

PENNSYLVANIA NATURAL GAS SUMMIT
December 10, 2008

Natural Gas Litigation Update

Ross H. Pifer, Director
Agricultural Law Resource and Reference Center
Penn State Dickinson School of Law
www.dsl.psu.edu/centers/aglaw.cfm

Selected Pending Federal Cases

I. Lease Termination Cases

A. *Kropa v. Cabot Oil & Gas Corporation, Civil Action 3:08-cv-00551 (M.D. Pa. filed Mar. 25, 2008).*

1. Facts – Plaintiff owns 51 acres in Susquehanna County. He signed a five year lease with Defendant for \$25 per acre on March 7, 2006.
2. Plaintiff claims that the lease agreement is void because:
 - a) Defendant fraudulently induced him into entering into the lease by stating that it would never pay more than \$25 per acre.
 - b) The royalty provision of the lease agreement violates Pennsylvania’s Minimum Royalty Act, 58 P.S. § 33.

58 P.S. § 33 – “A lease or other such agreement conveying the right to remove or recover oil, natural gas or gas of other designation from lessor to lessee shall not be valid if such lease does not guarantee the lessor at least one-eighth royalty of all oil, natural gas or gas of other designations removed or recovered from the subject real property.”
3. Current procedural posture
 - a) Plaintiff filed a Complaint in the Susquehanna County Court of Common Pleas on March 7, 2008. The case was removed to federal court on March 25, 2008.
 - b) Defendant filed a Motion to Dismiss on March 31, 2008.
 - c) Oral argument was heard on September 16, 2008. The court asked for briefing on the issue of whether the contractual integration provision was affected by fact that the lease bonus payment of \$1275 was not made pursuant to the lease agreement, but rather to a separate payment letter.
 - d) *Amicus* briefs have been filed on both sides of the litigation.
 - e) The court has not yet ruled on the Motion to Dismiss.
4. Issues to be Resolved:

- a) Contract Integration Issue – Are representations of gas company barred by the parole evidence rule where terms of the bonus payment were not included in the lease agreement?
- b) Minimum Royalty Act Issue – Does the minimum royalty act address only production expenses or does it permit a landowner’s guaranteed minimum one-eighth royalty to be reduced to pay for post-production expenses? What is the definition of royalty under the minimum royalty act?
- c) Termination Issue – If the court determines that the lease violates the minimum royalty act, is termination of the lease agreement an appropriate remedy or is reformation of the lease the appropriate remedy?

B. *Lauschle v. The Keeton Group, LLC, Civil Action 4:08-cv-01868 (M.D. Pa. filed Oct. 9, 2008).*

- 1. Facts – The more than 100 plaintiffs own a total of 18,200 acres in Sullivan and Lycoming Counties. They signed lease agreements with Defendant in 2005 and 2006. Defendant has assigned these leases to various entities.
- 2. Plaintiffs claim that the lease agreements are void because the royalty provision of the lease agreements violate Pennsylvania’s Minimum Royalty Act, 58 P.S. § 33.
 - a) 58 P.S. § 33 – “A lease or other such agreement conveying the right to remove or recover oil, natural gas or gas of other designation from lessor to lessee shall not be valid if such lease does not guarantee the lessor at least one-eighth royalty of all oil, natural gas or gas of other designations removed or recovered from the subject real property.”
 - b) The lease agreements provide for a royalty of one-eighth less any taxes, assessments, and adjustments from production from the leasehold.
- 3. Current procedural posture
 - a) Plaintiffs filed a Complaint on October 9, 2008.
 - b) Defendant filed a Motion to Dismiss the case on November 24, 2008.

C. *Frederick v. Range Resources – Appalachia, LLC, Civil Action 1:08-cv-00288 (W.D. Pa. filed Oct. 17, 2008).*

1. Facts – Plaintiffs hold royalty interests pursuant to lease agreements with Defendant. Plaintiffs have received and continue to receive royalty payments from said lease agreements.
2. Plaintiffs seek injunctive relief and a declaration that the lease agreements are terminated based on the following claims:
 - a) Violation of Pennsylvania’s Minimum Royalty Act, 58 P.S. § 33;
 - b) Breach of contract;
 - c) Conversion; and
 - d) Unjust enrichment.
3. Current procedural posture
 - a) Plaintiffs filed a Complaint in the Warren County Court of Common Pleas on September 15, 2008. The case was removed to federal court on October 17, 2008.
 - b) Defendant filed a Motion to Dismiss the case on November 10, 2008.
 - c) Plaintiffs filed a Motion to Remand to State Court on November 13, 2008.

