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Double the Trouble: Tax Sales of Duplicate Mineral Assessments in West Virginia

Adam Speer
Babst Calland

Anyone dealing with land and title issues in West Virginia quickly learns the importance of real property assessments. The relative ease in which an interest in land, including mineral rights, can be lost in a tax sale means that landmen and title practitioners who fail to examine a property's tax assessment history do so at their peril. Those histories are found in the volumes of "landbooks" maintained by each county assessor's office. A relatively common and beguiling problem arises when the title examiner discovers that a property has been double assessed. Such duplicate assessments are rarely obvious, as assessed interests are often described by brief and vague notations and sometimes assessed in the name of a long-gone predecessor in title.

Recently, in *Haynes v. Antero Resources Corporation*,[1] *Hill v. Lone Pine Operating Company*[2] and *L&D Investments Inc. v. Mike Ross, Inc.*[3], the Supreme Court of Appeals of West Virginia considered the validity of several tax deeds that stemmed from the duplicate assessment of certain oil and gas interests created by the Harrison County Assessor's Office. In each of the cases, the court re-affirmed its long-standing precedent that holds that in the case of two assessments of the same land under the same claim of title, the state can only require one payment of taxes under either assessment. The cases highlight the potential consequences of duplicate tax assessments of severed mineral interests in West Virginia and the need to have interests properly assessed. The *Haynes, Lone Pine* and *L&D Investment* decisions should be maintained in any title practitioner's toolkit for analyzing interests conveyed by a tax sale and determining the likelihood of a successful challenge to set aside a tax deed.

Historical Background

In West Virginia, landowners have a duty to have their land entered on the landbooks for taxation.[4] While each landowner is responsible for having his land entered on the landbooks, the county assessor's office is responsible for generating the actual assessment and including it in the landbooks.[5] An interest in land from a particular source should only be entered on the landbooks and taxed under one assessment, but there are instances when the county assessor's office, for one reason or another, issues duplicate assessments on the same interest.

Over the course of the last century, the Supreme Court of Appeals of West Virginia has consistently held that when the same interest in land is being assessed under duplicate assessments and taxes are being paid under one of the assessments and the other becomes delinquent, the tax sale of a delinquent assessment is void. In *State v. Low*, 46 W. Va. 451 (1899), the court found that "where there is privity of title, one payment is sufficient and full satisfaction . . . [p]ayment of the taxes by the owner or by any one entitled to make it, is an absolute defeat and termination of any statutory power to sell."[6] Nearly 10 years later, in *State v. Allen*, 65 W. Va. 335 (1909), the court held that in the "case of two assessments of the same land, under the same claim of title, for any year, one payment of taxes,

[1] Haynes v. Antero Res. Corp., 2016 W. Va. LEXIS 803 (Oct. 28, 2016) (memorandum decision).
[2] Hill v. Lone Pine Operating Co., 2016 W. Va. LEXIS 903 (Nov. 18, 2016) (memorandum decision).
[3] L&D Invs., Inc. v. Mike Ross, Inc., 818 S.E.2d 872 (W.Va. 2018).
[4] W. Va. Code. §11A-3-37.
[5] W. Va. Code §11-4-4.
[6] State v. Low, 46 W. Va. 451, 458-59 (1899).

under either assessment, is all the State can require."[7] The *Allen* court ruled that a tax sale of a duplicate assessment was void because the taxes were paid under one of the assessments.[8]

Haynes, Lone Pine and L&D Investments

Haynes v. Antero Resources Corporation, *Hill v. Lone Pine Operating Company* and *L&D Investments Inc. v. Mike Ross, Inc.* stem from duplicate production-based assessments created by the Harrison County Assessor's Office pursuant to a 1988 letter it received from the State Tax Department. Prior to 1988, the practice of the Harrison County Assessor's Office was to enter the assessments for interests in the oil and gas in place on the landbook records and the assessments for the production-based assessments on the personal property books.[9] In 1988, the Assessor received a letter from the State Tax Department directing it to convert all production-based assessment records from the personal property books to the corresponding real estate entry in the landbooks.[10] If the accounts could not be matched, the Assessor was directed to enter the personal property record as a separate assessment on the landbooks.[11] Due to the discrepancy between the descriptions in the landbooks and personal property books, several duplicate assessments were generated as a result of the 1988 letter leading to the ensuing litigation.

i) Haynes v. Antero Resources Corporation

In *Haynes*, the property at issue was a 1/80 interest in the oil and gas underlying approximately 200 acres owned by Presley Rush Southern. Southern's three children, including the respondent, inherited the 1/80 oil and gas interest, subject to the widow's dower interest.[12] From 1960 through 1987, Southern's 1/80 interest was assessed under one tax ticket, in the name of the widow, as "1/80th Int. 213.35 As. O&G".[13] The widow continuously paid the taxes assessed in her name from 1960 through 1987.[14] In 1988, three additional property tax assessments were issued against each of the children concerning the same 1/80 interest inherited from their father.[15] The assessment was for an interest described as "Int. 226 As. Leased O&G".[16] The widow continued to pay the taxes on the 1/80 interest under the assessment charged to her from 1988 through 2004, but the respondent failed to pay the taxes due under the additional tax ticket that was in his name.[17] In 1994, the respondent's 1/240 interest was sold to the petitioner's father (Haynes) at tax sale.[18]

The court of appeals agreed with the circuit court that the assessment charged against the widow and the additional assessments against the children were double assessments of the same land under the same claim of title because the assessments covered the same 1/80 interest that was inherited from Southern.[19] Although payments were not made under the additional assessment, "the State could require only one payment for the subject mineral estate".[20] Since the widow continuously made payments on the entire 1/80 interest, the court held that the respondent's taxes were never delinquent, and therefore the tax sale was void as a matter of law.[21]

[7] Syl. Pt. 2., State v. Allen, 65 W. Va. 335 (1909).
[8] Id. at 339.
[9] See L&D Invs., Inc. v. Mike Ross, Inc., 818 S.E.2d 872, 875 (W.Va. 2018).
[10] Id.
[11] Id.
[12] Haynes, 2016 W. Va. LEXIS at 3.
[13] Id.
[14] Id.
[15] Id.
[16] Id.
[17] Id. at 3-4.
[18] Id. at 4.
[19] Id. at 8.
[20] Id. at 9.
[21] Id.

