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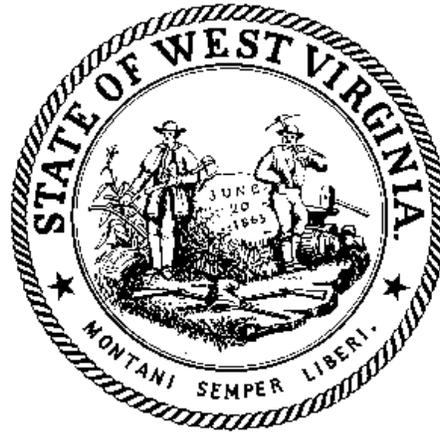
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Oil and Gas, Natural Resources, and Energy Journal

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WEST VIRGINIA



*Andrew Graham**

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I. Introduction

This Article summarizes and discusses important developments in West Virginia oil and gas law between August 1, 2018, and July 30, 2019. This Article is divided into two parts. The first part will discuss common law developments in both State and Federal courts. The second part will discuss statutory developments in legislations and regulations.

II. Judicial Developments

This section will first discuss two oil and gas cases decided by West Virginia’s highest court. Next, decisions issued by West Virginia’s federal district courts, and decisions by the Fourth Circuit Court of Appeals will be discussed and presented in chronological order as the decisions were handed down by the courts.

A. The West Virginia Supreme Court of Appeals

EQT Prod. Co. v. Crowder.

In June 2019, the West Virginia Supreme Court of Appeals of West Virginia held that a mineral owner does not have a right to use the overlying surface to benefit mining or drilling operations for other lands.¹ Absent an express agreement from the surface owners, the Court held that using the surface to benefit other lands is trespassing.²

In this case, EQT Production Company (“EQT”) held a century-old lease in Doddridge County, West Virginia, permitting the company to drill oil and gas wells on the Carr tract.³ The 1901 lease remained in effect, but over time the surface was severed from the minerals and the surface was divided into several parcels.⁴ In 2011, the owners of the tract’s mineral rights signed an amendment allowing EQT to “pool and/or unitize and combine the rights provided by the 1901 lease with other leases to drill and extract oil and gas under neighboring lands.”⁵ EQT then began preparations for a horizontal Marcellus shale gas well on the Plaintiffs’ surface lands.⁶ The wells were

1. EQT Prod. Co. v. Crowder, 828 S.E.2d 800, 811 (W. Va. 2019).

2. *Id.*

3. *Id.* at 802.

4. *Id.* at 803.

5. *Id.* at 804.

6. *Id.*

designed to extract gas from 3,232 acres of land, and not just the 351 acres originally covered by the Carr lease.⁷

Before EQT started drilling, the Plaintiffs' attorney notified EQT that it only had the right to use "their surface lands as 'reasonably necessary to extract the severed minerals from beneath the Carr tract.'"⁸ In spite of this, EQT entered Plaintiffs' surface parcels and prepared the area to be drilled.⁹ By June 2014, EQT "had drilled some 9.7 miles of horizontal bores under neighboring properties."¹⁰

Subsequently, the Plaintiffs filed suit for trespass in November 2014.¹¹ The Plaintiffs argued, and the circuit court agreed, "that EQT has the implied right to use the Plaintiffs' surface lands for 'well pads, roads, and pipelines to drill into, and produce gas from, but only from, the mineral tract,' underlying the [Carr Tract.]"¹² Further, EQT "did not have an express or implied right to enter or use the surface lands to drill and produce gas from neighboring mineral tracts."¹³ The jury awarded the plaintiffs \$190,000 in trespass damages and EQT appealed.¹⁴ The Supreme Court of Appeals affirmed the ruling, concluding that "[u]sing the surface to extract minerals elsewhere, without the permission of the surface owner, is a trespass."¹⁵ Thus, a mineral owner or lessee must reach a separate agreement with a surface owner to access minerals under neighboring land.¹⁶

Andrews v. Antero Res. Corp.

