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Kentucky Oil and Gas Update

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KENTUCKY OIL AND GAS UPDATE

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I. INTRODUCTION

No major developments occurred in Kentucky case law in the relevant time period of this update. Although areas of law other than oil and gas were the foundation for the ultimate decisions, three Kentucky appellate court opinions that loosely affect the oil and gas industry are discussed hereinbelow: *Kentucky Natural Gas Corp. v. City of Leitchfield ex rel. Its Utilities Commission*,[2] *Yost Energy, LLC v.*

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2. Ky. Natural Gas Corp. v. City of Leitchfield *ex rel.* Its Utility Comm'n, No. 2008-CA-000789-MR, 2011 WL 4501976 (Ky. Ct. App. Sept. 30, 2011).

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Gaines,[3] and *Milam v. Viking Energy Holdings*.[4] Notably, the first two opinions are "not to be published." According to the Kentucky Rules of Civil Procedure, "opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state."[5] However, if there is no published opinion that would adequately address an issue before the Kentucky court of appeals, an unpublished decision rendered after January 1, 2003, may be cited for consideration. Similarly, the third opinion states: "this opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky."

II. Case Law

A. *Interpretation of Gas Purchase Agreements*

In *Kentucky Natural Gas Corp. v. City of Leitchfield ex rel. Its Utilities Commission*,[6] the court of appeals of Kentucky considered certain issues presented on appeal relating to the interpretation of a gas purchase agreement between Kentucky Natural Gas Corporation ("KNG") and the City of Leitchfield by and through its Utility Commission ("City"). Ultimately, the court affirmed the Grayson circuit court's November 29, 2007, entry of judgment nullifying the contract.

On November 17, 2000, City, as buyer, and KNG, as seller, entered into a written gas purchase agreement ("Agreement") for a term of twenty years. The Agreement provided KNG twelve months in which they were to construct gas production and gathering and delivery facilities and begin delivering gas to City, with certain specific requirements for quality, quantity, and price of the gas provided.[7] Additionally, KNG's failure to deliver the minimum quantity of gas for reasons other than *force majeure* would be considered a default, entitling City to cancel the Agreement without notice to KNG.[8] The specific provision at issue provided as follows:

> This Agreement shall only apply to gas delivered to Buyer from the gas field known as the 'Leitchfield Northeast Field,' such field being located to the north and east of Leitchfield, and Buyer shall be expressly permitted, at its option, to purchase gas from certain properties from which Buyer has previously purchased gas from in the 'Shrewsbury Field,' such field being located south of the City of Leitchfield.[9]

3. Yost Energy, LLC v. Gaines, No. 2011-CA-000554-MR, 2012 WL 1649103 (Ky. Ct. App. May 11, 2012).

4. Milam v. Viking Energy Holdings, LLC, 370 S.W.3d 530 (Ky. Ct. App. 2012).

5. Ky. R. Civ. P. 76.28(4)(c).

6. *Ky. Natural Gas Corp.*, 2011 WL 4501976, at *1. This opinion is "not to be published." *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

On November 15, 2002, two days prior to the expiration of the stipulated twelve months, the president of KNG informed City that it would not be able to supply gas from the Leitchfield Northeast Field before the end of such period.[10] As an alternative, KNG requested permission to tie into City's gas main in the Shrewsbury Field to otherwise provide the necessary quantity of gas.[11] City opted to extend the twelve-month period for an additional sixty days and further agreed to purchase gas from the Shrewsbury Field if it met the requirements contained in the Agreement, but only after KNG was supplying gas from the Leitchfield Northeast Field.[12] The construction for the Leitchfield Northeast Field was eventually completed on January 17, 2002; connection was established on February 1, 2002; KNG began supplying gas on February 7, 2002; and City began accepting gas on February 13, 2002.[13]

Subsequently, on February 22, 2002, City detected a leak in the valve in the Leitchfield Northeast Field and informed KNG of the same; KNG inspected the valve but took no corrective action.[14] Consequently, the valve was not reopened, and KNG failed to deliver the agreed-upon quantity of gas from the Leitchfield Northeast Field.[15] However, KNG did maintain sufficient gas deliveries from the Shrewsbury Field.[16] On April 3, 2002, City sent a letter to KNG, asserting that the Agreement was null and void.[17] City then filed a declaratory judgment action on May 30, 2002, seeking a determination that the Agreement was nullified due to KNG's default.[18] KNG counterclaimed and affirmatively pled that, based upon City's decisions to extend the delivery date for sixty days and accept gas from the Shrewsbury Field, the Agreement had been effectively modified.[19] City responded, denying the same.[20]

