

## Federal Court Directed to Rule on Challenge to WV Pooling Statute



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### **Energy Alert**

(by [Robert Stonestreet](#) and [Austin Rogers](#))

A federal appeals court has instructed a lower court to resolve a pending suit challenging the constitutionality of West Virginia's oil and gas pooling and unitization law. The federal district court previously declined to resolve certain constitutional issues presented in the suit on the grounds that those issues should be decided by a state court instead of a federal court.

In 2022, the West Virginia Legislature enacted Senate Bill 694 to revise West Virginia law governing the pooling and unitization of oil and gas formations associated with horizontal well development. Pooling and unitization essentially involves combining separately owned properties into a single "unit" through which one or more horizontal wells are drilled. The oil and gas produced from the horizontal well is then allocated among all the properties in the unit for purposes of calculating production royalties payable to the mineral owners.

Prior to Senate Bill 694 becoming effective on June 7, 2022, formation of a pooled unit for a horizontal well drilled through "shallow" oil and gas formations, which includes the Marcellus Shale, required consent of 100% of the mineral owners for all the properties to be included in the unit. This 100% consent requirement did not apply to horizontal wells drilled through "deep formations" such as the Utica Shale. One of the more significant changes made by SB 694 was to allow the West Virginia Oil and Gas Conservation Commission to approve units for shallow formations where at least 75% of the mineral owners consent, provided other requirements are also satisfied. This means that up to 25% of a unit could potentially include properties for which the mineral owner did not consent to being part of a unit.

Before Senate Bill 694 became effective, a pair of mineral owners (Scott Sonda and Brian Corwin) filed a lawsuit in the federal District Court for the Northern District of West Virginia seeking to preclude the law from taking effect. Governor Jim Justice was the only defendant named in the case. In their suit, Sonda and Corwin alleged that the law was illegal for several reasons, including the claim that the law authorizes the unconstitutional taking of private property without just compensation and deprives landowners of due process of law.

Federal Judge John Preston Bailey initially dismissed all of their claims for two reasons. First, Judge Bailey concluded that Sonda and Corwin lacked standing to bring the challenge because (a) their property had not been pooled into a unit without their consent and no operator had sought approval of a unit to include their property without their consent; and (b) the Commission, not the Governor, has the power to directly enforce Senate Bill 694.

Second, Judge Bailey ruled that, even if Sonda and Corwin established standing, Governor Justice had constitutional immunity from the suit because he had no direct authority to implement Senate Bill 694. Rather, the Commission has the authority to implement the law.

Instead of dismissing their suit entirely, Judge Bailey granted leave for Sonda and Corwin to amend their complaint to name the Commission as a defendant instead. Sonda and Corwin did so, and also named as defendants each person who serves on the Commission. The amended complaint still does not allege that mineral properties owned by Sonda or Corwin were pooled into a unit without their consent. Instead, the amended complaint attempts to address the standing

issue by alleging that Senate Bill 694 effectively eliminates their ability to challenge whether they are being fairly compensated for oil and gas produced from their property that was pooled into a unit with their consent.

The Commission moved to dismiss the amended complaint for various reasons, including Sonda's and Corwin's lack of standing to bring the case. Judge Bailey did not address the standing issue, but agreed with the Commission with respect to three of the five claims asserted by Sonda and Corwin. Judge Bailey then abstained from addressing the Commission's arguments for dismissal of the other two claims, which asserted constitutional violations, because he believed that those issues were more appropriate for resolution by a state court instead of a federal court.

The Commission appealed Judge Bailey's decision to abstain from addressing the arguments for dismissal of the constitutional claims. By [opinion](#) issued on January 31, 2024, the Fourth Circuit Court of Appeals ruled that Judge Bailey should not have abstained. The appellate court also directed Judge Bailey to first address the standing issue before addressing any other pending issue. The opinion does not specify a deadline for Judge Bailey to rule on those issues. If Judge Bailey finds that Sonda and Corwin continue to lack standing to assert their claims, the case will presumably be dismissed on that ground alone. If Judge Bailey concludes that Sonda and Corwin have established standing, Judge Bailey will likely address the merits of the Commission's other arguments for dismissal.

If you have questions about this lawsuit or West Virginia law governing pooling and unitization, please contact either of the following attorneys to learn more: Robert Stonestreet at [rstonestreet@babstcalland.com](mailto:rstonestreet@babstcalland.com) or 681.265.1364 or Austin Rogers at [arogers@babstcalland.com](mailto:arogers@babstcalland.com) or 681.265.1368.

