

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
-CHARLESTON DIVISION-

GARY P. JONES and SHIRLEY J. JONES,
individually, and H. DOTSON CATHER,
Trustee of Diana Goff Cather Trusts, and
MCDOWELL POCAHONTAS COAL
COMPANY, INC., a Virginia corporation,

Plaintiffs,

v.

Civil Action No. 2:06-cv-00671
(Judge Joseph R. Goodwin)

DOMINION RESOURCES SERVICES, INC.,
a Virginia corporation, DOMINION TRANSMISSION,
INC., a Delaware corporation, and DOMINION
EXPLORATION & PRODUCTION, INC., a
Delaware corporation,

Defendants.

**ORDER CONDITIONALLY CERTIFYING TEMPORARY
SETTLEMENT CLASS AND PRELIMINARILY APPROVING SETTLEMENT**

Upon consideration of the Joint Motion for Conditional Certification of Class and Preliminary Approval of Class Action Settlement, and supporting memorandum of law, and Joint Motion for Leave to File Amended Settlement Agreement, and being satisfied that the putative settlement class fulfills all requirements for the certification of a temporary settlement class, conditional on the terms of the Amended Settlement Agreement entered into by the parties, and that the proposed Amended Settlement Agreement meets the applicable criteria for preliminary approval, the Court hereby finds and **ORDERS** as follows:

1. Substitution of Parties. The parties have requested that Dominion Appalachian Development, LLC (“DADI”) be substituted as a party in place of Defendant Dominion Resources Services, Inc. (“DRS”). According to the parties’ joint motion, DRS is not a proper

party to this action because neither it nor its predecessors entered into any gas leases with any members of the class of this case. DADI and/or its predecessors, on the other hand, have entered into gas lease agreements which are the subject of the class-wide claims in this matter. Finding good cause for the parties' motion, the Court **ORDERS** that Defendant Dominion Resources Services, Inc. be dismissed as a party to this action and that Dominion Appalachian Development, LLC be added as a Defendant for the sole purpose of settling the class claims in this action.

2. Settlement Class. The Court has considered the submissions of the parties with regard to the temporary and conditional certification of a settlement class, and has analyzed the proposed settlement class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure and makes the following findings:

- a. Numerosity. The settlement class, consisting of an estimated 25,000 persons, satisfies the numerosity requirement of Federal Rule of Civil Procedure 23(a) as joinder of such a large group would be impractical.
- b. Commonality. There are common issues of law and fact relating to whether the Dominion Defendants improperly paid royalties by deducting post-production expenses or using flat rates. While this is dependent upon language in individual leases, the class members have been subclassified by the type of leases they had, one-eighth or flat rate, which makes their claims common as to both liability and damages by subclass.
- c. Typicality. The claims of the proposed class also satisfy the element of typicality. Rule 23(a) does not require that the claims be identical, just that they arise out of the same legal or remedial theory. *See United Bhd.*

of Carpenters & Joiners of Am. v. Phoenix Assoc., 152 F.R.D. 518, 522 (S.D.W. Va. 1994). The named Plaintiffs' claims are typical of the claims of the putative class members, as they are based upon the propriety of the same type of post-production expense deductions or flat rates.

- d. Adequate Representation. There is no evidence that the named Plaintiffs' interests conflict in any way with the other members of the putative class. Instead, the parties' interests appear to be aligned, as they are all seeking to recover for improperly paid royalties arising from deductions of post-production expenses or payment of flat rate royalties. Additionally, Class Counsel is experienced in class action and other complex litigation and have worked to prosecute the claims of the class in this matter. Thus, the requirement of adequate representation of the settlement class has been fully met.
- e. Predominance of Common Issues. As addressed above, there are common issues that exist between the named Plaintiffs and the putative class members. The Rule 23(b)(3) requirement is similar to the commonality requirement of Rule 23(a)(2). However, Rule 23(a)(2) only requires that common questions exist; Rule 23(b)(3) requires that they predominate. *See* 2 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3.24 (4th ed. 2002). The predominance test is met in this case because all of the class members have common liability claims regarding whether royalties were properly paid where post-production expenses were deducted or flat rates used. The claims are also subject to common types

of proof, including the types and amounts of deductions taken, the flat rates paid, and the period during which they were taken. These issues predominate over any individual questions, and the proposed settlement has mooted any problem of manageability that would attend this case if it were to be tried or litigated on a class action basis.