The circuit court granted summary judgment in favor of City and dismissed KNG's counterclaim, ruling that while City had unilaterally agreed to extend the construction period for sixty days, the Agreement had not been otherwise modified.[21] Emphasizing that the parties disagreed as to whether gas deliveries from the Shrewsbury Field would satisfy the terms of the Agreement, the court found that there was no meeting of the minds, and thus there could be no "mutually

10. *Id.*
11. *Id.*
12. *Id.* at *2.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at *3.

agreed upon modification of the contract."[22] Additionally, the court found that since the proposed modification was not in writing, it did not comport with the statute of frauds.[23] Further, the court held that the offer of substitute gas deliveries was not adequate consideration to support a claim of contract modification.[24] Therefore, KNG's default rendered the Agreement null and void.[25] KNG appealed, alleging (i) the trial court erred in finding the Agreement had not been modified based on the statute of frauds, (ii) summary judgment was improper since there was an issue of fact as to whether KNG was precluded from delivery under *force majeure*, and (iii) the trial court erred in concluding the amendment was not supported by consideration.[26]

In consideration of the foregoing issues, the court of appeals agreed that there was no meeting of the minds as to whether the Agreement had been modified: "[t]here being no mutual assent, there could be no modification of the contract."[27] Noting that while the circuit court's ruling that the statute of frauds precluded the finding of modification was likely correct, such a holding "constituted surplusage and thus, we need not render an opinion as to the correctness of that decision since our holding on this issue renders the argument moot."[28] The court dismissed KNG's argument regarding consideration for the alleged modification on similar grounds.[29]

Turning to the *force majeure* argument, the court cited Black's Law Dictionary for the definition of the term, highlighting that it applies to "causes which are outside the control of the parties and could not be avoided by exercise of due care."[30] KNG and City expanded this definition in the Agreement to include, *inter alia*, "other causes, whether the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome . . . ."[31] Applying the foregoing definition to the facts, the court explained that KNG must have been unable to prevent or overcome such *force majeure*, which impliedly obligated KNG to remedy the situation within a reasonable time, if possible.[32] The court found no support for KNG's claims of *force majeure*, noting that "KNG was aware of the alleged problem with the valve, had the ability to repair the issue, and failed to do

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at *5.
28. *Id.*
29. *Id.* at *7.
30. *Id.* at *5 (citing BLACK'S LAW DICTIONARY 645 (6th ed. 1990)).
31. *Id.* at *6.
32. *Id.*

so."[33] Thus, as there was no contract modification and no *force majeure*, the court affirmed the circuit court's judgment, finding that there were no issues of material fact which would preclude the entry of summary judgment.[34]

B. *Jury Instructions Relating to Lease Obligations*

In *Yost Energy, LLC v. Gaines*, Yost Energy, LLC ("Yost") appealed the Warren circuit court's judgment that certain jury instructions did not conform to the language of the lease in dispute.[35] Ultimately, the court of appeals agreed that the initial jury instruction was erroneous but found that the revised jury instruction was proper.[36]

The appellees, Jerry Gaines and Marilyn Gaines ("Appellees"), owned certain property situated in Warren County, Kentucky.[37] On August 17, 2004, Appellees entered into an oil and gas lease with Yost for said property.[38] The lease included the following language regarding the term thereof:

> It is agreed that this lease shall remain in force for a term of one year from this date and as long thereafter as oil, gas, casing-head gas, casing-head gasoline or any of them is produced from said leased premises or shut-in royalty or rental is paid for the right to inject, store and remove gas in and from the oil and gas strata underlying said premises, as hereinafter provided: or operations for drilling are continued as hereinafter provided.[39]

Additionally, the lease contained the following "completion of drilling" provision:

> If the Lessee shall commence to drill a well within the term of this lease or any extension thereof, the Lessee shall have the right to drill such well to completion with reasonable diligence and dispatch, and if oil and gas, or either of them, be found, this lease shall continue and be in force with like effect as if such well had been completed within the term with Lessee paying rental, royalty, or shut-in royalty payments.[40]

Drilling occurred on Appellees' property January 5, 2005, and production of two and three barrels of oil was obtained.[41] Thereafter production ceased, allegedly due to weather conditions, but later re-

