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Oil & Gas Survey: West Virginia

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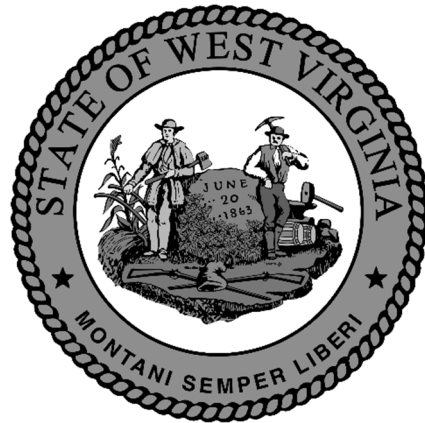


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OIL & GAS SURVEY: WEST VIRGINIA

*Joshua P. Fershee**

This Article summarizes and discusses important recent developments in West Virginia’s oil and gas law as determined by recent West Virginia Supreme Court of Appeals cases. There were no substantial legislative changes in the current period.

I. ANDREWS V. ANTERO RESOURCES CORPORATION

In *Andrews v. Antero Res. Corp.*, Antero Resources Corporation (“Antero”) derived leasehold rights to develop mineral resources in Harrison County, West Virginia, through a severance deed.¹ The severance deed was executed in the early 1900s and listed

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1. 828 S.E.2d 858, 861 (W. Va. 2019).

certain rights, including the right to drill, bore, and operate oil and gas wells.²

The Petitioners represented holders of the surface rights on properties near Antero's drilling activities and alleged that Antero's mineral operations interfered with the Petitioners use and enjoyment of the land.³ Specifically, the Petitioners pointed to the annoyance, inconvenience, and discomfort caused by heavy equipment, diesel fumes, and other emissions from traffic, and there was no allegation of property damage.⁴ The Petitioners asserted that the operator did not have the right to extract natural gas using methods like horizontal drilling and hydraulic fracturing, which were not contemplated when the severance deeds were executed in the 1900s.⁵ Further, they asserted, even where the drilling operations were located off-site of the Petitioners' surface estate, Antero had substantially interfered with the Petitioners' use and enjoyment of their surface estate.⁶

Under West Virginia law, the owner of mineral rights possesses the right to use the surface in a manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.⁷ However, for an owner of mineral resources to access an implied easement for surface rights, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without substantial burden to the surface owner.⁸

In this case, Antero's off-site horizontal drilling operations did not cause any substantial burden because Antero was within its rights to use the surface land to access the minerals below.⁹ The court, consistent with prior rulings, determined that building roads and well pads and drilling wells was reasonably necessary for the extraction of natural gas.¹⁰ Although horizontal drilling was not envisioned at the time of deed formation (mineral owners only anticipated the impacts of vertical drilling), expert testimony revealed that horizontal drilling

2. *Id.*

3. *Id.* at 862.

4. *Id.*

5. *Id.* at 864.

6. *Id.* at 865.

7. *Id.*

8. *Id.* at 870.

9. *Id.* at 872.

10. *Id.* at 873.

has less of a surface impact than traditional vertical drilling.¹¹ Furthermore, because the drilling operations were located off-site of the Petitioners' surface estates, the claim was even more attenuated.¹²

This case further confirms that under West Virginia law, both horizontal and vertical drilling operations constitute surface use in a manner reasonably necessary to extract natural gas.¹³

II. KUPFER V. CHESAPEAKE APPALACHIA, LLC

In *Kupfer v. Chesapeake Appalachia, LLC*, the Kupfers received ninety acres of land by deed in 1980.¹⁴ The deed did not contain any oil and gas reservations. In 1990, the Kupfers conveyed eight parcels of land, plus an additional 60-acre parcel (the "ninth parcel") to Michael Blair.¹⁵ The Petitioners' deed stated that the eight parcels were excepted and reserved from all coal, oil, gas, and other minerals, thus retaining those mineral rights from the eight parcels.¹⁶ That deed later described the "ninth parcel" but made no reference to any reservations or exceptions as to the mineral rights.¹⁷

In September 2000, Michael Blair conveyed his interest in the ninth parcel to Zachary Blair using exactly the same language as the 1990 deed.¹⁸ In 2009, Zachary Blair leased the oil and gas resources to Chesapeake Appalachia, LLC, which then sold and assigned the lease in 2014 to the current rights holder, SWN Production Company.¹⁹ The language of the 1990 deed was preserved in subsequent conveyances, explicitly reserving and excepting the oil and gas resources for the eight parcels and separately referencing to the "ninth parcel" without mentioning a reservation.²⁰ In 2016, the Petitioners filed a complaint of trespass and conversion against the respondents claiming that they owned the oil and gas rights associated

11. *Id.* at 869.

