *Appalachian Land Co.* 468 S.W.3d at 853 n.5; *Kilmer*, 990 A.2d at 1155. The price that the pipeline companies paid the producers reflected this fact. *Id.* With deregulation, pipeline companies assumed the role of common carriers, and producers assumed the responsibility and costs of gathering the gas and transporting it to carriers. *Kilmer*, 990 A.2d at 1155; *Clough*, 179 P.3d at 35-36. Therefore, when plaintiffs refer to the historical practice of paying royalties based on one-eighth of the price received by the producer, they fail to mention that the price was the wellhead price—and that it did not include the value added by gathering and compression. *Kilmer*, 990 A.2d at 1155; David E. Pierce, *Royalty Jurisprudence: A Tale of Two States*, 49 Washburn L.J. 347, 368 (2010).

II. SUMMARY OF ARGUMENT

As is universally recognized, gas becomes more valuable as it moves downstream from the wellhead. *See, e.g., Appalachian Land Co.*, 468 S.W.3d at 854; Patricia Proctor, J. Kevin West, Gregory P. Neil, *Moving Through the Rocky Legal Terrain to Find a "Safe" Royalty Clause or a "New" Market at the Well*, 19 Tex. Wesleyan L. Rev. 145, 150 (2012). Where royalties are based on the proceeds from the sale of the gas, courts, in recent years, have been called upon to decide where those proceeds should be determined. Should the proceeds be determined at the wellhead or should they be determined at some downstream location, such as the interstate pipeline? The courts have reached different answers to this question.

The courts in some states have held that "at the well" royalty clauses mean that gas is valued for royalty purposes at the wellhead. *Baker v. Magnum Hunter Prod., Inc.*, 473 S.W.3d 588, 591-95 (Ky. 2015); *S Bar B Ranch v. Omimex Canada, Ltd.*, 942 F. Supp.2d 1058, 1062-63 (D. Mont. 2013); *Emery Res. Holdings, LLC v. Coastal Plains*

Energy, Inc., 915 F. Supp.2d 1231, 1237, 1241-42 (D. Utah 2012); *Kilmer*, 990 A.2d at 1158; *Bice v. Petro-Hunt, L.L.C.*, 768 N.W.2d 496, 502 (N.D. 2009); *Creson v. Amoco Prod. Co.*, 10 P.3d 853, 855 (N.M. Ct. App. 2000); *Schroeder v. Terra Energy, Ltd.*, 565 N.W.2d 887, 894 (Mich. Ct. App. 1997); *Babin v. First Energy Corp.*, 693 So.2d 813, 815 (La. Ct. App. 1997); *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 122 (Tex. 1996); *Atl. Richfield Co. v. Cal.*, 214 Cal. App.3d 533, 541-42, (Cal. Ct. App. 1989); *Piney Woods Country Life Sch. v. Shell Oil Co.*, 726 F.2d 225, 230-31 (5th Cir. 1984) (Mississippi).

The courts in other states, including West Virginia, have held that the lessee is required to make the gas marketable and to bear all of the costs for doing so. Syl. Pt. 1, *Tawney,* 219 W. Va. 266, 633 S.E.2d 22; *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 902 (Colo. 2001); *Wood v. TXO Prod. Corp.*, 854 P.2d 880, 882-83 (Okla. 1992); Syl. Pt. 3, *Gilmore v. Superior Oil Co.*, 388 P.2d 602 (Kan. 1964).

The cases that require royalties to be paid on a downstream price have consistently based their decisions on an implied covenant to market the gas. *Wellman v. Energy Res., Inc.,* 210 W. Va. 200, 211, 557 S.E.2d 254, 265 (2001); *Rogers*, 29 P.3d at 896; *Wood*, 854 P.2d at 882; *Gilmore*, 388 P.2d at 606-07.

In this case, however, the Lease does not require royalties to be paid on the price of the gas but on the number of wells drilled. JA at 557-76. As a result, it does not matter to the lessor where the gas is sold or what it sells for. As this Court has recognized, there is no duty to market the gas under a flat-rate lease; the amount of gas produced and sold is "irrelevant." *See, e.g., Bruen v. Columbia Gas Trans. Corp.*, 188 W. Va. 730, 732, 426 S.E.2d 522, 524 (1992).

In 1982, the Legislature concluded that flat-rate leases were "unfair." W. Va. Code § 22-6-8(a)(2). Although flat-rate leases were once commonplace, the Legislature found that they had become "oppressive" and that they worked an "unjust hardship" on gas owners. *Id.* Therefore, the Legislature declared that it would "discourage as far as constitutionally possible" future development of gas under flat-rate leases. § 22-6-8(a)(4). To this end, the statute prohibits the issuance of permits for new wells or reworked wells on flat-rate leases—with one exception. § 22-6-8(d), (e). The statute allows permits for new wells or reworked wells if the owner of the working interest agrees to pay the owner of the gas "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 . . . ." § 22-6-8(e).

Pursuant to § 22-6-8(e), EQT has made the statutory payments to plaintiffs for new wells or reworked wells on their flat-rate lease. As a result, EQT has paid the plaintiffs millions of dollars more than they are entitled to under the Lease. The payments have been based on one-eighth of the proceeds received by EQT at the wellhead, just as the statute requires.

Not satisfied, plaintiffs have sued for more money. They contend that EQT must make its statutory payments based on the full downstream price for the gas—the price at the interstate pipeline or beyond—not the price at the wellhead. Plaintiffs base their claim entirely on *Tawney*. But the decision of this Court in *Tawney* did not involve a flat-rate lease or the flat-rate statute. *Tawney* involved leases that required royalties to be paid on proceeds, and the Court based its decision on the existence of an implied duty to market, a duty that is nonexistent and irrelevant under a flat-rate lease. *See Bruen*, 188 W. Va. at 732, 426 S.E.2d at 524. This case must be decided based on the statute, not on implied covenants arising in dissimilar leases.