33. *Id.* (noting also that the necessary repairs would have required approximately thirty minutes of labor).
34. *Id.* at *7.
35. Yost Energy, LLC v. Gaines, No. 2011-CA-000554-MR, 2012 WL 1649103, at *1 (Ky. Ct. App. May 11, 2012). This opinion is "not to be published." *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Yost Energy, LLC*, 2012 WL 1649103, at *1.
40. *Id.* at *3.
41. *Id.* at *1.

sumed on November 18, 2005.[42] Yost sent the first royalty check to Appellees in January of 2006 from the sale of oil in December 2005.[43] Appellees returned the check, asserting the lease had expired due to inactivity.[44] Yost brought an action for declaratory judgment on the issue of whether the lease had expired; Yost counterclaimed, alleging its entitlement to compensation for property damage.[45]

At trial, the jury agreed with Yost that the lease had expired but found that Yost was not liable for property damages.[46] The instruction given to the jury said, in relevant part:

> Are you satisfied from the evidence that between August 17, 2004, and August 17, 2005, Plaintiff, Yost Energy, LLC, was pursuing, in good faith and with reasonable diligence, the production of oil and gas under the lease from the Defendants, Jerry "Peanuts" Gaines and Marilyn Gaines?[47]

Yost appealed to the court of appeals, arguing that (i) it was entitled to a directed verdict, (ii) the jury instructions were contrary to the evidence and the language of the lease, and (iii) the trial court erred in not granting its motion for judgment notwithstanding the verdict ("JNOV").[48] A panel of the court of appeals reversed the trial court's decision, agreeing that the jury instructions did not conform to the language of the lease because "the instructions erroneously confined the issues of the completion of drilling *and* the pursuit of production to the primary lease term."[49] The case was then remanded to the circuit court for retrial.

At the second trial, although a slightly different instruction was given to the jury (discussed below), the jury again found that the lease had expired and did not award any damages.[50] Yost filed several motions, including another motion for JNOV, but all were denied.[51] Yost then appealed on two issues. First, Yost claimed the jury instruction was erroneous on several grounds, including that it failed to instruct the jury that (i) the lease would remain in full force and effect if Yost obtained production from the completed well; (ii) the requirement that a well be completed with reasonable diligence and dispatch was only in regards to the initial well in question and not a continued production requirement; and (iii) the lease would have been maintained if Yost were making preparations to commence drilling a subsequent well even if there was insufficient production from the initial well.

42. *Id.*
43. *Id.* at *1, *4.
44. *Id.* at *1.
45. *Id.*
46. *Id.*
47. *Id.* at *3.
48. *Id.* at *1.
49. *Id.* (emphasis added).
50. *Id.* at *2.
51. *Id.*

Additionally, Yost claimed that the trial court did not follow the directions of the court of appeals in drafting the jury instruction.[52] Second, Yost alleged the trial court erred in denying its motions, including its motion for JNOV.[53]

In considering the revised jury instruction in controversy, the court of appeals focused on the following language:

> Are you satisfied from the evidence that Yost Energy, LLC, commenced a well on the Gaines property between August 17, 2004, and August 17, 2005, and thereafter continued to drill the well to completion and pursue the production of oil and gas in good faith and with reasonable diligence and dispatch?[54]

The court explained that the earlier panel had found that the problem with the first jury instruction was that it said both the commencement and the pursuit of production were to take place within the primary term, whereas, according to the language of the lease, the only thing that was required during the primary term of the lease was the commencement of a well.[55] Finding that the revised instruction clearly set forth both the primary term *and* the pursuit of production thereafter as distinct actions which were to occur during separate time periods, the court upheld the revised instruction as proper.[56]

Turning to the arguments regarding the denial of Yost's motions, the court relayed that Kentucky has a public policy which encourages the exploration of oil and gas development.[57] Yost asserted the following application of such policy: once it commenced a well under the lease within the one year primary term, the aforementioned public policy would "save" him when the well was completed within three months of the expiration of the primary term, such that the lease should not have been cancelled for lack of good faith or diligent effort to obtain production.[58] Citing to the previous panel's decision, the court explained that Kentucky also has a strong public policy "against a lessee holding land for an unreasonable length of time simply for speculative purposes, or because of lack of due diligence, where the lessor's only revenue results from royalty payments received from continued production."[59] In the instant case, Yost commenced the well in December of 2004, at which time only a few barrels of oil were obtained and not sold.[60] The well was not completed until November of 2005, after the one-year primary term of the lease had expired.[61]

