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Gary Holland & Nash Bowen *

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Introduction of Oil and Gas Development

This article provides an update of the oil and gas law developments in the State of Kentucky from August 1, 2017 through July 31, 2018, and focuses on major legislative and regulatory enactments as well as any developments in the common law.

I. Legislative and Regulatory Developments

The Kentucky General Assembly regular session began January 02, 2018, and ended April 14, 2018. The following is a discussion of the notable legislation passed during the regular session.

A. Senate Bill 104

1. “Natural Gas Pipeline Safety”

Senate Bill 104 (“SB 104”) amends Kentucky Revised Statutes, Title 24, Chapter 278 and Title 29, Chapter 367 relative to authorization for the commission to assess and enforce civil penalties for damage to an underground facility used in the transportation of gas or hazardous liquid.

SB 104 will amend the aforementioned statutes to require underground facility operators to report to the commission any excavation damage to an underground facility used in the transportation of gas or hazardous liquid, and will authorize the commission to assess and enforce civil penalties for such damage.¹ The Governor of Kentucky signed SB 104 into law on April 02, 2018.

B. Senate Bill 249

1. “Oil and Gas Hearings”

Senate Bill 249 (“SB 249”) amended Kentucky Revised Statutes, Title 28, Chapter 353, implementing the requirement for formal complaints relating to improper drilling or mining operations to be received by the Energy and Environment Cabinet’s Office of Administrative Hearings.

SB 249 will amend the aforementioned statute to exempt oil and gas hearings held under Chapter 353 from the hearing requirements of Chapter 13B, except for hearings conducted by the Kentucky Oil and Gas

1. See Ky. Rev. Stat. Ann. § 367.4909 (West 2018).

Conservation Commission under Chapter 353.500-720; to change notice requirements; to change the bond forfeiture process for noncomplying operators; to allow the director to determine whether a distance variance may be permitted for a well; to require formal complaints relating to improper drilling or mining operations to be received by the Energy and Environmental Cabinet's Office of Administrative Hearings; and to change the appeal process for final determinations made or orders issued.² The Governor of Kentucky signed SB 249 into law on April 02, 2018.

II. Judicial Developments

A. *Marcum v. Equitable Resources Exploration, Inc.*,

Marcum v. Equitable Resources Exploration, Inc. ("Marcum") is an unpublished decision rendered by the Kentucky Court of Appeals (the "Appeals Court"), and as such, is not binding precedent, but is nevertheless persuasive. Marcum reached the Court of Appeals on appeal from a trial court order granting summary judgement in a quiet title action.³

The Appeals Court took the opportunity to clarify and reiterate Kentucky law regarding a surface owner's ability to adversely possess a severed mineral interest.⁴ The Appeals Court outlined Kentucky law, reciting that the owner of the surface overlying a severed mineral interest holds said mineral interest in trust for the benefit of the mineral owner.⁵ Therefore, in order for a surface owner to adversely possess the underlying severed mineral interest, said surface owner must first "repudiate [the] trust by acts or words in such a manner as to clearly and unmistakably bring notice to the owner of the mineral estate."⁶ The plaintiffs maintained that they had repudiated said trust because they had continuously produced oil from a well and had a storage tank located on the premises for a period of twenty years, which they submitted, constituted constructive notice of repudiation.⁷ However, the Appeals Court agreed with the trial court that merely producing oil from, and storing oil on the premises, even for a period of twenty years, was insufficiently "clear" and "unmistakable" notice to

2. See S.B. 249, 2018 Reg. Sess. (Ky. 2018).

3. No. 2016-CA-001138-MR, 2017 WL 6062114 at *1 (Ky. Ct. App. Dec. 8, 2017)

4. See *id.*

5. *Id.* at *2.

6. *Id.* at *3 (citing *Great W. Land Mgmt., Inc., v. Slusher*, 939 S.W.2d 865, 867-68 (Ky. 1996)).

7. *Id.* at *2.

constitute a repudiation of the trust.⁸ Therefore, a claim of adverse possession of the severed mineral interest could not be made. Accordingly, the Appeals Court affirmed the holding of the trial court.⁹

8. *Id.* at *3-*4.

9. *Id.* at *4.