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West Virginia Enacts Co-tenancy Statute to Eliminate Crucial Barrier to Shale Development

On March 9, 2018, Governor Justice signed into law the Co-tenancy Modernization and Majority Protection Act which goes into effect on July 1, 2018. This new law modifies the longstanding rule requiring *all* co-owners of oil and gas to execute an oil and gas lease or give permission to an oil and gas operator before any extraction of the oil and gas can occur. Under the new law, where certain pre-requisites are satisfied, the operator may develop the oil and gas if a minimum of 75% of ownership is leased.

Prior to this statute, West Virginia was in the minority of states adhering to the rule that extraction of oil and gas by less than 100% of the co-tenants constituted waste and was actionable as trespass (see *Law v. Heck Oil Co.*, 145 S.E. 601 (W. Va. 1928)). Under the old law, operators had to obtain leases from all interest holders in an oil and gas estate, regardless of undivided interest or number of owners. When met with co-tenants that refused to lease or were unable to be located, the operators were left with few costly options including proceeding with development in the form of a partition action or filing an action under the missing, abandoned or unknown owners statute in order to secure the unleased interest.

Under the new law, several requirements must be met: (1) when mineral ownership under a certain tract(s) is fractionalized and held by at least seven different co-owners, and (2) the operator has made reasonable efforts to obtain exploration and production leases from all owners having the right to lease, and (3) the operator has acquired permission to produce oil and gas from co-owners vested collectively with at least 75% of the oil and gas estate, then the operator may develop the oil and gas without liability for claims of waste or trespass from unleased owners.

In the event that oil and gas development does commence in compliance with the new law, it provides that non-consenting co-owners are entitled to choose between two remedies: (1) to receive a prorated share of the production royalty, without deduction of production costs, based on their ownership interest and in an amount equal to the highest royalty percentage, highest lease bonus and highest delay rentals obtained of all of the leased co-owners, or (2) to participate in the oil and gas development and assume all of his or her prorated share of the revenue and production costs, free and clear of all existing royalty burdens, according to the their ownership interest. The law further provides for specific rights and obligations of both nonconsenting co-owners and operators as they pertain to verifying the most favorable lease terms, the manner in which production revenues and costs are tracked, and how these new rules apply to formation specific development.

The Co-tenancy Modernization and Majority Protection Act is intended to promote and streamline the development of oil and gas in West Virginia to the benefit of both operators and owners alike. We are optimistic it will also have the effect of opening new areas for development that were previously cost prohibitive. However, it also creates an untested legal framework along with additional responsibilities that operators must learn how to utilize in order to develop these areas. The prudent operator will need to conduct leasing efforts in a manner that proactively takes into account the requirements of the new law in order to expeditiously utilize the same in the event of a nonconsenting co-owner. As it is now in its infancy, West Virginia operators should incorporate the new law into their development plans by offering market conscious lease terms and seek West Virginia licensed counsel in order to ensure adherence to the new law’s requirements.

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