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Legislative Stairway to Economic Heaven: Why a Dormant Minerals Act is a Necessary Addition to West Virginia's Recent Natural Gas Modernization Laws

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I. INTRODUCTION

The three oil and gas laws that were passed during the 2018 West Virginia legislative session recently went into effect, most notably, the Co-tenancy Modernization and Majority Protection Act.[1] Until this year, West Virginia's outdated oil and gas laws have presented difficult development hurdles for natural gas exploration and production companies.[2] These antiquated rules hindered job creation and corporate investment because of small, outstanding fractional interests held by unknown or unlocatable individuals, or held by people who outright refused to consent to mineral development.[3] West Virginia's formerly stringent leasing requirements placed the state at a competitive disadvantage to the contiguous, shale-producing states of Ohio and Pennsylvania—both of which had co-tenancy laws in place earlier.[4]

Although only one of the new laws contains the word modernization in the title, all three these bills could be described as modernizing oil and gas production. Overall, the changes streamline mineral development, restructure royalty accounting, and expedite the shift of some mineral rights to surface owners. These changes will have positive ramifications for the state by increasing both the number of natural gas careers and tax revenue derived from the natural gas proceeds.[5] Now that progress has been made to bring both the co-tenancy and royalty issues up to date, the next oil and gas issue necessary to help modernize the state should resolve the problem of unknown and unlocatable mineral owners and their dormant mineral interests.

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[1] Michael Vennum, *West Virginia Co-Tenancy Bill Signed into Law*, Energy & Environmental Law Blog, March 12, 2018, https://www.vorysenergy.com/2018/03/articles/energy/west-virginia-co-tenancy-bill-signed-into-law.
[2] West Virginia Chamber of Commerce, *West Virginia Chamber 2018 Position Paper*, Energy Resources Development, http://www.wvchamber.com/Issues-Advocacy/Position-Papers.aspx.
[3] *Id.*
[4] Linda Harris, *Surface, mineral rights owners say details will be key to getting co-tenancy bill passed*, The State Journal, January 22, 2018, https://www.wvnews.com/statejournal/news/surface-mineral-rights-owners-say-details-will-be-key-to/article_6583e1c9-f8ec-5f1d-bdbe-bb21a984a3a7.html.
[5] Carrie Hodousek, *Justice says he will sign co-tenancy bill*, Metro News, March 7, 2018, http://wvmetronews.com/2018/03/07/justice-says-he-will-sign-co-tenancy-bill.

This paper will focus on the direction West Virginia should move to take full advantage of the economic opportunity presented by shale natural gas production. Section II provides background by illustrating the historic presence of fossil fuels in West Virginia, the checkered history of coal development, and the state's continued commitment to fossil fuels in the future. Then, it will outline the positive prospects presented by the perfect economic combination of the shale revolution and the increased global demand for natural gas. Furthermore, it will express the need for legislative urgency because of the various technological advances in both solar energy production and battery storage. Technological advancements in renewable energy will likely limit the long-term economic potential for West Virginia if natural gas production is the sole focus for sustaining the state's future economy—similar to the way coal previously sustained the state.

Section III will analyze the recent progress in natural gas laws that were passed through House Bill 4268, Senate Bill 360, and House Bill 4270. It also notes that although progress has been made, there is still necessary modernization that needs to be completed. Then, Section III will evaluate the likely positives and negatives outcomes of enacting a Dormant Minerals Act. Finally, Section IV will provide a recommendation to the state's legislators to enact a West Virginia specific Dormant Minerals Act.

II. BACKGROUND

This section will provide the background for why West Virginia should adopt a Dormant Minerals Act by illustrating the historical existence of fossil fuels in West Virginia, the checkered history of the state's fossil fuel development, and its continued commitment to fossil fuels moving forward. Then, this section will outline West Virginia's position to take advantage of the encouraging economic environment presented by the shale revolution combined with the increase in global demand for natural gas.

A. Presence – Coal, Oil, and Gas in Place

West Virginia has a well-established history of fossil fuel development due to the rich mineral deposits underlying its borders. The existence of coal in western Virginia was known by European colonists as early as the mid-1700s, when settlers to the region extracted it to heat their homes.[6] Additionally, the existence of oil and natural gas had been known long before the arrival of European settlers by Native Americans that recognized the fuel source of "burning springs" from the outflows of petroleum on the Little Kanawha, Kanawha, and Big Sandy rivers.[7] In fact, as early as 1775, George Washington visited the burning springs on the Kanawha River.[8]

The first large scale mining of coal in West Virginia did not begin until the early nineteenth century, and it existed merely as a support to the region's booming salt industry.[9] Sharing its roots in salt development, the oil and gas industry was also spawned when natural gas was struck in 1815 while drilling for salt in Charleston, West Virginia.[10] Eventually, hundreds of thousands of barrels of oil floated down the river to Parkersburg where they were then shipped to other cities by rail or river.[11] By the mid-1800s, nearly all of the light in the newly-formed West Virginia towns were provided by natural gas, marking the beginning of the era of fossil fuel development in West Virginia.[12] The presence of fossil fuels—particularly coal—has attracted investors, companies, and workers seeking profits for over 150 years, however, the sustained economic growth of the Mountain State has not been realized over that same period of time.

