1-1-2022

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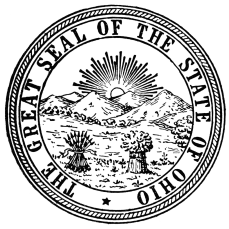
Recommended Citation

Ross H. Pifer and Chloe J. Marie, *Appalachian Basin--Pennsylvania, West Virginia, and Ohio -- Oil and Gas Developments*, 8 *Tex. A&M J. Prop. L.* 255 (2022).



APPALACHIAN BASIN–PENNSYLVANIA, WEST VIRGINIA, AND OHIO–OIL AND GAS LAW DEVELOPMENTS

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DOI: https://doi.org/10.37419/JPL.V8.I3.2

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This article addresses oil and gas case law developments that have occurred within the Appalachian Basin's primary oil and gas producing states of Pennsylvania, West Virginia, and Ohio during 2021 by reviewing opinions issued by the highest appellate courts within each of these three states. The oil and gas law topics addressed by these state supreme courts during 2021 have ranged from those occurring upstream, such as leasing, to those occurring downstream, such as approval of a utility rate increase for the extension of a natural gas pipeline.

I. PENNSYLVANIA SUPREME COURT

A. *Application of State Consumer Protection Law to Oil and Gas Leases*

In *Commonwealth v. Chesapeake Energy Corporation*, the Pennsylvania Supreme Court held that the Pennsylvania Office of Attorney General ("OAG") could not utilize the state's Unfair Trade Practices and Consumer Protection Law ("UTPCPL") to pursue legal remedies against an oil and gas lessee.[1]

The Pennsylvania OAG filed suit against two natural gas companies, Anadarko Petroleum Corporation ("Anadarko") and Chesapeake Energy Corporation ("Chesapeake"), on behalf of private landowners alleging "unfair methods of competition and unfair or deceptive acts or practices" in the companies' handling of royalty payments, in violation of section 3 of the UTPCPL.[2] The OAG alleged that certain joint venture and market allocation agreements entered between Anadarko and Chesapeake were illegal as they hindered what should have been a fair and competitive royalty system. Additionally, the OAG alleged

1. 247 A.3d 934, 950 (Pa. 2021).
2. *Id.* at 938.

that Anadarko engaged in unfair methods of competition and unfair or deceptive acts and practices within the joint venture.[3]

Anadarko filed preliminary objections, arguing that the UTPCPL applied only to sellers in consumer transactions. Thus, Anadarko asserted that the UTPCPL claims were "legally insufficient" because Anadarko had not sold anything.[4] To the contrary, according to Anadarko, it had been in the position of a purchaser when it acquired mineral rights through the oil and gas leases.[5]

The Court of Common Pleas of Bradford County overruled Anadarko's preliminary objections and found that acquiring mineral rights qualifies as "trade and commerce" as spelled out in section 2(3) of the UTPCPL[6] because the acquisition of an oil and gas lease constitutes a "distribution of services" as well as "any trade or commerce."[7] The Court of Common Pleas also concluded that the anticompetitive conduct claims filed against Anadarko under the UTPCPL were "sufficient to survive a demurrer."[8]

On appeal, the Commonwealth Court affirmed in part and reversed in part the trial court's order.[9] Regarding the OAG's authority to pursue UTPCPL violations against an oil and gas lessee, the Commonwealth Court affirmed.[10] The court noted that oil and gas leases were the equivalents of sales because landowners transferred ownership of their natural gas rights to Anadarko for money.[11] In addition, the court pointed out that section 2(3) of the UTPCPL sets out "two distinct and independent clauses" and that the second clause gives a broader interpretation of the terms "trade" and "commerce."[12] As a result, the court concluded that these terms include the "buying and selling" of commodities as per the definitions of "trade" and

3. *Id.*
4. *Id.* at 938–39.
5. *Id.* at 939.
6. *Id.* at 934, 937. 73 P.S. § 201-2(3) provides that "'Trade' and 'Commerce' mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth."
7. *Chesapeake Energy Corp.*, 247 A.3d at 939.
8. *Id.*
9. *Id.* The trial court certified two questions for appeal: 1) "whether the OAG may bring claims under the UTPCPL in this case"; and 2) "whether the OAG's antitrust allegations are cognizable under the UTPCPL 'catchall' provision in Section 2(4)(xxi)."
10. *Id.*
11. *Id.* at 939–40.
12. *Id.* at 940.