ii) Hill v. Lone Pine Operating Company

In *Lone Pine*, the property at issue was the oil and gas interest in approximately 364 acres that were part of a larger parent-tract of 1,300 acres. The 1,300 acres had been leased and was producing since 1899.[22] In 1988, the Harrison County Assessor's Office erroneously created several duplicate production-based assessments for an "Interest in 1300 AS Lease Oil & Gas" because the assessor could not match the 1,300-acre lease with a real property assessment.[23] William L. Mitchell, who owned an interest in the 364-acre tract and was being assessed for an interest in the oil and gas in the same, was one of the parties subject to a double, production-based assessment. Mitchell continued to pay taxes on the original assessment for his interest in the oil and gas in place in the 364-acre tract, but failed to pay taxes on the duplicate production-based assessments for the 1,300 acres.[24] In 1994, Mitchell's interest under the double assessment was sold at tax sale to David and Suellen Hill, the petitioners in the case.[25] In 2010, Mitchell, who was unaware of the 1994 tax deed, quitclaimed all of his interest in the oil and gas underlying the 1,300 acres to Lone Pine, the respondent.[26]

The Supreme Court of Appeals ruled in favor of Lone Pine, upholding the circuit court's order. The court of appeals agreed with the circuit court that there was no dispute that Mitchell consistently paid the original tax on the oil and gas in place for the 364 acres for years. Because Mitchell never allowed the original taxes assessed to him to become delinquent, the court found that the deputy commissioner of delinquent and forfeited lands of Harrison County did not have the authority to sell his interest.[27] Since Mitchell and Lone Pine continuously paid taxes on the original assessment, he could not be affected by the duplicate assessment.[28]

iii) L&D Investments Inc. v. Mike Ross, Inc.

The fact pattern in *L&D Investments* is nearly identical to the fact pattern in *Haynes* and *Lone Pine*, but "the scenario is reversed".[29] In *L&D Investments*, 80 percent of the interest in the oil and gas in place underlying a 1,041 acre mineral tract was being assessed under one "master assessment" in the name of Charles Lee Andrews, a predecessor.[30] Like in *Haynes*, the eighty-percent interest in the oil and gas was owned by several parties but was being assessed under one tax ticket. As with the other cases, in 1988 the Harrison County Assessor's Office generated several production-based assessments that were charged to several predecessors.[31] The "master assessment" remained on the landbooks after 1988 and was paid each year through 1999.[32] In 2000, the taxes under the master assessment became delinquent, but the taxes under the production-based continued to be paid.[33] In 2003, a tax deed conveying the interest under the master assessment was issued to the respondent, Mike Ross, Inc. L&D Investments, Inc., the petitioner, obtained its interest by deeds from one of the owners whose interest was sold at the tax sale in 2013.[34]

[22] Hill v. Lone Pine Operating Co., 2016 W. Va. LEXIS 903, 2 (Nov. 18, 2016)
[23] Id.
[24] Id. at 3.
[25] Id.
[26] Id. at 5
[27] Id. at 11-12.
[28] Id. at 12.
[29] L&D Invs., Inc. v. Mike Ross, Inc., 818 S.E.2d 872, 880 (W.Va. 2018).
[30] Id. at 876.
[31] Id.
[32] Id. at 877.
[33] Id.
[34] Id.

The court ruled that although the 1988 assessments were production-based assessments, they were real property assessments of the parties' undivided interests in the 1,041 acre mineral tract.[35] Because the interests covered by the production based assessments were also covered by the master assessment, they were double assessments. Since the L&D Investments and its predecessors continuously paid taxes on the production-based assessments, and such assessments purported to be the full real property assessments of the predecessors' interest in the oil and gas, the court held that that the State could only require payment under either of the assessments and found the tax deed conveying the interest in the master tax sale to be void.[36]

In its opinion in *L&D Investments*, the court was compelled to point out the critical distinction between the facts in the case with the facts in *Lone Pine* and *Haynes*. In *Lone Pine* and *Haynes,* the petitioners in those cases could only claim ownership of the oil and gas through the purchase of the tax lien that resulted from the non-payment of the duplicate assessment.[37] However, in *L&D Investments*, the petitioner claimed title to the oil and gas through a series of wills, deeds and other instruments, not the mere purchase of a lien at tax sale.[38] The court recognized that the "forfeiture of lands is a harsh, even dreadful remedy, and courts learn from it and never apply it except where the law clearly warrants," and noted that such was not warranted in this case.[39]

Conclusion

The cases of *Haynes*, *Lone Pine* and *L&D Investments* highlight the importance of carefully scrutinizing tax sales and landbook records before obtaining an interest from or making royalty payments to the tax sale purchaser. Historic landbook records should be carefully reviewed to ensure that the delinquent interest sold by the tax deed is not subject to a duplicate assessment. If the interest sold by the tax deed is subject to multiple assessments, and payment has been made under one of the assessments, the tax deed is likely void as a matter of law, as reflected in the above cases. However, because there may be facts and circumstances that are not of public record that could influence the validity of the tax sale, a court order through an action to quiet title should be obtained to eliminate the risk of any adverse claims.

[35] Id. at 881.
[36] Id.
[37] Id.
[38] Id.
[39] Id. *citing* State v. Cheney, 45 W. Va. 478, 480 (1898).

Texas Supreme Court Allows Producers Paying Royalties to Deduct Post-Production Costs

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In a victory for gas producers over royalty owners, on March 1, 2019, the Texas Supreme Court issued its opinion in a significant royalty case*, Burlington Resources Oil & Gas Company LP v. Texas Crude Energy, LLC* (No. 17-0266). The case concerned gas royalty payments by Burlington to owners of overriding royalty interests (ORRIs). At issue was whether Burlington could deduct post-production costs from downstream, off-lease sales proceeds when calculating the ORRI payments. The Supreme Court held that Burlington could deduct post-production costs, despite a royalty clause requiring royalty payments based on the "amount realized" from gas sales, because other language fixed the royalty valuation point at or near the wellhead.