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[6] *West Virginia: The story of a state that got bought*, Appalachian Magazine, March 6, 2014, http://appalachianmagazine.com/2014/03/06/west-virginia-the-story-of-a-state-that-got-bought.
[7] West Virginia Geological and Economic Survey, *History of WV Mineral Industries – Oil and Gas*, July 16, 2004, http://www.wvgs.wvnet.edu/www/geology/geoldvog.htm.
[8] *Id.*
[9] *West Virginia: The story of a state that got bought*, Appalachian Magazine, March 6, 2014, http://appalachianmagazine.com/2014/03/06/west-virginia-the-story-of-a-state-that-got-bought.
[10] West Virginia Geological and Economic Survey, *History of WV Mineral Industries – Oil and Gas*, July 16, 2004, http://www.wvgs.wvnet.edu/www/geology/geoldvog.htm.
[11] *Id.*
[12] *Id.*

B. Physical Graffiti – Scars From Coal Development

The extraction of fossil fuels has provided many economic prospects for West Virginians in the past, but those opportunities have not been exclusively positive. Coal development, particularly through surface mining, has literally created scars upon the topography of the state. Mountaintop removal surface mining has caused the beautiful hills of the state—the icons of West Virginia—irreparable harm.[13] In addition to some of the historically aesthetic views being permanently diminished, the air and water pollution also caused by mountaintop removal is harming citizens of the state by increasing cardiovascular disease, lung cancer, pulmonary disease, and birth defects in the areas of extraction.[14] Although the dangers of surface coal mining are relatively new to West Virginia[15], the dangers of traditional underground coal mining—like roof falls and explosions[16]—have always existed.[17]

To exacerbate matters, much of the wealth realized as a result of coal development has not been received by West Virginia residents. Despite West Virginia's incredible wealth of coal, historically, much of the profits from its rich resources have been gained by out-of-state corporations.[18] Fossil fuel development in the United States is generally a rental business—moving into town when prices are high and opportunity is rich, then moving out when the economics

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[13] Miles O'Brien, *How Mountaintop Mining Affects Life and Landscape in West Virginia*, Scientific American, May 5, 2017, https://www.scientificamerican.com/article/how-mountaintop-mining-affects-life-and-landscape-in-west-virginia.
[14] Richard Schiffman, *A Troubling Look at the Human Toll of Mountaintop Removal Mining*, Yale Environment 360, November 21, 2017, https://e360.yale.edu/features/a-troubling-look-at-the-human-toll-of-mountaintop-removal-mining.
[15] Kenneth R. Bailey, *Surface Mining*, The West Virginia Encyclopedia, July 8, 2013, https://www.wvencyclopedia.org/articles/645.
[16] *WV Mine Disasters 1884 to Present*, West Virginia Office of Miners' Health Safety and Training, http://www.wvminesafety.org/disaster.htm.
[17] David Kerley and Michael Murray, *Mining: The Most Dangerous Job?*, ABC News, April 6, 2010, http://abcnews.go.com/WN/mining-dangerous-job/story?id=10301377.
[18] *West Virginia: The story of a state that got bought*, Appalachian Magazine, March 6, 2014, http://appalachianmagazine.com/2014/03/06/west-virginia-the-story-of-a-state-that-got-bought.

adversely shift.[19] Boom and bust cycles in the energy industry are standard, and the evidence of those cycles are visibly apparent throughout many struggling communities in the state.[20] The remnants of these once bustling coal towns should serve as a reminder to West Virginia legislators to take advantage of the state's abundant natural resources when the economics are favorable.

At the moment, unfavorable coal economics[21] have forced West Virginia's transition away from coal to focus on natural gas, but the transition has not been solely optimistic. For instance, on a small-scale, history is repeating in the form of out-of-state individuals taking West Virginia's mineral profits. Many third and fourth generation mineral owners, heirs of former state residents, that have since moved away, continue the unfortunate tradition of in-state fossil fuel profits—now in the form of natural gas royalty payments—leaving the state to be distributed throughout other state economies. Additionally, there has been much discussion in the media and in the scientific community about the pros and cons of developing natural gas.[22] These debates mostly involve weighing the positive economic impacts against negative environment and public health impacts.[23]

Specifically, the economic arguments against development are the diminution of property values and the threats to the viability of both agriculture and tourism.[24] While development creates employment opportunities, many energy boom-cycle jobs are temporary or go to out-of-state workers which provide little long-term economic benefits to a region.[25] Nevertheless, in lieu of the

[19] Edwin Dobb, *The New Oil Landscape*, National Geographic, March 2013.
[20] William Robbins, *90% Jobless Rate Grinds West Virginia Coal Town*, The New York Times, 1983, https://www.nytimes.com/1983/04/10/us/90-jobless-rate-grinds-west-virginia-coal-town.html.
[21] David Ismay, *Department of Energy Finally Admits That Economics, Not Renewables, Is Killing Coal*, Conservation Law Foundation, August 24, 2017, https://www.clf.org/blog/doe-economics-killing-coal.
[22] The role of ethics in shale gas policies, Science of the Total Environment, at 1114, November 16, 2013, www.elsevier.com/locate/scitotenv.
[23] *Id.*
[24] *Id.*
[25] *Id*. at 1116.

negatives associated with natural gas extraction, West Virginia continues to move forward with production because of the potential profits and lack of significant alternatives for the state.

From a policy standpoint, the Mountain State has stayed committed to fossil fuel development. For example, in 1994, West Virginia enacted oil and gas conservation legislation that prioritized long-term mineral development.[26] It stated that West Virginia's public policy is to promote the development of oil and gas resources by encouraging the maximum recovery of oil and gas.[27] Moreover, the state's conservation legislation also added criminal penalties and fines for violations to help deter exploration and production companies that seek to cut corners.[28] Due to the finite nature of fossil fuels in general, the conservation legislation protects the state's valuable resources by prohibiting waste of oil or gas during development.[29]

Building on the oil and gas conservation legislation, West Virginia subsequently strengthened its commitment to fossil fuels on two occasions. First, in 1998, it did so by directing the West Virginia Division of Environmental Protection to refrain from proposing or promulgating any new rule to reduce emissions of greenhouse gases.[30] In addition, it directed the state agency not to submit to the United States Environmental Protection Agency for a reduction of greenhouse gases.[31] Second, shortly thereafter in the year 2000, the legislature favored coal production as essential to economic growth.[32] At the moment, West Virginia is benefitting because its commitment to fossil fuels mirrors that of the current President,[33] however, America's policy toward coal, oil, and natural gas development may vary greatly depending on who holds that office.