The Supreme Court of Appeals found Antero Resources Corporation's ("Antero") horizontal well development did not constitute a nuisance because the actions were necessary, within its implied rights as mineral right owners, and did not substantially burden neighboring property owners' use of their lands.¹⁷

Antero operated several well pads for horizontal drilling in Harrison County.¹⁸ Its drilling authority came from century-old severance deeds that

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 805.

13. *Id.*

14. *Id.*

15. *Id.* at 811.

16. *Id.*

17. *Andrews v. Antero Res. Corp.*, 828 S.E.2d 858, 873 (W. Va. 2019).

18. *Id.* at 861.

retained mineral rights underlying certain properties.¹⁹ The leases also allowed for

the right to drill, bore and operate for [oil and gas] at any time, also the right to use water from said land for the purpose of said drilling, boring and operating, and the right at any time to remove all necessary machinery used for the last named purposes, upon or off said land.²⁰

In addition to constructing and operating the horizontal wells, the project also required truck deliveries and the development of “well roads, pipelines, and a compressor station.”²¹

The plaintiff-property owners claimed that the development of the Marcellus shale affected the use and enjoyment of their properties “due to the annoyance, inconvenience, and discomfort caused by excessive heavy equipment and truck traffic, diesel fumes and other emissions from the trucks, gas fumes and odors, vibrations, noise, lights, and dust.”²² However, none of the horizontal wells were on the plaintiff-property owners’ surface land, and Antero held leasehold rights to the oil and gas underlying their lands.²³

The property owners filed suit, which was transferred from the circuit court to the Mass Litigation Panel (“MLP”). The MLP granted summary judgement for Antero based on its development rights in the severance deeds and found the complained-of activities to be “reasonable and necessarily incident to Antero’s development of the underlying minerals.”²⁴ The MLP did not apply the principals of nuisance law in its reasoning and the plaintiff-property owners appealed.²⁵

The Supreme Court of Appeals applied a two-part test to determine if Antero’s activity constituted a nuisance.²⁶ The plaintiff-property owners needed to provide evidence that (1) Antero’s activities were not reasonably necessary for developing the Marcellus shale and (2) their use of the properties were substantially burdened by the activities.²⁷ The Court found

19. *Id.*

20. *Id.* (brackets original).

21. *Id.* at 861-62.

22. *Id.* at 862.

23. *Id.* at 861-63.

24. *Id.* at 862-63.

25. *Id.*

26. *Id.* at 870 (citing *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721 (1980)).

27. *Id.*

the plaintiffs failed to meet either requirement because the wells were not on their surface property, did not damage their land, and Antero's activities were reasonable for mineral development.²⁸

**Note: The Author's firm represented Antero Resources Corporation in the case.*

B. Federal Courts

Bison Resources Corp. v. Antero Resources Corp.

In September 2018, the United States District Court for the Northern District of West Virginia ruled that a right of first refusal ("ROFR") is a personal right and does not transfer to a successor without express language.²⁹ The court granted summary judgment to Antero Resources Corporation and held that Antero owned the rights to the subject leases free of the ROFR.³⁰

Over a forty-year period, the subject leases had been conveyed to several parties, including Bison Resources Corporation ("Bison") and Antero.³¹ The first assignment of the leases included a "right[] of first refusal to drill any additional wells."³² After acquiring all rights, titles, and interest in the subject leases, excluding "[Bison's] wellbore interest and an overriding royalty interest," Antero began drilling wells to the Marcellus Shale.³³

As Antero started producing natural gas, Bison filed suit for trespass, conversion, and tortious interference, claiming the Antero had not provided it with prior notice before drilling new wells and did not offer a right of first refusal to drill.³⁴ However, Antero argued, and the court agreed, that Bison did not have a valid right of first refusal because the right was personal to those named in the first assignment of the subject leases.³⁵ The assignment did not include references to successors or assigns, indicating to the court that the ROFR was only intended to bind the original parties.³⁶ Thus, Antero

28. *Id.* at 873.

29. *Bison Res. Corp. v. Antero Res. Corp.*, No. 1:16CV107, 2018 WL 4558474, at *5 (N.D.W. Va. Sept. 21, 2018).

30. *Id.* at *6.

