The Big XII

12 Recent Appalachian Basin Oil & Gas Cases

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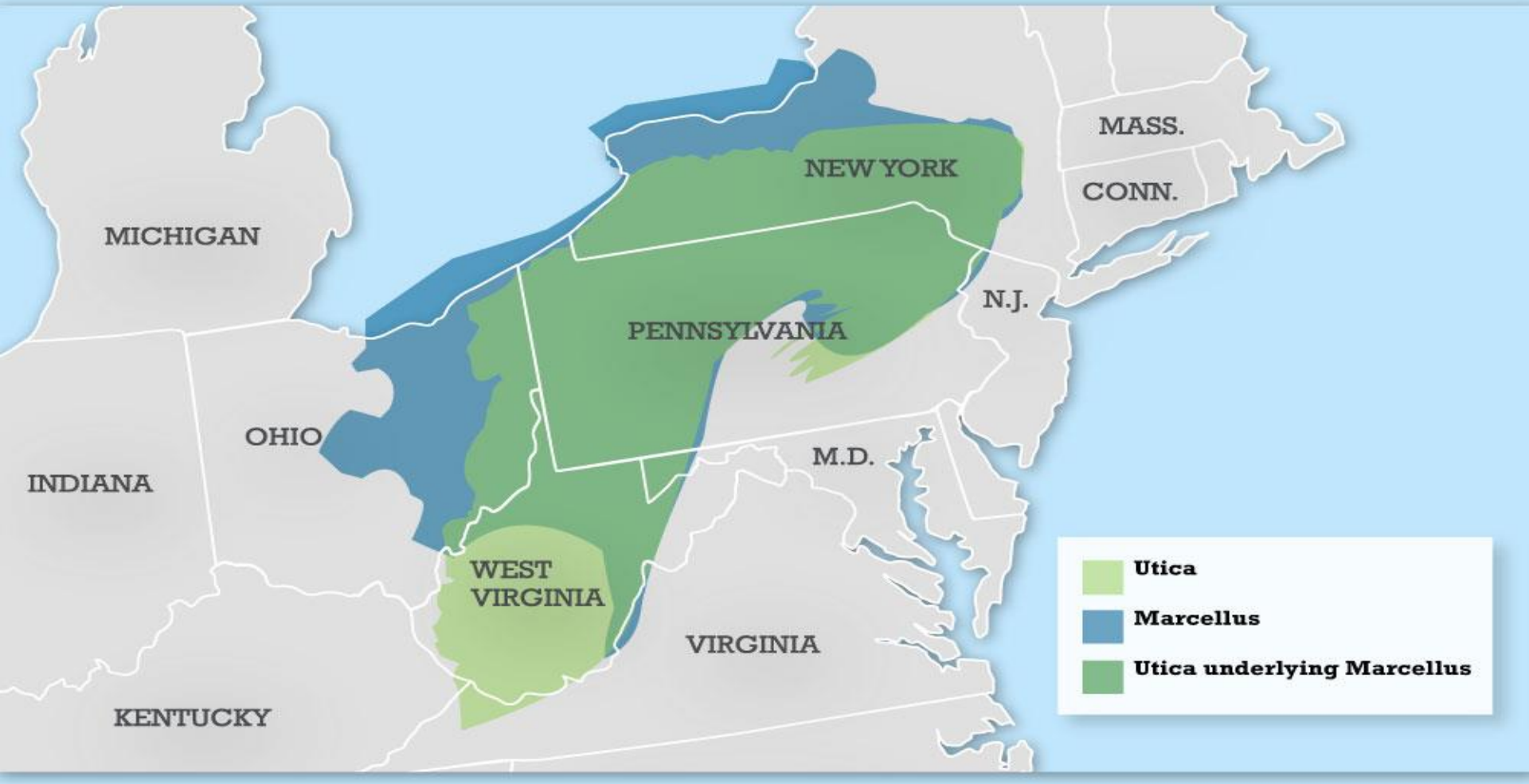
The Appalachian Basin



