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What Lies Beneath: Waivers In Historical Coal Deeds May Leave Mid-Stream Operators Without Subjacent Support

In refusing jurisdiction over an Appeal on Wednesday, April 22, 2015, the Pennsylvania Supreme Court effectively indicated that coal *may* still be king in the Appalachian Basin. The Supreme Court sustained a ruling in favor of a coal mine owner, wherein the Superior Court held that a mid-stream operator was not entitled to subjacent support underneath its pipelines. Specifically, the Superior Court held that the right to subjacent support was previously conveyed away together with the coal in deeds executed in the early 1900s, and that the right had not been re-acquired by the mid-stream company or its predecessors by either a de facto taking or adverse possession. *Pa. Servs. Corp. v. Tex. E. Transmission, LP*, 98 A.3d 624 (Pa. Super. Ct. 2014), *appeal denied*, No. 497 WAL 2014, (Pa. April 22, 2015).

The conflict between Pennsylvania Services Corporation, trading as Emerald Coal Resources, LP (“Emerald Coal”), and Texas Eastern Transmission, LP (“Texas Eastern”) began when the Pennsylvania Department of Environment Protection issued a permit to Emerald Coal in 2010 allowing it to conduct long wall system coal mining operations under coal property it owns in Greene County, Pennsylvania. *Id.* at 626. The operating permit required Emerald Coal to reach an agreement with Texas Eastern or otherwise obtain an order determining efforts to mitigate damages to Texas Eastern’s pipelines during mining. *Id.* at 627. After failing to reach an agreement, Emerald Coal sought an order declaring it the owner of superior property rights, specifically the right of subjacent support. Texas Eastern argued that the waiver of support in the original coal deed did not permit the type of mining Emerald Coal was engaging in. Alternatively, Texas Eastern argued that they or their predecessor had re-acquired the right to subjacent support for the pipelines by eminent domain or adverse possession. *Id.* at 628.

Ultimately, the Superior Court determined that the right to subjacent support can be waived, holding that the language in the original coal deed expressly waived this right. *Id.* at 630 and 631. The Court further held that even if Texas Eastern’s predecessor possessed the right to effectuate a de facto taking or exercise the power of eminent domain, it did not actually take the necessary action to do so. *Id.* at 631–633. Similarly, the Court held that Texas Eastern did not engage in any activity adverse to Emerald Coal’s property interest or otherwise demonstrate that it met the burden of proof necessary to establish title by adverse possession. *Id.* at 633 and 634. Accordingly, in applying Pennsylvania’s long established rules of construction and in interpreting language in century-old coal deeds, the Court upheld Emerald Coal’s rights to the coal and subjacent support estates as superior to those held by Texas Eastern.

As oil and gas title departments and mid-stream companies presently acquiring pipeline rights-of-way are aware, early coal severances waiving subjacent support are nearly ubiquitous in the region. Thus, as the oil and gas industry continues to expand its footprint in our area, conflicts like this will undoubtedly continue to emerge. In such an environment, both coal and oil and gas companies should be aware not only of the effect of language in instruments within their own chain of title, but whose rights reign supreme.

To learn more about how this decision and others may impact your operations in the Marcellus, please contact John Seeds, Barb Strnad, or our Energy Group at 800-243-5412.



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