- f. Superiority of the Class Action Mechanism. This case is also appropriate for class action status because it would promote both efficiency and uniformity of judgment, as the numerous class members, many of whom would lack the necessary resources, will not be forced to separately pursue claims or execute settlements in various courts.

Therefore, this Court preliminarily **FINDS** that all of the requirements of Federal Rule of Civil Procedure 23(a) and 23(b)(3) have been satisfied, and this action is hereby conditionally and temporarily certified as a class action for settlement purposes on behalf of the following two subclasses of plaintiffs:

Flat Rate Subclass: All persons who have entered into, or who are or were lessors of, oil and gas leases on lands lying within the boundary of the State of West Virginia, and who have or had oil, gas or other hydrocarbon production under said lease and have received or are due royalty payments from June 22, 1996 through the Date of Settlement, from DTI, DEPI, DADI, or their predecessors or successors for Flat Rate Wells. The Flat Rate Subclass excludes lessors due royalties for One-Eighth Wells, Fixed Rate Wells, and Non-Affiliate Farmout Wells, as well as persons entitled to receive Overriding Royalty Interests. Dominion Resources, Inc. and its subsidiaries, affiliates, and related corporations are excluded as lessors from this Subclass. The Flat Rate Subclass does not include lessors due royalties for wells drilled or acquired by DTI, DEPI or DADI after May 31, 2006.

One-Eighth Subclass: All persons who have entered into, or who are or were lessors of, oil and gas leases on lands lying within the

boundary of the State of West Virginia, and who have or had oil, gas or other hydrocarbon production under said lease and have received or are due royalty payments from June 22, 1996 through the Date of Settlement, from DTI, DEPI, DADI, or their predecessors or successors for One-Eighth Wells. The One-Eighth Subclass excludes lessors due royalties for Flat Rate Wells, Fixed Rate Wells, Non-Affiliate Farmout Wells, and wells under leases where the deduction of Post-Production Expenses is expressly permitted, as well as persons entitled to receive Overriding Royalty Interests. Dominion Resources, Inc. and its subsidiaries, affiliates, and related corporations are excluded as lessors from this Subclass. The One-Eighth Subclass does not include lessors due royalties for wells drilled or acquired by DTI, DEPI or DADI after May 31, 2006.

The following causes of action are specifically included: claims for improper royalty payments, improper deductions, improper measurement, improper accounting for natural gas liquids, improper sales price, breach of lease agreements, breach of fiduciary duty, fraud, violation of the West Virginia Consumer Credit and Protection Act (W. Va. Code § 46A-6-101, *et seq.*), violation of the West Virginia flat rate royalty statute (W. Va. Code § 22-6-8) and punitive damages, for failure to pay proper royalty.

This certification is temporary and conditioned on the terms of the settlement reached by the parties.

3. Class Representatives. Plaintiffs Gary P. Jones and Shirley J. Jones, H. Dotson Cather and McDowell Pocahontas Coal Company, Inc. are designated as Class Representatives.

4. Class Counsel. After considering the required factors in Federal Rule of Civil Procedure 23(g), the Court appoints Marvin W. Masters, The Masters Law Firm, LC, Charleston, West Virginia; Michael W. Carey, Carey, Scott & Douglas, PLLC, Charleston, West Virginia; Thomas W. Pettit, Thomas W. Pettit, L.C., Barboursville, West Virginia; Scott S. Segal, The

Segal Law Firm, Charleston, West Virginia; and David J. Romano, Romano Law Office, Clarksburg, West Virginia as Class Counsel.