"commerce" set out in the Merriam-Webster's Dictionary and found section 2(3) to be a "catch-all" provision.[13]

With regard to the antitrust claim, the Commonwealth Court concluded that antitrust violations could lead to UTPCPL actions if the violation "fit[s] within one of the categories of behavior deemed, by rule or in the Law itself, 'unfair methods of competition' or 'unfair or deceptive acts or practices.'"[14] The court, however, found that the alleged "conduct generally impairing competition" did not fit into one of those categories.[15]

The Pennsylvania Supreme Court granted a Petition for Allowance of Appeal, and on March 24, 2021, the Court ruled that the UTPCPL did not provide authority for the OAG to file suit "against Anadarko for its alleged unfair and deceptive practices in acquiring natural gas leases from the landowners."[16] Based on the definitions of "trade" and "commerce" in section 2(3), the Court determined that it was the intent of the legislature for section 3 to cover "only acts of selling . . . even though the ordinary meaning of those terms signifies both buying and selling goods" and that the Commonwealth Court had failed to recognize "the specialized legislative definition of trade and commerce" by discarding the first part of section 2(3) and adopting a common definition of these terms.[17] The Supreme Court added that the legislature would not have bothered to define the terms "trade" and "commerce" in the first part of section 2(3) if it wanted those terms to have a common meaning.[18]

The Supreme Court also found that the Commonwealth Court had not appropriately applied Pennsylvania Supreme Court precedent interpreting the UTPCPL.[19] In one such case, *Commonwealth v. Monumental Properties*, the Supreme Court had ruled that the UTPCPL

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 950.
17. *Id.* at 946.
18. *Id.* at 947.
19. *Id.* at 947–48. *See* Commonwealth v. Monumental Props., Inc., 329 A.2d 812 (Pa. 1974); *see also* Danganan v. Guardian 179 A.3d 9 (Pa. 2018). In *Danganan*, the Supreme Court ruled that the second part of Section 2(3) did "not modify or qualify the preceding terms. Instead, it was appended to the end of the definition and prefaced by 'and includes,' thus indicating an inclusive and broader view of trade and commerce than expressed by the antecedent language." In the case at hand, the Supreme Court found that the Commonwealth Court did not properly understand their decision, in that it "the Danganan Court said it was "'inclusive,' i.e., included the first part, and 'broader' in that it applied to conduct 'directly or indirectly affecting the people of this Commonwealth.'"

applied to a residential lease situation because the "tenants are in every meaningful sense [the] consumer."[20] The Commonwealth Court had expanded this ruling in the case at bar to include oil and gas leasing situations.[21] The Supreme Court reiterated its conclusion that the UTPCPL protected only consumers and purchasers. In this oil and gas lease, however, Anadarko was the purchaser and the landowners were the sellers.[22]

Consequently, the Supreme Court concluded that Anadarko did not engage in "the advertising, offering for sale, sale or distribution" of any product because the company merely acquired mineral rights, making it a buyer, and that section 3 of the UTPCPL did not apply to buyers in commercial transactions, only to sellers.[23] Regarding the antitrust claim, the Supreme Court determined that since the OAG was not entitled to bring claims against Anadarko under the UTPCPL, the issue about the admissibility and use of antitrust remedies in this case was moot.[24]

B. *Application of Equitable Doctrine of Abandonment to Oil and Gas Lease*

In *SLT Holdings, LLC, v. Mitch-Well Energy, Inc.*, the Pennsylvania Supreme Court refused to apply the equitable doctrine of abandonment if the contractual remedies contained in the oil and gas lease provided an adequate remedy at law.[25]

SLT Holdings, LLC, ("SLT") was the lessor on oil and gas leases that were held by Mitch-Well Energy, Inc., ("Mitch-Well") as the lessee.[26] The leases—upon two separate parcels—had been granted in 1985, and one well was drilled on each parcel.[27] The wells produced in paying quantities until 1996, but no additional production occurred nor were any payments made after that time.[28] In 2013, SLT filed a complaint in equity against Mitch-Well, alleging that Mitch-Well had abandoned its oil and gas rights as a result of its inaction.[29]

20. 329 A.2d at 826.
21. *Id.* at 830.
22. *Chesapeake Energy Corp.*, 247 A.3d at 947.
23. *Id.* at 948.
24. *Id.* at 950.
25. 249 A.3d 888, 890 (Pa. 2021).
26. *Id.*
27. *Id.*
28. *Id.* at 891.
29. *Id.*