Under the plain terms of the statute, the payments are to be based on the total amount received by the lessee "at the wellhead," not at the interstate pipeline or some other downstream location. A wellhead amount means a wellhead amount. If the Legislature had intended some other amount, it could have said so. In fact, the Legislature considered and rejected earlier versions of the statute that would have required payments based on "gross proceeds" or the "total amount" received without specifying "at the wellhead." JA at 376, 382. The Court should therefore answer the first certified question by ruling that *Tawney* does not determine how payments are to be made under the statute. The plain language of the statute controls.

The second certified question asks whether the statute operates prospectively or whether it "abrogate[s] flat-rate leases in their entirety." JA at 4. Because plaintiffs have not challenged the validity of their lease with EQT—and have expressly ratified it—there is no need for the Court to reach the second question. In any event, it is clear from the statute itself that the Legislature did not attempt to invalidate or even amend flat-rate leases. The Legislature left all such leases intact. Instead of abrogating flat-rate leases—and thereby impairing vested contract rights—the Legislature prohibited the issuance of permits for new wells or reworked wells unless the owner of the working interest agrees to pay a statutory amount to the owner of the gas. Under the statute, the owner of the working interest can continue to produce gas from existing wells on flat-rate leases by paying the flat-rate royalty. And the owner of the working interest can obtain permits for new wells on flat-rate leases by agreeing to make the statutory payment to the owner of the gas. In both instances, the flat-rate leases themselves remain in place, however, just as the Legislature intended. Therefore, the answer to the second certified question is that the statute does not invalidate flat-rate leases.

III. STATEMENT REGARDING ORAL ARGUMENT

By order dated April 6, 2016, the Court has scheduled this case for oral argument under Rule 20 on September 14, 2016.

IV. ARGUMENT

A. STANDARD OF REVIEW

Under W. Va. Code § 51-1A-3, the Court may answer certified questions of law where the answer is determinative of an issue in the case and there is no controlling law:

> The supreme court of appeals of West Virginia may answer a question of law certified to it by any court of the United States or by the highest appellate court or the intermediate appellate court of another state or of a tribe or of Canada, a Canadian province or territory, Mexico or a Mexican state, if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state.

In deciding certified questions, the Court employs a de novo, plenary standard of review. Syl. Pts. 2 & 3, *BPI, Inc. v. Nationwide Mut. Ins. Co.*, 235 W. Va. 303, 773 S.E.2d 647 (2015); Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1998).

While the Court retains the power to reformulate questions, Syl. Pt. 3, *Kincaid v. Magnum*, 189 W. Va. 404, 432 S.E.2d 74 (1993), W. Va. Code § 51-1A-4, the Court will not answer questions that are not dispositive of a claim or questions that are not necessary to the decision of the case. *State ex rel. Advance Stores Co. v. Recht*, 230 W. Va. 464, 740 S.E.2d 59, 63-64 (2013); *Zelenka v. City of Weirton*, 208 W. Va. 243, 245, 539 S.E.2d 750, 752 (2000); Syl. Pt. 7, *Shell v. Metro. Life Ins. Co.*, 181 W. Va. 16, 380 S.E.2d 183 (1989).

B. PRINCIPLES OF STATUTORY INTERPRETATION

"It is basic in our law and universally accepted that where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." *Crockett v. Andrews*, 153 W. Va. 714, 718, 172 S.E.2d 384, 386 (1970); *see Hereford v. Meek*, 132 W. Va. 373, 386, 52 S.E.2d 740, 747 (1949). "[W]e emphasize that judicial interpretation of a statute is warranted *only* where the statute is ambiguous." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223, 228 (2016) (emphasis in original); *see Int'l Union of Operating Eng'rs v. L.A. Pipeline Constr. Co.,* No. 15-0898, 2016 WL 2953983, at *4 (W. Va. May 18, 2016). Under this rule, the Court "will not alter the text in order to satisfy the policy preferences of the petitioners." *Tomblin*, 236 W. Va. 528, 782 S.E.2d at 229. Rather, the Court will strive to give effect to "'every section, clause, word or part of the statute.'" Syl. Pt. 1, *Feroleto Steel Co. v. Oughton*, 230 W. Va. 5, 736 S.E.2d 5 (2012) (quoting Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999)). "It is presumed that each word in a statute has a definite meaning and purpose." *T. Weston, Inc. v. Mineral Cnty.*, 219 W. Va. 564, 568, 638 S.E.2d 167, 171 (2006).

A statute is ambiguous when it is "susceptible of two or more constructions or such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Hereford*, 132 W. Va. at 386, 52 S.E.2d at 747; *see Davis Mem'l Hosp. v. W. Va. State Tax Comm'n*, 222 W. Va. 677, 682-83, 671 S.E.2d 682, 687-88 (2008). "The fact that parties disagree about the meaning of a statute," however, "does not itself create ambiguity or obscure meaning." *T. Weston, Inc.*, 219 W. Va. at 568, 638 S.E.2d at 171. Otherwise, courts would have to declare statutes ambiguous whenever the parties disagreed as to their meaning. As one Court has observed:

> [S]tatutory ambiguity cannot be determined by referring to the parties' interpretations of the statute. Of course their interpretations differ. That is why they are in court.

John v. U.S., 247 F.3d 1032, 1041 (9th Cir. 2001) (Tallman, J., concurring).

