

ALERT

ENERGY & NATURAL RESOURCES



Supreme Court of Appeals of West Virginia Accepts Certified Questions About Deductibility of Post-Production Expenses and the Viability of *Tawney*

The West Virginia Supreme Court of Appeals has accepted four questions certified to it by The United States District Court for the Northern District of West Virginia in *Charles Kellam, et al. v. SWN Production Company, LLC, et al.*, No. 5:20-CV-85. The Court will hear oral argument during the January 2022 term. The Court will address four questions: (1) Is *Estate of Tawney v. Columbia Natural Resources, LLC*, 219 W.Va. 266, 633 S.E.2d 22 (2006) (*Tawney*) still good law in West Virginia; (2) What is meant by the “method of calculating” the amount of post-production costs to be deducted; (3) Is a simple listing of the types of costs which may be deducted sufficient to satisfy *Tawney*; and (4) If post-production costs are to be deducted, are they limited to direct costs or may indirect costs be deducted as well?

At the time of the District Court’s certification in *Kellam*, defendants’ Motion for Judgment on the Pleadings asserting that the Kellams’ lease complied with *Tawney* and that the District Court was bound by the decision in *Young v. Equinor USA Onshore Properties, Inc.*, 982 F.3d 201 (4th Cir. 2020) was pending. In *Young*, the 4th Circuit Court of Appeals reversed Judge Bailey and held the lease clearly and unambiguously allowed the deduction of post-production expenses and noted that “*Tawney* doesn’t demand that an oil and gas lease set out an Einsteinian proof for calculating post-production costs. By its plain language, the case merely requires that an oil and gas lease that expressly allocates some post-production costs to the lessor identify *which costs* and *how much* of those costs will be deducted from the lessor’s royalties.” *Young*, 982 F.3d at 208. Moreover, the 4th Circuit noted recent criticism of *Tawney* by the West Virginia Supreme Court of Appeals. See *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 800 S.E.2d 850 (2017).

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