WEST VIRGINIA

Post-production Costs

- *Leggett v. EQT Prod. Co.*, 800 S.E.2d 850 (W. Va. 2017)
  - W. VA. CODE § 22-6-8 provides that leases with flat-rate well royalty must be converted to "1/8 at the wellhead" for new or reworked wells
  - Can the lessee deduct post-production costs and use the net-back method to determine "1/8 at the wellhead"? Or does *Tawney* prohibit such deductions?
  - Certified question from federal district court

Post-production Costs

- In *Leggett* I (Nov. 17, 2016), the Court held that, because of *Tawney*, lessees could not use "net-back" method
  - Royalty cannot be diluted by costs and losses incurred downstream from wellhead before marketable product is rendered
    - Including expenses incurred in gathering, transporting, or treating the OG
  - Two justices dissented: *Tawney* shouldn't apply in interpreting flat-rate statute

Post-production Costs

- Then, there was a curious turn
  - Majority opinion author was defeated for re-election
  - Lessee asked for reconsideration
  - When motion was heard after new justice took her seat
  - She voted with the two dissenters to rehear the case
  - Guess what happened?

Post-production Costs

- In *Leggett* II, the Court held that the flat-rate statute permits "net-back" method of calculating royalty, even though *Tawney* generally disallows such deductions under lease language
  - In the majority, the two dissenters and the new justice, plus one other justice concurred
  - One justice dissented
- Will *Tawney* now be challenged?

NPRO Consent to Pooling

- *Gastar Exploration, Inc. v. Contraguerro*, 800 S.E.2d 891 (W. Va. 2017)
  - OG lease can be pooled without consent or ratification by NPROs
  - Pooling doesn't create cross-conveyance
  - Pooling only consolidates the contractual and financial interests regarding production
    - *Boggess v. Milam*, 34 S.E.2d 267 (1945)
  - Following TX rule would give executive rights back to NPROs

Survey Access

- *Mountain Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850 (W. Va. 2016)
  - Pipeline would carry gas produced mainly by pipeline affiliates from Wetzel Co., W. Va., to Roanoke Gas Co., Transco Pool, and Columbia WB line, all in Va.
  - Company applied for FERC certificate and needed to survey pipeline route
  - Landowners refused survey access
  - Company said it would use W. Va. eminent domain
  - Landowners got an injunction

Survey Access

- *Mountain Valley*
  - On appeal, WVSCA held that company did not have eminent domain power under W.Va. statute because it could not show that its desired use was for "public use"
  - Company was not a regulated utility
  - No W.Va. consumers or non-company-affiliated producers would benefit from pipeline

Pooling Authority

- *Stern v. Columbia Gas Trans., LLC*, 2016 WL 7053702 (N.D.W. Va. Dec. 5, 2016)
  - Lessors refused to sign pooling modification
    - Granting clause: "all other rights and privileges necessary, incident to, or convenient for the operation of the [lessors' property], alone and conjointly with other lands for the production and transportation of oil and gas"
  - Lessee went ahead and filed Declaration of Pooling, which included part of lessors' lands

Pooling Authority

- *Stern*
  - Court held that the granting clause "contemplates the pooling or unitization with neighboring lands"
  - Court rejected lessors' argument that pooling wasn't allowed because there was no royalty allocation language in their lease
    - Lessors are entitled to royalty in proportion with the acreage of their land in the unit
      - Analogized this situation to a community lease

OHIO

The ODMA Cases

- On Sept. 15, 2016, the Ohio Supreme Court decided 12 cases pending before it relating to the Ohio Dormant Mineral Act (ODMA)
- There are two versions of the ODMA, one enacted in 1989, and another in 2006

The ODMA Cases

- *Corban v. Chesapeake Exploration, L.L.C.*, 2016 Ohio 5796 (2016)
  - 1989 version is not self-executing and did not automatically reunite severed oil and gas with the surface
  - Under the 1989 version, surface owner must seek to abandon severed OG through quiet title action
  - Any ODMA claim brought after June 30, 2006, must comply with notice requirements in 2006 version