12. *Id.*

13. *Id.*

14. No. 17-0527, 2018 WL 2175553, at *1 (W. Va. May 11, 2018).

15. *Id.*

16. *Id.*

17. *Id.* at *2.

18. *Id.*

19. *Id.*

20. *Id.*

with the “ninth parcel,” asserting that those rights were also reserved in the 1990 deed.²¹

The Kupfers argued that “[a] deed of conveyance, in order to pass title, must contain a description of the property being conveyed which sufficiently identifies the land, either by the language of the granting clause itself or by reference to extrinsic facts which render the description certain.”²² Additionally, they argued that the subject deed provided lists of the parcels to be conveyed early in the document, and that language “completed the conveyance.”²³ They further claimed that additional descriptions of the individual parcels appearing later in the deed were not needed.²⁴ Therefore, they claimed that if the later “unnecessary parcel by parcel description is removed,” the remaining deed language was sufficient to identify what was conveyed, reserving and excepting oil and gas rights for all parcels, including the ninth parcel.²⁵

The court disagreed, stating that “Petitioners’ argument is fundamentally flawed in that it focuses on but one portion of the subject deed and fails to consider all of the parts together so as to give effect to the intention of the parties.”²⁶ The court further explained, “it is axiomatic that ‘[p]arties are bound by general and ordinary meanings of words used in deeds.’”²⁷

Under West Virginia law, in order to pass title, a deed of conveyance must contain a description of the property being conveyed that sufficiently identifies the land, either by the language of the grant clause itself or by reference to extrinsic facts that render description certain. Here, the deed contained a distinct description of parcels one through eight and includes language regarding the oil and gas reservations. However, the “ninth parcel” is described in a separate portion of the document, and the description is silent on oil and gas reservations. In this case, the court determined that the deed did not

21. *Id.*

22. *Id.* at *3 (quoting *Sally-Mike Props. v. Yokum*, 332 S.E.2d 597, 602 (W. Va. 1985)).

23. *Id.*

24. *Id.* at *6–7.

25. *Id.* at *7.

26. *Id.* at *8.

27. *Id.* at *10. (quoting *Syl. Pt. 1, McDonough Co. v. E.I. DuPont DeNemours & Co., Inc.*, 280 S.E.2d 246 (W. Va. 1981); *Syl. Pt. 1, Meadows v. Belknap*, 483 S.E.2d 826 (W. Va. 1997)).

reserve or except any coal, oil, or gas. As such, the Petitioners do not own the parcel of land, and therefore lack standing to bring forth any claim.

III. EQT PRODUCTION CO. V. CROWDER

A. Facts

Margot Beth Crowder and David Wentz own surface land (“Crowder Land”) that had been part of a larger tract of land in Doddridge County, West Virginia. The mineral rights of that land were leased in 1901 to a predecessor of EQT Production Company (“EQT”) to drill for oil and gas. EQT drilled horizontal wells on the Crowder Land surface that extended under neighboring properties and to natural gas. In 2011, EQT sought to pool the rights provided under the 1901 lease with other leases it held so it could drill and extract oil and gas on neighboring lands. EQT obtained a pooling clause in a modified deed in 2011 from the mineral owners but not from the surface owners of Crowder and Wentz.

EQT then drilled horizontal wells on the Crowder Land, which produced gas derived from neighboring properties. Crowder and Wentz sued, claiming that EQT’s lease did not allow the company to use the Crowder Land surface estate to extract oil and gas from neighboring mineral estates. The lease did not have a pooling clause. Instead, the lease only granted permission to extract oil and gas from the mineral estate below the Crowder Land surface.