If a statute is ambiguous, the Court attempts to determine legislative intent. *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998). The Court will look at "'the spirit, purposes and objects of the general system of law of which [the statute] is intended to form a part.'" *Id.* (quoting Syl. Pt. 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908)). In doing so, the Court will assume that the Legislature is familiar with existing law and that it intended the statute to "'harmonize completely'" with existing law. *Id.* In addition, the Court will examine legislative history, including earlier versions of the statute and the circumstances of the statute's adoption. *Davis Mem'l Hosp.*, 222 W. Va. at 684, 671 S.E.2d at 689. While the Court will search for legislative intent when a statute is ambiguous, it will not attempt to revise or rewrite the statute under the "guise of 'interpretation.'" Syl. Pt. 1, *Consumer Advocate Div. v. Public Serv. Comm'n*, 182 W. Va. 152, 86 S.E.2d 650 (1989).

C. THE ANSWER TO THE FIRST CERTIFIED QUESTION IS NO

The first certified question asks whether *Tawney* has any effect on how payments are determined under the flat-rate lease statute, which was enacted 24 years before *Tawney* and 19 years before *Wellman*. The answer to that question is no.

1. The Statute Is Not Ambiguous—Statutory Payments Are Determined at the Wellhead

Section 22-6-8 consists of several parts. Subsection (a) contains findings in regard to flat-rate leases. The findings include (1) that there are numerous flat-rate leases, (2) that these leases are "unfair" and "oppressive," (3) that there have been substantial improvements in technology since the leases were made, and (4) that the Legislature may exercise its police power "to discourage as far as constitutionally possible the production and marketing of oil and gas" under flat-rate leases.

Subsection (b) contains declarations concerning flat-rate leases, in particular, "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 flat-rate lease. To this end, the

Legislature further declared "that it is the obligation of this state to prohibit the issuance of any permit . . . for the development of oil or gas" under such leases.

Subsection (c) requires an operator seeking a permit for a well to file his lease or a description of his lease with his application. Except as provided in subsection (e), subsection (d) states no permit shall be issued for any new well or reworked well on a flat-rate lease.

To avoid the prohibition of subsection (d), an applicant may file an affidavit stating that the owner of the working interest has agreed to pay the owner of the gas "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 . . . ." § 22-6-8(e). The one-eighth amount is to be determined "before deducting the amount to be paid to or set aside for the owner of the oil or gas in place . . . ." *Id.*

Under the plain terms of the statute, flat-rate leases remain in effect. Working interest owners can continue to operate existing wells. The working interest owners are prevented, however, from obtaining permits for new wells or reworked wells unless they agree to pay the statutory amount to the gas owners.

The question is, what is the statutory amount. The answer lies in the text of the statute itself. The statutory amount is one-eighth of the amount received by the owner of the working interest "at the wellhead." § 22-6-8(e). The statutory amount is not one-eighth of the amount received at the interstate pipeline or some other location downstream. The receipts are to be measured "at the wellhead." The Legislature rejected earlier versions of the statute that did not have this limiting language. JA at 376, 382. The first certified question should be answered based on the plain language of the statute.

Pennsylvania has a statute with a similar purpose. It is called the Guaranteed Minimum Royalty Act. 58 Pa. Stat. Ann. § 33.3 (formerly 58 Pa. Stat. Ann. § 33). The Guaranteed Minimum Royalty Act requires "at least one-eighth royalty" on certain leases. *Id.* In *Kilmer*, 990 A.2d 1147, the question was whether royalty should be calculated at the wellhead or at a downstream point of sale. The Supreme Court of Pennsylvania concluded that the royalty should be determined at the wellhead. *Id.* at 1158. The Court specifically approved a net-back method of determining royalties when the gas is sold downstream. *Id.*

In reaching this decision, the Court relied on the fact that gas was generally sold at the wellhead when the Guaranteed Minimum Royalty Act was passed in 1979. *Id.* at 1155, 1157. Even though the Guaranteed Minimum Royalty Act did not contain the phrase "at the wellhead," the Court held royalties should be determined at the wellhead because that is where they were generally determined when the Act became law. *Id.* at 1157-58.

In their brief, plaintiffs argue that Pennsylvania and West Virginia give different meanings to "at the wellhead." Petitioners' Brief at 30-31. But the Pennsylvania statute did not even use the term "at the wellhead." Even so, the Pennsylvania court concluded that the wellhead was the proper location for determining royalties under the Guaranteed Minimum Royalty Act. The flat-rate statute in West

Virginia specifically uses the phrase "at the wellhead" to define the location for making payments, and the Court needs only to apply it.

Unable to offer any competing meaning for "at the wellhead," and unable to distinguish *Kilmer*, plaintiffs claim that "at the wellhead" is ambiguous, so—contrary to established principles of statutory interpretation—the Court should just ignore the phrase and require EQT to pay on the full downstream price. Petitioners' Brief at 20, 26-27. In support of their argument, plaintiffs note that *Tawney* held "at the wellhead" was ambiguous when used in a lease. *Id.* at 18, 26-27. If "at the wellhead" is ambiguous when used in a lease, plaintiffs contend the phrase must also be ambiguous when used in a statute. *Id.*

In *Tawney*, however, the ambiguity arose from the use of "at the wellhead" in leases that required the lessee to pay royalties based on a percentage of proceeds and that imposed on the lessee an implied duty to market. As the Court explained, "the 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." 219 W. Va. at 272, 633 S.E.2d at 28. The Court concluded it was not. *Id.*

The lease in this case does not require royalties to be paid on a percentage of the proceeds, and it imposes no implied duty to market the gas or to pay all the expenses of doing so. In this case, we have a flat-rate lease. Under flat-rate leases, royalties are paid "*regardless* of production." *Bruen*, 188 W. Va. at 733, 426 S.E.2d at 525 (emphasis in original). The "quantity of production is irrelevant." *Id.* at 732, 426

S.E.2d at 524. As a result, the lessee has no duty to place the gas in a marketable condition or to transport it to a marketable location. Nor does the lessee have any duty sell the gas at the best price. Rather, the lessee's duty is simply to pay the flat rate for each well drilled. *Id.* at 733, 426 S.E.2d at 525.

