

# LEGISLATIVE & REGULATORY UPDATE

By Nikolas Tysiak, Legislative and Regulatory Chairman



Our update is West Virginia heavy this time. Here are the cases since our last update:

Kaess v. BB Land, LLC, —S.E.2d—, 2024 WL 4784609 (November 14, 2024). Certified question to Supreme Court from U.S. District Court for Northern District of West Virginia, inquiring whether the deduction of certain costs from the delivery of royalties were allowable under West Virginia law when the lease calls for “in kind” royalty delivery. After extensive analysis, the Supreme Court likened an “in kind” royalty provision as being similar to a “flat” royalty provision, and ultimately held that lessor under a lease with an in kind royalty provision where the lessor elects NOT to take oil and gas in kind is not subject to the deduction of post-production costs as a matter of West Virginia law.

Venable Royalty Ltd. v. EQT Production Company, 908 S.E.2d 501 (W. Va. I. C., 2024). The Intermediate Court was presented with the problem of determining whether non-participating royalty interests (“NPRIs”) should be classified as “real estate” or “personal property” as a matter of West Virginia law. The NPRI at issue was conveyed by a tax deed following a delinquent tax sale concerning the interest. One side argued that the tax deed was void because an NPRI is personal property. The other side claimed that the tax deed was successful because an NPRI is assessable as real estate, rendering the tax deed effective as to the reserved NPRI. After reviewing the available authorities, the Intermediate Court determined that NPRIs should be classified as real estate interests because they are vested real property.

Romeo v. Antero Resources Corporation, —S.E.2d—, 2024 WL 4784706 (November 14, 2024). Another certified question from the U.S. District Court for the Northern District of West Virginia concerning post production costs. The Court adopted a “point of sale” rule, which indicates that the lessee must bear all costs incurred in exploring for, producing, marketing and transportation the product to the point of sale. The Court expressed concern that adopting a different rule would make the marketability of produced gas a question of fact to be determined by courts or other judicial proceedings, instead of a question of law. Acknowledging that their ruling put West Virginia in a minority of one regarding the deductibility of post-production costs, the Court nevertheless found that the deduction of such costs could only be taken if specifically stated in a lease, and further found that the same rulings extended to NGLs derived from produced natural gas.

West v. Armstrong, 2024 WL 4709943 (W. Va. I.C.A., November 7, 2024). In 1905, landowners conveyed ½ oil and gas interest under 30 acres, described as “one half part of the royalty and rents reserved under such lease while the same remains in force . . .” and then includes additional language that the parties argued over whether it limited the conveyance generally or only if only certain terms of the conveyance were limited. The Supreme Court found that the limiting language contained in the oil and gas conveyance only applied to certain provisions of the deed, and not the conveyance as a whole.

Bleigh v. Dominion Energy Transmission, Inc., 2024 WL 5201003 (W. Va. I.C.A., December 23, 2024). This case involves the determination of the rights and duties under a 1909 oil and gas lease and subsequent 1952 lease modification. The modification gave the operator the right to inject and store oil and gas into the Berea Sand. A storage well was subsequently completed on the property. After the deep rights under the lease became vested in DETI and HG Energy, successors to those rights, the landowner, Bleigh, alleged that these operators did not take proper steps to develop the oil and gas under the prudent operator standard. The Court found that the modification agreement overrode the implied covenant to prudently operate and develop the oil and gas, resulting in the storage lease being sufficient to hold the lease so long as the lease continues to be used for storage.

As always, if you come across anything that needs to be reported on, please let us know ASAP.

Regards,

Nik Tysiak  
Chair – Legislative and Regulatory Committee MLBC