31. *Id.* at *2.

32. *Id.*

33. *Id.*

34. *Id.* at *1-2.

35. *Id.* at *4-5.

36. *Id.*

owned the oil and gas rights because the ROFR did not transfer and was no longer valid.³⁷

**Note: The Author's firm represented Antero Resources Corporation in the case.*

Berghoff v. Chesapeake Appalachia, LLC

In *Berghoff*, the United States Court of Appeals for the Fourth Circuit held that a lessee failed to properly pool a lessor's land when the lessee did not mail a copy of the pooling declaration to the lessor before the end of the primary term.³⁸ In 2006, the Berghoffs leased their oil and gas rights to Great Lake Energy Partners and its successor-in-interest Chesapeake Appalachia, LLC ("Chesapeake") with a five-year primary term.³⁹ The secondary term allowed the lease to be renewed for as long as Chesapeake searched for oil or gas, or as long as oil and gas was able to be produced.⁴⁰ The lease included a pooling provision that allowed the lessee to consolidate the land into larger units.⁴¹ However, the lessee had to record a declaration of consideration and "mail[] a copy thereof to the Lessor."⁴²

Towards the end of the primary term, the lessee abandoned a well pad location because the lessor and lessee could not agree on a site for the well's access road.⁴³ Following this, Chesapeake began building a well pad on adjoining land and spudded a well, with the intention to consolidate the properties into a unit.⁴⁴ With twelve days left in the primary term, Chesapeake executed and recorded a "Declaration and Notice of Pooled Unit"⁴⁵ but failed to mail a copy to the Berghoffs until two years after the primary term of the lease expired.⁴⁶ When Chesapeake sent the Berghoffs royalty payments, they refused them and filed suit claiming the lessee produced oil and gas from their land without consent.⁴⁷ After the case was removed to federal court, the district court granted the lessee's motion for summary judgement and found that because land within the unit had been pooled within the primary term, Chesapeake had satisfied the lease

37. *Id.* at *6.

38. *Berghoff v. Chesapeake Appalachia, LLC*, 747 F. App'x 120, 126 (4th Cir. 2018).

39. *Id.* at 121-22.

40. *Id.* at 122.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 123.

45. *Id.*

46. *Id.*

47. *Id.*

requirements.⁴⁸ The Berghoffs then appealed, and the Fourth Circuit ruled in their favor.⁴⁹

The Fourth Circuit found that oil and gas can only be pooled “in accordance with the method and purposes as provided in the pooling clause.”⁵⁰ Therefore, Chesapeake did not properly pool the leased premises into the unit because it did not mail a copy of the pooling declaration to the lessors before the end of the primary term, as required by the pooling clause.⁵¹ The court also addressed a side issue regarding the access route to the well pad, and found the record had been too thin for the district court to have ruled for the lessee.⁵² The district court’s ruling was vacated and remanded for further proceedings.⁵³

Sierra Club v. United States Army Corps of Engineers

The United States Court of Appeals for the Fourth Circuit vacated the Mountain Valley Pipeline’s Clean Water Act Nationwide permit 12 (“NWP 12”) verification after ruling that the US Army Corps of Engineers (“Army Corps”) violated Section 401 of the Clean Water Act.⁵⁴ The court also determined that the Army Corps cannot substitute state special conditions with its own special conditions.⁵⁵ And further, a state cannot waive its own special conditions for specific cases without complying with the Clean Water Act’s notice and comment requirements.⁵⁶

As designed, the Mountain Valley Pipeline would cross 591 federal bodies of water through Virginia and West Virginia.⁵⁷ The Clean Water Act required the pipeline to obtain clearance from the Army Corps before starting construction because the construction would involve discharging fill material into federal waters.⁵⁸ The NWP 12 permit allowed for activities such as construction to discharge materials in the water which were deemed “to create only minimal environmental impact.”⁵⁹ West Virginia also imposed

48. *Id.*

49. *Id.* at 127.

50. *Id.* at 125 (quoting *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 860 (Tex. 2005)).

51. *Id.* at 126.

52. *Id.* at 124.

53. *Id.* at 127.