In *Bruen*, the Court rejected the lessor's claim that the lessee breached a flat-rate lease by not producing gas in paying quantities. *Id.* at 735, 426 S.E.2d at 527. Correspondingly, in *Bassell v. W. Va. Cent. Gas Co.*, 86 W. Va. 198, 103 S.E. 116, 117 (1920), the Court rejected the lessors' claim that the lessee was using compression to produce too much gas from a well, thus limiting the number of wells drilled under a flat-rate lease:

> The rental bears no relation to the quantity of gas contemplated or actually produced. It was compensation fixed in advance of production and without any definite knowledge as to what the production would be. Hence the rental reserved was the same for wells of light production and wells of heavy production. In respect of the adequacy of the compensation and the duration of the annual rentals, the contract was manifestly one of hazard. Being such, it argues nothing in support of the construction contended for.

Id. The Court of Appeals for the Fourth Circuit recently called this rule "longstanding West Virginia law." *Wellman v. Bobcat Oil & Gas, Inc.*, 524 Fed. Appx. 26, 27 (4th Cir. 2013) (per curiam).

The statute does not amend or change the Lease. The terms of the Lease remain the same, as plaintiffs themselves recognized in the ratifications they signed only a few years ago. In those ratifications, plaintiffs agreed that the Lease is in full force, and they affirmed "all of the terms and provisions of the Lease." JA at 447, 449, 453. There is no implied duty to market under the Lease and thus no basis for declaring "at the wellhead" ambiguous and initiating a hunt for legislative intent.

2. *The Court Does Not Need to Decide the Validity of Specific Deductions*

In deciding the certified question, the Court does not have to address whether the deductions taken by EQT are too much or too little. In their brief, plaintiffs contend that the deductions are excessive. Petitioners' Brief at 4, 18. EQT maintains that it is only deducting a portion of the expenses that it could be deducting. If plaintiffs believe that EQT's deductions are excessive, they are free to pursue a claim for underpayments. The issue arises, however, only after the Court determines that EQT has the right to take deductions to reach an "at the wellhead" price. The parties can then put on their evidence as to the reasonableness of the deductions, and the District Court can decide the issue. The question now being certified by the District Court does not involve the reasonableness of the deductions but whether EQT can take deductions to reach a wellhead price.

Plaintiffs also complain that EQT makes its statutory payments on the volume of gas sold not on the volume of gas extracted. Petitioner's Brief at 3-4. Plaintiffs contend that EQT should pay them on the price at the interstate pipeline and on the volume of gas at the well. Plaintiffs want to be paid for any gas that is lost during gathering or used as fuel for compression. Again, this is not a certified issue.

The record shows, however, that EQT makes statutory payments on the volumes of gas for which it is paid. This is consistent with the statute, which requires payments on the amount "paid to or received by or allowed to" the owner of the working interest. § 22-6-8(e). It is also consistent with the decision of Judge Goodwin in *W.W. McDonald Land Co. v. EQT Prod. Co.*, 983 F. Supp.2d 790, 803 (S.D. W. Va. 2014). In that case, the lessors made the same argument the plaintiffs are making here, that they were entitled to be paid on the downstream price and the upstream volume. Judge Goodwin rejected that argument as "perverse," noting that the lessors "want to have their cake and eat it too." *Id.* Judge Goodwin ruled that EQT was only required to pay royalties on the gas it was able to sell. *Id.*

In its order, the District Court asked the general question: whether *Tawney* controls how payments are to be made under the statute. EQT does not believe that it is necessary for the Court to address the specific issue involving how volumes should be calculated. If the Court reaches that issue, however, the Court should hold that the statutory payments should be based on the volumes sold, not on the volumes produced.

Finally, plaintiffs complain that EQT Production sells the gas to an affiliate, EQT Energy, at the wellhead. Petitioners' Brief at 3, 18. With no evidentiary support, plaintiffs state that the sale price paid by EQT Energy is "not a fair market value." *Id.* at 18. In fact, the Court has already dismissed plaintiffs' claim that EQT Energy conspired with EQT Production to underpay amounts due under the statute. JA at 596. While EQT Production sells the gas to EQT Energy at the wellhead, the price is the index price for the gas at the interstate pipeline less the costs of getting the gas to the interstate pipeline. JA at 140-41, 188, 223. In making statutory payments, EQT follows this same general formula. It takes the price at the interstate pipeline and deducts some of the costs of getting the gas there. JA at 193-94, 231-32, 275, 282, 313. This method recognizes that gas is more valuable as it moves downstream, and it ensures that the gas owner receives full value at the wellhead, the location where statutory payments are to be based.

3. *If the Statute Is Ambiguous, the Ambiguity Should Be Resolved in Favor of the Working Interest Owner*

Relying on *Tawney*, plaintiffs argue that if the statute is ambiguous they win, just as the lessors did in *Tawney*. Petitioners' Brief at 18-19, 26-27, 31. The Court in *Tawney* resolved the ambiguity in favor of the lessors based on the rule that oil and gas leases "'will generally be liberally construed in favor of the lessor, and strictly as against the lessee.'" 219 W. Va. at 273, 633 S.E.2d at 29 (quoting Syl. Pt. 1, *Martin v. Consol. Coal & Oil Corp.*, 101 W. Va. 721, 133 S.E. 626 (1926)).