D. Other Cases

1. Impact of Pending Cases?
2. Impact of Current Economic Situation?

II. Eminent Domain – Gas Storage Fields

Steckman Ridge Bedford County Litigation

1. Facts – Steckman Ridge Group, a Texas-based energy company, seeks to acquire subsurface natural gas storage rights to a number of parcels of real estate in Bedford County. The subject landowners object to the establishment of the storage field because it will limit their ability to profit from gas drilling into the Marcellus Shale formation.
2. Current procedural posture

- a) The Federal Energy Regulatory Commission (FERC) issued a certificate of public convenience to Steckman Ridge on June 5. The landowners filed a motion for reconsideration with FERC.
- b) From June 26, 2008, and July 16, 2008, Steckman Ridge filed various suits in the Western District of Pennsylvania seeking to condemn the subject real estate using the power of eminent domain pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h).
- c) On November 21, 2008, FERC ultimately denied rehearing of the matter.
- d) On December 5, 2008, the court consolidated the various cases into one action for further proceedings under docket number 3:08-cv-154-KRG.
- e) On December 8, 2008, a pre-trial order was issued, scheduling the trial date for the week of May 11, 2009.

III. Environmental Litigation – Allegheny National Forest

A. *Pennsylvania Oil and Gas Association v. U.S. Forest Service, Civil Action 1:08-cv-162 (W.D. Pa. filed May 27, 2008).*

1. Plaintiffs in the litigation are Pennsylvania Oil and Gas Association (POGAM) and the Allegheny Forest Alliance (AFA). POGAM's members include owners of oil, gas, and mineral estates within the Allegheny National Forest. AFA is a coalition of public school districts, municipalities, and businesses located within, or with interests connected to, the Allegheny National Forest.
2. Plaintiffs' allegations:
 - a) The Forest Service issued a Draft Revised Forest Plan for the Allegheny National Forest in May 2006. The public was provided with an opportunity for comment on the draft plan.
 - b) The Forest Service issued a final Revised Forest Plan in March 2007. The plan included a number of measures to restrict the development of oil, gas, and mineral estates within the Allegheny National Forest. Many of these measures had not been subjected to the public comment provisions.
 - c) Plaintiffs appealed the final plan with the Forest Service. On February 15, 2008, the Deputy Chief of the Forest Service issued an Appeals

Decision. This Appeals Decision found three areas where the plan was not in compliance with the National Environmental Policy Act, but it nevertheless affirmed the plan.

3. Plaintiffs seek a declaration that the Revised Forest Plan violates the National Environmental Policy Act and other related legal authorities. Plaintiffs also seek to have the approval of the plan vacated and remanded to the Forest Service to fulfill the required public comment provisions.
4. Current procedural posture
 - a) Plaintiffs filed a Complaint on May 27, 2008, and Defendant filed an Answer on September 5, 2008.
 - b) A Case Management Conference was conducted on November 19, 2008.

B. *Forest Service Employees for Environmental Ethics v. U.S. Forest Service, Civil Action 1:08-cv-323 (W.D. Pa. filed Nov. 20, 2008).*

1. Plaintiffs in the litigation are Forest Service Employees for Environmental Ethics, Allegheny Defense Project, and Sierra Club.
2. Plaintiffs claim that the Forest Service has been violating the National Environmental Policy Act by failing to conduct Environmental Impact Statements or Environmental Assessments prior to issuing Notices to Proceed for natural gas exploration and development activities within the Allegheny National Forest. Plaintiffs claim that the Forest Service has issued at least 34 such Notices to Proceed in the time period beginning on September 13, 2007, and ending June 25, 2008.
3. Plaintiffs seek a declaration that the Forest Service has failed to comply with the National Environmental Policy Act and the Administrative Procedures Act. Plaintiffs also seek an injunction barring the Forest Service from issuing any further Notices to Proceed until it has complied with these statutory requirements. Finally, plaintiffs seek reasonable attorney fees and costs.
4. Current procedural posture
 - a) Plaintiffs filed a Complaint on November 20, 2008, and an Amended Complaint on December 4, 2008.
 - b) The Answer of the Forest Service is due on February 2, 2009.