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[26] W. Va. Code § 22C-9-1.
[27] *Id.*
[28] W. Va. Code § 22C-9-14(a).
[29] W. Va. Code § 22C-9-6.
[30] W. Va. Code § 22-23-2(a).
[31] W. Va. Code § 22-23-2(b).
[32] W. Va. Code § 22-23A-1.
[33] Executive Order 13783, *Promoting Energy Independence and Economic Growth*, Federal Register, Vo. 82., No. 61., March 31, 2017.

C. Houses of the Holy – Shale Natural Gas Resides in the Appalachian Basin

The shale revolution, brought on by technological advances in both horizontal drilling and hydraulic fracturing, has revitalized the natural gas extraction industry.[34] Proved reserves—the estimated volumes of resources that geologic data has discovered with reasonable certainty to recover under existing economic and operating conditions—are massive in the Appalachian Basin. As of 2016, West Virginia held the third-highest proved reserves of shale gas in the country, at nearly twenty-four billion cubic feet,[35] which is more than many of the well-known shale-producing states of Oklahoma, North Dakota, Louisiana, Colorado, and Ohio.[36] The proved reserves of the Marcellus and Utica Shales, paired with the technological advances driving the shale revolution, have perfectly situated West Virginia—with its commitment to fossil fuel development—to substantially benefit for decades to come.

In addition to the opportunities presented by massive reserves and technological advancement, the economics to displace coal in favor of natural gas are also favorable. Demand for natural gas—which burns cleaner than coal and oil—has surged as countries look to decrease environmental pollution.[37] The global liquified natural gas ("LNG") market is set to continue its rapid expansion through 2020 as facilities approved for construction in the first half of the decade come on line.[38] Shell forecasts global demand for gas to grow by an average two percent a year until 2035, making gas the fastest-growing source of energy over that period.[39] LNG demand is

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[34] Bobby Magill, *Drilling, Fracking Efficiency Fuels Oil and Gas Boom*, Climate Central, March 23, 2014, http://www.climatecentral.org/news/drilling-fracking-efficiency-fuels-oil-and-gas-boom-17204.
[35] *Shale Gas Statistics*, Energy Information Administration, https://www.eia.gov/dnav/ng/ng_enr_shalegas_a_EPG0_R5301_Bcf_a.htm.
[36] *Id.*
[37] John Benny, *Chevron expects LNG supply shortage by 2025*, Reuters, March 6, 2018, https://www.reuters.com/article/us-chevron-lng/chevron-expects-lng-supply-shortage-by-2025-idUSKCN1GI2EH.
[38] *Id.*
[39] Ron Bousso, *LNG market needs $200 billion investment to meet demand: Shell*, Reuters, February 26, 2018, https://www.reuters.com/article/us-shell-lng/lng-market-needs-200-billion-investment-to-meet-demand-shell-idUSKCN1GA1ZH.

set to grow twice as fast in China, South Korea, and India as they switch from coal to natural gas power plants.[40] The worldwide demand for natural gas has already been felt in the Appalachian Basin. For the first time since 1957, the United States became a net exporter of natural gas by increasing exports by 35.6 percent.[41] A primary reason for the shift has been the increased production from the Marcellus and Utica Shales.[42]

To prepare for the increased local and global demand, the investments into West Virginia by natural gas drillers, frackers, processors, and pipeliners of nearly thirty-five billion dollars are already estimated to have taken place.[43] The projections of financial returns are great enough that investors outside of the United States are also pursuing profits from the Appalachian Basin by devoting large sums of money into the region.[44] Recently, the foreign investment of nearly eighty-four billion dollars was announced, which would likely lead to 100,000 permanent jobs and add several more gas-fired power plants to the area.[45]

Driving the demand through the year 2050, the Energy Information Administration projects the industrial sector as the largest consumer of natural gas, specifically in chemicals where natural gas is used as a feedstock in the production of methanol and ammonia, in industrial heat and power, and in liquefied natural gas export facilities.[46] Natural gas will also likely be used for electric power generation as the scheduled expiration of renewable tax credits takes place over the next

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[40] *Id.*
[41] Dan Speicher, *U.S. becomes net exporter of natural gas for first time in 60 years*, Tribune-Review, March 19, 2018, http://triblive.com/state/pennsylvania/13438494-74/us-becomes-net-exporter-of-natural-gas-for-first-time-in-60.
[42] *Id.*
[43] Casey Junkins, *West Virginia Gov. Jim Justice: China Deal Is 'Serious'*, The Intelligencer, December 5, 2017, http://www.theintelligencer.net/news/top-headlines/2017/12/west-virginia-gov-jim-justice-china-deal-is-serious.
[44] *Id.*
[45] Dave Mistich, *Details Scant About $84 Billion China Energy Investment Deal in West Virginia*, WV Public Broadcasting, November 13, 2017, http://wvpublic.org/post/details-scant-about-84-billion-china-energy-investment-deal-west-virginia.
[46] *Annual Energy Outlook*, Energy Information Administration, February 6, 2018, at 70.