Burlington involved royalty payments by Burlington, the producer, to Texas Crude and Amber Harvest, owners of ORRI's in producing properties. The ORRIs in *Burlington* were set forth in assignments to Texas Crude and Amber Harvest. The assignments provided generally that "[s]aid overriding royalty interests shall be delivered to ASSIGNEE into the pipelines, tanks or other receptacles with which the wells may be connected, free and clear of all development, operating, production and other costs." The assignments also contained a valuation clause providing that "[t]he overriding royalty interest share of production shall be delivered to ASSIGNEE or to its credit into the pipeline, tank or other receptacle to which any well or wells on such lands may be connected, free and clear of all royalties and all other burdens and all costs and expenses except the taxes thereon or attributable thereto." The valuation clause also provided, in the disjunctive, that the assignee could elect to take royalty in cash, in which event Burlington was obligated to pay royalty based on (i) "amount realized from such sale" in the event of an arm's-length sale on or off the lease, or, in the event of a non-arm's-length sale, (ii) the "market value at the wells."

In *Burlington*, the royalties had been paid in cash and the production sold at arm's length. Thus, the "amount realized" valuation standard governed. Texas Crude argued, and the court of appeals agreed, that the "amount realized" language created a royalty free of post-production costs, per *Chesapeake Exploration, L.L.C. v. Hyder*, 483 S.W.3d 870 (Tex. 2016). The Supreme Court disagreed. The Court ruled that while the "amount realized" language "provides considerable support" for Texas Crude's position if "[v]iewed in isolation," the contract language as a whole supported Burlington's position that the royalty bears post-production costs.

The Court considered as significant the "into the pipelines" language that twice appears in the royalty assignments. The Court found that a "sensible reading of this rather abstruse provision is that the 'pipelines, tanks, or other receptacles' are the physical spot at which Texas Crude's interest in the product arises," and thus the place where the royalty is to be valued. In addition, the Court was persuaded that "the pipelines … to which … wells … may be connected" referred to a location "at or near the wellhead." Putting these two concepts together yielded a royalty valuation point at or near the wellhead, which meant that Burlington could deduct post-production costs from downstream sales prices when calculating royalties.

Importantly, the Court rejected Texas Crude's argument that the "into the pipelines" language referred only to *in-kind* transfers. This argument had some appeal given the fact the assignments referred to the royalty "share of production" being "delivered" into the pipelines, language that suggests a physical delivery of product. Nonetheless, the Court believed that if the parties had "intended to create one set of rules for in-kind royalties and another for in-cash royalties," then they

would have used more express language. The Court further noted the "odd" and "implausible" results that would occur if it construed the "into the pipelines" language to apply only to in-kind transfers. For example, if this language covered only in-kind transfers, then "an in-kind transfer would give Texas Crude its royalty percentage of production at the well," whereas "an arms-length sale off the lease would give Texas Crude a higher royalty based on the downstream price after post-production enhancements." The Court remarked of this example: "Under this construction, Burlington would be penalized for marketing Texas Crude's share of production, finding a third-party buyer, transporting the product, and performing other post-production enhancements. It is difficult to fathom why either party would have intended such a result."

While the *Burlington* opinion does not overrule or even criticize *Hyder*, the opinion does, as a practical matter, limit it. Notably, when confronted with the possibility that construing the royalty at issue as cost-free could lead to a result in which the royalty owner got a far better deal simply by electing to take the royalty in cash rather than in kind, the *Hyder* Court had a strikingly different reaction than did the *Burlington* Court: "The fact that the Hyders might or might not be subject to post-production costs by taking the gas in kind [on the lease property] does not suggest that they must be subject to those costs when the royalty is paid in cash [based on sales in distant markets]. The choice of how to take their royalty, and the consequences, are left to the Hyders." 483 S.W.3d at 875. Thus, *Hyder* seemed to endorse the view that the royalty valuation point (for in-cash royalties) does not by default coincide with the royalty delivery point (for in-kind royalties). *Burlington* now seems to embrace the opposite view.

Thus, *Burlington* is a favorable decision for producers. It holds that "amount realized" language does not necessarily establish a royalty free of post-production costs if there is other language in the royalty clause—even language that might appear to address in-kind royalties—indicating that the royalty owner's interest is in the product *at or near the well*. "We have never held that an 'amount realized' valuation method frees a royalty holder from its usual obligation to share post-production costs even when the parties have agreed to value the royalty interest at the well."

Burlington extends the holding in *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118 (Tex. 1996). At issue in *Heritage* were royalty provisions specifically prohibiting "deductions from the value of Lessor's royalty by reason of any required processing, cost of dehydration, compression, transportation, or other matter to market such gas." Justice Owen's opinion, which became the plurality opinion for the Court, held that despite the foregoing language, the producer could properly deduct post-production costs from downstream sales proceeds to calculate royalties that were to be based on the market value at the well. As Justice Owen observed, deducting these costs from downstream sales proceeds to determine market value at the well was not equivalent to deducting the costs from "the value of the Lessor's royalty" when such royalty was based on market value at the well. *Burlington* follows and expands the *Heritage Resources* holding.

Burlington now provides a basis for producers to deduct post-production costs for "amounts realized" leases just as *Heritage Resources* allowed such deductions for "market value at the well" leases. But *Burlington* would seem to require some other language in the lease or assignment that fixes a royalty valuation point at or near the wellhead before such cost deductions are allowed for "amounts realized" leases.

In Putative Class Action, Fifth Circuit Holds that Texas Operators Must Seek Best Price Available in Calculating Royalties Under Proceeds Lease

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Operators in Texas have a duty to market their gas and seek the best reasonable price available for purposes of calculating and paying royalties under a "proceeds lease," according to the U.S. Court of Appeals for the Fifth Circuit in a February 20, 2019 ruling.[1] The case involved a royalty dispute between Devon Energy Production Co. (DEPCO) and a putative class of royalty owners of natural gas wells operated by DEPCO in the Barnett Shale gas field.

