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West Virginia Supreme Court of Appeals Issues Opinions Addressing the Rights of Surface Owners and Oil and Gas Operators

West Virginia's Supreme Court of Appeals issued two opinions earlier in June that addresses the interplay between the rights of surface owners who do not own the minerals underlying their properties, and those of oil and gas operators that are developing those rights. The first case addresses the extent to which surface lands, the minerals of which have been severed, may be used to drill horizontal wells onto neighboring properties. The second addresses private nuisance claims raised by the owners of surface lands for oil and gas activities taking place on nearby lands.

EQT Production Co. v. Crowder

The first case, *EQT Production Co. v. Crowder*, 2019 WL 2414728, ___ S.E.2d ___ (W. Va. Jun. 5, 2019), concerned a 350-acre tract of land (Tract) that was subject to a 1901 oil and gas lease. The minerals rights were severed from the surface in 1936 by means of a deed that conveyed the "surface only" to the grantee. In 2011, the owners of the oil and gas signed an amendment to the 1901 lease that allowed the lessee to "pool and/or unitize and combine the rights" provided under the oil and gas lease "with other leases to drill and extract oil and gas under neighboring lands." *Id.* at *3. Two years later, the lessee constructed a well pad on the Tract, from which it drilled several horizontal wells that were in large part beneath neighboring lands.

The owners of a portion of the affected surface lands filed trespass claims against the lessee. The plaintiffs acknowledged that the lessee had the right to enter and reasonably use their surface lands to extract the minerals beneath the Tract but contended that the lessee did not have the right to use their lands to extract minerals from neighboring lands by means of horizontal drilling. The trial court granted partial summary judgment in the plaintiffs' favor,

finding as a matter of law that EQT had trespassed, and a jury subsequently awarded the plaintiffs \$190,000 in damages.

On appeal, the Supreme Court of Appeals unanimously affirmed. It held that while a mineral owner (or its lessee) has “an implied right to use the surface of a tract in any way reasonable and necessary” to develop “the minerals underlying the tract[,]” it “does not have the right to use the surface to benefit mining or drilling operations on other lands, in the absence of an express agreement with the surface owner permitting those operations.” *Id.* at *10.

In reaching its holding, the court rejected an argument that wells were “reasonable and necessary to develop the natural gas beneath neighboring lands[,]” *Id.* at *10 (emphasis in original), but the court did not address a related, and more compelling argument: that in order to economically produce oil and gas from under the plaintiffs’ lands, it was reasonable and necessary to develop the Tract jointly with neighboring lands by means of horizontal wells drilled from the plaintiff’s lands. While that argument may now be foreclosed in West Virginia, it will almost certainly be raised in similar cases in other parts of Appalachia.

Moving forward in West Virginia, if an operator intends to drill horizontal wells from a surface property whose rights are severed from the minerals, and either (i) the property was not subject to an oil and gas lease that included a unitization or pooling provision when then severance occurred or (ii) the severance deed does not include language allowing the mineral estate to be jointly developed with neighboring lands, the operator must enter into a separate agreement with the surface owner authorizing the operator to use the surface to drill for and produce oil and gas from neighboring properties.

Andrews v. Antero Resources Corp.

In *Andrews v. Antero Resources Corp.*, 2019 WL 2494598, ___ S.E.2d ___ (W. Va. Jun. 10, 2019), the court rejected private nuisance claims raised by the owners of surface lands arising from Marcellus Shale drilling and production operations being conducted from the surfaces of nearby properties. Over a vigorous dissent, the

majority held that the plaintiffs' private nuisance claims failed as a matter of law because: (i) the severance deeds for the plaintiffs' properties reserved to the defendants' predecessors-in-interest the right to operate for and market the oil and gas; (ii) the plaintiffs were not alleging that the defendants' operations had damaged their properties; and (iii) the defendants had the right to conduct shale operations directly on the plaintiffs' surface lands, and the harms alleged by the plaintiffs were less significant than those they would have experienced had drilling taken place on their own lands.

The court adopted a two-part test that will apply to similar claims in the future. Under that test, the surface owner must prove that: (i) the mineral owners' surface activities are not "reasonably necessary for the extraction of the mineral;" and (ii) the surface activities constitute a "substantial burden to the surface owner." *Id.* at *11. In practice, both parts of the test will likely be difficult for plaintiffs to prove. Given the operational expenses involved, it is difficult to imagine that an oil and gas operator would engage in surface activities that are not "reasonably necessary" to oil and gas production and marketing.

As to the second part of the test, so long as a mineral owner's use of the surface is "compatible" with that of the surface owner, generally the use will not be deemed to be a "substantial burden" even if the use is "inconvenient to the surface owner and ... damaging to the surface estate." *Id.* at **12-13. As demonstrated by *Andrews*, unless the surface uses in a particular situation are more burdensome than ordinary shale drilling operations, they will not give rise to a private nuisance claim absent special circumstances such as limiting language in the property's severance deed.

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