SLT filed a motion for partial summary judgment, seeking injunctive relief and damages for conversion as well as a court declaration that Mitch-Well no longer held oil and gas rights on the property.[30] The Court of Common Pleas of Warren County granted SLT's motion for partial summary judgment in 2018, relying on precedent established in *Jacobs v. CNG Transmission Corp.*[31] and *Aye v. Philadelphia Co.*[32] to support abandonment of the leases.[33] The Court of Common Pleas contended that Mitch-Well's "lack of further drilling, its cessation of production for 16 years from the single wells it did drill on each lot, its failure to make required payments in lieu of royalties, its removal of equipment, and its closing of its business bank account all raised a presumption of abandonment."[34]

On appeal to the Pennsylvania Superior Court, Mitch-Well contended that there were genuine issues of material facts that should have precluded the grant of summary judgment.[35] Mitch-Well asserted that SLT did not provide any opportunity for notice and cure as required by the terms of the lease agreements and that the lease agreements provided for the lessee to retain an interest in certain acreage around each completed well in the case of an uncured breach.[36] The Superior Court affirmed the trial court's decision.[37]

On April 29, 2021, the Supreme Court of Pennsylvania reversed the Superior Court's decision and remanded the case for further proceedings.[38] In so ruling, the Supreme Court held both lower courts missed an "essential initial step" in carrying out their analysis as to whether the application of an equitable remedy was appropriate.[39] Specifically, the Court opined that it would not grant equitable relief if there was an adequate legal remedy.[40] The Court found that "[b]ecause [lessors] had available to them a full and adequate remedy at law, through contract principles generally applicable to oil and gas leases, and through the specific provisions of the subject leases, . . . it was error to provide recourse through application of the equitable

30. *Id.* at 891–92.
31. 332 F. Supp. 2d 759 (W.D. Pa. 2004).
32. 44 A. 555 (Pa. 1899).
33. *SLT Holdings, LLC*, 249 A.3d at 892–96.
34. *Id.* at 893–94.
35. *Id.* at 892.
36. *Id.* at 892, 897.
37. *Id.* at 892.
38. *Id.* at 888, 897.
39. *Id.* at 894.
40. *Id.* at 897.

doctrine of abandonment."[41] Although the Court did not rule on the substantive issue of whether abandonment had occurred, the Court did note that "abandonment is the result of intention of the challenged party, not that party's non-performance."[42]

C. *Interpretation of Pennsylvania's Environmental Rights Amendment*

In *Pennsylvania Environmental Defense Fund v. Commonwealth*, the Pennsylvania Supreme Court rendered an opinion addressing the proper use of proceeds from oil and gas leases on state forest and game lands.[43] In 2012, the Pennsylvania Environmental Defense Foundation ("PEDF") filed suit against the Commonwealth of Pennsylvania challenging the constitutionality of legislative amendments to the Fiscal Code that allowed the Commonwealth to move money received through the leasing of state forest and game lands for oil and gas extraction from the Oil and Gas Lease Fund to the Pennsylvania General Fund.[44] According to PEDF, these amendments violated the Environmental Rights Amendment ("ERA") in Article I, Section 27 of the Pennsylvania Constitution.[45]

In an earlier landmark decision issued in this same case, the Supreme Court affirmed that the ERA is a constitutional public trust subject to private trust law.[46] As a result, the Court concluded that royalties derived from natural gas sold and extracted from leased state-owned lands represented a sale of trust assets that the state was required to return to the trust corpus.[47] Thus, the transfer of these funds to the Pennsylvania General Fund was improper.[48] The Court, however, did not rule at that time whether bonus payments, delay rental payments, and interest penalties for late payments also represented a sale of trust assets and remanded the case to the Commonwealth Court for consideration of that question.[49]

On remand, the Commonwealth Court held in 2019 that bonus payments, delay rental payments, and interest penalties for late

41. *Id.* at 890.
42. *Id.* at 895.
43. 255 A.3d 289 (Pa. 2021).
44. *Id.* at 289, 292.
45. *Id.* at 292.
46. Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 916 (Pa. 2017).
47. *Id.* at 937–38.
48. *Id.* at 939.
49. *Id.* at 935–36.

payments were income.[50] Because these sources of income did not originate from a sale of trust assets, the state did not have to return them to the trust corpus.[51] Furthermore, the court noted that the state could deposit this income into the General Fund and then distribute it among Pennsylvania citizens, as life tenants, and future generations, as remaindermen, in conformity with a 1947 statute providing for income distribution schemes.[52] According to this statute, the state must distribute one-third (1/3) of royalty revenues for non-trust purposes and return two-thirds (2/3) to the trust corpus.[53]

