

Oil and Gas Development in West Virginia Involving Unknown or Unleased Parties

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West Virginia law presents unique challenges regarding jointly owned property in situations where a minority owner cannot be identified, is not available or refuses to join in the leasing of oil and gas. It is not uncommon for oil and gas rights in West Virginia to be owned by members of the same family for several generations, and the result is that an operator may need to approach multiple parties to lease a single parcel. Historically, West Virginia law has placed strict requirements on a lessee in leasing cotenants and required the consent of all parties before oil and gas operations could commence. However, when leasing all cotenants in an oil and gas property is not feasible, there are several statutory options available in West Virginia that may provide relief to an operator, including a new Cotenancy Modernization and Majority Protection Act that was passed this year.

Legal Background in West Virginia

West Virginia has long been among the minority of jurisdictions with the strict requirement that all cotenants of a mineral interest must consent to any development of oil or natural gas¹. West Virginia courts have held that a tenant in common cannot unilaterally develop oil and gas under a property without risking a claim for waste from the remaining cotenants. The Supreme Court of Appeals in West Virginia has enjoined oil and gas development where a 1/172 fractional interest holder remained unleased². Therefore, there is a significant risk to a producer in situations where all cotenants are not under a lease. However, this strict rule can be avoided through different legal processes that can protect both the operator and majority cotenants.

Proceeding in West Virginia Courts to Lease Unknown or Unleased Parties

West Virginia has a statutory procedure to lease unknown or missing mineral owners, which may be an option where efforts to locate a missing owner have been exhausted³. To initiate this proceeding, a petition must be filed in the applicable county court which includes a summary of the missing parties, a description of the proposed operations and the actions taken to identify the missing parties⁴. If all the requirements of the statute are met, a special commissioner will be appointed by court to negotiate a lease on behalf of the missing owners. Further, in a case where an owner can be located but has not leased, a statutory partition proceeding may allow a majority cotenant to proceed with leasing. Under this law, an owner or lessee can petition a court to have the jointly owned property subdivided or force a sale or purchase of the entire property where a subdivision cannot be conveniently made⁵. The downside to these procedures is that they are often costly and time-consuming, and are only effective in limited situations.

West Virginia's Recent Cotenancy Act

This past year brought a major development regarding an oil and gas operator's ability to develop property where the entire ownership interests cannot be leased. West Virginia HB 4268, known as

¹ Williamson v. Jones, 43 W. Va. 562 (1897)

² Law v. Heck Oil Company, 106 W. Va. 296 (1928).

³ See W. Va. Code §55-12A-1, et seq.

⁴ See W. Va. Code §55-12A-5.

⁵ See W. Va. Code § 37-4-1, et seq.

the “Cotenancy Modernization and Majority Protection Act” was enacted and became effective June 3, 2018⁶. This Act, which was discussed in the last issue of the *E-Report* in the context of an update on West Virginia legislation, streamlines the oil and gas leasing process for unleased cotenants, and facilitates development without unnecessary delay by creating a new exception to the West Virginia statute governing waste between certain cotenants⁷.

At a fundamental level, the Cotenancy Act re-defines the relationship between cotenants owning undivided interests in oil and gas underlying a single tract of land by providing, in certain defined circumstances, a statutory defense against claims for waste and trespass. Where there are seven or more cotenants, operators may develop land if 75% of the royalty owners, as defined in the Act, sign leases and reasonable efforts were made to negotiate with all royalty owners. If the conditions are satisfied, the development of the mineral tract is permitted, and is not considered waste or trespass. Further, the consenting cotenants are not liable for damages for the same due to the development.

In addition to permitting the development of oil and gas under the framework above, the Act implements several conditional safeguards and restrictions regarding nonconsenting and unknown or unlocatable mineral interest owners. Nonconsenting cotenants shall elect to receive payment in accordance with two alternative options and royalty payments equal to the highest percentage royalty paid to a consenting cotenant will be reserved for unknown and unlocatable mineral interest owners⁸. Specific requirements are included to search for unknown and unlocatable owners and reporting is made to the State Treasurer⁹.

There remain a few areas of the new act that potentially may need clarification. The reasonable effort standard required of a producer in lease negotiations could be a point of conflict. Further, the payment options available to a nonconsenting oil and gas owner may be a source of disputes. Nonetheless, the new law is a major advancement for oil and gas producers dealing with an unleased minority cotenant.

Conclusion

The leasing of unknown interest holders or minority cotenants that refuse to lease can be a challenge in West Virginia. However, several statutory options exist that may be applicable in various situations to avoid claims for waste. Further, West Virginia’s Cotenancy Act now provides a streamlined pathway to the development of these untapped resources. These legal processes can provide relief to oil and gas producers to address the problem of unleased cotenants in West Virginia.

⁶ See W. Va. Code § 37B-1-1, et seq.

⁷ See W. Va. Code § 37-7-2; and § 37B-1-4(a).

⁸ See W. Va. Code § 37B-1-4(b).

⁹ See W. Va. Code § 37B-1-4(d).