C. *Duhring Resource Co. U.S. Forest Service, Civil Action 1:07-cv-314 (W.D. Pa. filed Nov. 8, 2007).*

1. Plaintiff, a natural gas development company, claims that as a result of its interest in the mineral estate beneath the Allegheny National Forest, it has a right to access the surface estate in order to reasonably develop the oil and gas resources. In March 2007, plaintiff provided the Forest Service with notice of its intent to develop the natural gas resource. To address certain objections, plaintiff prepared a revised plan of operation in May 2007. The Forest Service did not issue a Notice to Proceed until several months later and included several conditions in this Notice to Proceed. Plaintiff objects to the imposition of the conditions.
2. Pennsylvania Oil and Gas Association is an Intervenor-Plaintiff in the litigation, and the Allegheny Defense Project is an Intervenor-Defendant in the litigation.
3. Current procedural posture
 - a) Plaintiff filed a Complaint on November 8, 2007; a First Amended Complaint on March 1, 2008; and a Second Amended Complaint on June 19, 2008.
 - b) Plaintiffs filed a Motion for Partial Summary Judgment on August 8, 2008. The Forest Service filed a Motion to Dismiss on August 19, 2008. The Allegheny Defense Project filed a Motion to Dismiss on August 25, 2008.

Selected Pending Pennsylvania Cases

IV. Preemption

A. *Great Lakes Energy Partners v. Salem Township*, 931 A.2d 101 (Pa. Commw. Ct. 2007), *allocatur granted*, 29 WAP 2008 (Pa. May 27, 2008).

1. Facts – Salem Township enacted an ordinance to regulate surface and land development associated with oil and gas drilling operations. Plaintiff filed suit challenging the township’s authority to enact the ordinance. The Westmoreland County Court of Common Pleas ruled that the township’s ordinance was preempted by the Oil and Gas Act.
2. Commonwealth Court ruling – “Here, the trial court examined the challenged provisions of the Township’s oil and gas operations to conclude that those provisions regulated aspects of oil and gas operations that are preempted by the state legislation. We discern no error in common pleas’ conclusions. . . [W]e affirm based on the well-reasoned analysis set forth in the trial court’s opinion.”

3. Current procedural posture

- a) The Commonwealth Court opinion was filed on July 27, 2007.
- b) The Supreme Court granted allocatur on May 27, 2008. Briefing was concluded on August 5, 2008. The Supreme Court heard oral argument on September 9, 2008.
- c) The Pennsylvania State Association of Township Supervisors and Nockamixon Township filed Amicus Curiae briefs supporting the arguments of Appellant. The Pennsylvania Department of Environmental Protection filed an Amicus Curiae brief supporting the arguments of Appellee.

B. *Huntley & Huntley, Inc. v. Borough of Oakmont*, 929 A.2d 1252 (Pa. Commw. Ct. 2007), allocatur granted, 31 WAP 2008 (Pa. May 27, 2008).

1. Facts – Plaintiff sought a conditional use permit to conduct natural gas drilling operations in an R-1 Residential zoning district. The Borough of Oakmont Council denied the application, and the Allegheny County Court of Common Pleas affirmed the Council’s decision.
2. Commonwealth Court ruling – “In summary, at least with regard to well site location, we conclude that the trial court erred in concluding that the Oil and Gas Act does not preempt ordinances that seek to regulate the location of wells. However, our decision does not foreclose the possibility that other ordinance provisions that do not address a feature of the Oil and Gas Act may apply.”
3. Current procedural posture

- a) The Commonwealth Court opinion was filed on July 27, 2007.
- b) The Supreme Court granted allocatur on May 27, 2008. Briefing was concluded on August 7, 2008. The Supreme Court heard oral argument on September 9, 2008.
- c) The Pennsylvania Department of Environmental Protection, the Pennsylvania State Association of Boroughs, and Nockamixon Township filed Amicus Curiae briefs supporting the arguments of Appellant.