In its decision on appeal, the Supreme Court agreed with the Commonwealth Court's conclusion that bonus payments, delay rental payments, and interest penalties for late payments were income derived from trust assets.[54] The Court, however, ruled that the Commonwealth Court's application of the 1947 statute and its analysis of income distributions to life tenants and remainderman beneficiaries was completely inapposite to the current case.[55] Based upon the plain language of the ERA and private trust principles, the Supreme Court reversed the Commonwealth Court's decision and reiterated the principle that income derived from the oil and gas sold and extracted from leased state-owned lands is part of a constitutional public trust, and, as such, the state must return to the trust corpus.[56] Accordingly, it was improper for the state to remove bonus payments, delay rental payments, and interest penalties for late payments from the Oil and Gas Lease Fund.[57]

D. *Eminent Domain Claim for Natural Gas Storage Buffer Zone*

In *Hughes v. UGI Storage Co.*, the Pennsylvania Supreme Court ruled that it is not necessary for a pipeline company to have eminent domain authority over a specific property in order to be liable for an inverse condemnation claim.[58] Rather, the fact that the entity has

50. Pa. Env't Def. Found. v. Commonwealth, 214 A.3d 748, 774 (Pa. Commw. Ct. 2019).
51. *Id.*
52. *Id.*
53. *Id.*
54. Pa. Env't Def. Found. v. Commonwealth, 255 A.3d 289, 314 (Pa. 2021).
55. *Id.* at 309.
56. *Id.* at 314.
57. *Id.*
58. 263 A.3d 1144 (Pa. 2021).

eminent domain authority generally is sufficient for a party to assert such a claim.[59]

UGI Storage Company ("UGI") acquired a 1,216-acre underground natural facility—referred to as the Meeker storage field—and applied for a certificate of public convenience and necessity with the Federal Energy Regulation Commission ("FERC").[60] As part of its application, UGI proposed to create a 2,980-acre buffer zone area surrounding the Meeker storage field.[61] The property in question, owned by Hughes is within the proposed buffer zone.[62] FERC partially granted UGI's application but denied certification of portions of the proposed buffer zone as UGI did not have the necessary property rights for parcels—including the Hughes parcel—in that area.[63] FERC, however, did certify those portions of the proposed buffer zone for which UGI held pre-existing mineral rights.[64]

Hughes filed a lawsuit against UGI, alleging a *de facto* condemnation of their property.[65] Hughes asserted that UGI applied for federal certification of a buffer zone with the aim of preventing oil and gas extraction around the Meeker storage field and that, despite their property not being part of the certified buffer zone, "[UGI's] actions and statements relative to the proposed buffer zone 'were sufficient to prevent oil and gas exploration and production companies from seeking to exploit the land located in the Meeker Buffer Zone for oil and gas.'"[66] Hughes argued that they were unable to gain profit from the extraction of natural gas underneath their property.[67] UGI countered that "to be liable for a *de facto* taking, an entity must possess the power of eminent domain relative to the plaintiffs' property" and that it was not afforded eminent domain authority following FERC's denial of their certificate application for portions of the proposed buffer zone.[68]

The Court of Common Pleas accepted UGI's argument, citing *Gentle v. Blair County Convention & Sports Facilities Authority*, for the proposition that "[a] *de facto* taking occurs when an entity *clothed with the power of eminent domain* has substantially deprived a

59. *See id.* at 1157.
60. *Id.* at 1145.
61. *Id.* at 1145–46.
62. *Id.* at 1146.
63. *Id.*
64. *Id.* at 1150.
65. *Id.* at 1148.
66. *Id.* at 1149.
67. *Id.* at 1150.
68. *Id.* at 1150–51.

property owner of the beneficial use and enjoyment of his property."[69] Since UGI Storage was vested with the power of eminent domain only for the Meeker storage field and portions of the buffer zone area not including the Hughes parcel, the court determined that a *de facto* taking claim could not be supported.[70] The Commonwealth Court affirmed this ruling, stating that UGI lacked federal certification to exercise eminent domain powers over the Hughes' property.[71]

On appeal before the Supreme Court, Hughes argued that the lower court ruling "provides a playbook for how public utilities like UGI [Storage] can enjoy the full benefits and protections of a buffer zone without providing any compensation to affected landowners."[72] Ruling in favor of Hughes, the Supreme Court observed that the Eminent Domain Code does not establish a requirement of a property-specific eminent domain power in this instance, stating specifically that "a public or quasi-public entity need not possess a *property-specific* power of eminent domain in order to implicate inverse condemnation principles."[73]