Royalty owners alleged that DEPCO sold the gas to a subsidiary, Devon Gas Services (DGS), at an "artificial price" and passed along an unreasonably high gas processing fee to the royalty owners. The owners claimed that DEPCO intentionally lowered the purchase price of the gas at the wellhead by 17.5 percent (the amount of the gas processing fee) and, thus, provided lower royalty payments to the owners because DEPCO used a lower price to calculate the owners' royalties. The owners claimed DEPCO used this systemic pricing model for all gas processed through Devon's Bridgeport Gathering System, which services all of DEPCO's wells in the Barnett Shale. The owners further argued that they all held Class Lease forms, which carried an implied duty to market under Texas law. The owners maintained that DEPCO breached its implied duty to market the gas when it artificially lowered the price of the natural gas that it sold to DGS.

DEPCO, in opposition, argued that the Class Leases at issue were not all the same and that the district court improperly assumed that the same "duty to market" applied to all of them. Based on *Dvorin v. Chesapeake*, DEPCO argued that the district court had a duty to review each Lease individually, including all ancillary documents associated with said Leases, to determine if a duty to market existed. Upon review of the record and the district court's decision, the Fifth Circuit found DEPCO's argument to be unavailing. Unlike *Dvorin*, where all of the lease forms at issue were different, here the Fifth Circuit found that all nine Lease forms were the same and that the duty to market applied equally to all of them. Further, the *Dvorin* court did not require, as DEPCO argued, that every potential ancillary document be located and reviewed before determining whether a group of leases imposed the same implied duty to market. In *Dvorin*, there were other clauses in the Leases that modified the royalty clauses. In this case, no such clauses existed. Simply put, the Fifth Circuit refused to accept DEPCO's argument. The court found that, under Texas law, no difference existed between the implied duty to market and any express duty to market that may be set forth in a lease. Both require reasonableness – the operator must take "reasonable" steps as a "reasonably prudent operator" to market the gas. Pursuant to this duty, DEPCO owed the owners the "...best current price reasonably available."

The Fifth Circuit went on to analyze certain class certification issues arising from the Leases. At the end of the day, the court reversed and remanded the matter back to the district court for further review of the evidence relating to the Leases to determine whether sufficient additional evidence existed to support a finding that the breach of the duty to market and damages from any said breach could be ascertained on a class-wide basis.

[1] Seeligson v. Devon Energy Production Co., L.P. 2019 WL 852060 (5th Cir.).

Oklahoma Court of Appeals Reverses Order Certifying a Class of Royalty Owners Alleging the Underpayment or Non-payment of Royalties on Natural Gas and its Constituents

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The Oklahoma Court of Appeals, in *Whisenant v. Strat Land Exploration Co.*,[1] reversed a decision of the District Court of Beaver County certifying a royalty owner *class*. Whisenant sued Strat Land alleging, on behalf of a proposed class of similarly situated royalty owners, the underpayment or non-payment of royalties on natural gas and its constituents from certain Oklahoma wells. The evidence showed that the putative class included approximately eighty-eight Oklahoma wells and approximately 1,000 royalty owners throughout the United States (¶ 15, note 11). The proposed class wells were located within, or adjacent to, Ellis, Harper, Beaver and Texas Counties. (¶ 2).

Whisenant asserted that one of the issues of law and fact common to the proposed class was "whether gas [is] in Marketable Condition at the meter run/gathering line inlet" (¶ 3). He additionally argued, among other issues, that Strat Land paid royalty to him and to the proposed class using a common method based on the *net revenue* Strat Land received under its marketing contracts rather than paying royalties based on the *gross amount* received by the midstream purchaser from its sale of the gas at interstate or intrastate markets. (¶ 4)

The District Court certified a class, subject to a series of exclusions not described below, consisting of all royalty owners in Oklahoma wells that:

> (a) operated by [Strat Land]; (b) marketed by Strat Land to DCP Midstream (f/k/a Duke Energy Field Services)' and (c) that have produced gas and/or gas constituents (such as residue gas, natural gas liquids, helium, or condensate) from February 12, 2009 to the time Class Notice is given. . . . (¶ 5)

The District Court granted class certification under 12 O.S. § 2023(B)(3). Strat Land filed an interlocutory appeal of the class certification order.[2]

The Oklahoma Court of Appeals observed that "the primary issue on appeal is whether there are common questions of law or fact." (¶ 10). However, since the class was certified below under 12 O.S. § 2023(B)(3), the court noted the additional requirement that common issues *predominate* over other questions. The court stated, early in its discussion, that "[i]n the present case, class certification is inappropriate because a 'highly individualized' review of the facts pertaining to each of the numerous wells is necessary."[3] In concluding that the lower court's order granting class certification should be reversed, certain of the key findings of the Court of Appeals included the following:

[1] 429 P.3d 703, 2018 OK CIV APP 65.

[2] Under Oklahoma state court procedure, an order granting or denying class certification is "subject to a de novo standard of review by any appellate court reviewing the order." 12 O.S. Supp. 2014 § 2023(C)(2).

[3] The Oklahoma Court of Appeals cited in support of this conclusion its earlier decision in *Strack v. Cont'l Res., Inc.*, 2017 OK CIV APP 53, ¶ 32, 405 P.3d 131, *cert. denied.*

First, the court found that the standards in Oklahoma for determining whether certain types of post-production costs may be deducted in the computation of gas royalty payments, as recognized in the landmark case of *Mittelstaedt v. Santa Fe Minerals, Inc.*,[4] require a fact-intensive inquiry. That the trial court found "that Strat Land had a common corporate policy of not paying royalty on the gross value of the gas produced under the leases"[5] was insufficient to satisfy the predominance requirement of 12 O.S. § 2023(B)(3).[6] Rather, in discussing the complex analysis of determining whether the costs deducted in the computation of gas royalties were expenses necessary to make the gas a *marketable product*, the Court of Appeals stated that "highly individualized and fact-intensive review of each Class Members' claim would be necessary to determine if [the defendant] underpaid oil or gas royalties."[7]

Second, as a consequence of the above, the Court of Appeals rejected Whisenant's contention that "[c]lass action treatment will allow a large number of similarly situated individuals to prosecute their common claims in a single forum, simultaneously, efficiently, and without duplication of time, expense and effort on the part of those individuals, witnesses, the courts and/or [Strat Land]."[8] The court was likewise unpersuaded by Whisenant's contention that disposing of the case as a class action would "avoid the possibility of inconsistent and/or varying results in this matter arising out of the same facts."[9]

Third, the Oklahoma Court of Appeals declined Whisenant's assertion that "determination of the quality of gas and other facts pertinent to each well are susceptible to generalized proof."[10]

Fourth, the appellate court rejected the use of assumptions parallel to those used in the case of *Tyson Foods, Inc. v. Bouaphakeo,*[11] finding:[12]

> [A]n assumption analogous to that forwarded by the employees in *Tyson*—i.e., an assumption that, for each gas well within the proposed class, the royalty-valuation point and deductible costs can be set at the same average point and amount—is unwarranted.