C. *Arbor Resources LLC v. Nockamixon Township*, No. 2008-4801-31-1, slip op. (Bucks Ct. Com. Pl. Sept. 29, 2008), appeal docketed, 1972 CD 2008 (Pa. Commw. Ct. Oct. 9, 2008).

1. Facts – Four gas companies sought a declaration that the Oil and Gas Act precluded Nockamixon Township from applying its zoning ordinance to regulate drilling operations. In response, the township filed preliminary objections, arguing that the matter was not properly before the court because the gas companies had not presented the matter to the township’s Zoning Hearing Board prior to filing suit.
2. Court of Common Pleas ruling – The court acknowledged that the Oil and Gas Act had some preemptive effect on municipal regulation. The court, however, concluded that it could not reach the question of whether any township ordinances had been preempted in the instant case because the gas companies had failed to utilize available statutory remedies.
3. Current procedural posture
 - a) The Memorandum Opinion and Order of the Bucks County Court of Pleas was issued on September 29, 2008.
 - b) A Notice of Appeal was filed with the Commonwealth Court on October 9, 2008. The briefs of the appellants are due on December 24, 2008.

V. Department of Conservation and Natural Resources litigation

Belden & Blake Corp. v. Department of Conservation and Natural Resources, No. 25 MD 2006 (Pa. Commw. Ct. Mar. 5, 2007), appeal docketed, 35 MAP 2007 (Pa. Apr. 4, 2007).

1. Facts – Belden & Blake holds the rights to oil and gas for certain parcels of land beneath Oil Creek State Park. Belden & Blake gave notice to the Department of Conservation and Natural Resources (DCNR) of its intention to develop gas wells on the tracts. DCNR imposed the following conditions upon Belden & Blake: (a) execution of a right-of-way/coordination agreement; (b) posting of a \$10,000 performance bond for each of the wells; and (c) payment of \$74,885 for double stumpage fees for removal of timber. Belden & Blake seeks a declaration that it has an implied easement to use of the surface estate for the purpose of developing its natural gas interest and an injunction to prevent DCNR from interfering with its use of the surface estate.
2. Commonwealth Court ruling – “The law recognizes Petitioner’s right to enter upon the land to exercise its oil and gas rights, [. . .], and consequently, the Department has no power to condition Petitioner’s exercise of those rights by requiring it to enter into the coordination agreement.” Similarly, the court ruled that DCNR had no authority to impose a bond or to assess stumpage fees. The court did allow that “[t]he parties are not precluded, however, from entering into an agreement setting forth their cooperative efforts with regard

to Petitioner's exercise of its right, but such agreement may not impose requirements on Petitioner not founded in statute or in case law authority."

3. The Supreme Court accepted oral argument on the following issues:
 - a) Does the common law require that a subsurface owner's right to reasonable use of the surface be balanced with the surface owner's interest?
 - b) As the manager of State parks, which are declared to be public natural resources to be maintained and preserved for the people by Section I, Article 27 of the Pennsylvania Constitution and the Conservation and Natural Resources Act, does DCNR have a duty to ensure Belden & Blake makes reasonable use of the surface of Oil Creek State Park in developing its oil and gas?
 - c) Can DCNR, as the manager of Oil Creek State Park, require a written agreement to document the measures needed to reasonably protect the surface of the park by Belden & Blake during its oil and gas development activities?
 - d) Can DCNR, in order to fulfill its fiduciary duty to conserve and maintain State parks, require measures it believes are reasonably necessary to protect Oil Creek State Park during oil and gas development activities?
 - e) Does the recognition by the legislature and the public of the importance of protecting State parks weigh in favor of finding that DCNR has a duty to ensure that Belden & Blake's use of the surface of Oil Creek State Park is reasonable?
4. Current procedural posture
 - a) The Commonwealth Court opinion was filed on March 5, 2007.
 - b) DCNR filed a Notice of Appeal on April 4, 2007. Briefing was concluded on April 14, 2008. The Supreme Court heard oral argument on April 14, 2008.