54. *Sierra Club v. U. S. Army Corps of Eng’rs*, 909 F.3d 635, 654 (4th Cir. 2018).

55. *Id.* at 639.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 640 (quoting *Crutchfield v. Cty. of Hanover*, 325 F.3d 211, 214 (4th Cir. 2003) (internal citation omitted)).

additional conditions for receiving the general permit, including a seventy-two-hour limitation on individual stream crossings.⁶⁰ West Virginia then waived its requirement for an individual water quality certification.⁶¹

When assessing the proposal, the Army Corps found that the Mountain Valley Pipeline incorporated a different method for constructing the pipeline that was more protective of the water than West Virginia's seventy-two-hour rule.⁶² Based on this finding, the Army Corps replaced the State's special condition for the dry open-cut method and issued a verification concluding that the pipeline met the criteria of NWP 12.⁶³ This violated Section 401 of the Clean Water Act because the Army Corps is required to incorporate the State's certification into the federal verification, without modification.⁶⁴ Section 401 requires this from the Army Corps in order to avoid the possibility of the Army Corps setting aside state certifications and "undermin[ing] the system of cooperative federalism upon which the Clean Water Act is premised."⁶⁵ Further, West Virginia could not waive its special conditions for specific cases without a notice-and-comment period.⁶⁶ Therefore, the Mountain Valley Pipeline had not complied with all of the terms of NWP 12 and the verification was voided in its entirety.⁶⁷

Cowpasture River Pres. Ass'n v. Forest Serv.

The United States Court of Appeals for the Fourth Circuit held that the United States Forest Service ("Forest Service") improperly authorized the Atlantic Coast Pipeline.⁶⁸ The pipeline was to be built through parts of the George Washington and Monongahela National Forests, spanning twenty-one miles of the forests.⁶⁹ The plan also allowed for a right-of-way across the Appalachian Trail.⁷⁰ The planning and proposals had initially been denied or critiqued over environmental impact concerns, including "landslides, slope failures, sedimentation and impacts to groundwater, soils, and threatened and

60. *Id.* at 641.

61. *Id.*

62. *Id.* at 642.

63. *Id.*

64. *Id.* at 647.

65. *Id.* at 648.

66. *Id.* at 653.

67. *Id.* at 655.

68. *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 155 (4th Cir. 2018), *petition for cert. filed*, No. 18-1587 (U.S. Sept. 23, 2019).

69. *Id.*

70. *Id.*

endangered species” that would result from the construction of the pipeline.⁷¹ In April 2016, the Forest Service requested the pipeline developer create ten stabilization designs, but the developer only provided two of the requested site designs.⁷² However, in May 2017, the Forest Service withdrew its concerns and approved the pipeline and right of way.⁷³ The Forest Service determined “major pipeline route alternatives and variations do not offer a significant environmental advantage when compared to the proposed route or would not be economically practical.”⁷⁴ Several environmental groups then filed a challenge to this decision.⁷⁵

The Petitioners claimed the Forest Service violated the National Forest Management Act (“NFMA”), the National Environmental Policy Act (“NEPA”), and the Mineral Leasing Act (“MLA”).⁷⁶ The NFMA created the Forest Plans which governs the activities that can take place in the forests.⁷⁷ The Forest Service’s recommendation for the pipeline included project-specific amendments that would exempt the project from thirteen standards “relat[ing] to soil, water, riparian, threatened and endangered species, and recreational and visual resources.”⁷⁸ The petitioners argued, and the Fourth Circuit agreed, that the Forest Service’s decision was arbitrary and capricious in concluding the amendments were not directly related to the Plan’s purpose and that it would not have substantial adverse effects on the forest.⁷⁹ Thus, the Forest Service violated the NFMA.

The court further found that the Forest Service violated the NEPA because it failed to sufficiently consider alternate routes and the environmental consequences of the pipeline, including the risks it originally had contemplated.⁸⁰ In addition, the Forest Service did not have the authority to grant a right of way through the Appalachian Trail because the Secretary of the Interior administers the National Park System.⁸¹ The right of way was vacated and the petition to review the Forest Service’s decision was

71. *Id.*

72. *Id.* at 156.