The court concluded that a class-wide determination based either on the variables as they exist with Whisenant's one well "or on an average sampling (i.e., of gas quality, proximity of interstate pipelines, availability and proximity of processing plants, market realities, and so forth) would result in distorted and inconsistent awards to the various members of the class."[13] Citing *Tyson Foods,*

[4] 1998 OK 7, 954 P.2d 1203.
[5] (¶ 12)
[6] The Court of Appeals cited *EQT Production Co. v. Adair,* 764 F.3d 347 (4th Cir. 2014) ("Even a plethora of identical practices will not satisfy the predominance requirement if the defendants'; common conduct has little bearing on the central issue in the litigation – in this case, whether the defendants underpaid royalties."
[7] Citing *Strack v. Cont'l Res., Inc.,* 2017 OK CIV APP 53, ¶ 32, 405 P.3d 131, and *Foster v. Apache Corp.,* 285 F.R.D. 632, 638 (W.D. Okla. 2012).
[8] *Whisenant* at ¶ 16.
[9] *Id.*
[10] *Id.* at ¶ 17.
[11] 136 S.Ct. 1036 (2016).
[12] *Whisenant* at ¶ 20.
[13] *Id.* at ¶ 21.

Inc. v. Marez,[14] the court noted that "a judgment must be based upon evidence that establishes essential facts as probably, not merely possibly being true."[15]

Fifth, the Court of Appeals found "[a] reliance upon facts derived from other wells would be as impermissible as it would have been to determine liability in *Wal-Mart* based upon generalized evidence derived from other store managers."[16] The Court of Appeals rejected the plaintiff's assertion that class action certification was appropriate here based on the contention that the case would rely on admissible expert testimony to prove class-wide liability.

Finally, the court held that, even if Strat Land paid royalties to the members of the putative class using a common method, "the establishment of this common fact fails to resolve the issue of liability, an issue which remains individual rather than common."[17] The court specifically rejected Whisenant's contention that the alleged common method was either right or wrong, class-wide.

Concluding that the predominance and superiority requirements for class certification under 12 O.S. § 2023(B)(3) were not satisfied in this case, the Court of Appeals reversed the trial court's order granting class certification. Whisenant's subsequent petition for certiorari review by the Oklahoma Supreme Court was denied by that Court by order issued on October 1, 2018. Mandate was issued on October 31, 2018.

[14] 1996 OK CIV APP 137, ¶ 8, 931 P.2d 760.
[15] *Whisenant* at ¶ 21.
[16] *Id.*at ¶ 22.
[17] *Id.* at ¶ 23.

Ohio Legislature Amends Real Estate Licensing Statute to Exempt Landmen

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An article in the December 2018 issue of the Oil & Gas E-Report noted that the Ohio Supreme Court had interpreted the state's real estate licensing statute as applying to petroleum landmen. The case was *Dundics v. Eric Petroleum Corp.*, which was handed down in late September 2018.[1] One of the effects of the decision was that, unless a landman had a real estate license, the landmen would have no cause of action to recover unpaid or underpaid fees. Another consequence was that, unless a landman happened to have a real estate license, that landman would be guilty of a criminal misdemeanor.[2]

In late 2018, the Ohio legislature responded. Part of S.B. 263 amends the state's real estate licensing statute, effective March 20, 2019. As amended, Revised Code § 4735.01 provides that "oil and gas land professionals" are exempt from the requirement of obtaining a real estate license in two situations. One is if the land professional is an employee of the person or company for whom the land professional is performing his or her duties.[3] The other is if "the oil and gas land professional is not engaged in the purchase or sale of a fee simple absolute interest in oil and gas or other real estate and the oil and gas land professional complies with division (A) of section 4735.023 of the Revised Code."[4] To comply with 4735.023, a land professional must register annually with the state and provide certain specified information to any landowner or other person with whom the land professional deals.[5]

[1] *Dundics v. Eric Petroleum Corp.*, 2018-Ohio-3826, 2018 WL 4627711 (interpreting Ohio Rev. Code §§ 4735.01 and 4735.02).
[2] *See* Ohio Rev. Code § 4735.99.
[3] Ohio Rev. Code § 4735.01(I)(i).
[4] Ohio Rev. Code § 4735.01(I)(h).
[5] Ohio Rev. Code § 4735.023.

Ohio Supreme Court Addresses Marketable Title Act[1]

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Encouraged by higher commodity prices and increased development, Ohio landowners continue to use Ohio's Dormant Mineral and Marketable Title Acts (ODMA and OMTA) to establish title to severed oil and gas interests in their changes of title. That has led to more scrutiny by litigants and courts alike into whether and how both Acts might apply to extinguish prior ownership claims.

Recently, the Supreme Court of Ohio clarified how a severed mineral interest may be preserved by the OMTA. In *Blackstone v. Moore*, 2018-Ohio-4959 (Dec. 13, 2018), the Court held that under the OMTA, a deed reference to a previously reserved royalty interest was sufficiently-specific to preserve that interest because the reference identified the type of interest created and the person to whom the interest was granted (even if the reference did not include the volume and page number of the record in which, or the date on which, the interest was reserved).