few years.[47] Additionally, natural gas plant liquid production is projected to double between 2017 and 2050, supported by increased demand by the global petrochemical industry.[48] And by 2050, the East and Southwest regions of the country are projected to account for more than 60% of total U.S. natural gas plant liquid production.[49]

To meet increased demand, production from shale gas and tight oil, as a share of total U.S. natural gas production, is projected to continue to grow and account for almost forty percent of total energy production by the year 2050.[50] To help move the gas from the tri-state area to market, the Federal Energy Regulatory Commission recently issued separate orders granting approval certificates for the Mountain Valley Pipeline and the Atlantic Coast Pipeline.[51] Both pipelines run from West Virginia to various locations in Virginia and North Carolina.[52]

Although the United States has historically exported natural gas by pipeline to Canada and Mexico, exports of liquefied natural gas are expanding to more distant destinations.[53] The Cove Point LNG export terminal in Maryland has already started long-term contractual service for gas exports, much of which will be supplied from the Marcellus Shale.[54] Five more U.S. LNG export facilities are currently under construction and should be completed around 2021—when LNG export capacity is projected to increase as Asian demand grows.[55] U.S. exports of natural gas to Eastern Canada should increase as well because of its proximity to the Appalachian Basin.[56]

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[47] *Id.*
[48] *Id.* at 50.
[49] *Id.* at 52.
[50] *Id.* at 20.
[51] Ken Ward Jr., *FERC approves Mountain Valley, Atlantic Coast pipeline projects*, Charleston Gazette-Mail, October 13, 2017, https://www.wvgazettemail.com/news/ferc-approves-mountain-valley-atlantic-coast-pipeline-projects/article_56f6dbc9-9a87-57e6-ab47-4b6c17132e42.html.
[52] *Id.*
[53] *Annual Energy Outlook*, at 24.
[54] *Cove Point LNG starts long-term service*, Argus, April 10, 2018, http://www.argusmedia.com/news/article/?id=1659474.
[55] *Annual Energy Outlook*, at 74.
[56] *Id.*

As a result of the increased demand for natural gas, in 2016, West Virginia ranked third of the three highest producing Marcellus Shale states, producing only 1,270 billion cubic feet—slightly less than Ohio's 1,386 billion cubic feet of production.[57] On the other hand, Pennsylvania led all shale-producing states in 2016 with 5,049 billion cubic feet—edging out Texas as the America's leader in shale-gas production.[58] Arguments vary as to why West Virginia—with the third highest natural gas reserves in the country—is far behind Pennsylvania in production.

Larger natural gas development in Pennsylvania is most likely because of two reasons. First, Pennsylvania remains the only major gas-producing state in the country that does not tax production.[59] And in Ohio, the severance tax is low and fixes—currently calculated at less than one percent[60] of the national average market price for natural gas.[61] Second, both Pennsylvania[62] and Ohio[63] have made development easier for companies with forced-pooling laws. For these reasons, West Virginia legislators need to enact laws that encourage natural gas development so that the Mountain State can better compete with Ohio and Pennsylvania for economic growth.

D. Coda – West Virginia's Window of Opportunity

West Virginia should not rely on natural gas to ignite its economy for the next 150 years like it did with coal for the past 150 years. More importantly, the state will likely be limited to a shorter window of opportunity to take advantage of the shale revolution and the favorable economic conditions that are currently available. Nationwide, the traditional electricity grid model

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[57] Independent Statistics and Analysis, *Shale Gas Production*, Energy Information Administration, February 13, 2018, Website, https://www.eia.gov/dnav/ng/ng_prod_shalegas_s1_a.htm.
[58] *Id*.
[59] Marie Cusick, *Report: Severance tax proposal could cost mineral owners millions*, State Impact, March 22, 2018, https://stateimpact.npr.org/pennsylvania/2018/03/22/report-severance-tax-proposal-could-cost-mineral-owners-millions/
[60] Ohio Rev. Code § 5749.02(A)(6).
[61] *U.S. National Average Natural Gas Price*, Nasdaq, May 4, 2018, https://www.nasdaq.com/markets/natural-gas.aspx
[62] 58 Pa. Stat. § 408.
[63] Ohio Rev. Code § 1509.27.

is evolving.[64] Like the evolution of the shale revolution, technological advances to the traditional business model are creating opportunities for non-traditional electricity generation. Although natural gas will likely displace many coal-fired power plants, the overall need for traditional large-scale electricity generation facilities has already begun to decline.

That decline, combined with the affordability of distributed solar and battery storage in the future, makes it foreseeable that after 2050, renewables will capture much of the electricity generation market that natural gas is currently taking from coal. Despite the phase down and expiration of federal solar tax incentives, distributed solar in the residential sector is projected to grow by nine percent a year through 2050 because of rising incomes, declining technology costs, and social influences.[65] Home electricity storage in batteries is also expected to increase because costs will decline as utility-scale energy storage markets grow.[66] Solar growth is projected to support economic opportunities for storage systems, which will enable renewable production during hours of high solar output to supply electricity at times of peak electricity demand.[67]

Consequently, West Virginians and their legislators should temper long-term expectations for natural gas viability because many of the same arguments currently being used to transition away from coal to natural gas will be used to transition from natural gas to renewable energy sources. The rate technology is increasing for both solar panels and battery storage, renewables' displacement of natural gas will not take the same 150 years that gas did to displace coal. Accordingly, West Virginia should promote the production of natural gas through the year 2050

[64] John P. Banks and Lisa V. Wood, *The Flexible and Evolving Power Distribution Grid*, Brookings, December 9, 2014, https://www.brookings.edu/blog/planetpolicy/2014/12/09/the-flexible-and-evolving-power-distribution-grid.
[65] *Annual Energy Outlook*, at 130.
[66] *Id.* at 96.
[67] *Id.*

and beyond; but the state should also carefully plan for alternative economic development after 2050 because natural gas may not be able to solely sustain the state.