5. Preliminary Approval of Settlement. The proposed Amended Settlement Agreement the parties have entered into establishes the calculation of settlement payments based upon the type of lease the class members have with the Dominion Defendants (flat rate or one-eighth). Class members with one-eighth leases are entitled to additional consideration if they enter into a lease modification.

In particular, flat rate subclass members are eligible to receive a settlement payment based upon their share of an amount equal to 50% of the difference between a royalty based upon one-eighth of the DTI Monthly Index Price for monthly volumes and the actual monthly royalty payment during the period of June 1999 through May 2006, plus 9% simple annual interest, and less Court-approved fee awards. The settlement payment due each flat rate subclass member is calculated first by determining the aggregate monthly difference for each flat rate well on their lease and then determining the net owner's total.¹

One-eighth subclass members who currently own a one-eighth lease and who agree to a lease modification, are eligible to receive a settlement payment based upon their share of an amount equal to 155% of the difference between a royalty based upon one-eighth of the DTI Monthly Index Price and the rate on which royalties were paid for monthly volumes during the period of June 1996 through May 2006, plus 9% simple annual interest, and less Court-approved fee awards. One-eighth subclass members who owned a one-eighth lease and those who currently own a one-eighth lease but who do not elect the lease modification are eligible to

¹Calculation examples for the settlement payments for flat rate subclass members and one-eighth subclass members are set forth in the Amended Settlement Agreement.

receive a settlement payment based upon their share of an amount equal to 120% of the difference between a royalty based upon one-eighth of the DTI Monthly Index Price and the rate on which royalties were paid for monthly volumes during the period of June 1996 through May 2006, plus 9% simple annual interest, and less Court-approved fee awards. The settlement payment due one-eighth subclass members is calculated first by determining the aggregate monthly difference for a well and then determining the net owner's total.

In accordance with the terms of the Amended Settlement Agreement, a bank account will be established by the claims administrator for the settlement fund at a federally chartered financial institution. The Dominion Defendants will contribute to the settlement fund a sum equal to the gross owners' totals for participating one-eighth subclass members and participating flat rate subclass members, as defined in the Amended Settlement Agreement. The principal in the settlement fund shall be used to make settlement payments and to pay any fee awards. The remainder of the settlement fund shall be returned to the Dominion Defendants after the claims administrator has made a final report approved by the Court. All interest accruing in the settlement fund shall be paid to the Dominion Defendants with the remainder of the settlement fund unless necessary for making settlement payments. The Dominion Defendants shall make an initial contribution of \$15.0 million to the settlement fund within thirty (30) days of the entry of this Order, or following Court approval of the claims administrator and establishment of the settlement fund, whichever date is later, and the remaining contribution to the settlement fund within seven (7) days prior to the claims administrator's distribution of the settlement payments.

The costs of notice and administration expenses up to \$2.0 million will be paid by the Dominion Defendants in accordance with the terms of the Agreement. Dominion shall be responsible for additional costs incurred by the claims administrator for recording lease

modifications which shall not be included as administration expenses included toward the \$2.0 million threshold. If the costs of notice and administration expenses exceed \$2.0 million, then the excess costs and expenses shall be assessed as costs of litigation.

The Amended Settlement Agreement was reached after extensive arm's length negotiations between counsel, including numerous formal mediation sessions with a mediator. Counsel for the settlement class and the Dominion Defendants are experienced in complex litigation, including class action litigation involving oil and gas lease royalties. Thus, having reviewed the terms of the proposed Amended Settlement Agreement, the Court preliminarily finds the Amended Settlement Agreement to be sufficiently reasonable to warrant providing notice to the class members and proceeding with a formal fairness hearing. In making this determination, the Court has considered the current posture of this litigation and the risks and benefits to the parties involved in both settlement of these claims and continuation of the litigation.

Accordingly, the Court **GRANTS** preliminary approval of the Amended Settlement Agreement. The settlement will be submitted to class members for their consideration and for a hearing in accordance with Federal Rule of Civil Procedure 23(e).