The facts of the case were relatively straightforward: The Kuhns conveyed real property to the Browns in 1915, reserving a one-half interest in oil and gas royalties. In 1969, the Browns' successor-in-interest conveyed the same property to the Blackstones by a deed that referenced the Kuhns' reserved royalty interest as follows:

> Excepting the one-half interest in oil and gas royalty previously excepted by Nick Kuhn, their [sic] heirs and assigns in the above described sixty acres.

The Blackstones brought suit in 2012 claiming, in part, that the OMTA terminated the royalty interest. While they succeeded at the trial court, the Seventh District Court of Appeals ruled against the Blackstones, holding that the reference to the Kuhns' royalty interest in the 1969 deed was sufficiently specific, thus preserving the royalty interest under the OMTA.

On appeal to the Supreme Court of Ohio, the Blackstones argued that the reference to the Kuhns' royalty interest in the 1969 deed was not sufficiently-specific because the reference did not include the volume and page number of the instrument originally creating the royalty interest. Alternatively, the Blackstones suggested that at a minimum, the deed reference should have included both the name of the grantor and grantee and the instrument's recording date.

Disagreeing with the Blackstones, the Supreme Court held that the reference to the Kuhns' royalty interest in the 1969 deed was specific and thus preserved the royalty interest. Interpreting the statutory language, the Court observed that marketable record title is taken subject to interests inherent in the record chain of title, "provided that a general reference * * * to * * * interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such * * * interest."[2]

The Court held that determining whether a reference to an earlier interest in the chain of title was general or specific under the statute involves a three-step analysis. First, is there a reference to an interest described within the chain of title? Two, is the reference a "general reference"? Three, if the answers to the first two questions are yes, does the general reference contain a specific identification of a recorded title transaction?

[1] This article is based in part on a previous article posted on our firm's website.
[2] R.C. 5301.49(A).

Here, the reference to the Kuhns' royalty interest was specific, rather than general, because it included "details and particulars about the interest in question," the interest was "accurately referenced," and was free from ambiguity. Namely, the reference included the type of interest (i.e., a "one-half interest in oil and gas royalty") and identified the name of the original reserving party (i.e., "Nick Kuhn, their [sic] heirs and assigns"). And because the interest was specific, it was unnecessary for the Court to proceed to the third question—whether the general reference contained a specific identification of a recorded title transaction.

While the Court acknowledged the Blackstones' policy arguments for requiring a volume/page or date reference as part of the specificity analysis, the Court noted that those arguments are best directed to the legislature. These items were not required based on the statute's plain language.

Note that in a concurring opinion, Justice DeGenaro wrote that the scope of the Court's opinion was "narrow" and "should not be read to implicitly hold that the more general [OMTA] continues to apply to mineral interests following the enactment of the [ODMA]—a more specific statute for providing for the termination of those interests." While not an issue raised on appeal, Justice DeGenaro—who left the Court at the end of last year–questioned whether the OMTA still applies to mineral interests after the passage of the ODMA.

Saltwater Disposal Agreement that Did Not Set a Maximum Length on the Agreement's Term Became a Month-To-Month Lease by Operation of Louisiana Law

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In 2008, Toce Energy, LLC drilled an oil well on the defendants' land.[1] The well soon began producing salt water, in addition to oil, and Toce entered a surface lease with the landowners. The surface lease, which the parties called their "Saltwater Disposal Agreement," gave Toce the right to use a previously plugged and abandoned well on the land for salt water disposal.[2] Toce began saltwater injection operations.

The Saltwater Disposal Agreement stated

> This Agreement will terminate on October 15, 2009, unless on or before said date, Grantee pays to Grantors, as set forth below, a rental of TWO THOUSAND and NO/100 Dollars ($2,000), which payment will maintain Grantee's rights in effect for one (1) year from the date above mentioned, and Grantee may continue to maintain the rights herein granted for successive one (1) year periods by paying Grantors, on or before the beginning of each respective period, the sum of TWO THOUSAND and NO/100 Dollars ($2,000.00).

Toce extended the Saltwater Disposal Agreement from year to year through 2017. In that year, Toce assigned its oil and gas leases, as well as the Saltwater Disposal Agreement, to Oleum America LLC. Prior to the assignment, Toce sent the landowners a check for $2000 and gave notice that it desired to extend the Saltwater Disposal Agreement for another year. The landowners notified Toce and Oleum, however, that they were refusing to allow another extension, and that they were terminating the Saltwater Disposal Agreement as of October 15, 2017. Oleum, however, continued to operate the saltwater disposal well beyond that date. Oleum brought suit, seeking a declaration that the Saltwater Disposal Agreement still was in force. The landowners counterclaimed, alleging trespass.

The landowners contended that they had a right to terminate the lease. They pointed to Louisiana Civil Code article 2679, one of the articles that governs leases (though not all oil and gas leases[3]). The article states:

> The duration of a term may not exceed ninety-nine years. If the lease provides for a longer term or contains an option to extend the term to more than ninety-nine years, the term shall be reduced to ninety-nine years.

[1] Oleum America LLC v. Stelly, 2018 WL 6497865 (W.D. La. 2018).
[2] Toce apparently had an oil and gas lease. Under Louisiana law, unless an oil and gas lease provides otherwise, the lessee under the oil and gas lease may have an implied right to use the land for salt water disposal associated with the oil and gas production. *See* Leger v. Petroleum Engineers, Inc., 499 So. 2d 953 (La. App. 3rd Cir. 1986). The court did not discuss whether the oil and gas lease precluded use of the land for saltwater disposal, whether Toce wanted a surface lease to avoid any doubt about its right to use the land for salt water disposal, whether Toce wanted a surface lease so that it could use the salt water disposal well for disposing of salt water produced from other lands (in addition to the leased land), or whether there is some other reason why Toce entered the Saltwater Disposal Agreement.
[3] Regions Bank v. Questar Exploration & Production Corp., 184 So. 3d 260 (La. App. 2nd Cir. 2016).

If the term's duration depends solely on the will of the lessor or the lessee and the parties have not agreed on a maximum duration, the duration is determined in accordance with the following Article.