II. WEST VIRGINIA SUPREME COURT OF APPEALS

A. *Acceptance of Estimated Just Compensation in Eminent Domain Proceeding*

In *Scherich v. Wheeling Creek Watershed Prevention & Flood Prevention Commission*, the West Virginia Supreme Court of Appeals ruled that a landowner had a right to pursue just compensation proceedings in an eminent domain case even though the landowner had accepted the payment of estimated just compensation proffered by the government 27 years earlier.[74]

In 1990, the Wheeling Creek Watershed Protection and Flood Prevention Commission ("Commission") pursued a condemnation action under West Virginia Code section 54-2-14a, referred to as the state quick-take statute, against the Scherichs to acquire two parcels of their lands, including oil and gas rights, for the construction of a

69. Genter v. Blair Cty. Convention & Sports Facilities Auth., 805 A.2d 51, 55 (Pa. Commw. Ct. 2002).

70. *Hughes*, 263 A.3d at 1154.

71. *Id. See also* Hughes v. UGI Storage Co., 243 A.3d 278, 289 (Pa. Commw. Ct. 2020).

72. *Hughes*, 263 A.3d at 1155.

73. *Id.* at 1158.

74. Scherich v. Wheeling Creek Watershed Prot. & Flood Prevention Comm'n, 855 S.E.2d 912 (2021).

dam.[75] The Commission offered compensation in the amount of $97,000.00, which the Scherichs rejected.[76] Nevertheless, the circuit court agreed to the "quick take" of the land parcels and allowed the Commission to deposit the estimated compensation amount with the circuit clerk.[77] As a result, the Commission held a defeasible title until the court could resolve the compensation issue.[78]

In 1991, the Scherichs petitioned to receive the estimated just compensation, and the Commission paid them the deposited amount plus appropriate interest.[79] No further proceedings occurred in the matter until October 2018 when the Scherichs filed a Motion for Further Proceedings to Determine Just Compensation.[80] The circuit court, however, dismissed *sua sponte* the condemnation action during a status hearing.[81] The circuit court stated that the fact that the Scherichs accepted the estimated just compensation provides "sufficient proof of accord and satisfaction such that [the Scherichs] have no further right or claim to this matter."[82]

On appeal, the West Virginia Supreme Court of Appeals reversed the circuit court's decision and remanded the case for further proceedings.[83] Recalling the notice and opportunity portion of West Virginia Rule of Civil Procedure 41(b),[84] the Supreme Court of Appeals explained that the circuit court "neither gave notice of its intent to dispose of this matter nor afforded Petitioners the opportunity to address the grounds upon which the circuit court was considering for dismissal."[85]

In addition, the Court noted that the lower court drew certain conclusions based on "substantive errors," including the determinations that it was the responsibility of the Scherichs to finalize the condemnation proceedings and that accord and satisfaction barred their claims.[86] The Court found that the condemning authority bears the burden of concluding a condemnation action and that "[a] person

75. *Id.* at 914.
76. *Id.* at 914–15.
77. *Id.* at 914.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 921.
84. *Id.* at 916 ("Before a court may dismiss an action under Rule 41(b) notice and an opportunity to be heard must be given to all parties of record.").
85. *Id.* at 917.
86. *Id.* at 917–21.

entitled to proceeds of a condemnation action filed pursuant to West Virginia Code section 54-2-14a (1981) has the legal right to accept the condemning authority's estimate of just compensation without prejudicing such person's right to challenge that amount."[87] Because the burden was on the government to move the condemnation action forward, the 27 year delay in action did not preclude the landowners from pursuing their claim.[88]

The Court, however, did conclude that the circuit court had properly addressed the issue of public use raised by the Scherichs.[89] The Scherichs argued that the Commission did not need to take their oil and gas rights for the dam project and that its action "exceeded the land needed for public use."[90] The circuit court held that "for the purposes mentioned in [the condemnation] Petition . . . the lands sought to be acquired in this proceeding are necessary for [the Commission's] use for the purposes aforesaid and are not in excess of the quantity reasonably necessary for such purposes."[91]