The ODMA Cases

- In two companion cases, *Walker v. Shondrick-Nau*, 2016 Ohio 5793 (2016) and *Albanese v. Batman*, 2016 Ohio 5814 (2016), the Court reiterated that the 2006 version of the ODMA applies to claims brought after June 30, 2006
- *Walker*: Severed OG owner protected OG by timely filing notice of preservation after receiving notice of abandonment
- *Albanese*: OG was not abandoned because surface owner had not complied with 2006 version of ODMA

Landman Licensing

- *Dundics v. Eric Petroleum Corp*., 2017-Ohio-640 (Ohio App. Feb. 17, 2017)
  - Landmen bought leases for company, but company didn't pay landmen what was promised; landmen sued to collect money
  - Magistrate ruled that landmen couldn't collect money because they weren't Ohio licensed real estate brokers
  - Trial court and appeals court affirmed

Post-Production Cost Deductions

- *Lutz v. Chesapeake Appalachia, L.L.C.*, 71 N.E.3d 1010 (Ohio 2016)
  - Putative class action
  - Federal district court certified question
    - "Does Ohio follow the 'at the well' rule . . . or does it follow some version of the 'marketable product' rule . . . ?"
  - Ohio S.Ct.: OGL is a contract subject to traditional rules of contract construction
    - Specific lease language controls
    - If ambiguous, court needs extrinsic evidence; if not, district court can interpret w/o assistance
    - Declined to answer and dismissed case

Force Majeure

- *Haverhill Glen, LLC v. Eric Petroleum Corp.*, 67 N.E.3d 845 (Ohio App. 2016)
  - Surface owner's denial of access to oil and gas lessee was force majeure which tolled the primary term of the OG lease
  - Force majeure clause in OGL specifically included "inability to obtain necessary . . . access" as a force majeure

PENNSYLVANIA

Damage from Drilling in Dimock

- *Ely v. Cabot Oil & Gas Corp*., 2017 WL 1196510 (M.D.Pa. Mar. 31, 2017)
  - Landowners sued Cabot, alleging that Cabot negligently drilled two OG wells that interfered with and damaged their water supply and their enjoyment of their property
  - After 3-week trial, jury returned verdict in landowners' favor and awarded $4.24 million
  - Court granted Cabot's motion for new trial and set aside verdict

OG Regulation

- *Wayne Land and Mineral Group, LLC v. Del. R. Basin Comm'n*, 2017 WL 1100565 (M.D. Pa. Mar. 23, 2017)
  - Delaware River Basin Commission asserts authority to approve/disapprove OG projects in Delaware River Basin in NY, PA, NJ, and DE
    - De facto moratorium while DRBC "adopts" regs
  - Court reaffirmed DRBC authority
  - Case has been appealed to 3d Circuit

OG Regulation

- *Robinson Twp. v. Comm'n of Pa.*, 147 A.3d 536 (Pa. 2016)("*Robinson* IV")
  - Struck most of the remaining provisions of Act 13 of 2012
    - Act 13: enacted by General Assembly to address increased OG development
  - Left "impact fee" in place
  - Struck down:
    - PUC/appeals court authority to hear challenges to local regulations of OG activity

OG Regulation

- *Robinson* IV
  - confidentiality regarding frac chemicals
  - Provision under which PADEP did not have to notify private water well owners if a spill associated with hydraulic fracturing occurred
  - Eminent domain powers for companies acquiring property for gas storage
  - In *Robinson Twp. v. Comm'n of Pa.*, 83 A.3d 901 (Pa. 2013)("*Robinson* I"), the Court struck down Act 13 spacing and zoning provisions

Title Wash

- *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016)
  - Affirmed decision that 1935 tax sale of unseated lands covered both the surface and OG, even though OG had been severed from surface in 1899 deed
    - Severed OG owner had not complied with statutory requirement to notify county commissioners of severance so that OG could be assessed for taxation
  - rejected arguments that OG could not have been properly assessed and that severed OG owner had been denied due process because of insufficient notice of tax sale proceedings
  - Reaffirmed *Hutchison v. Kline*, 49 A. 312 (Pa. 1901)

Thank You!

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