73. *Id.* at 158.

74. *Id.* at 159 (citing to a U.S. Forest Service draft Record of Decision (“ROD”)).

75. *Id.* at 160.

76. *Id.*

77. *Id.*

78. *Id.* at 162.

79. *Id.* at 166.

80. *Id.* at 173.

81. *Id.* at 183.

granted.⁸² A Writ of Certiorari was filed and docketed with the United States Supreme Court in June 2019.

Equinor USA Onshore Props. Inc., v. Pine Res., LLC

The United States Court of Appeals for the Fourth Circuit found that a contract party cannot recover damages for lost royalties when the development contract required drilling three wells, but did not require production.⁸³ In 2008, Pine Resources, LLC (“Pine”) sold its Marcellus mineral rights in 565 acres of land to PetroEdge Energy (“PetroEdge”), a non-party.⁸⁴ The Purchase and Sale Agreement (“PSA”) set forth that PetroEdge would apply for a meter tap and then spud three wells within certain time frames.⁸⁵ In return, Pine retained a royalty interest equal to 18 percent of the hydrocarbons produced from the mineral rights.⁸⁶ The two parties extended the spudding deadlines multiple times, and PetroEdge commenced drilling the first well in December 2011.⁸⁷ However, the well was never completed and did not produce hydrocarbons.⁸⁸ PetroEdge then sold its mineral rights in the land to Equinor USA Onshore Properties, Inc. (“Equinor”), formerly Statoil USA Onshore Properties, Inc., stating in the contract that the first well obligation had been met and two more would need to be drilled by April 1, 2014.⁸⁹

Upon notification of the sale, Pine contacted Equinor and informed the assignee that it was in violation of the PSA and needed to obtain production from the first well and start drilling the remaining wells.⁹⁰ Equinor responded that it would not complete the first well or drill the other two because a meter tap had not been installed, which would have triggered the spud obligation.⁹¹ In July 2014, Equinor sought a declaratory judgement stating it owed no obligation to Pine beyond royalty payments.⁹² Pine then countersued for breach of contract relating to the spudding obligation.⁹³ In 2017, following a

82. *Id.*

83. *Equinor USA Onshore Properties Inc. v. Pine Res., LLC*, 917 F.3d 807, 810 (4th Cir. 2019).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 811.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 812.

92. *Id.*

93. *Id.*

judgment in favor of Equinor, Pine appealed and the Fourth Circuit reversed and remanded.⁹⁴ Rather than granting summary judgment, the district court conducted a bench trial to determine whether the PSA required production and to assess damages.⁹⁵ From the bench trial, the district court determined the agreement did not require production, only spudding, and ruled in favor of Equinor.⁹⁶ Further, the district court did not grant damages because the evidence was only based on royalty loss and not damages from the failure to spud the wells.⁹⁷ Pine then appealed again to the Fourth Circuit, which affirmed the district court's ruling, stating that "[t]he plain meaning of 'spud' refers only to the initial drilling of wells, not completion or production."⁹⁸ Thus, Equinor had no further obligation under the PSA and did not owe damages.⁹⁹

**Note: The Author's firm represented Equinor USA Onshore Properties, Inc., formerly known as Statoil USA Onshore Properties, Inc., in the case.*

III. Legislative and Regulatory Developments

A. Legislative Enactments

The West Virginia Legislature enacted no statutes between August 1, 2018, and July 30, 2019 that significantly altered existing West Virginia oil and gas law.

B. Regulatory Changes

Effective February 11, 2019, title 35 section 7 of the West Virginia Code of State Rules, regulating the certification of gas wells, was repealed.¹⁰⁰ The legislative rule had been in effect since May 10, 2001 and was repealed by Senate Bill 240, which repealed legislative rules that were no longer authorized or were obsolete.¹⁰¹

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 814.

99. *Id.* at 818.

100. W. VA. CODE R. §§ 35-7-1 to 35-7-4 (2019).

101. *See* S.B. 240, 84th Leg., Reg. Sess. (W. Va. 2019).