LEGISLATIVE & REGULATORY UPDATE

By Nikolas Tysiak, Legislative and Regulatory Chairman

Welcome back to the real world! Now that summer is over, and Russian gas is being abandoned by many around the world, the oil and gas industry, and particularly the operators and land professionals in the Appalachian Basin, find themselves with more to do than ever before. There was not a lot of activity over the summer, but a few interesting developments arose.

SWN Production Company v. Kellam, 875 S.E.2d 216 (W. Va. 2022). Certified question to W. Va. Supreme Court from federal district court for the Northern District of West Virginia. Primarily, the Supreme Court was asked whether the 2006 case *Estate of Tawney v. Columbia Natural Resources* remained good law, and, if so, how to apply the requirements regarding deduction and calculation of royalties contained in that lease. After a lengthy discussion of the history behind royalty litigation in West Virginia and comparing the circumstances of *Tawney* to *Leggett v. EQT Production Co.*, 239 W. Va. 264 (2017), the Court concluded that Tawney remains good law and is applicable to contractually created royalty provisions, while *Leggett* applies to statutorily created royalties.

Senterra Limited v. Winland, 2022-Ohio-2521. Marketable Title Act case. In a unique twist, the surface owner attempted to utilize the Duhig rule (a Texas case regarding repeated, identical reservations of oil and gas interests) to indicate that a ¼ oil and gas reservation was void at its inception, and therefore should be vested with the surface owners. The court disagreed, pointing to the unbroken chain of title of the severed mineral owners effectively preserving the reserved oil and gas interest. The court further found that reliance upon *Duhig* would not resolve the issue in favor of the surface owner in any case and found in favor of the severed mineral owner.

In addition to the above cases, the new West Virginia statutory pooling statute became active as of June 30, 2022 (W. Va. Code §22C-9-7a). This allows oil and gas operators to bring unleased interests into an oil and production unit without landowner consent under certain circumstances. As a threshold issue, at least 75% of the net acreage in a unit must be under lease/control of oil and gas operators, and 55% of the working interest must be vested in the operator making the petition for a statutory unit. Operators can effectively establish joint operations with other, minority operators using the statute. However, the applying operator must first go through an extensive application process that includes (among other things) a significant investment in time and effort to compile title for the entire proposed unit. The application process must be heard by the Oil and Gas Conservation Commission in Charleston and is subject to extensive accounting oversight before approval will be given. As of the date of this writing, we understand that only one application has been made and no approvals have yet been given.

Also, effective June 30, 2022, West Virginia removed the prior requirement under the Cotenancy Modernization and Majority Protection Act (W. Va. Code §37B-1-1, et seq.) that, as a threshold matter, there needed to be at least 7 “royalty owners” before the act could be utilized. The only threshold matter as to whether the Act applies now is whether the operator seeking protection under the Act has at least 75% of the oil and gas leased or otherwise controlled. Finally, West Virginia instituted new reporting requirements for well production and payments for royalty owners (W. Va. Code §37C-1-1, et seq.). Failure to make timely payments and reports under this new act will result in fines against Operators on a percentage basis, calculated as prime rate plus 2% in interest charges against the amount unpaid.
Regards, and as always, let us know if you come across any interesting developments.

Nik Tysiak
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