The Circuit Court of Doddridge County ruled in favor of Crowder and Wentz and entered an order granting partial summary judgment, finding that EQT trespassed when it used the Respondent’s surface lands to conduct operations on neighboring properties. A jury awarded \$190,000 in damages. EQT brought this appeal.

The high court determined that mineral lessees have “an implied right to use the surface of a tract in any way reasonable and necessary to the development of minerals underlying the tract.”²⁸ It is worth noting that the court confirmed that the use of horizontal drilling and hydraulic fracturing is reasonable and necessary. However, the court continued, “a mineral owner or lessee does not have the right to

28. EQT Prod. Co. v. Crowder, 828 S.E.2d 800, 801 (W. Va. 2019).

use the surface to benefit mining or drilling operations on other lands, in the absence of an express agreement with the surface owner permitting those operations.”²⁹

In addition, the court explained that the owners of the mineral estate could not provide pooling rights to use the Crowder Land because the mineral owners “no longer owned the right to use the surface estate for exploration on and production from neighboring tracts.”³⁰ The mineral estate had been severed from the surface in 1936, meaning the pooling right “was a right attached to the surface estate.”³¹

This decision could (and should) have the effect of overruling a 2016 lower court decision. Back in April 2016, a West Virginia case ruled that there was an implied right to pool in oil and gas leases.³² The *EQT* decision corrects this erroneous decision, which implied that all oil and gas leases come with an implied right of pooling.³³

IV. L&D INVESTMENTS, INC. V. MIKE ROSS, INC.

Charles Lee Andrews (“Charles”), as trustee for his mother, Mary, held a fee simple title to two tracts of land.³⁴ The surface land was eventually divided among Mary’s descendants, and the oil and gas wealth was conveyed to several different individuals.³⁵ A real

29. *Id.*

30. *Id.* At 810.

31. *Id.*

32. *There is an Implied Right to Pool an Oil and Gas Lease*, Jackson Kelly LLC Oil and Gas Update, <https://oilandgas.jacksonkelly.com/2016/04/there-is-an-implicit-right-to-pool-an-oil-and-gas-lease.html> (April 20, 2016) (discussing *American Energy-Marcellus LLC v. Poling*, Circuit Court of Tyler County, West Virginia, Civil Action No. 15-C-34 H).

33. See Joshua P. Fershee, *Oil & Gas Survey: West Virginia*, 5 TEX. A&M J. PROP. L. 169 (2019); Taryn Phaneuf, *Professor says judge’s opinion on implied pooling rights marks departure from state oil and gas law*, THE W. VA. REC. (Aug. 11, 2016), <https://wvrecord.com/stories/510990698-professor-says-judge-s-opinion-on-implicit-pooling-rights-marks-departure-from-state-oil-and-gas-law> [<https://perma.cc/6SEA-JX8G>]; Robert J. Burnett & William J. Blakemore, *Pooling Clause Not Necessary: West Virginia Court Finds Implied Right to Pool Exists Where Lease Silent* (May 25, 2016), <https://www.hh-law.com/driller-may-have-an-implicit-right-to-pool-lease-where-no-pooling-clause-exists/> [<https://perma.cc/HM55-C4SC>] (“No court has ever recognized an implied covenant to pool.”).

34. *L&D Invs., Inc. v. Mike Ross, Inc.*, 818 S.E.2d 872, 875 (W. Va. 2018).

35. *Id.*

property tax assessment for 100% of the oil and gas interests remained solely in the name of Charles. Additional tax assessments were added to the Harrison County land books in 1988.³⁶ The assessment under the “master assessment” in Charles’s name was paid each year through 1999.³⁷

In 1999, several descendants claiming an interest in the oil and gas rights requested separation of their respective interests from the “master assessment.”³⁸ The descendants paid their individual assessments each year, but the master assessment was not paid starting in 2000.³⁹ The master assessment became delinquent, and a tax lien on the property in the name of Charles was sold at a delinquent tax sale to Mike Ross, Inc (“MRI”) in 2003.⁴⁰ In 2013, L&D investments (“Petitioners”) purchased oil and gas interests from two of Mary’s decedents. L&D expected oil and gas royalties from the purchase but then learned that MRI owned the assets through a delinquent tax sale.⁴¹