6. Notice to Settlement Class Members. The Court has considered the forms of notice and plan of dissemination proposed by the parties in their Joint Motion for Approval of Notice Forms and Plan of Dissemination and supporting memorandum of law. The Court finds that the proposed notice forms and plan of dissemination meet the requirements of Federal Rule of Civil Procedure 23 and are the best notice practicable under the circumstances. Therefore, notice will be provided to class members in accordance with the notice plan established by the

parties' notice experts as set forth in the Joint Motion for Approval of Notice Forms and Plan of Dissemination and supporting memorandum of law.

7. Exclusion Requests, Exercise of Option Not to Proceed, Objections and Claims.

The notice to class members shall include the following information concerning deadlines:

- a. Exclusion Requests. Any class member wishing to exclude himself or herself from the class must sign a written request to be excluded containing the information required by the class notice and this exclusion request must be filed on or before November 1, 2008, and served by mail to the post office box to be designated in Charleston, West Virginia, as established by Class Counsel in the name of the Clerk of Court for the United States District Court for the Southern District of West Virginia.
- b. Exercise of Option Not to Proceed. In the event that the minimum required approval percentage as defined in the Amended Settlement Agreement is not met, Dominion must exercise its option not to proceed with the settlement by filing a notice with the Court on or before December 1, 2008.
- c. Comments and Objections. Any class member or other interested party wishing to submit comments to support or oppose any aspect of the Amended Settlement Agreement may do so in writing, without the necessity of retaining counsel or making any formal appearance. All written comments in support of or opposition to any aspect of the Amended Settlement Agreement must be filed no later than November 1, 2008, and served by mail to the three addresses set forth in the class

notice. Any class member or other interested party wishing to appear at the formal fairness hearing in person or through his or her attorney must submit a written request, filed no later than November 15, 2008, and served by mail to the addresses set forth in the class notice. This requirement ensures that the parties will have adequate notice of the issues and arguments to be addressed at the formal fairness hearing.

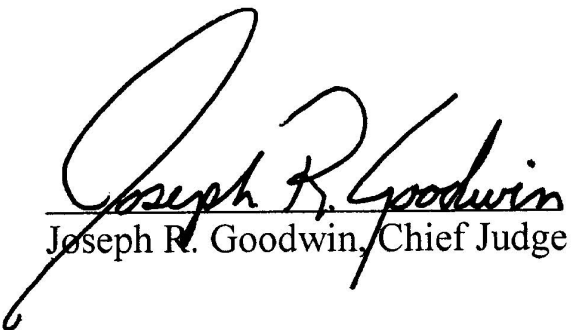
- d. Responses to Objections. Responses to any objections must be filed on or before December 1, 2008.
- e. Claims. Class members who do not request to be excluded from the class will receive notice and a claim form in the mail which will tell them how much they are eligible to receive from the settlement. Settlement checks will be mailed within a reasonable time period after there is final approval of the settlement. The Court finds that this claims process is appropriate in this matter.

8. Formal Fairness Hearing. A formal fairness hearing shall be held on January 19, 2009, before this Court in Charleston, West Virginia at 10:00 a.m. to consider whether the settlement should be given final approval. The date or time of this hearing may be changed without further notice to the settlement class. Class Counsel shall post any changes to the hearing date or time on the website established as part of the notice to be provided to class members.

9. Class Counsel Fees and Expenses. The Court will separately consider a request for a reasonable fee award for Class Counsel. Class Counsel will file a motion requesting the Court to award reasonable attorneys' fees in an amount not to exceed 25% of the gross owners'

totals for participating subclass members, plus costs of litigation. Any objections to the request for a fee award shall be filed within thirty days of the motion, and any response to objections shall be filed within ten days thereafter. Any fee award approved by the Court shall be paid by the claims administrator from the settlement fund.

It is so ORDERED.


Joseph R. Goodwin, Chief Judge

DATED: July 16, 2008

Submitted by:

/s/ Marvin W. Masters /s/ whl

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