There is no such rule for statutes. For statutes, different rules apply. Where, as here, a statute is in derogation of the common law, it must be strictly construed. Syl. Pt. 3, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 647 S.E.2d 920 (2007); Syl. Pt. 4, *State ex rel. Van Nguyen v. Berger*, 199 W. Va. 71, 483 S.E.2d 71 (1996).

> Statutes which impose duties or burdens or establish rights or provide benefits which were not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation. Where there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in the common law.

Phillips, 220 W. Va. at 491, 647 S.E.2d at 927 (quoting Norman J. Singer, *3 Sutherland Statutory Construction* § 61:1 at 217 (6th Ed. 2001)).

Also, while the Court will generally afford remedial statutes a liberal construction, it only does so to effectuate the specific purpose of the statute, not some broader aim. *See Henthorn v. Collins*, 146 W. Va. 108, 111, 118 S.E.2d 358, 360 (1961) ("[T]he duty to construe a remedial statute liberally can not amount to authority to a court to extend a statute to a case wholly beyond its effects."); *Wiseman v. Crislip*, 72 W. Va. 340, 78 S.E. 107, 111 (1913) (holding that this rule of construction "does not authorize the court to add other supposed evils, purposes, and objects").

Plaintiffs' main argument is that the statute is not in derogation of the common law but in harmony with it. Petitioners' Brief at 18-20, 24-26. Plaintiffs' theory is that when the flat-rate lease statute was enacted in 1982 oil and gas law in West Virginia—and across the United States—was settled. According to plaintiffs, lessees had an implied duty to market the gas, and this duty required them to pay all costs of making the gas marketable and transporting it to a marketable location. *Id.* at 18-20. Therefore, plaintiffs say, the statute should be interpreted to require that the statutory payments be made on the full downstream price without any deductions for the costs of getting the gas there because that was the practice when the statute was enacted. *Id.*

There is just one problem with this argument: it is completely wrong. In 1982, gas was generally sold by producers to pipeline companies at the wellhead. *Appalachian Land Co.,* 468 S.W.3d at 853 n.5; *Kilmer*, 990 A.2d at 1155; Lowe, 49 SMU L. Rev. at 224. The pipeline companies bore the costs of gathering the gas and transporting it to downstream buyers. *Kilmer*, 990 A.2d at 1155. The pipeline companies paid the producers a wellhead price. *Id.*; *Clough*, 179 P.3d at 35-36. And the producers paid royalties based on that wellhead price. *Kilmer*, 990 A.2d at 1155.

With deregulation in the 1980s and 1990s, the role of the pipeline companies changed. *Clough*, 179 P.3d at 35-36. They became interstate carriers, not buyers and gatherers of the gas. *Id.*; *Appalachian Land Co.,* 468 S.W.3d at 853 n.5; *Kilmer*, 990 A.2d at 1155. The producers assumed the duties of gathering the gas and transporting it to the pipeline companies, and the additional costs of doing so. *Clough*, 179 P.3d at 35; Proctor, 19 Tex. Wesleyan L. Rev. at 148-49. To arrive at a wellhead price on which to pay royalties, producers began deducting some or all of the additional costs from the downstream price. *Kilmer,* 990 A.2d at 1149. This is sometimes referred to as the net-back method of paying royalties. *Baker*, 473 S.W.3d at 592-93 (stating the net-back method determines the value of the gas at the well by deducting the downstream costs from the downstream sales price); *Kilmer,* 990 A.2d at 1149 (same).

Plaintiffs rely on the 1951 treatise *The Law of Coal, Oil and Gas in West Virginia and Virginia* by Robert T. Donley, to support their claim that deductions are improper, but the treatise does not support their claim. The treatise says that it has been the practice in the oil industry "to compensate the landowner by selling the oil by running it to a common carrier and paying to him one-eighth of the sale price received." § 104. The treatise goes on to state that "[t]his practice has, in recent years, been extended to situations where gas is found." *Id.* "[B]ut," the author notes, "the great majority of [gas] leases provide for the payment of a flat well rental annually for each producing gas well." *Id.*

When Mr. Donley wrote his treatise in 1951, producers were generally selling their gas to pipeline companies at the wellhead. John W. Broomes, *Waste Not, Want Not: The Marketable Product Rule Violates Public Policy Against Waste of Natural Gas Resources,* 63 U. Kan. L. Rev. 149, 173-74 (2014); Pierce, 49 Washburn L.J. at 368. Today gas is usually sold at the interstate pipeline, and the producers incur the additional costs of getting it there. As noted, to reach a wellhead price, the producers deduct some of their midstream costs and pay their lessors one-eighth of the net price. Mr. Donley was not addressing this method of paying royalties but the emergence of percentage leases.

In 1982 when the statute was enacted, lessors were generally paid royalties based on a wellhead price. When the Legislature referred to proceeds "at the wellhead," that is what it meant. The Legislature did not envision—much less adopt—the decisions in *Wellman* or *Tawney* because those cases would not be decided for decades.

In those instances when the lessee did not sell the gas at the wellhead, the lessee was generally allowed to deduct post-production costs in calculating royalty when the statute was enacted. *Johnson v. Jernigan*, 475 P.2d 396, 398-99 (Okla. 1970) (allowing deduction of transportation costs because the duty to market does *not* require the lessee to bear the full cost of delivery to an off-site purchaser); *Reed v. Hackworth*, 287 S.W.2d 912, 913-14 (Ky. 1956) (allowing deduction of transportation costs to determine market value of gas at the well); Lawrence Mills & J.C. Willingham, *The Law of Oil and Gas* § 130, at 189 (1926) ("[T]he lessor is entitled only to his oil or gas or the value thereof at the well and not at some distant market. So if the lessee constructs a pipe line or deals with another to do so, he is entitled to charge against the lessor his proportion of the reasonable rental value of such line."); *but see Gilmore*, 388 P.2d at 606-07 (holding that lessee could not deduct cost of compressing gas for delivery to purchaser's pipeline on leased premises because lessee had implied duty to make the gas marketable).