52. *Id.*
53. *Id.*
54. *Id.* at *4.
55. *Id.* at *3.
56. *Id.*
57. *Id.* at *4.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

Referencing prior cases, the court reiterated that Yost could lose its interest in the lease based upon forfeiture, abandonment, or expiration.[62] Although Yost asserted inclement weather was the cause for delay in completion, the court noted that Yost had worked on wells on adjacent properties during those times.[63] Additionally, there was evidence that Yost was unable to continue production due to financial constraints.[64]

Lastly, the court disagreed with Yost's argument that the Prudent Operator Rule should be applied to its benefit. The Prudent Operator Rule is defined as the "performance of leasehold duties by the operator which conformed to the reasonable standard."[65] The panel that previously addressed Yost's claims stated that there was sufficient evidence to support the jury's finding that Yost had not pursued production with reasonable diligence and good faith.[66] The court agreed and found the foregoing adequate to uphold the jury's verdict that the lease had expired.[67]

C. *Exercising Eminent Domain to Condemn Pipeline Easements*

In *Milam v. Viking Energy Holdings, LLC*, Steven B. Milam and Amy L. Milam (the "Milams") appealed the Warren circuit court's interlocutory judgment relating to the condemnation by Viking Energy Holdings, LLC ("Viking") of a pipeline easement across their property.[68] Ultimately, the court of appeals affirmed the circuit court's ruling in favor of Viking.[69]

Viking was licensed in Kentucky as a gathering line operator pursuant to chapter 805, section 1:190(9) of the Kentucky Administrative Regulations and was engaged in creating a complex, integrated pipeline system for the gathering, transportation, and delivery of natural gas.[70] Viking also professed to be a "common carrier" under chapter 278, section 470 of the Kentucky Revised Statutes ("KRS"), meaning that "its receipt, transportation, and delivery of gas [was] a public use."[71] The parties disputed whether Viking acquired the rights to a pipeline that crossed the Milams' property. The Milams refused Viking access to the property to repair potential leaks in the line. In response, Viking filed a petition for condemnation with the circuit

62. *Id.* (citing Hiroc Programs, Inc. v. Robertson, 40 S.W.3d 373, 377 (Ky. Ct. App. 2000)).
63. *Id.* at *5.
64. *Id.*
65. *Id.* at *4.
66. *Id.*
67. *Id.*
68. Milam v. Viking Energy Holdings, LLC, 370 S.W.3d 530, 531 (Ky. Ct. App. 2012).
69. *Id.* at 536.
70. *Id.* at 531.
71. *Id.*

court under chapter 278, section 502 of the KRS, which provides, in relevant part:

> Any corporation or partnership organized for the purpose of . . . constructing, maintaining, or operating oil or gas wells or pipelines for transporting or delivering oil or gas, including oil and gas products, in public service may, if it is unable to contract or agree with the owner after a good faith effort to do so, condemn the lands and material or the use and occupation of the lands that are necessary for constructing, maintaining, drilling, utilizing and operating pipelines . . . .[72]

Pursuant to Viking's petition, the circuit court appointed commissioners to calculate the fair market value of the easement.[73] The Milams filed exceptions to the amount, in addition to their answer to Viking's petition, wherein they asserted that (i) Viking had not made a good faith offer prior to entering the petition; (ii) Viking did not own the pipeline under their property; and (iii) Viking did not have the right to acquire the easement by eminent domain.[74] Also, the Milams raised the affirmative defense that the easement had terminated and abandoned from non-use and the applicable statute of limitations had expired.[75] A bench trial ensued, the culmination of which was interlocutory judgment in favor of Viking.[76] The Milams appealed, presenting two issues, but only one of which is discussed herein, namely whether Viking had the authority to exercise the power of eminent domain to condemn the pipeline easement.[77]

The above issue centered on the meaning of the phrase "in public service" as used in section 278.502 of the KRS. The Milams stretched the Kentucky Administrative Regulations' distinction between transmission lines and gathering lines for the purpose of licensure to the exercise of the power of eminent domain. Specifically, in order to exercise the power of eminent domain, the Milams argued that for Viking to have been operating "in public service," it must have been operating a *transmission line*.[78] Chapter 805, section 1:190(9) of the Kentucky Administrative Regulations defines a "transmission line" as "a pipeline that is subject to the exclusive jurisdiction of the United States Department of Transportation under 49 C.F.R. Parts 191, 192, 194, and 195."[79] Alternatively, subpart (5) of the same regulation defines a "gathering line" as follows:

> Any pipeline that is installed or used for the purpose of transporting crude oil or natural gas from a well or production facility to the

72. *Id.* at 533.
73. *Id.* at 531.
74. *Id.* at 532.
75. *Id.*
76. *Id.*
77. *Id.* at 531.
78. *Id.* at 534.
79. *Id.* at 535.

> point of interconnection with another gathering line, an existing storage facility or a transmission or main line, including all lines between interconnections, except those lines or portions thereof subject to the exclusive jurisdiction of the United States Department of Transportation under 49 C.F.R. Parts 191, 192, 194 and 195.[80]

Because the pipeline that Viking sought to condemn was a *gathering line*, the Milams contended such pipeline was not operated "in public service" and therefore the exercise of eminent domain was improper.[81] Viking disagreed with the Milams' narrow reading of section 278.502 of the KRS, contending that the Kentucky Assembly chose not to distinguish between transmission lines and gathering lines but rather used the general term "pipeline," and therefore, the court should likewise not distinguish between the two.[82]

The court admitted that, while the General Assembly utilized the general term "pipeline," the Administrative Regulations for the Division of Oil and Gas differentiated between gathering lines and transmission lines.[83] However, despite the dissimilar regulatory treatment, the court found no authority to extend the distinction to section 278.502 of the KRS.[84] Furthermore, the circuit court had concluded in its findings of fact that Viking was a common carrier and that the Milams had failed to meet the burden of establishing the lack of necessity of public use; the Milams did not challenge the court's factual findings, therefore public use had been adequately established and was not addressed by the appellate court.[85] Accordingly, the court upheld the circuit court's ruling that Viking was entitled to exercise the power of eminent domain as a gathering line operator.[86]

III. LEGISLATION

A. *Gas Pipeline Safety: Maximum Penalty for Violations*

On Tuesday, January 3, 2012, House Bill 148 ("HB 148") was introduced, and on Wednesday, March 28, 2012, the Governor signed the same into law.[87] HB 148 amended chapter 278, section 992 of the KRS, which addresses gas pipeline safety.[88] Specifically, in relation to the maximum civil penalty the Public Service Commission may assess for each day the violation persists, HB 148 deleted the previous $25,000 maximum penalty with a threshold of $500,000 for a related series of violations and replaced the same with "the maximum civil

80. *Id.*
81. *Id.* at 534.
82. *Id.*
83. *Id.* at 535.
84. *Id.*
85. *Id.*
86. *Id.* at 536.
87. H.B. 148, 2012 Reg. Sess. (Ky. 2012).
88. *Id.*

penalty as contained in 49 C.F.R. sec. 190.223, as of December 31, 2011, for a violation of any provision of 49 U.S.C. sec. 60101 et seq, or any regulation or order issued thereunder."[89] The foregoing code citations relate to the minimum safety standards adopted by the United States Department of Transportation pursuant to the federal pipeline safety laws and any regulation adopted and filed pursuant to chapter 13A of the KRS by the Public Service Commission governing the safety of pipeline facilities or the transportation of gas, as those terms are defined in the Natural Gas Pipeline Safety Act.[90]

B. *Coal Mine Safety: Drug and Alcohol Testing*

House Bill 385 ("HB 385") was introduced on February 9, 2012, and was signed into law by the Governor on April 11, 2012.[91] HB 385 amended sections 351.120, 351.122, 351.182, 351.183, 351.184, and 351.990 of the KRS, relating to mine safety and the drug testing of employees.[92] HB 385 contained the following amendments, *inter alia*: (a) including "probation" and "final order of the commission" as defined terms of section 351.010 of the KRS;[93] (b) modifying the requirements as to what must be included in a notification to the holder of a certification for violation of drug and alcohol-free status or failure or refusal to submit to a drug and alcohol test;[94] (c) requiring the commissioner of the Department of Natural Resources ("DNR") to impose analogous sanctions against a miner's Kentucky licenses or certifications when notified of a disciplinary action from a reciprocal state against a miner holding corresponding licenses or certifications;[95] (d) changing the urine test from eleven to ten panels, replacing methaqualone with buprenorphine and deleting synthetic narcotics, and allowing the remaining panels to be set by order of the Mine Safety Review Commission no later than June 1 of each year;[96] and (d) establishing penalties for first, second, and third offenses for failing a drug and alcohol test.[97]