The landowners argued that the Saltwater Disposal Agreement was a lease whose term depended solely on the will of the lessee. Therefore, its term was governed by Civil Code article 2680. That article provides that leases of immovable property,[4] other than agricultural leases, are from month to month when parties have not agreed to the length of the lease.

Oleum did not seriously dispute that the Saltwater Disposal Agreement constituted a lease. Oleum argued, however, that the lease had a term. The term was one-year. The lease also contained an option to extend the lease an unlimited number of times—with each extension being for another one-year term. If the Agreement's failure to put a limit on the number of extensions caused the Agreement to run afoul of Civil Code article 2679's prohibition on leases whose term exceeds 99-years, the article's plain language should have the effect of limiting the total duration of the Agreement, with extensions, to 99 years.

The court disagreed and entered a partial summary judgment in favor of the landowners, holding that the Agreement was month-to-month after the first year, and that the landowners had given Oleum a reasonable notice of their intent that the lease would terminate in October 2017.

[4] "Immovable property" is a civil law classification of property that is analogous to the common law's concept of real property. *See* La. Civ. Code art. 462; *see also* In re Goodrich Petroleum Corp., 894 F.3d 192, 197 n.9 (5th Cir. 2018) ("In civil law systems things are divided into movables and immovables. This division was known in Roman law and other ancient legal systems and has been adopted in modern civil codes. In common law jurisdictions, property is divided into personal property and real property, but these terms may be taken as roughly equivalent to the civilian notions of movables and immovables.").

Court Holds that OCSLA Regulation does not Serve as Basis for Duty Under General Maritime Law

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Terry Gantt was an employee of Seadrilll Americas, Inc.[1] He brought suit, alleging that he was injured while responding to a fire on board the M/V WEST NEPTUNE. When the fire occurred, the NEPTUNE was providing services related to the drilling of a well on the federal Outer Continental Shelf, off the coast of Louisiana.

Gantt named several defendants, including various "LLOG defendants" that are related to the company that was operating pursuant to a federal offshore oil and gas lease. Gantt asserted general maritime negligence claims against the LLOG defendants. Under maritime law, a plaintiff must prove four elements to recover under a negligence theory—(1) the existence of a duty; (2) the defendant's breach of the duty; (3) an injury sustained by the plaintiff; and (4) a causal link between the injury and the breach of duty.

The LLOG defendants moved for summary judgment, arguing that the plaintiff would be unable to show that they owed him any duty. The district court began by noting that, when a principal hires an independent contractor, the principal has no duty to discover or remedy hazards created by the contractor. Here, the LLOG defendants had hired an independent contractor. Thus, under the general rule, the LLOG defendants should have no liability.

The plaintiff did not dispute this. Instead, the plaintiff asserted that the LLOG defendants owed him a duty under 30 C.F.R. § 250.107, a regulation promulgated pursuant to the Outer Continental Shelf Lands Act.[2] The regulation requires certain leaseholders, including the LLOG defendants, to promote safety by "[m]aintaining all equipment and work areas in a safe condition." The United States District Court for the Eastern District of Louisiana (Africk, J.) noted, however, that the United States Fifth Circuit has held that a violation of OCSLA regulations does not give rise to a private cause of action.

That was not the end of the inquiry, however. The district court then considered whether the OCSLA regulations have the effect of imposing a duty under general maritime law. The court stated that the Fifth Circuit had not directly addressed whether OCLSA regulations have the effect of imposing a duty under general maritime law. However, the Fifth Circuit has previously held that OCSLA regulations do not create a duty or a standard of care for negligence claims governed by Louisiana law. Further, the Fifth Circuit has stated that the OCSLA regulations are not "analogous to safety regulations which require a specific standard of conduct in particular situations." Based on that Fifth Circuit reasoning, the district court held that OCSLA regulations do not establish a duty or a standard of conduct under general maritime law.

Finally, the plaintiff argued that a contract between one of the LLOG defendants and an entity related to the plaintiff's employer required the LLOG defendant to confirm that the relevant vessel was safe, but that the defendant had failed to do so. The court rejected this argument too. The court granted the LLOG defendants' motion and dismissed the plaintiff's claims against them with prejudice.

[1] Gantt v. Seadrill Americas, Inc., 2018 WL 6725373 (E.D. La. 2018).
[2] 43 U.S.C. § 1331, *et seq.*

Louisiana Third Circuit Affirms Trial Court's Denial of Pipeline Company's Attempt to Use Eminent Domain to Acquire Right-of-Passage for Pipeline Maintenance

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Acadian Gas Pipeline constructed and operated a natural gas pipeline to carry gas from the Haynesville Shale area to Napoleonville, Louisiana, where the gas is sold.[1] The pipeline crosses land owned by Oliver McMickens, and Acadian Gas has a servitude that authorizes that crossing. After the pipeline had been in operation for several years, a dispute arose between Acadian and McMickens regarding damage to timber, and McMickens temporarily denied Acadian the right to access his property.

Before and after that temporary denial of access, McMickens allowed Acadian to cross his land by a "gentlemen's agreement" to reach the pipeline. Nevertheless, McMickens's temporary exclusion of Acadian from his property prompted Acadian to seek a formal, permanent right of access, so that the company did not have to rely on the revocable "gentlemen's agreement" by which Acadian had gained access to McMickens's land. Acadian sought to purchase a permanent right-of-passage to access the pipeline for maintenance, but Acadian and McMickens could not reach an agreement regarding the route and the amount of compensation that Acadian would pay McMickens.

Acadian filed suit in state court in Rapides Parish, seeking to acquire a permanent right-of-passage by expropriation for Acadian's preferred route. After a bench trial, the district court issued a judgment denying Acadian's request. Acadian appealed to the Louisiana Third Circuit Court of Appeal.