Plaintiffs contend that *Tawney* and *Wellman* simply "clarified what the common law had always been in West Virginia." Petitioners' Brief at 18. This is not so. *Wellman* announced as a new syllabus point:

> 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.

Syl. Pt. 4, 210 W. Va. 200, 557 S.E.2d 254. On the issue of what language "provides otherwise," *Wellman* suggested that a provision requiring royalties to be paid at the "mouth of the well" might be sufficient. 210 W. Va. at 211, 557 S.E.2d at 265. This suggestion was in accord with *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 493, 128 S.E.2d 626, 633 (1962), which recognized that the parties were free to stipulate that royalties be computed "on the basis of the wellhead price."

Tawney ultimately concluded—24 years after the flat-rate statute was enacted—that provisions stating that royalties are to be paid on proceeds at the well or proceeds at the wellhead are ambiguous and that the implied duty to market requires the lessee to bear all costs of transporting and marketing the gas. 219 W. Va. at 272, 633 S.E.2d at 28. The Court repeated Syllabus Point 4 from *Wellman*.

In doing so, the Court in *Tawney* said it was applying its "own settled law." 219 W. Va. at 271, 633 S.E.2d at 27. In support of that statement, the Court first cited Donley, *The Law of Coal, Oil and Gas in West Virginia,* § 104, which refers to the practice of paying royalties on one-eighth of the "price received." As we have seen, however, that price was generally a wellhead price, not a downstream price.

The Court also cited *Davis v. Hardman*, 148 W. Va. 82, 90, 133 S.E.2d 77, 81 (1963), in which the Court noted that royalties are "not chargeable with any of the costs of discovery and production." EQT has not charged its lessors with any of the costs of discovery or production, and that is not an issue in this case.

Finally, the Court cited *Wellman,* which established the rule that where a lease is based upon proceeds the lessee must bear "all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale." Syl. Pt. 4, 210 W. Va. 200, 557 S.E.2d 254. Because *Wellman* was decided decades after the flat-rate statute was enacted, it could not have informed the drafting of the statute in 1982.

One final point on plaintiffs' claim that *Wellman* and *Tawney* were settled law in 1982: If *Wellman* and *Tawney* were settled law, why would the Legislature insert "at the wellhead" in the statute? The phrase "at the wellhead" has been the foundation for the lessee's argument that post-production costs should be deducted from the downstream price. Why would the Legislature insert this phrase into the statute if the Legislature intended to preclude post-production deductions? Yet, we know that the phrase "at the wellhead" was added to the statute during the legislative process. JA at 376, 382, 390. Plaintiffs have no explanation for this fact, other than to say that "at the wellhead" is ambiguous. But the question remains, why add this supposedly ambiguous phrase if the Legislature's intent was to preclude deductions? The answer is that the Legislature did not intend to preclude deductions. It intended to ensure that proceeds were calculated at the wellhead, the recognized and established location for doing so. The phrase "at the wellhead" specifies the location for computing the price on which statutory payments are made.

D. THE COURT NEED NOT ANSWER THE SECOND CERTIFIED QUESTION BUT IF IT DOES THE ANSWER IS THAT THE STATUTE DOES NOT INVALIDATE FLAT-RATE LEASES

In the second certified question, the District Court asks whether the statute operates prospectively or whether it abrogates flat-rate leases in their entirety. Because the plaintiffs have not challenged the validity of their flat-rate lease—and, in fact, have stipulated that their lease is valid—this question is not properly before the Court. In any event, it is clear that the statute does not abrogate flat-rate leases. It merely prohibits permits for new or reworked wells on flat-rate leases unless the owner of the working interest agrees to pay the owner of the gas one-eighth of the proceeds at the wellhead.

1. *Plaintiffs Have Not Challenged the Validity of Their Flat-Rate Lease*

There is no claim in the Amended Complaint that the 1906 Lease is invalid or that flat-rate leases in general are invalid. JA at 8. Nor is there any such claim in plaintiffs' brief to the District Court. JA at 508. Instead, plaintiffs' claim is that EQT did not pay them the full amount due under the Lease and the flat-rate statute. JA at 20 ¶ 49.

("Defendants failed to pay them the amount of money due and owed them at the time due.")

In fact, plaintiffs are estopped from claiming that their flat-rate lease is invalid. *Hager v. Exxon Corp.*, 161 W. Va. 278, 284, 241 S.E.2d 920, 924 (1978). Only a few years before this suit was filed, plaintiffs ratified the 1906 Lease, stipulated that the Lease is valid, and affirmed "all of the terms and provisions of the Lease." JA at 447, 449, 451.

A certified question should not be answered where it will not be dispositive of the claim actually pending in the certifying court. W. Va. Code § 51-1A-3; *Recht*, 230 W. Va. 464, 740 S.E.2d at 63-64; *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 861, 253 S.E.2d 666, 669 (1979). Nor will the court consider certified questions not necessary to the decision of the case. *Zelenka*, 208 W. Va. at 245, 539 S.E.2d at 752; Syl. Pt. 7, *Shell*, 181 W. Va. 16, 380 S.E.2d 183; Syl. Pt. 6, *W. Va. Water Serv. Co. v. Cunningham*, 143 W. Va. 1, 98 S.E.2d 891 (1957). In determining whether a certified question is necessary or dispositive, the Court looks to the actual claims raised in the complaint. *See Bass v. Coltelli*, 192 W. Va. 516, 521, 453 S.E.2d 350, 355 (1994).