B. *Application of "Stranger to the Deed" Rule to Rights of First Refusal*

In *Klein v. McCullough*, the West Virginia Supreme Court of Appeals ruled that the "stranger to the deed" rule did not apply to rights of first refusal.[92] Courts have described the "stranger to the deed" rule as applied in West Virginia as meaning that "[a] reservation or an exception in favor of a stranger to a conveyance does not serve to recognize or confirm a right which does not exist in his favor when the conveyance which contains such reservation or exception is made."[93] The court in *Klein*, however, indicated a possible inclination to abolish the rule entirely.[94]

In 1995, Julia McCullough transferred to her son, Benjamin McCullough, ownership of a parcel of land, including the oil and gas rights that existed beneath the property.[95] The deed included a "right of first refusal" clause, requiring Benjamin McCullough to offer Lanna Klein, his sister and a third party to the deed, the right of first

87. *Id.* at 921.
88. *Id.* at 918–19.
89. *Id.* at 918.
90. *Id.* at 917.
91. *Id.* at 918.
92. Klein v. McCullough, 858 S.E.2d 909, 912 (W. Va. 2021).
93. Erwin v. Bethlehem Steel Corp., 62 S.E.2d 337, 338 (W. Va. 1950).
94. *Klein*, 858 S.E.2d at 916.
95. *Id.*

refusal to buy the property.[96] Upon his death in 2010, Benjamin McCullough's wife, Darlene McCullough, inherited the entire estate, including the subject parcel. Darlene McCullough subsequently sold the property without regard to the right of first refusal clause.[97] Lanna Klein sued her sister-in-law, asking for the court to enforce the "right of first refusal" clause.[98]

Darlene McCullough alleged that Lanna Klein was a "stranger" to the deed and thus had no right of first refusal.[99] The Circuit Court of Tyler County accepted this argument, ruling in favor of Darlene McCullough and rendering the right of first refusal in the deed "void, inoperative," and unenforceable.[100]

Lana Klein appealed the circuit court's order to the Supreme Court of Appeals, claiming that the circuit court was wrong in applying the "stranger to the deed" rule to a right of first refusal.[101] She argued that "a reservation or exception in a deed refers to an interest that touches the land, while a right of first refusal exists separate from the land and is simply a contractual right to receive an offer."[102] Thus, she contended that the circuit court erred in applying the "stranger to the deed" rule to rights of first refusal as the rule should apply only to reservations and exceptions.[103]

The Court agreed with Lana Klein's argument, stating that a right of first refusal is indeed a contractual and preemptive right.[104] Because preemptive rights are different from reservations and exceptions, the Court concluded that the "stranger to the deed" rule does not apply to rights of first refusal.[105] Accordingly, the Supreme Court of Appeals reversed the circuit court's decision and remanded the case for further proceedings.[106]

C. *Validity of Tax Sale Following Duplicative Tax Assessment*

In *Orville Young, LLC v. Bonacci*, the West Virginia Supreme Court of Appeals ruled that a deed for property sold at a tax sale was

96. *Id.* at 912.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 913.
101. *Id.*
102. *Id.*
103. *Id.* at 914.
104. *Id.*
105. *Id.* at 915.
106. *Id.* at 916.

void where the property had been the subject of two tax assessments, one of which had been paid as required.[107]

In 1906, Albert Schenk acquired a tract of farmland that was over 500 acres in size.[108] In 1919, he executed an oil and gas lease for 202 acres underlying this tract.[109] These real property interests passed from Albert Schenk through successive generations, and at the time of the litigation his great-great-grandsons, Frank and Brian Bonacci, owned 162.78 acres of the portion of the parcel subjected to the 1919 oil and gas lease.[110]

In 1935, an assessor erroneously assessed based upon a severance of a fractional mineral estate from the surface interest, resulting in two assessments: one for the entire estate of more than 500 acres and another one for the oil and gas leasehold interests underlying the 202-acre surface.[111] The Bonacci's predecessors paid the tax for the entire estate but not for the duplicate assessment of the oil and gas leasehold interest.[112] Consequently, the assessor declared the taxes owed on the oil and gas leasehold interests delinquent, and the oil and gas interests were later sold in 1949 at a tax sale.[113] These same oil and gas interests also were sold at a tax sale in 1995, again based upon the nonpayment of the duplicate assessment.[114] Orville Young, LLC and Rolaco, LLC (collectively referred to as "Orville Young") claimed ownership of the oil and gas rights based upon a purchase at the 1995 tax sale, and the Bonaccis filed suit to quiet title of the oil and gas rights.[115]

The Circuit Court of Marshall County found the two assessments to be "duplicative" because there had never been a severance of the 202-acre tract from the larger tract.[116] Therefore, the circuit court ruled that the 1949 tax sale was invalid and that the Bonaccis were the owner of the oil and gas rights.[117] Orville Young appealed the circuit court's ruling to the West Virginia Supreme Court of Appeals, arguing that the tax sales were valid because the taxes had not been paid on the separately assessed oil and gas interests.[118]

107. 866 S.E.2d *91, *100–01 (W. Va. 2021).
108. *Id.* at *94–95.
109. *Id.* at *95.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at *95–96.
114. *Id.* at *96.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at *97.