The circuit court granted summary judgment on the ground that the Petitioners’ claims were barred by a three-year statute of limitations.⁴² The Supreme Court of Appeals of West Virginia reversed, stating that “void tax sale deeds did not have a statute of limitations.”⁴³ The Court further found that the circuit court erred by concluding that the petitioners’ ownership interests were “legitimately sold out from under them.”⁴⁴ Because of the double assessments and the payment of the taxes by the Petitioners, the court determined that the mineral interests were never delinquent, and the sale was void.⁴⁵

V. STEAGER V. CONSOL ENERGY, INC.

Consol Energy, Inc., d/b/a CNX Gas Company, LLC (“Consol”) and Antero Resources Corporation (“Antero”) own multiple gas wells in several West Virginia counties.⁴⁶ The

36. *Id.* at 876.

37. *Id.*

38. *Id.* at 877.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 875.

43. *Id.* at 882.

44. *Id.* at 881.

45. *Id.*

46. Steager v. Consol Energy, Inc., 832 S.E.2d 135, 140 (W. Va. 2019).

Respondents (Consol and Antero) are the owners of traditional and horizontal gas wells.⁴⁷ The gas wells are assessed for *ad valorem* taxes based on a formula created by the West Virginia State Tax Commissioner, Dale W. Steager.⁴⁸ This case concerns the proper valuation of operating expense deductions for horizontal and traditional gas wells.⁴⁹

Consol and Antero first claimed that the Tax Department imposed a cap on operating expense deductions.⁵⁰ The cap was described as both a percentage (30% for vertical wells and 20% for horizontal wells), and a monetary figure (\$5,000 for vertical wells and \$150,000 for horizontal wells).⁵¹ The Court was asked to determine whether the West Virginia Code allows for a cap placed on operating expense deductions and if the cap can be described as both a percentage and dollar figure.⁵²

Additionally, Consol and Antero argued that the operating expense deduction calculation, which did not include expenses associated with gathering, processing, and transporting the gas, resulted in an overvaluation of the gas wells.⁵³ Finally, the Court needed to decide whether a monetary average was the correct calculation of operating expense deductions as opposed to an unlimited percentage.⁵⁴

The Court affirmed the business court's finding that the use of a "not to exceed" amount or "cap" on operating expense deductions was not supported by the West Virginia Code § 110-1J 4.3.⁵⁵ The cap singled out wells with higher gross receipts, and thus the cap applied a different percentage reduction for operating expenses. In doing so, the cap allowed the Tax Department to treat higher grossing and lower grossing wells differently and applied two different tax valuation methods depending on the well.⁵⁶ This was in violation of the West Virginia Constitution Article X, Section 1 "equal and uniform"

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 141.

51. *Id.*

52. *Id.* at 140.

53. *Id.* at 142.

54. *Id.* at 140.

55. *Id.*

56. *Id.* at 142.

requirement, as well as the equal protection provisions of the West Virginia and United States Constitutions.⁵⁷

Next, the Tax Department had restricted the definition of operating expenses to only include costs relating to the maintenance and production of gas.⁵⁸ However, the Tax Department calculated gross receipts at the point of sale, which they used to derive the tax on the producers.⁵⁹ The process of bringing gas to the point of sale subjected producers to more operating expenses, including transportation expenses.⁶⁰ Energy producers were not allowed to incorporate those transportation expenses in the operating expense calculation, meaning that the tax deduction for operating expenses did not include the total cost of bringing the gas to the market.⁶¹

The business court concluded that operating expenses should include gathering, compressing, processing, and transporting expenses; and the Supreme Court agreed. However, the business court failed to provide a remedy on this issue, so the court determined that the Tax Department's interpretation that the regulation includes post-production expenses as part of the annual industry average operating expenses was correct.⁶²

Lastly, the Court concluded that a monetary average was the correct calculation for operating expenses, but that the monetary average should not be calculated as an unlimited percentage deduction for operating expenses.⁶³ The Court found that the language of the regulation plainly contemplated the use of a monetary average and not percentages.⁶⁴

57. *Id.*

58. *Id.*

59. *Id.* at 143.

60. *Id.*

61. *Id.* at 142.

62. *Id.* at 148.

63. *Id.* at 151.

64. *Id.*