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Introduction of Oil and Gas Development

This article provides an update concerning notable oil and gas law developments in the Commonwealth of Kentucky from August 1, 2021, through July 31, 2022, and focuses on notable legislative and regulatory enactments and relevant developments in Kentucky common law.

I. Legislative and Regulatory Developments

The Kentucky General Assembly’s regular session began on January 4, 2022, and was scheduled to conclude on April 14, 2022. The following discusses the significant legislation relating to the oil and gas sector passed during the regular session.

A. State Legislative Developments

1. House Bill 669 also known as Senate Bill 315

a) “Abandoned Storage Tank and Orphan Well Reclamation”

House Bill 669 (“HB 669”), also identified as Senate Bill 315 (“SB 315”), amends a Kentucky “act relating to oil and gas, making an appropriation therefor, and declaring an emergency.”¹ The first revision to HB 669 clarifies the definition of an “orphan well.” This revision points a reader back to subsection (14) of the act, which defines a “well” as “a borehole,” subject to conditions. The revision continues to remove technical inclusions in the definition. The next revision allows the establishment of separate accounts to segregate money for operations by the Kentucky Abandoned Storage Tank and Orphan Well Reclamation Program.² Similarly, the bill now allows the cabinet to accept and deposit funds into

1. KY LEGIS 173(48) (2022), 2022 Kentucky Laws Ch. 173 (HB 669).
 2. *Id.* (1)(c)(4).

separate accounts for use under subsection (10).³ Subsection (10) is a new addition. It stipulates, that money “received by the Commonwealth under,” the Infrastructure Investment and Jobs Act, shall be maintained and may be used for “the plugging and abandonment of wells and the remediation and reclamation of associated pipelines, facilities, and infrastructure eligible for funding under this section.”⁴ Guidance on grants under subsection (10) is elaborated on in subsections (11) through (13).⁵ This range discusses the number of eligible wells from each vendor, the exceptions built into grant language, and clarifies the use of formulas and other elements of grant consideration. Throughout the bill, the legislature repeatedly incorporated the term “remediate” and its roots.⁶

The Governor of Kentucky signed HB 669 into law on April 8, 2022.

B. State Regulatory Developments

1. 30 Ky. Admin. Regs. 3:030

a) “Classification of Goods and Services for Registration of Trademarks and Service Marks”

Kentucky Administrative Regulation 3:030 (“Reg. 3:030”), relating to § 365.593 of the Kentucky Revised Statutes, introduces instructions for trademark applicants.⁷ Section 365.593 requires the Secretary of State to establish “a system for classifying goods and services for purposes of application for registration of trademarks.”⁸ In compliance, Reg. 3:030 creates a framework for a system, per the statutory mandate. Reg. 3:030 consists of only one section. Section 1 stipulates that the “applicant shall indicate by number the classification of the goods or services recited in the application,” the regulation continues to say the “following classification of goods and services shall be used in the registration of trademarks and service marks,” accompanied with a comprehensive classification list.⁹ The list ranges from (1) to (45), each with a different classification of goods and services.¹⁰ Among the list are classifications such as, “(8) [h]and tools and implements; hand operated cutlery; side arms (except firearms); razors . . .

3. *Id.* (9)(c).

4. *Id.* (10).

5. *Id.* (11)–(13).

6. *Id.* (1)(a), (5)(a).

7. Ky. Rev. Stat. Ann. § 365.593 (West); 30 Ky. Admin. Regs. 3:030.

8. *Id.*

9. *Id.* § 1 n.7.

10. *Id.* § 1(1)–(45).

(12) Vehicles; apparatus for locomotion by land, air or water . . . (26) Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers; hair decorations; false hair,” and, “(44) [m]edical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services.”¹¹ The list covers nearly every good or service imaginable and provides applicants with identifiers, to streamline the trademark process in Kentucky. Under the authority of the Secretary of State, Reg. 3:030 became effective on April 5, 2022.

III. Judicial Developments

There were two noteworthy cases in the past year that involved oil and gas. *Imhoff v. House*¹² touched on an oil and gas lease dispute, but it was only a review of contract law, not oil and gas law. *Commonwealth v. Louisville Gas and Electric Co.*¹³ was more involved as an oil and gas case but primarily concerned the rights of the government to deputize eminent domain power involving oil and gas production.

A. Supreme Court Cases

1. Imhoff v. House

a) “Severance Tax in Lease Agreements”

Imhoff v. House and Vinland Energy Operations, LLC is a published decision from the Supreme Court of Kentucky.¹⁴ In *Imhoff*, the lessors (including Imhoff) appealed a writ of prohibition. The trial court denied Vinland Energy’s motion to dismiss and their motion for reconsideration, denying Vinland Energy’s claims of lack of subject matter jurisdiction. The appellate court granted Vinland Energy a writ of prohibition because the trial court lacked subject matter jurisdiction. The lessors originally brought a class action against Vinland Energy for breach of contract because Vinland had deducted severance taxes before distributing royalties. The Supreme Court had since issued an opinion regarding lease agreements that are silent on severance taxes, that they may not be deducted before royalties, and Vinland Energy complied with the holding. Here, the key

11. *Id.* §§ 1(8), (12), (26), & (44).

12. *Imhoff v. House*, 628 S.W.3d 88 (Ky. 2021).

13. *Commonwealth v. Louisville Gas & Elec. Co.* 648 S.W.3d 76, 88 (Ky. Ct. App. 2022).

14. *Imhoff*, 628 S.W.3d at 94 n.12.

takeaway for oil and gas is the reaffirmation of severance tax treatment. *Appalachian Land Co. v. EQT Prod. Co.*¹⁵ held that “in the absence of a specific lease provision apportioning severance taxes, lessees may not deduct severance taxes or any portion thereof prior to calculating a royalty value,” and this court upholds that judgment.¹⁶

The Supreme Court of Kentucky found no error in the Court of Appeals’ ruling and affirmed the Court of Appeals’ decision.

B. Appellate Activity

1. Commonwealth v. Louisville Gas and Electric Company

a) “Conservation Easements and Condemnation”

Commonwealth of Kentucky v. Louisville Gas and Electric Co. is a yet-to-be-published decision from the Court of Appeals of Kentucky, to appear in the Southwestern Reporter Third.¹⁷ In *Louisville Gas and Electric*, the Kentucky Heritage Land Conservation Fund Board (“the Board”) filed an interlocutory appeal of the denial of their motion to dismiss. The trial court denied the Board’s motion to dismiss on the theory of sovereign immunity. This appellate court affirmed the trial court’s decision. Though the Board had a valid claim to a sovereign immunity defense because the state granted them a conservation easement and, thus, they functioned as a representative of the state, the defense was waived. The counterparty, Louisville Gas and Electric (“LG&E”), also acted in a substituted state capacity. LG&E invoked condemnation for the property, allowing them to seize the property by invoking eminent domain. This allows public utilities to use the power of eminent domain and, as the *Louisville Gas and Electric* Court found, use “any right or power of eminent domain created by statute.”¹⁸ The statute, saying that statutory eminent domain powers are exercisable as if conservation easements do not exist, was vested in LG&E as if it were the state exercising the power itself.

The Court of Appeals found no error in the circuit court’s ruling and affirmed the circuit court’s decision.

15. *Appalachian Land Co. v. EQT Prod. Co.*, 468 S.W.3d 841 (Ky. 2015).

16. *Id.*

17. *Imhoff*, 628 S.W.3d at 94 n.13.

18. *Commonwealth v. Louisville Gas & Elec. Co.* 648 S.W.3d 76, 88 (Ky. Ct. App. 2022).