The Third Circuit reviewed the legal standards applicable to the case. Under Louisiana law, the operator of a proposed or existing natural gas pipeline that has secured a certificate of convenience and necessity can acquire by expropriation such property rights as are "necessary for the proper conduct of its business as a common carrier," including rights to facilitate the construction, operation, or maintenance of the pipeline.[2] To justify expropriation, the taking of private property by expropriation must be necessary for a public purpose.[3] The questions of whether the purpose of the taking is "public" and whether the taking is "necessary" are matters for the trial court to decide, and that court's determination should be affirmed on appeal, absent manifest error.[4]

In the context of a challenge to the "necessity" of a taking, the *necessity* at issue relates to the purpose of the taking, not the specific location of the land where the expropriator seeks rights.[5] An expropriator has "large discretion" in deciding the extent and location of the property to be expropriated.[6] The Louisiana Supreme Court has stated:

[1] Acadian Gas Pipeline System v. McMickens, 2018 WL 6816472 (La. App. 3rd Cir. 2018).
[2] La.Rev.Stat. 45:251(3). Of course, the owner from whom the rights are expropriated is entitled to compensation.
[3] *Acadian Gas*, 2018 WL at *2 (citing La. Const. art. 1 §4(B)(5)).
[4] *Id.* (citing La. Const. art. 1 §4(B)(5) and Lafayette City-Parish Consol. Gov't v. Person, 100 So. 3d 293 (La. 2012)).
[5] *Id.* at *2.
[6] *Id.*

> The criteria to be considered by the expropriator in determining the location and extent of the property to be expropriated includes factors such as costs, environmental impact, long range area planning, and safety considerations.[7]

If a landowner challenges the necessity of the taking, the landowner has the burden of proving that the expropriator exercised its discretion “arbitrarily, capriciously, or in bad faith.”

The appellate court affirmed the trial court’s decision, concluding that the decision was not manifestly erroneous.[8] The appellate court noted that Acadian had operated and maintained the pipeline for several years without the right-of-passage that it sought and that McMickens had only denied Acadian access on one occasion. The court also noted that McMickens had identified an alternative access route that would be shorter, and that Acadian does not seem to have adequately considered other routes. Further, the Third Circuit also noted that record did not contain evidence showing that Acadian had adequately considered safety and environmental issues when choosing its proposed route for accessing the pipeline for maintenance. In addition, the Third Circuit noted that the trial court had concluded that Acadian was motivated to seek the right-of-passage because of the timber damages dispute, rather than a true need for a permanent way to access the pipeline.

[7] *Id.* at *3 (citing Red River Waterway Com'n v. Fredericks, 566 So. 2d 79, 83 (La.1990)).
[8] *Id.* at *12, 14.

Colorado Supreme Court Rejects Activists' Request for Rule Conditioning Drilling Permits on a Finding of No Adverse Impact

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In early 2019, the Colorado Supreme Court issued its decision in *Martinez*, a much-watched case that some people feared had the potential to stop all oil and gas drilling in the state. The dispute that gave rise to the case began in 2013, when a handful of "youth activists" petitioned the Colorado Oil and Gas Conservation Commission for a regulation providing that the Commission would

> not issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change.[1]

In support of their petition, the activists alleged that hydraulic fracturing was adversely impacting human health and impairing the environment, and that human activity was causing climate change. In effect, they sought a complete cessation of drilling in Colorado.

The Commission solicited written comments from interested persons, held a public hearing, and then engaged in deliberations on the proposed rule. Ultimately, the Commission voted unanimously to deny the petition. The Commission issued a written ruling stating that the proposed rule was inconsistent with the Commission's statutory mandate. The proposed rule would require the Commission to condition any oil and gas drilling on a finding of no adverse impact on the environment, whereas statutory law requires the Commission to balance the production of oil and gas with environmental protection. The Commission also noted that it was working with the Colorado Department of Public Health and Environment to address the concerns raised by the activists in their petition.

The youth activists filed suit to challenge the Commission's ruling, but the Denver District Court upheld the Commission's ruling. The activists appealed. In a split decision, the appellate court's majority reversed, ruling in favor of the activists. The Colorado Supreme Court agreed to review the case.

The Colorado Supreme Court noted that activists argued that the rule they sought is necessary for compliance with the Colorado Oil and Gas Conservation Act. In particular, the activists pointed to language in the Act's legislative declaration in Colorado Revised Statute 34-60-102(1)(a)(I). That provision states that it is in the "public interest to"

> [f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.

[1] Colorado Oil and Gas Conservation Commission v. Martinez. 433 P.3d 22 (2019).

The activists argued that the phrase “in a manner consistent with” requires the Commission to make a finding that oil and gas activity will have no adverse effect on public health or the environment before the Commission allows further drilling.

The Commission disagreed, arguing that the statute requires a balancing of development and environmental protection. The Commission and other opponents of the proposed regulation noted that the section on which the activists relied also contains language stating that it is in the public interest to “manage oil and gas operations in a manner that balances development with wildlife conservation.” Colo. Rev. Stat. 34-60-102(1)(a)(IV). Further, section 34-60-106(2)(d) authorizes the commission to regulate oil and gas operations “so as to prevent and mitigate significant adverse environmental impacts … to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility.” They argued that each of these provisions shows that the legislature intend that the Commission engaged in balancing, rather than in the prohibition of oil and gas activity unless it can be done without environmental impact.

The Colorado Supreme Court concluded that the statutory provision is ambiguous and that both the activists’ interpretation and the Commission’s interpretation are plausible. The court therefore looked at other provisions of the Act and at legislative history. The court rejected the activists’ contention that the legislative history shows that the legislature intended for the Act to preclude oil and gas activity, except after a finding that the activity would have no adverse impact. The court also rejected the Commission’s argument that the legislature intended to establish a balancing test. Instead, the court concluded that the history showed that the legislature intended to promote multiple goals.

Ultimately, although the court rejected each side’s arguments, the effect of the court’s conclusion may be reasonably close to the Commission’s position. The court stated

> [I]n our view, the pertinent provisions make clear that the Commission is required (1) to foster the development of oil and gas resources, protecting and enforcing the rights of owners and producers, and (2) in doing so, to prevent and mitigate significant adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, but only after taking into consideration cost-effectiveness and technical feasibility.

The court concluded that the rule proposed by the activists was inconsistent with this mandate and that the Commission had not erred by refusing to engage in the rule-making requested by the activists. The court also found it noteworthy that the Commission was already working with the Department of Public Health and Environment to address some of the concerns raised by the activists.

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