Specifically, in regard to the notification discussed in (b) hereinabove, the holder of the certificate must be notified of his right to either (i) appeal the suspension to the Mine Safety Review Commission ("MSRC") within thirty days of the notification, or (ii) notify the commissioner of the DNR or the executive director of the Office of Mine Safety and Licensing ("OMSL") within thirty days that he intends to be evaluated by a medical professional trained in substance

89. *Id.*
90. 49 U.S.C. §§ 60101–60140 (2006).
91. H.B. 385, 2012 Reg. Sess. (Ky. 2012).
92. *Id.*
93. *Id.* § 1(1)(af)–(ag).
94. *Id.* § 2(12)–(14); *see also id.* § 6(3)–(5).
95. *Id.* § 3(2).
96. *Id.* § 4(8).
97. *Id.* § 7(8).

treatment, complete any prescribed treatment, and submit an acceptable result from a drug and alcohol test.[98] Failure to take either of the foregoing actions "shall result in the revocation of all licenses and certifications issued by the [OMSL] for a period of not less than three years, and the holder shall remain ineligible for any other certification issued by the [OMSL] during the revocation period."[99] HB 385 also established certain procedures accompanying a holder's choice to notify the commissioner or executive director, including the timing of the evaluation, treatment, and drug test. The completion of the evaluation, treatment, and submission of an acceptable drug test is considered a first offense.[100] Notably, the option of notifying the commissioner or executive director shall not be included in a notification sent to a miner following his first offense; at that point, his only option is to appeal within thirty days of receipt.[101] Finally, in regard to notifications, HB 385 set forth certain requirements for reissuing licenses; certificates are revoked by the procedures discussed hereinabove.[102]

The relevant penalties HB 385 established for a first offense of failing a drug and alcohol test include probation, suspension, or a combination of both, as well as other conditions and time constraints as ordered by the MSRC; however, if the miner fails to pursue an appeal, all licenses and certifications will be revoked for a period of three years.[103] Licenses and certifications will be reissued upon compliance with the orders of the MSRC.[104] A second offense shall result in the revocation of all licenses and certifications for a period of five years, which may be reissued by (i) compliance with all training and testing requirements, (ii) satisfying the requirements of sections 4 and 5 of the act, and (iii) compliance with all orders of the MSRC.[105] A third offense will "result in the permanent revocation of all licenses and certifications with no possibility of reissuance."[106]

C. *Surface Mining: Disposal and Reclamation*

House Bill 231 ("HB 231"), which proposed amendments to sections 350.450, 440, and 350.410 of the KRS, relating to the disposal of overburden and site reclamation in conjunction with surface coal mining, was introduced on January 9, 2012, and signed into law by the governor on April 11, 2012.[107] HB 231 established the general rule

98. *Id.* § 2(12)(a).
99. *Id.* § 2(12)(b).
100. *Id.* § 2(12)(b), 2(13).
101. *Id.* § 2(14).
102. *Id.* § 2(12)(b).
103. *Id.* § 7(8)(a).
104. *Id.*
105. *Id.* § 7(8)(b).
106. *Id.* § 7(8)(c).
107. H.B. 231, 2012 Reg. Sess. (Ky. 2012).

that "all overburden shall be returned to the mined area to the maximum extent possible," with any remaining overburden to be disposed of within the permitted area or a previously mined area that is eligible for reclamation under the abandoned mine land program.[108] Otherwise, the remaining overburden shall be transported, placed in lifts, and concurrently compacted in an engineered constructed fill.[109] "In no event shall overburden be disposed of in an intermittent, perennial, or ephemeral stream or other water of the Commonwealth."[110] HB 321 further specified that to restore a property to the approximate original contour, both the original configuration of the land as well as the original elevation of the area must be restored to its state prior to the disturbance associated with coal removal.[111] All excess spoil over what is necessary to restore to the approximate original contour must be disposed of in a manner consistent with the above.[112]

108. *Id.* § 1(2)(a).
109. *Id.*
110. *Id.*
111. *Id.* § 3(4).
112. *Id.* § 3(5).