Stated differently, the Court will not give advisory opinions as to issues not properly raised in the pleadings. *State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 210-11, 737 S.E.2d 229, 238-39 (2012); *Mainella v. Bd. of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 27 S.E.2d 486, 487-88 (1943); *see also State ex rel. Kutil v. Blake*, 223 W. Va. 711, 719-20, 679 S.E.2d

310, 318-19 (2009) (holding it was inappropriate for the lower court to rule on a matter not pending before the court). Specifically, the Court will not address claims that are not raised in the complaint. *See Schatken*, 230 W. Va. at 211, 737 S.E.2d at 239.

The second certified question is not dispositive of any claim in the case. The Amended Complaint alleges only that EQT has taken unauthorized deductions from its payments, and it seeks damages for the deductions. JA at 17-20. The Amended Complaint does not allege the Lease is invalid. Therefore, the Court should not reach the second certified question.

2. *The Statute Does Not Invalidate Flat-Rate Leases*

In enacting § 22-6-8, the Legislature recognized that both the United States Constitution and the West Virginia Constitution prohibit laws that impair the obligation of contracts. U.S. Const., Art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."); W. Va. Const., Art. III, § 4 ("No . . . law impairing the obligation of a contract, shall be passed.") In an effort to steer clear of these provisions, the Legislature did not invalidate flat-rate leases. It took a different course. Relying on its police power, the Legislature prohibited the issuance of permits for new wells or reworked wells on flat-rate leases unless the owner of working interest agreed to pay the owner of the gas one-eighth of the proceeds at the well.

If the Legislature had intended to invalidate flat-rate leases, it could have easily said so: "All flat-rate leases are hereby void." The Legislature made no such declaration. Rather, it made a conscious decision not to go that far.

As is clear from its text, the Legislature intended the statute to apply prospectively—to block permits for new wells or reworked wells on flat-rate leases after the statute was enacted. § 22-6-8(d) ("no such permit shall be hereafter issued"). To apply the statute retroactively to invalidate existing leases would violate this Court's longstanding rule against such legislation. As the Court explained in *Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 118, 705 S.E.2d 806, 815 (2010), unless a statute expressly states that it applies retroactively, the Court will apply it prospectively. "Absent a direct expression of such intent by the Legislature, we are constrained to apply the law in effect at the time of the deed's execution." *Id.*

The law in effect at the time the Lease was executed allowed flat-rate leases. *See Bruen*, 188 W. Va. at 735, 426 S.E.2d at 527; Syl. Pt. 2, *Bassell*, 86 W. Va. 198, 103 S.E. 116. There is no basis for interpreting the flat-rate statute to invalidate this Lease or other existing flat-rate leases.

Unable to find anything in the text of the statute to support their argument that the statute abrogates flat-rate leases, plaintiffs cite a circuit court opinion from the *Tawney* litigation. Petitioners' Brief at 32. The circuit court issued this opinion several months after this Court issued its opinion in *Tawney*, 219 W. Va. 266, 633 S.E.2d 22. In its opinion, the circuit court did not hold that § 22-6-8 invalidates flat-rate leases. Instead, the circuit court held that it—the circuit court—would invalidate the leases based on the policy expressed in the statute. *Estate of Tawney v. Columbia Natural Res., L.L.C.*, No. 03-C-10E, 2006 WL 6056969 (Roane Cnty. Aug. 4, 2006) (order). The second certified question asks whether *the statute* abrogates flat-rate leases. The answer to that question is no.

3. *The Court Should Not Invalidate Flat-Rate Leases*

In its second certified question, the District Court did not ask whether a court—in exercise of its judicial power—should invalidate flat-rate leases. Nor did the District Court certify the constitutional issues that must be decided as part of any decision by a court on the validity of flat-rate leases.

As discussed earlier, the Court does not decide issues that are not certified to it, and it generally does not decide constitutional issues that are certified from federal courts. *Abrams v. W. Va. Racing Comm'n*, 164 W. Va. 315, 318-319, 263 S.E.2d 103, 106 (1980). As this Court explained in *Abrams*, "[a] resolution by a state court of a federal constitutional claim is not binding on the federal courts." *Id.* And, while this Court can issue a binding opinion on a state constitutional issue, the decision "would not foreclose the federal court from deciding upon a different federal standard and ignoring our State constitutional standard." *Id.*

The request by plaintiffs and their amici that this Court invalidate flat-rate leases through an exercise of its judicial power is far outside the certified question and far outside any responsible use of that power. Under our Constitution: "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others . . . ." W. Va. Const. Art. V, § 1. This separation of powers "is not merely a suggestion; it is a part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. Pt. 1, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981). The plain language of this provision "calls not for construction but only for obedience." *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 84, 150 S.E.2d 449, 452 (1966).

This Court's traditional rules of statutory interpretation embody the separation of powers principle. "It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten . . . ." *State v. Gen. Daniel Morgan Post No. 548,* 144 W. Va. 137, 145, 107 S.E.2d 353 (1959); *see Taylor-Hurley v. Mingo Cnty. Bd. of Educ.,* 209 W. Va. 780, 788, 551 S.E.2d 702, 710 (2001). "Our duty is to interpret the statute, not to expand or enlarge upon it." *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 126, 464 S.E.2d 763, 768 (1995). "Courts may not reform statutes to correct perceived inadequacies." *State ex rel. Allen v. Stone*, 196 W. Va. 624, 630, 474 S.E.2d 554, 560 (1996).

Using its police power, the Legislature determined that no permits for new wells or reworked wells should be issued unless the owner of the working interest agrees to pay the one-eighth statutory amount to the owner of the gas. § 22-6-8(d), (e). The Legislature acted prospectively. It did not rescind permits for existing wells, and it did not invalidate flat-rate leases. The Legislature did declare flat-rate leases unfair, but, at the same time, it recognized that existing contracts have constitutional protection.

