

Utica Shale & Pipeline

Update and Review

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A Note from the Chairman

Dear Current and Former Clients:



Our firm is still very involved in representing Lessors and Mineral Owners involving underpayment of royalties, breach of lease, marketable title lawsuits involving ownership of mineral rights, leasing and litigation, as well as helping individuals with their estate planning needs. It seems that many individuals, during this COVID virus crisis, have determined to either update or have prepared a Last Will, power of attorney, trust (if appropriate) and other similar documents so that their wishes will be followed and their loved ones will have an easier and more orderly time to proceed with life.

One may also need to consider upcoming changes in the tax laws, especially estate and federal income tax. Small and medium size business owners and farmers whose assets and wealth are primarily tied up with shares of stock and company assets or the land and farm equipment may need to plan carefully in the future so that one may not be forced to sell the business or farm land in order to pay taxes. Asset protection planning is vitally important, especially if the state and federal governments will enact significant increases in taxes. Keep in mind that 2021 elected officials can pass new laws that become effective retroactive to January 1, 2021, so making changes before year-end may be very important to preserving your wealth for yourself, your spouse, and your heirs.

Our law firm has filed a motion with the Texas bankruptcy court requesting approval to file the proof of claims of all the certified class members in the Chesapeake bankruptcy. After filing said motion, Chesapeake counsel has agreed to stipulate to the fact that the certified class has the right to file the proof of claims so that the hundreds of individual class members need not file individually. We filed a single proof of claim on your behalf per an Exhibit/Schedule that included the names and addresses of each of you. Chesapeake still has a right to object to the validity of the claims since liability is still pending in the U.S. Court of Appeals.

We have also filed a motion with the U.S. Court of Appeals requesting the court to allow the case against Total E&P USA, Inc. (25% ownership) to immediately proceed. We requested a severance/splitting off of Chesapeake due to the Stay Order issued by the U.S. Bankruptcy Court of its litigation. Without a doubt, all parties will attempt to object to our request and wish to further delay the pending appeal. If the federal appeals court grants our request, it will be most likely next summer before a decision is issued. Upon approving our request to proceed solely against Total E&P USA, Inc., the court will schedule the dates for the pleadings to be filed, then schedule the oral argument hearing which will be held in Cincinnati and then about two months after the hearing to issue its decision. Said decision should be precedent (dependent upon actual language) against Chesapeake and also Encino Energy. If we are successful with the appeal, then Encino/EAP Ohio, LLC will need to refund withheld royalties plus no longer deduct future royalties, but that only happens if the U.S. Court of Appeals reverses the U.S. District Court.

We will continue to battle for justice.

Bill Williams

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614-644-4357

Dave Yost
Ohio Attorney General
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Columbus, Ohio 43215
800-282-0515

Senator Frank Hoagland
Senate Building
1 Capitol Square, 1st Floor
Columbus, Ohio 43215
614-466-6508
*Represents Belmont, Carroll,
Harrison, Jefferson,
Monroe, Noble,
Washington counties*

Senator Tim Schaffer
Same Senate address as above
614-466-8076
Representing Guernsey County
Senator Michael Rulli
Same Senate address as above
614-466-8285
Representing Columbiana County



Lessors Are Likely Required to Arbitrate Whether Oil and Gas Lease Expired

By Matthew W. Onest, Esq.

Whenever a lessor-landowner has finally decided to pursue the idea that his or her oil and gas lease has expired or terminated, he or she usually engages an attorney, who then sends at least one demand letter to the lessee and if unsuccessful, brings a lawsuit in a court. The public only knows about those cases that are filed in the courts because those cases are public records, meaning the public generally has the right to examine the records for those cases and in most cases, attend the trial. However, the public does not have access to such cases which are being arbitrated. Arbitration is a dispute resolution outside the court-system. Most arbitrations are private and unless there is some sort of court filing relating to the arbitrations, no one other than those who participate in the arbitration even knows it exists.

Whether a landowner needs to arbitrate his or her lease expiration/termination claim will depend upon a single question – did the landowner agree to arbitrate its oil and gas lease dispute? This question is often answered by reviewing the oil and gas lease. Did the oil and gas lease state that the parties would arbitrate their disputes? If the answer is “yes,” then most disputes about the lease will be submitted to arbitration. If the answer is “no,” the landowner must also be sure he or she did not sign another contract or agreement which requires arbitration of the lease disputes.