As the world shifts away from fossil fuels to renewable resources due to economic efficiencies, the demand for West Virginia's proven natural gas reserves will decrease because of the inevitable drop in natural gas prices.[68] The massive proven reserves of the Marcellus Shale, touted as the future of West Virginia, may become stranded assets that remain in the ground.[69] Although this scenario seems unimaginable in the epicenter of shale-boom, West Virginians need not look past their own state's borders to view coal industry's decline and the mountains—both literally and figuratively—of proven coal reserves that will likely never be extracted.[70]

Many West Virginian residents remain proud of the state's history of helping to power the world through its natural abundance of mineral resources. Yet, it is surprising to some that the state continues its commitment to develop fossil fuels because of the checkered history of coal production. Nonetheless, given the lack of viable alternatives for economic advancement, the potential benefits of the shale revolution through the Marcellus Shale, and the increase in global demand for natural gas, the totality of the circumstances is too alluring to overlook. Moving forward, West Virginians and their legislators must be mindful of the lessons learned from coal development—like effectively planning part of the state's future economy through more than just fossil fuel development. However, the state must act quickly to take advantage of the window of economic opportunity presented by the shale revolution because relying solely on natural gas development to sustain West Virginia for the next 150 years is unrealistically optimistic.

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[68] Lester R. Brown et al., *The Great Transition: Shifting from Fossil Fuels to Solar and Wind Energy*, at 13, 2015.
[69] *Id.*
[70] Ken Ward Jr., *WV coal production decline expected to continue*, Charleston Gazette-Mail, June 28, 2017, https://www.wvgazettemail.com/business/wv-coal-production-decline-expected-to-continue/article_7b57c20b-dc69-55c5-b47d-640d857b39e1.html.

III. ANALYSIS

This section of the paper will analyze the recent natural gas legislation that passed in West Virginia. Then, it outlines the potential positive and negative outcomes of enacting a Dormant Minerals Act. And finally, this section will recommend the next logical step for West Virginia.

A. Celebration Day – West Virginia's Recent Natural Gas Modernization Laws

Taken together, House Bill 4268, Senate Bill 360, and House Bill 4270 create positive changes that signify the legislature's intent to promote natural gas extraction while helping the residents of the state raise money through timely and equitable royalty payments. The increased transparency, modernization, and efficiency of these three bills is beneficial to all parties. As a state, West Virginia will also benefit from the changes that these bills generate due to the increased competitiveness with the neighboring shale-producing of Ohio and Pennsylvania.

i. HB 4268

Before this bill, companies had to pay large sums of money to curative landmen and genealogists to locate missing mineral owners because West Virginia required one-hundred percent of the mineral interests to be leased.[71] And where landmen and genealogists failed to find a missing owner, companies were then forced to pay even more in legal fees to complete missing heirs petition procedures. This bill enacted the must-needed change by reducing the one-hundred percent leasehold requirement to seventy-five percent, as long as there are seven or more mineral owners involved.[72] Although this new law is considered a major advancement for energy company efficiency, some believe that it is also positive for both surface owners and mineral owners.

Delegate Bill Anderson—lead sponsor of the bill—remarked, "The passage of this legislation will allow us to, in my opinion, increase the production, which will increase the wealth

[71] *Law v. Heck Oil Co.*, 145 S.E. 601, 602 (1928).
[72] W. Va. Code § 37B-1-4(a).

the citizens and the mineral owners of this state, which will increase the tax revenue of our state, allowing us to better deal with the problems facing our state."[73] Notably, the new law helps energy companies to solve the issues of unknown or non-consenting mineral owners. For example, it defined unknown owners as those where the "present identity or location cannot be determined" after a reasonable records search; a reasonable inquiry in the vicinity of their last residence; a diligent inquiry from the other tract owners; and a reasonable review of internet resources.[74]

Conversely, to avoid some potential negative consequences, the legislature added measures to protect unknown or nonconsenting owners by negotiating favorable terms for the lease on their behalf. For example, a nonconsenting cotenant is entitled to receive the share of production royalty "free of post-production expenses," equal to the highest royalty percentage paid to a cotenant in the same tract, as well as any other payments calculated on a weighted-average net mineral acre basis.[75] Furthermore, these leases will not be considered all-depths leases because nonconsenting cotenants and unknown owners will retain all rights to all other formations.[76] But this is merely a half measure because it only partially clears title and limits development to only one formation. While this can be viewed as protecting the interests of unknown or unlocatable owners, it enables the continuance of absentee mineral ownership and allows minerals to lie dormant.

Surface owners are not only afforded greater surface protections through this enactment, but they also will have the opportunity to benefit from future royalties.[77] For instance, companies must obtain a surface owner's consent, regardless of whether such surface owner possesses any actual ownership in the mineral interest, when exercising the nonconsenting owner provision.[78]

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[73] Dave Mistich, *House Passes Landowner Rights Bill Known As Co-tenancy*, WV Public Broadcasting, February 15, 2018, http://wvpublic.org/post/house-passes-landowner-rights-bill-known-co-tenancy#stream.
[74] W. Va. Code § 37B-1-3.
[75] W. Va. Code § 37B-1-4(b).
[76] W. Va. Code § 37B-1-4(e).
[77] *Id.*
[78] W. Va. Code § 37B-1-6(a).