On November 18, 2021, the West Virginia Supreme Court of Appeals upheld the circuit court's decision that the tax deeds were void.[119] The Court first observed

> when a single landowner owns both the surface and the subjacent mineral estate in a parcel of property and such mineral estate has not been severed from the surface, the property should be assessed as a single, whole unit and not as separate assessments for the surface estate and the mineral estate.[120]

The court then cited precedent ruling that "[i]n case of two assessments of the same land, under the same claim of title, for any year, one payment of taxes, under either assessment, is all the State can require."[121] The Court also interpreted West Virginia Code section 11-4-9 as meaning that one's undivided interest in the surface and mineral estate of a single property cannot be subject to more than one tax assessment.[122] Since the Bonaccis or their predecessors had always paid the tax on the entire estate in one full payment every year, the government was not entitled to receive any additional tax payments.[123] Thus, there had never been delinquency, and the Court found the tax sale invalid.[124]

III. OHIO SUPREME COURT

A. *Interpretation of Ohio Marketable Title Act*

In *Erickson v. Morrison*, the Ohio Supreme Court ruled that referencing a preexisting mineral interest in a recorded title transaction is sufficient to preserve the interest under the Marketable Title Act even if it does not state the record owner's name.[125]

In 1926, James and Rose Logan conveyed the surface rights of their property to Edward and Alta Riggs but retained the mineral rights underlying the property.[126] Thereafter, ownership of the surface rights was conveyed several times throughout the years, each time with the

119. *Id.* at *101.
120. *Id.* at *98.
121. State v. Allen, 64 S.E. 140, 140 (W. Va. 1909).
122. *Orville Young*, 866 S.E.2d at 99.
123. *Id.* at 100–01.
124. *Id.* at 101.
125. Erickson v. Morrison, 176 N.E.3d 1 (Ohio 2021).
126. *Id.* at 2–3 ("Excepting and reserving therefrom all coal, gas, and oil with the right of said first parties, their heirs and assigns, at any time to drill and operate for oil and gas and to mine all coal.").

mention of the 1926 deed and mineral rights reservation language.[127] The widower James Logan conveyed ownership of the mineral rights to C.L. Ogle in 1941.[128] In 2017, the heirs of Ogle filed a quiet title action, seeking a court declaration that they have ownership of the mineral rights to the land.[129] The current surface right owners, Paul and Vesta Morrison, asserted that the reservation of the mineral rights "had been extinguished under Ohio's Marketable Title Act or, alternatively, that the mineral rights were deemed abandoned under the 1989 version of R.C. 5301.56, Ohio's Dormant Mineral Act."[130]

The trial court sided with the Ogle heirs, but the Fifth District Court of Appeals reversed the trial court's judgment, holding that the reservation of the mineral rights indeed was extinguished under Ohio's Marketable Title Act.[131] The court of appeals noted that "the Reservation does not state by whom the interest was originally reserved, nor to whom the interest was granted."[132] The Ogle heirs appealed the decision to the Supreme Court, which agreed to address the issue of whether the Marketable Title Act requires "that a reservation set forth the name of the person holding the interest in order to be specific and preserve the interest."[133]

On appeal, the Ogle heirs argued that the reservation is not a "general reference" under R.C. 5301.49(A) because the owner of the reservation could be easily found after proceeding to a title search and, for this reason, was not extinguished under Ohio's Marketable Title Act.[134] To the contrary, the Morrisons argued that under the Marketable Title Act, "a title examiner needs to review only the language of the root of title and the instruments recorded during the 40 years subsequent to the root of title to locate any specific references to an interest predating the root of title."[135] The Morrisons asserted that, in the facts at hand, none of the recorded title transactions referred to the owner of the mineral interests.[136]

On March 16, 2021, the Ohio Supreme Court reversed the Court of Appeals' judgment.[137] The Court reviewed existing precedent,

127. *Id.* at 3.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 3–4.
134. *Id.* at 4.
135. *Id.*
136. *Id.*
137. *Id.* at 8.

