Wyoming Courts Raise the Stakes for Former Operators Allowing Surface Owners to Recover Double Damages

Jeffrey Pope

Partner
307.778.4223
Cheyenne
jspope@hollandhart.com

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Five years ago, the Wyoming Supreme Court decided two cases, both involving Pennaco Energy, Inc. as lessee of mineral interests—including exploration, development, and extraction rights—on land in Northern Wyoming, that are together known as the *Pennaco* cases (*Pennaco Energy, Inc. v. KD Co. LLC* and *Pennaco Energy, Inc. v. Sorenson*). In both instances, Pennaco entered into agreements that required it to make various annual payments to the surface landowners for use of the land and to compensate the owner for any damages caused by operations. Surface landowners sued the present-day operator of coal bed methane wells—as well as previous operators that sold the assets and assigned the surface use contracts and interests to another party—seeking recovery of annual payments under the agreements.

Pennaco argued its relationship with the landowners was based on interests in the land, not the agreements; and once it assigned its interests in the land to another party, it had no future liability. Both the District Court and the Supreme Court found that the language of the agreement determines the legal relationship between surface landowners and lessee/operators. Under principles of contract law, all operators in the chain of assignment of the agreements remain liable for annual payments unless the agreement contains specific language ending the operator's obligations when the agreement is assigned to another party. In effect, these decisions imposed "perpetual liability" on most operators in Wyoming because very few surface use agreements contain this type of "no future liability" clause.

In the years following the *Pennaco* cases, many operators that had assigned interests in surface use agreements to other parties, and then left Wyoming, have become ensnared in disputes involving endless demand letters or lawsuits by surface owners using the *Pennaco* cases to extract millions of dollars in damages. Until recently, those demands have centered almost exclusively on annual payments that a current operator has either not paid or underpaid.

But recently, the financial liability for operators had changed significantly as courts have upped the ante, giving surface owners more leverage. Wyoming state district courts have begun to allow surface owners to recover *double* the amount of outstanding annual payments using a provision of Wyoming's Split Estate Act (Wyo. Stat. Ann. § 30-5-405(b)).

That provision allows a surface owner to recover double damages from an operator, defined as someone engaged in oil and gas operations, who fails to pay an annual surface payment.

These rulings raise the stakes of potential liability for former operators. Former operators must now be proactive when they receive demand letters. While it can be difficult to monitor former assets and current operators, former operators potential increased liability mean they must respond quickly and substantively. Operators need to employ creative negotiation strategies to resolve disputes up front and carefully select which disputes to litigate.

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