And after seven years of production, surface owners may file an action to quiet title to the interests of the unknown owners for the oil and natural gas underlying the surface.[79] Then upon sufficient proof, the surface owner will receive a special commissioner's deed transferring title as well as the proportionate share of all future royalty proceeds.[80] This royalty potential, for surface owners that do not have mineral rights under their lands, will help to ease the tensions of the surface owners that oppose development on their lands but realize no compensation from their opposition.

This bill also transfers part of the out-of-state unknown mineral ownership back to in-state residents. These additional funds should result indirectly in positive economic benefits to the state because that money will likely be distributed within its borders. West Virginia will benefit directly, as well as indirectly. Beginning July 1, 2023, and every six months thereafter, fifty percent of the unknown owners' revenue will be transferred to the Oil and Gas Reclamation Fund, and fifty percent will go toward the Public Employees Insurance Agency Stability Fund ("PEIA").[81] Although this provision was likely added to help the legislation pass, it would have been more beneficial if the fifty percent of funds were diverted away from PEIA and toward a trust fund for future needs—like the fund used in Alaska which has recently eclipsed sixty billion dollars.[82] Although funding PEIA is both topical and politically wise, the greater wisdom of savings the gains of energy boom-cycles to help sustain the needs of the state through energy bust-cycles is portrayed as far back as the book of Genesis as Joseph planned for the famine in Egypt.[83]

In addition to the financial benefits gained by the state per producing well, this enactment is most valuable to West Virginia because it positions the state to be more competitive with the

[79] W. Va. Code § 37B-1-4(g).
[80] *Id.*
[81] W. Va. Code § 37B-2-5(f).
[82] The Associated Press, *Alaska residents receive smaller oil fund payments*, CBS News, October 5, 2017, https://www.cbsnews.com/news/alaska-residents-receive-smaller-oil-fund-payments.
[83] *The Book of Genesis*, The Bible, New International Version, Ch. 41, at 28-36.

neighboring Marcellus Shale states of Ohio and Pennsylvania. This increased competitiveness should increase the amount of producing wells, which will allow the state to draw funds from more well-sites, particularly in the form of severance taxes. As a result, there will likely be an aggressive push in natural gas development throughout the next decade.

ii. SB 360

Other beneficiaries from the recent bill passages—although the group is small—are the mineral owners tied to flat-rate leases corrected in Senate Bill 360. In the past, gas royalties were often paid quarterly in relatively low fixed amounts. Old oil royalties, on the other hand, were often paid on a sliding-scale at one eighth of the total value received after production. Some mineral tracts remained tied to those outdated lease terms because production continued over several decades; but as time went on, the legislature recognized that flat-rate leases were underpaying mineral owners their fair share of the profits realized from production.[84] Consequently, the original flat-rate statute was enacted to remedy this scenario by requiring companies to pay a one eighth minimum royalty on both gas and oil.[85]

Some exploration and production had been deducting post-production expenses out of the royalty payments, conflicting with the original intent of the statute, so litigation ensued. The previous flat-rate statute, which has been the center of the contentious *Leggett v. EQT Prod. Co.*[86] decision, has been amended to now include the phrase "not less than one eighth of the gross proceeds, free from any deductions for post-production expenses."[87] Here, the Legislators took

[84] W. Va. Code § 22-6-8(a).
[85] *Id.*
[86] *Leggett v. EQT Prod. Co.*, 800 S.E.2d 850 (2017).
[87] W. Va. Code § 22-6-8(e).

charge to correct the fallout of the most controversial fossil fuel case in West Virginia since 2009—when the United States Supreme Court granted certiorari to settle a matter.[88]

Although certiorari was denied by the United States Supreme Court in this scenario, this bill makes the West Virginia Supreme Court's reversal of its previous decision moot. It appears that the legislature answered the charge set forth by recently-promoted Chief Justice Workman, in her concurring opinion, when she urged it to "enact specific protections to assure fairness and reasonableness in the calculation of post-production costs."[89] Now, the flat-rate leases will pay mineral owners the intended one-eighth royalty, instead of allowing the deduction many post-production costs incurred by the exploration and production companies.[90] More significantly than just the statements contain within this bill, is the statement of voting for this bill. The legislature actively made a change that protects more mineral profits from leaving the state.

iii. HB 4270

In addition to the increased fairness set forth by the flat-rate statute amendment, standards increasing the transparency of royalty payments for all mineral owners also help ensure fairness between industry and citizens. For example, exploration and production companies must now report production information from horizontal wells, such as the prices received; gross value; an interest owner's interest in production expressed as a decimal; and an interest owner's ratable share prior to the deductions.[91]

Further protections for mineral owners that may not be able to afford attorneys include the provision that states "if an operator does not provide the information within the 60-day period, the interest owner may bring a civil action against the operator" and will be able to recover the

[88] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).
[89] *Leggett*, 800 S.E.2d at 869.
[90] *Id.*
[91] W. Va. Code § 37B-1-1(a).

reasonable attorneys' fees incurred.[92] Additionally, statewide transparency expands because quarterly reports of the monthly volumes of oil, natural gas, and natural gas liquids produced from a well must be filed and made public through the office of oil and gas website within a reasonable time.[93] Interest penalties were also created for late payments with a quarterly-compounded penalty to be set at the prime rate plus an additional two percent until such payment is made.[94]

Taken together, the progress of these three bills create positive changes that signify the legislature's intent to promote natural gas extraction while helping the residents of the state by raising money through timely and fair royalty payments. Overall, the mineral owners, the surface owners, and the industry will all benefit from increased transparency, efficiency, and modernization. West Virginia as a state will also benefit from the increased competitiveness with the neighboring shale-producing states of Ohio and Pennsylvania.

