



LEGISLATIVE & REGULATORY UPDATE

By Nikolas Tysiak, Legislative and Regulatory Chairman

After a hiatus in June, we have several new cases to report on this session.

In *Collingwood Appalachian Minerals III, LLC v. Erlewine*, --- S.E.2d ---, 2023 WL 4013373 (June 15, 2023), the West Virginia Supreme Court heard another case that contributes to the ongoing saga surrounding oil and gas rights being sold at tax sale. This case is a bit unique, in that there is both a language interpretation issue and a tax sale issue presented. The tract at issue contains 135 acres. In 1909, J. E. Huff conveyed the land to James Sivert, reserving $\frac{1}{2}$ the oil and gas. James Sivert conveyed the land to Joseph and Myrtle Rogers in 1944, reserving $\frac{1}{4}$ the oil and gas. The Rogerses conveyed the land to Osborn Dunham in 1945, reserving from the conveyance “all exceptions and reservations contained in all prior deeds”. Meanwhile, James Sivert conveyed his $\frac{1}{4}$ oil and gas interest to Joseph Palmer also in 1945, who then conveyed such $\frac{1}{4}$ oil and gas interest to Osborn Dunham in November of 1945. As of 1945, Osborn Dunham held $\frac{1}{2}$ the oil and gas and all of the surface as to the 135 acres. Critically, beginning in 1930, James Sivert was assessed for the surface and $\frac{1}{2}$ the oil and gas separately. Upon his reservation of $\frac{1}{4}$ oil and gas in 1944, the Rogerses and Sivert were each assessed for $\frac{1}{4}$ oil and gas under the land.

In 1968, Dunham conveyed to Russell F. Stiles “the same land” as received by him in 1945. Following this deed, Stiles became assessed for the surface and $\frac{1}{4}$ oil and gas, while Stiles became assessed for another $\frac{1}{4}$ oil and gas. Royalties were also paid in accordance with this division of oil and gas rights. In 1988, Stiles failed to pay either his surface assessment or the separate oil and gas assessment associated with the 135 acres. Erlewine purchased the surface assessment at tax sale in 1991, while Waco Oil & Gas Company and Trio Petroleum Corp. purchased Stiles’ the $\frac{1}{4}$ oil and gas assessment in the same year. In 1995, Trio and Waco purchased the $\frac{1}{4}$ oil and gas assessment entered in the name of Dunham at a separate tax sale. This raises three questions that the court had to address - (1) what effect did the 1968 deed have on ownership of the oil and gas estate; (2) what did the 1991 tax deed convey; and (3) what did the 1995 tax deed convey?

The Court addressed these questions in the reverse order indicated above. First, it found that the 1991 tax deed to Trio and Waco had to be valid, as there was no other paid assessment that would have saved the oil and gas assessment covering unsevered oil and gas rights entered in the name of Stiles. Erlewine tried to rely on *Orville Young LLC v. Bonacci*, 246 W. Va. 26 (2021), and the Court agreed that case was critically important to the analysis. However, the Court found that the *Orville Young* case was clearly distinguished from the situation surrounding the 135 acres, as *Orville Young* involved a situation where oil and gas was unsevered in title but severed for taxation and the surface estate assessment had been properly paid. Under recent case law, the Court has emphasized that any payment that covers a separate interest in oil and gas will be deemed to cover such interest. However, the only other assessment that could cover the unsevered oil and gas in this instance was the surface assessment, which was also delinquent at the same time. Additionally, West Virginia code indicates that an error in tax sale procedures will not invalidate the sale UNLESS a cause of action is expressly created in the code. The Court determined that the code does not include a separate cause of action that covers the circumstances created by the circumstances surrounding the 135 acres, resulting in there being no relief available to Erlewine, and found the 1991 tax deed covering the oil and gas rights of Stiles to be valid.

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The Court addressed the questions regarding the language of the 1968 deed and the 1995 tax deed simultaneously. Erlewine argued that the 1968 deed conveyed all interests of Dunham to Stiles, and that Dunham should not have retained any oil and gas rights under that deed and all his oil and gas rights became vested in Stiles; by extension, the 1995 tax deed could convey no interest because the oil and gas rights previously held by Dunham were covered by the Stiles surface assessment. The Court disagreed, effectively finding that the reference in the 1968 deed to “the same land” as conveyed in the 1945 deed acted as a limitation on the conveyance, thereby upholding the tax deed. Despite this conclusion, no points of law are cited by the Supreme Court, except to say that an unambiguous deed requires no interpretation, and finding the language unambiguous. Arguably, the reference to “the same land” could be construed as a further description of the land conveyed, and not intended as a limitation, so one could argue that the language of the 1968 deed is, in fact, ambiguous. As such, further analysis of the intent of the parties may have been warranted in these circumstances, and it may be wise to exercise caution and discretion in relying on the conclusions of the *Erlewine* case insofar as deed interpretation is concerned.

As a footnote to everyone’s favorite West Virginia tax sale case from recent years (*L&D Investments Inc. v. Mike Ross Inc.*), the West Virginia Supreme Court was recently presented with questions surrounding who should contribute to the attorneys’ fees in the broader litigation arising between L&D Investments, Antero, and Mike Ross. Finding that the counsel for L&D Investments had benefited various other oil and gas owners through his efforts, the Supreme Court held that such counsel should have the opportunity to have the other oil and gas owners, known and unknown, who benefitted from his efforts, contribute to his fees in *L&D Investments, Inc. v. Antero Resources*, 887 S.E.2d 208 (W. Va. 2023).

Warrior Oil and Gas, LLC v. Blue Land Services, LLC, 248 W. Va. 1 (2023), involved a land abstracting company (Blue) bringing action against Warrior Oil and Gas and WOG Minerals for failure to pay invoices for title services rendered. After a lengthy pre-trial and discovery process during COVID, Blue was eventually awarded a default judgment against Warrior and WOG, with accompanying damages. On appeal, the Supreme Court found various administrative deficiencies in the lower court’s order and award, including the following: (1) failure to list findings of fact and conclusions of law with the trial court’s order; (2) failure to properly apply law regarding the measure of appropriate damages; (3) failure to provide a reason to support its award of damages; and (4) improper award of pre-judgment interest. The Supreme Court reversed the default judgment award and remanded to the circuit court for further proceedings consistent with its findings.

In Pennsylvania, a case on permitting called *Marcellus Shale Coalition v. Department of Environmental Protection*, 292 A.3d 921 (Pa. S. Ct. 2023), the Pennsylvania Supreme Court was confronted with the question of the scope and breadth of the rulemaking authority afforded to the DEP under Act 13 of 2012, amending the Pennsylvania Oil and Gas Act of 1984. The Marcellus Shale Coalition challenged various definitions and conclusions reached by DEP in its rulemaking capacity under Act 13 as overly broad and unenforceable. The Supreme Court undertook a lengthy analysis of the background of administrative law in Pennsylvania, the rules specifically challenged by the MSC, the arguments set forth by both sides, the holdings below in the Commonwealth Court, and the impact those rules were likely to have on the permitting process, and found that the DEP unequivocally held the power to make the rules it made and enlisted appropriate community partners in establish those rules.

Thanks again from your friendly neighborhood Legislative and Regulatory Committee Chair.

Until next time,

Nik Tysiak
Chair – Legislative and Regulatory Committee

