LEGISLATIVE & REGULATORY UPDATE

By Nikolas Tysiak, Legislative and Regulatory Chairman

I hope everyone had a wonderful Thanksgiving holiday full of friends and family (and delicious, delicious turkey). I want to start out this update with something that should have been in the last update but was not.

Effective June 10, 2022, the West Virginia legislature modified Chapter 11A of the West Virginia Code to streamline the tax sale process by (1) eliminating the bifurcated distinction between "delinquent" and "non-entered" tax assessments, and (2) standardizing the statute of limitations for bringing procedural challenges to the tax sale process. Under the old laws, separate tax sale procedures existed for tax assessments that were "delinquent" (e.g., entered on the tax rolls but not timely paid) vs. "non-entered" (e.g., an assessment for a given real estate interest did not clearly exist on the appropriate county tax rolls). For delinquent assessments, the local sheriff's tax office had original jurisdiction over the administration of sales and tax deeds; if a given assessment was not redeemed from delinquency or sold within certain time frames, such delinquent assessments were turned over to the State Auditor's office for further administration and sale. Non-entered assessments existed exclusively under the original jurisdiction of the State Auditor's office for administration and sale. In practice, the State Auditor's office either explicitly or implicitly gave county assessors and sheriffs significant leeway in administering these taxation issues.

As landmen and lawyers practicing in West Virginia likely know, property interests affected by tax sales and tax deeds have proven challenging insofar as the ownership of executive rights and royalties pertaining to oil and gas. Recent caselaw brought a semblance of continuity to the effect of "non-standard" assessments affecting oil and gas interests, but in a way that was not anticipated by many title and real estate practitioners, which yielded varying and sometimes counter-intuitive results. Under the new tax sale regime, however, all sales of tax assessments for whatever reason (i.e., delinquency, non-entry, etc.) are to be administered by the State Auditor's office directly. In addition, due to the elimination of local, procedural activities from the process, the legislature extended the statutes of limitations within which procedural challenges to tax sales and deeds may be brought from 2 years to 3 years. Given that tax sales and deeds under the new laws will not take place until early 2023, it remains to be seen whether the State Auditor will continue its practice of "out-sourcing" tax sale efforts to the relevant county offices or take a more active role in administration of these interests. Mark your calendars for some time in 2024/2025 for these cases to make their way to the Supreme Court.

The West Virginia Supreme Court heard several cases on writs of prohibition involving some of our colleagues. A writ of prohibition is a special action brought directly to the West Virginia Supreme Court alleging that the underlying court exceeded its authority or lacked jurisdiction over the case at hand. While the facts are not necessarily relevant to landmen directly, there were several of these recently involving landmen working in multiple capacities for oil and gas production companies. See e.g., State ex rel. Antero Resources Corp. v. McCarthy, 2022 WL 17038493, --- S.E.2d --- (November 17, 2022); State ex rel. TH Exploration II, LLC v. Venable Royalty, Ltd, 2022 WL 12524993 (October 21, 2022).

On October 19, 2022, the Ohio Seventh District Court of Appeals found that the assignment of an overriding royalty interest out of a leasehold interest cannot be effective against subsequent leases in Marquette ORRI Holdings, LLC v. Ascent Resources-Utica, LLC (2022-Ohio-3786).

Continued

In that case, an oil and gas lessee under a prior oil and gas lease had assigned an override to Marquette ORRI and other parties, including language that the assignment would be effective against "top leases and/or new leases covering all or any portion of the lands and interests which are included . . ." in the underlying leasehold. The Court reasoned that there is no "privity of contract" (in other words, a direct, contractual relationship) between the override owner under a prior lease and a subsequent lessee, resulting in the language regarding future leases to be unenforceable between Marquette and a later lessee (in this case, Ascent).

Also in the Seventh District, on September 30, 2022, the Court issued its decision in the fourth of four cases involving the Whitacre group of companies dealing with whether a lease remains in production "in paying quantities" under Ohio law (Hogue v. Whitacre, 2022-Ohio-3616; Whitacre IV). The court reiterated the long-standing Ohio principle that "in paying quantities" only requires that gross profit exceed direct operating expenses monthly (as determined in Blausey v. Stein, 61 Ohio St.2d 264 (1980)). "Indirect expenses," including the actual cost of drilling the well amortized, are not considered to be direct operating expenses under this test and are therefore irrelevant. Under this test, the lease at issue in Whitacre IV was determined to be

In Pennsylvania, the Superior Court issued a decision regarding ownership of minerals arising from a potentially ambiguous oil and gas reservation on September 29, 2022 (Hunnell as Trustee of Hunnell Family Revocable Living Trust v. Krawczewicz, 2022 PA Super 166, --- A.3d ---). The controversy arose from a 1920 severance involving 104 acres of land, where prior owners (the "Theakstons") excepted and reserved from a conveyance to Brtko as follows: "all the oil and gas within and underlying the hereinbefore described tract of land is also reserved together with such rights to drill or operate for same as are set forth in full in lease . . ." The successors to Brtko as to the surface estate attempted to allege that they were the proper owners of the underlying oil and gas because the reservation was limited to a prior oil and gas lease. The trial court held that the language constituted an exception of all the oil and gas estate. Citing to the distinction between a reservation and an exception under Pennsylvania law, the Superior Court found that the trial court had not erred by vesting oil and gas ownership in the Theakstons (and their successors) as an "exception" and awarded ownership of the oil and gas accordingly.

For once, no notable Marketable Title Act or Dormant Mineral Act cases to report in Ohio. A lull, or just an anomaly? Stay tuned in January for more! Have a Happy Holiday season from your friendly, neighborhood Legislative and Regulatory Chair!

Nik Tysiak