Plaintiffs attempt to avoid the separation of powers principle by arguing that the principle "is not violated when a court determines the constitutional boundaries of a public policy." Petitioners' Brief at 34. This Court can, no doubt, determine the constitutionality of statutes or policies in statutes, but that is not the issue. The issue is whether this Court should rewrite the statute to do something the Legislature chose not to do—retroactively invalidate flat-rate leases.

Using the statute or the policies in the statute to invalidate flat-rate leases would also violate the Contracts Clauses in the United States and West Virginia Constitutions. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978); *U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 22 (1977); *Shell*, 181 W. Va. at 20-21, 380 S.E.2d at 187-188.

This Court has repeatedly emphasized that an oil and gas lease "is both a conveyance and a contract." Syl. Pt. 1, *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 346 S.E.2d 788 (1986). When gas is discovered, "the right to produce such gas becomes a vested right . . . ." Syl. Pt. 1, *United Fuel Gas Co. v. Battle*, 153 W. Va. 222, 167 S.E.2d 890 (1969). Invalidating that vested right would be a substantial impairment, one not supported by any broad and general social or economic problem. *Id.* To the contrary, the issue is simply whether a 12.5% revenue interest should be retained by the lessee or paid to the lessor. This issue has no effect on consumers of gas or the public at large. *Cather v. Seneca-Upshur Petroleum, Inc.*, No. 1:09CV139, 2010 WL 3271965, at *8 (N.D.W. Va. Aug. 18, 2010) (holding that lessors of oil and natural gas are not consumers protected by the West Virginia Consumer Credit and Protection Act).

Plaintiffs contend that the state has a legitimate interest in eliminating unforeseen windfall profits. Petitioners' Brief at 36-37; *Energy Reserves Grp. v. Kan.*

Power & Light Co., 459 U.S. 400, 412 (1983). But the flat-rate statute is not directed at windfall profits. As interpreted by plaintiffs, the statute, instead, would be "a law that takes property from A. and gives it to B." *Calder v. Bull*, 3 U.S. 386, 388 (1798). This would be a violation of basic due process and a classic taking—one for private use. *See Koontz v. St. Johns River Water Mgmt. Dist.,* 133 S. Ct. 2586, 2596, 2600 (2013); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). EQT and other operators have vested rights in flat-rate leases. They have drilled and developed the property in reliance on these leases. The state may not take this vested interest in land and return it to lessors simply because the state believes, in retrospect, that the underlying leases are now "unfair."

While the amici mineral owners urge the Court to invalidate flat-rate leases as unfair, EQT expects that the position of the amici would be different if the grantors in their chains of title tried to invalidate the old severance deeds that conveyed the minerals to the amici, often for only a few dollars an acre.

In support of their position, plaintiffs and their amici rely primarily on the circuit court's opinion in *Tawney*, 2006 WL 6056969. While that decision was appealed to this Court and the Court refused the appeal, the order refusing the appeal did not declare that the circuit court's decision was correct; it simply refused the appeal. See Order dated May 22, 2008, in No. 080482. The circuit court's decision has no precedential value in this Court, and the order refusing the appeal is not a decision by this Court on the merits of the case. *State ex rel. Miller v. Stone*, 216 W. Va. 379, 382 n.3, 607 S.E.2d 485, 488 n.3 (2004); *Smith v. Hedrick*, 181 W. Va. 394, 395, 382 S.E.2d 588, 589 (1989).

In footnotes, plaintiffs and their amici also cite this Court's decision in *McGinnis v. Cayton*, 173 W. Va. 102, 312 S.E.2d 765 (1984). In *McGinnis*, the Court reversed an order granting summary judgment to the lessee in a case to reform or void a flat-rate lease. The Court ruled that the lessors might be able to rescind the lease if they could prove mutual mistake. *Id.* at 106, 312 S.E.2d at 769. The Court held that other equitable defenses were unavailable because the plaintiffs and defendants were not the original parties to the lease. *Id.* at 106, 312 S.E.2d at 770. The Court did not find a mutual mistake, and it did not rescind the lease; it only ruled that summary judgment should not have been granted at that time. Plaintiffs have asserted no claim of mutual mistake. Nor can they. They have all recently signed ratifications affirming the validity of the Lease and declaring that it is in full force and effect. JA at 449, 451, 453.

Plaintiffs want the Court to do what the Legislature consciously chose not to do—invalidate flat-rate leases. This would destroy vested property rights across the state and, in so doing, violate the rule against retroactive legislation, the separation of powers principle, and the Contracts, Due Process, and Takings Clauses.

V. CONCLUSION

The Court should hold that the statutory payments under § 22-6-8 should be calculated on the amount received by the working interest owner at the wellhead and that the working interest owner may deduct reasonable and necessary post-production expenses to arrive at the wellhead amount. If it reaches the issue, the Court should further hold that § 22-6-8 does not abrogate flat-rate leases; the statute only prohibits permits for new wells or reworked wells unless the working interest owner agrees to make the statutory payments to the gas owner.

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IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 16-0136

PATRICK D. LEGGETT, et al,

Plaintiffs/Petitioners,

v.

EQT PRODUCTION COMPANY, et al,

Defendants/Respondents.

Upon Certified Questions from the United States District Court
for the Northern District of West Virginia
Case No. 1:13-cv-00004-FPS

CERTIFICATE

I, David K. Hendrickson, counsel for respondents, do hereby certify that on July 25, 2016, true and exact copies of the foregoing Respondents' Brief were served by mail and email upon:

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