Blackstone v. Moore, in which it concluded that "a reference that includes the type of interest created and to whom the interest was granted is sufficiently specific to preserve the interest in the record title."[138] The Court clarified that *Blackstone v. Moore* did not require that the title must identify the owner of the interest reservation and the type of interest to prevent extinguishment under Ohio's MarketableTitle Act.[139] The Court added that "[n]othing in the plain language of Ohio's Marketable Title Act provides that a recital of a prior interest is a general reference subject to being extinguished if it does not name the interest's owner."[140] Therefore, the Supreme Court concluded that referencing a preexisting mineral interest in a recorded title transaction is sufficient to preserve the interest from extinguishment under the Marketable Title Act even if it does not state the record owner's name.[141] As such, the Ogle heirs were the owners of the mineral rights.[142]

B. *Applicable Standard to Review Utility Rate Increase for Pipeline Extension Project*

In *Application of Suburban Natural Gas Co.*, the Ohio Supreme Court rejected a utility rate increase sought by the company to reimburse it for costs incurred in a natural gas pipeline extension project.[143] The Public Utilities Commission of Ohio ("PUCO") granted the application of Suburban Natural Gas Company to charge higher rates to its customers for public utility services after determining the usefulness of a 4.9-mile extension pipeline project.[144] To determine the usefulness of the pipeline extension project, PUCO applied the "used-and-useful" test under R.C. 4909.15(A)(1).[145] The Office of the Ohio Consumers objected to PUCO's higher utility rates, arguing that only two miles of the extension project were deemed "used and useful" as of the specified date of the determination of the project's usefulness.[146]

On September 21, 2021, the Ohio Supreme Court reversed PUCO's order and remanded the matter for PUCO to properly apply

138. Blackstone v. Moore, 122 N.E.3d 132, 137 (Ohio 2018).
139. *Erickson*, 176 N.E.3d at 6.
140. *Id.*
141. *Id.* at 8.
142. *See id.*
143. *In re* Suburban Nat. Gas Co., No. 2020-0781, 2021 WL 4269964 at *1 (Ohio Sept. 21, 2021).
144. *Id.* at *2.
145. *Id.* at *1.
146. *Id.*

the use-and-useful standard.[147] The Ohio Supreme Court held that PUCO inappropriately applied the "prudent-investment" test, instead of the "used-and-useful" test, by considering whether the investment was prudent and improperly looked at the financial future of the project.[148] According to the Court, the proper standard "measures usefulness as of the date certain, 'not at some speculative unspecified point in time.'"[149]

C. *Approval of Certificate of Environmental Compatibility and Public Need for Construction of Natural Gas Pipeline*

In *Application of Duke Energy Ohio, Inc.*, the Ohio Supreme Court allowed the construction and operation of Duke Energy's Central Corridor Gas Pipeline Project to proceed.[150]

In November 2019, the Ohio Power Siting Board ("Board") granted a certificate of environmental compatibility and public need to Duke Energy Ohio, Inc. for the construction and operation of the Central Corridor Gas Pipeline.[151] The cities of Reading and Blue Ash, Neighbors Opposed to Pipeline Extension, LLC ("NOPE"), and the village of Evendale appealed the Board's approval order, alleging that "the Board misapplied the statutory criteria governing certificate approval, decided the case on incomplete information, misweighed the evidence, and limited their ability to meaningfully participate."[152]

On September 22, 2021, the Ohio Supreme Court affirmed the Board's certificate approval order.[153] The Supreme Court found that the Board appropriately interpreted R.C. 4906.10(A)(1), which requires it to identify the "need" for a major utility facility project and not the "general public's need" as argued by the plaintiffs.[154] In addition, the Supreme Court noted that the Board adequately weighed the evidence of need, due mainly to the necessity to upgrade aging pipeline infrastructure.[155] The Court also observed that the Board properly evaluated the project's potential for environmental impacts under

147. *Id.* at *8.
148. *Id.* at *5–6.
149. *Id.* at *5.
150. *In re* Duke Energy Ohio, Inc., No. 2020-0511, 2021 WL 4301266, at *15 (Ohio Sept. 22, 2021).
151. *Id.* at *2.
152. *Id.*
153. *Id.* at *1.
154. *Id.* at *15.
155. *Id.* at *5.

R.C. 4906.10(A)(2).[156] Finally, the Supreme Court contended that the Board correctly determined that the project was safe.[157]

156. *Id.* at *7–8.
157. *Id.* at *8–9.