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Virginia Oil and Gas Update

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VIRGINIA OIL AND GAS UPDATE



By: Dan Kostrub & Dominique Ranieri¹

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I. INTRODUCTION

This Update covers the period from August 1, 2011, to July 31, 2012. During this time, the Virginia Legislature has amended and reenacted sections 55-154.2 and 45.1-181 of the Code of Virginia, relating to mineral right ownership and mine voids. During this same time period, Pamela Meade Sargent, United States Magistrate Judge for the United States District Court for the Western District of Virginia, Abingdon Division, addressed two cases regarding ownership of coalbed methane and the necessity to join coal owners as parties.

II. LEGISLATIVE ACTIVITY

House Bill No. 710 was introduced November 11, 2012, and signed by the Governor April 9, 2012.² The act amends and reenacts sections 45.1-181 and 55-154.2 of the Code of Virginia. Section 45.1-181

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2. H.B. 710, Ch. 695, 2012 Reg. Sess. (Va. 2012) (codified at VA. CODE ANN. § 55-154.2 (Westlaw through 2012 Reg. Sess. and 2012 Sp. Sess. I)).

explains the application and fee requirements to receive a permit to engage in any mining operation in Virginia.³ Section 55-154.2 underwent significant changes relating to the presumption regarding the owner of mineral rights.

A mine void is the shell, container chamber, passage, and space opened underground for the removal of minerals.⁴ Subsection A of reenacted section 55-154.2 of the Code of Virginia states, “[e]xcept as otherwise provided in the deed by which the owner of minerals derives title, the owner of minerals shall be presumed to be the owner of the [mine void], with full right to haul and transport minerals from other lands and to pass men, materials, equipment, water and air through such space.”⁵

Subsection B provides, notwithstanding subsection A or contracted otherwise by the instrument creating the mineral ownership or lease interest,

with respect to the coal mineral estate . . . the owner or, if leased, the lessee of the coal mineral estate or its successor, assign, sublessee, or affiliate retains the right to any coal remaining in place after the removal of surrounding coal, as well as the right to use the shell, container chamber, passage, space, or void opened underground that was created by the removal of the coal.⁶

Also, any void opened underground⁷ may be used for any activity related to the removal of coal from any lands for which a permit to mine coal has been approved (consistent with state and federal regulations).⁸ Even if the void has been sealed and a permit no longer exists, the void may be used to retrieve coal from other permitted lands with consent of the owner.⁹

Subsection C expressly states that subsection B shall not affect any contract entered into or in effect before July 1, 2012, and “shall have no bearing on or application to any determination of ownership rights in natural gas or coalbed methane.”¹⁰

3. There were no substantial changes made to this section other than renumbering.

4. H.B. 710, 2012 Reg. Sess. (Va. 2012).

5. VA. CODE ANN. § 55-154.2(A) (Westlaw through 2012 Reg. Sess. and 2012 Sp. Sess. I) (“The provisions of this subsection shall not affect contractual obligations and agreements entered into prior to July 1, 1981.”).

6. *Id.* § 55-154.2(B).

7. *Id.* § 55-154.2(B)(1) (“That is within the boundaries of a mine permit issued under Title 45.1.”).

8. *Id.*

9. *Id.* § 55-154.2(B)(2) (“Such consent shall not be unreasonably withheld if the owner has been offered reasonable compensation for such use. In determining whether an offer of compensation is reasonable, a court shall be guided by the compensation set forth in other leases for the use of mine voids as is customary in the area.”).

10. *Id.* § 55-154.2(C).

III. CASE LAW

A. Adkins v. EQT Production Company

In a suit on behalf of herself and others similarly situated, Eva Mae Adkins (“Adkins”) petitioned the court for leave to file an amended complaint, which no longer listed the coal owners as parties to the case.¹¹ The amended complaint “allege[d] that Adkins and the class members own[ed] certain gas estate interests in coalbed methane (“CBM”) gas fields . . . and [were] entitled to payments from EQT Production Company (‘EQT’) as lessors under voluntary leases of their gas estate rights.”¹² Most importantly, Adkin’s amended complaint contained a request for declaratory judgment (the “Motion”) declaring that:

[b]ecause a conveyance, reservation, or exception of coal does not include CBM as a matter of law, no CBM ownership conflict exists as a matter of law as between (i) a person owning gas estate interests in a CBM Unit tract, and (ii) a different person owning coal estate interests and not gas estate interests in the CBM Unit tract[.]¹³

EQT argued that the court should deny the Motion because the amendment would be futile—coal owners are indispensable parties—and the relief requested could not be granted as a matter of law.¹⁴

Based on the Virginia Supreme Court’s decision in *Harrison-Wyatt, LLC v. Ratliff*, CBM “[is] a separate, severable mineral estate and a grant of coal rights [does] not include the rights to CBM.”¹⁵ The Court held that the Motion would not be futile and that it was possible the relief requested could be granted in the absence of the coal owners.¹⁶ The Court further held that

there is no merit to EQT’s argument that the proposed amendment would be an improper collateral attack on the Board’s pooling orders. The Amended Complaint simply seeks a ruling that Adkins and the proposed class members are entitled to the escrowed funds from the forced-pooled CBM wells. The Gas Act at § 45.1-361.22(5) specifically requires such a ruling before the Board may order the release of escrowed funds.¹⁷

11. *Adkins v. EQT Prod. Co.*, No. 1:11cv00031, 2012 U.S. Dist. LEXIS 43171, at *4 (W.D. Va. Mar. 28, 2012).

12. *Id.*

13. *Id.* at *17–18.

14. *Id.* at *21.

15. *Harrison-Wyatt, LLC v. Ratliff*, 593 S.E.2d 234, 235, 238 (Va. 2004).

16. *Adkins*, 2012 U.S. Dist. LEXIS 43171, at *26–27.

17. *Id.* at *35.

B. Adair v. EQT Production Company

In a suit nearly factually identical to *Adkins*, Plaintiff Robert Adair (“Adair”) petitioned the court for leave to file a second amended complaint, which no longer listed the coal owners as parties to the case.¹⁸ The second amended complaint sought judgment that, as between the gas estate owners and the coal estate *only* owners, the gas estate owners were entitled to the CBM proceeds and further requested the court to enter judgment that Adair and the class members were entitled to any CBM royalties escrowed by EQT.¹⁹

After identical analysis, the court held that it was possible the relief requested could be granted in the absence of the coal owners and that it could not determine, as a matter of law, that “coal owners only” are required parties for the relief sought by the second amended complaint.²⁰ Therefore, the court could not find that amending the complaint to dismiss them would be futile.²¹

18. *Adair v. EQT Prod. Co.*, No. 1:10cv00037, 2012 U.S. Dist. LEXIS 42636, at *3 (W.D. Va. Mar. 28, 2012) (“This court previously granted EQT’s motion and dismissed Adair’s claims for 8/8ths of the net proceeds from these wells, seeking a declaratory judgment that the Gas Act is unconstitutional, for negligence in EQT’s voluntary undertaking of identifying CBM interests and for attorneys’ fees. Adair’s counsel agreed that the court’s prior rulings on these issues would control and prevent the need for EQT’s counsel to file its motions to dismiss these claims once again.”).

19. *Id.* at *24–25.

20. *Id.* at *31–33.

21. *Id.*