In keeping with the purpose and policy behind the recent natural gas law modernization—promote natural gas extraction and raise state funds—the recommendation for what the next natural gas bill do the same. Some argue that West Virginia must adopt aggressive forced pooling laws to stay competitive, stating that it is imperative in order to avoid economic downfall.[95] Conversely, others argue to move past fossil fuels altogether.[96] Somewhere between the two arguments is the stance that West Virginia should drill, but it should also heavily tax the industry

[92] W. Va. Code § 37B-1-1(b).
[93] *Id.*
[94] W. Va. Code § 37B-1-3.
[95] Zach Warder, *"NAY" TO FORCED POOLING: THE STAGNATION* OF WEST VIRGINIA'S NATURAL GAS INDUSTRY, 120 W. Va. L. Rev. 689, Winter 2017.
[96] *Radicals File Lawsuit Against WV DEP for Approving MV Pipeline*, Marcellus Drilling News, June 12, 2017, https://marcellusdrilling.com/2017/06/radicals-file-lawsuit-against-wv-dep-for-approving-mv-pipeline.

by tripling severance taxes to increase state funds.[97] Although all three arguments have merit, none are fair to all of the parties, and each is unlikely to pass a vote without serious concessions.

West Virginia will not stop drilling for natural gas, and until there are significant alternatives for economic development, it should not. The argument to cease altogether is illogical. On the contrary, arguments that the state will be subjected to economic downfall without an aggressive forced pooling bill are equally extreme. The idea that the lack of forced pooling is the sole reason why West Virginia's production is behind that of Pennsylvania does not take into consideration the economic considerations due to severance tax disparity between the states.

Although it is a heavily debated topic in the Keystone State[98], businesspeople are likely to behave like businesspeople. Given the option of drilling a similarly-producing well in a state with no severance tax versus a state that is five percent less profitable because of its severance tax is an easy business decision. Until Pennsylvania and Ohio raise their severance taxes, it is unlikely that West Virginia will be able to justify further disincentivizing the natural gas industry by tripling its current severance tax to fifteen percent.

Natural gas drilling is unlikely to stop in West Virginia. Drastically raising the severance taxes will likely limit production and aggressive forced pooling is not needed. However, a compromise to both arguments can be obtained through the enactment of a Dormant Minerals Act. It is the answer to how the West Virginia legislature can maximize the present opportunity in the Marcellus Shale while raising funds for the future of the state during economically favorable times. And most importantly, a Dormant Minerals Act is more likely to pass than the other options.

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[97] *West Virginia must raise severance taxes on gas*, The Exponent Telegram, October 4, 2015, https://www.wvnews.com/theet/opinion/editorials/west-virginia-must-raise-severance-taxes-on-gas/article_b4dedf6c-72a8-5d78-87c8-d9f5b8e06903.html.

[98] Joel Naroff, *Seriously, Pennsylvania, pass a severance tax already*, The Inquirer, August 18, 2017, http://www.philly.com/philly/business/seriously-pennsylvania-pass-a-severance-tax-already-20170818.html.

B. In Through the Out Door – Reuniting Dormant Minerals with the Surface

After a mineral interest is severed, in the continued generations after the initial grant, people are lost or die, corporations are extinguished, and successors sometimes cannot be traced.[99] The issue is that a severance cannot be undone because a mineral interest never dies, even if all its owners have died or disappeared.[100] The result is a cloud on the title of the surface owner that assures full value for the land will never be realized.[101] Mineral leases, therefore, cannot be properly established without additional procedures.[102] In West Virginia, this scenario has occurred in the vast majority of mineral tracts.[103] The statutory remedy to this issue needs to perform two tasks: (1) provide clear rules for the uses and events that maintain a mineral interest, and (2) provide a procedure to terminate mineral interests that are, in fact, dormant.[104]

A West Virginia specific Dormant Minerals Act ("DMA") is the remedy for mineral interests that have been abandoned. If a DMA is enacted, it would apply to all mineral interests, no matter the date of the original severance. As a grace-period for both mineral owners and surface owners, no dormant mineral interest could be terminated and merged with the surface interest for at least five years after the act is passed. That timeframe would permit owners of mineral interests to become educated on the new laws and assert any rights they chose. A DMA will remedy many of the difficulties presented by mineral severances that are rampant within the state's mineral titles.

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[99] *Dormant Mineral Interests Act, Model Summary*, The National Conference of Commission on Uniform State Laws, 2018, http://www.uniformlaws.org/ActSummary.aspx?title=Dormant%20Mineral%20Interests%20Act,%20Model.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *The Complicated Mineral Rights Issue (Mess?) in WV*, Marcellus Drilling News, March 24, 2017, https://marcellusdrilling.com/2014/03/the-complicated-mineral-rights-issue-mess-in-wv.
[104] *Dormant Mineral Interests Act, Model Summary*, The National Conference of Commission on Uniform State Laws, 2018, http://www.uniformlaws.org/ActSummary.aspx?title=Dormant%20Mineral%20Interests%20Act,%20Model.

To reassure critics, this would not be a sea change from several laws that have already been enacted. For example, the policy is already in place from the missing, unknown, and abandoned heirs statute. It states that the intent of the legislature is to facilitate development of coal, oil, gas, and other minerals, by removing certain barriers to such development caused by interests in minerals owned by abandoned owners.[105] Procedurally, the steps charted from House Bill 4268 can be followed.[106] Moreover, a DMA would not conflict with the ideology that the state cannot enact legislation to police the real property in its state because tax sales have used for decades.[107]

If proposed, the factors that are likely to be negotiated are: (1) the appropriate length of time before a mineral interest is considered abandoned; (2) what constitutes a savings event; and (3) what the proper notice requirements should be. For the length of time, West Virginia could use Louisiana's ten-year period as a starting point.[108] Several states, including Indiana[109] and Ohio[110], use a longer period of time, but due to the limited window of opportunity to extract the state's natural gas before the value of the proven reserves are diminished, West Virginia should adopt the shorter, ten-year timeframe. Continuous drilling operations, new leases, and transfers of interests are reasonable starting points for savings events. And notice requirements should be the easiest step to resolve because the procedures outlined in House Bill 4268 were recently approved by the legislature. Both Ohio's Dormant Mineral Act[111] and the Uniform Dormant Mineral Act[112] can also be used as textual examples for legislators.

[105] W. Va. Code § 55-12A-1.
[106] W. Va. Code § 37B-2-4.
[107] W. Va. Code, § 11A-2-10.
[108] La. Stat. § 31:74.
[109] Ind. Code § 32-23-10-2.
[110] Ohio Rev. Code § 5301.56(B)(3).
[111] Ohio Rev. Code § 5301.56.
[112] *Dormant Mineral Interests Act, Model Summary*, The National Conference of Commission on Uniform State Laws, 2018, http://www.uniformlaws.org/ActSummary.aspx?title=Dormant%20Mineral%20Interests%20Act,%20Model.

i. Positives of a Dormant Minerals Act

A Dormant Minerals Act would be overwhelmingly positive because it would help shift some out-of-state mineral interests back into the state, stimulate production as the major exporting pipelines come online, stimulate the local economy by distributing more royalty money within the state, and incentivize citizens to stay in West Virginia to hold their surface parcels. It would also help ease production tensions between industry and those surface owners that are bothered by production but do not realize the financial gains from either royalty payments or surface use payments. Most importantly, it would be a positive alternative to partition sales.

Currently, the partition process can force the sale of mineral rights at or close to the regional market price.[113] However, market prices per acre for mineral rights have fluctuated greatly within the last twenty years from several hundred dollars per acre to several thousand dollars per acre. Although the traditional partition process compensates mineral owners fairly for a dollar amount at the time of sale, arguably, it unfairly compensates them due to the timing of the market price.

This scenario was apparent to many West Virginians, including Circuit Court Judge Timothy Sweeney who spoke negatively about the process.[114] Moreover, the partition process allows the opportunity for an out-of-state mineral buying company to out-bid the surface owner or another West Virginia resident willing to sign a lease and keep the mineral interest's executive power within the state's borders. A DMA is a great way to side-step third parties.

Like the recent changes of House Bill 4268, Senate Bill 360, and House Bill 4270, a DMA will increase efficiency, modernize the industry by clearing some of West Virginia's messy title

[113] Andrew Brown, *Without forced-pooling law, WV gas industry sues landowners to gain access*, The Charlestown Gazette, June 21, 2015, https://www.wvgazettemail.com/news/without-forced-pooling-law-wv-gas-industry-sues-landowners-to/article_04f4b234-17f6-576e-8c1d-e27ec0f0c6ab.html.
[114] *Id.*

issues, and assist in the overall transparency between surface owners and mineral owners. This is the logical next step for the legislature to maintain its current progress.

ii. Negatives of a Dormant Minerals Act

In the past, several of the concerns regarding Dormant Minerals Acts have revolved around constitutional due process—specifically the taking of property without proper compensation or proper notice requirements. However, the U.S. Supreme Court has analyzed this issue and has explained that dormant mineral acts are constitutional for three reasons.

First, property interests are not constitutionally granted, but rather, are state-controlled interests. For example, in *Board of Regents v. Roth*, the Court stated that property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source—such as state laws.[115] Dormant Minerals Acts that require actions by mineral owners from the state to avoid an abandonment is not arbitrary because it furthers the legitimate state goal of taxation. In *Texaco, Inc. v. Short*—the landmark dormant minerals case—the Supreme Court noted that a state may encourage owners of mineral interests to develop the potential of those interests because "the fiscal interest in collecting property taxes is manifest."[116]

Second, no taking without compensation occurs. In *Texaco*, the Court further noted that because of the failure of the property owner to perform a statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse.[117] In these situations, a mineral owner's inaction is the cause of their lost property, not an action from the government that constitutes a taking of property. Therefore, no compensation is needed because a taking does not occur.

[115] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).
[116] *Texaco, Inc. v. Short*, 454 U.S. 516, 529 (1982).
[117] *Id.*

Third, a state's notice requirements are no different from that posed for any legislative enactment affecting substantial rights.[118] Generally, a legislature need not do anything more than enact and publish the law and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.[119] Additionally, the Court stated that it is well-established that property owners within a state "are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."[120] If the West Virginia legislature reviews the reasoning of the U.S. Supreme Court and carefully drafts its statute accordingly, no constitutional issues should arise from a West Virginia specific Dormant Minerals Act.

V. CONCLUSION

West Virginia should adopt a Dormant Minerals Act because it would align properly with the state's continued commitment to fossil fuels. A DMA would help the exploration and production companies by promoting development. It would ease some tensions between surface owners, mineral owners, and the industry because it would provide surface owners with more opportunities for financial gain through royalty payments. It would help transfer dormant minerals that are owned by out-of-state individuals back to in-state surface owners. And a DMA would be a full-measure solution to the recent unknown owners' provision because it would cover all-depths and help clear some the state's chaotic mineral title issues. These positive outcomes correlate with the legislature's intent in the recent changes of the three natural gas laws—to increase efficiency, to modernize, and to create transparency for both the industry and West Virginians. For these reasons, West Virginia should adopt a Dormant Minerals Act.

[118] *Id.* at 531-32.
[119] *Id.* at 532.
[120] *Id.*