If we assume the landowner’s lease has an arbitration provision, then the question is whether the landowner is required to arbitrate whether the lease expired or terminated, including for lack of production in paying quantities. Recently, the Seventh District Court of Appeals answered “yes” to that question.

In *French v. Ascent Resources-Utica, LLC*, 2020 -Ohio-4719, the landowners believed their oil and gas lease had terminated because the producer had failed to timely develop their oil and gas rights. The landowners sued the producer claiming that the lease had expired because no actual development had occurred at the end of the lease’s primary term (the fixed number of years during which the pro-

ducer must develop and produce the oil and gas). The producer claimed the lease continued because it had acquired permits for the drilling of at least one well unit using the landowners’ lands. The producer also claimed the landowners’ claims were subject to the lease’s arbitration provision. The landowners disagreed, citing to Section 2711.01(B)(1) of the Ohio Revised Code, which provides that “controversies involving the title to or the possession of real estate” are not subject to mandatory arbitration provisions. The landowners’ theory was that lease expiration claims involve questions surrounding title to or the possession of the in-place minerals and as a result, are not subject to arbitration clauses.

The Seventh District disagreed with the landowners and held that the landowners were required to arbitrate their claims because their oil and gas lease contained an arbitration provision. While the Seventh District acknowledged that oil and gas leases “create an interest in real estate,” the Court held that they themselves “are not issues concerning title to or possession of real estate.” With lease expiration cases, the Seventh District held that the landowners- lessors’ title to the real estate covered by the lease is not at stake. The Court further held that oil and gas leases do not give the lessee “title to or possession of real property,” but instead “only permit” the lessee to use the real property “to produce oil and gas.” Based on this analysis, the Court said the “title to or the possession of real estate” exception to arbitration does not apply to lease expiration cases.

We will have to wait and see what comes of this case and how it will interplay with the Ohio’s Supreme Court’s decisions in *Buell v. Chesapeake Exploration* and *Browne v. Artex*, each of which discussed leases and lease expiration claims in terms of being real property interests or issues. The holdings and analyses in these cases would seem to undercut the Seventh District’s analysis in *French*. But, as of now, landowners-lessors in the Seventh District’s counties will likely be required to arbitrate their lease expiration claims if the leases require arbitration.

Seventh District Court of Appeals holds Internet Search Not Required under Dormant Mineral Act (DMA)

By Gregory W. Watts, Esq.

On October 26, 2020, in *Crum v. Yoder*, 2020-Ohio-5046, the Seventh District Court of Appeals (covering Belmont, Carroll, Columbiana, Harrison, Jefferson, Mahoning, Monroe and Noble counties) held that an internet search is not required when searching for heirs of a severed mineral interest. In that case, Ernie Morris conveyed approximately 60 acres in Monroe County to himself and his wife, Louise I. Morris, “for their joint lives, remainder to the survivor thereof” in a quit-claim deed recorded on January 21, 1987. On July 25, 1990, Ernie and Louise I. Morris recorded a deed transferring the surface of the property with a clause stating: “Grantors except and reserve for themselves and their heirs and assigns all oil and gas royalty, all oil and gas, together with all leasing rights.” The six grantees listed in the 1990 surface deed were Robert E. Morris, Sara Lallathin, Betty Crum, Byron Morris, Kenneth Morris, and Rodney Morris. The grantees were the children of Ernie and Louise Morris, but this was not specified in the deed.

In May 2011, the Yoders searched the names of Ernie and Louise Morris in the Monroe County deed records, lease records, preservation notice indexes, official records, and probate records. No internet search was conducted. Not finding any address for Ernie and Louise Morris, or their heirs, the Yoders published a notice of abandonment in the local newspaper, and after no timely response proceeded to have the interest abandoned of record.

Subsequently, in 2018, the Morris heirs alleged the 2011 notice of abandonment was deficient because the Yoders did not attempt service by certified mail and did not engage in reasonable diligence in identifying heirs. The Morris heirs noted that the reserving deed transferred the property to six grantees, four of whom had the same last name as the grantors (and the two with different last names were females). It was urged

that a reasonable person would have researched these grantees to ascertain if they were the heirs of Ernie and Louise Morris. The Morris heirs also submitted the affidavit of a title examiner who said: she noticed how four of the six surface grantees shared the same last name as the grantors; she conducted a general internet search in 2016 on Google for Ernie and Louise Morris in Monroe County; and within minutes, she found their obituaries in the local newspaper which contained “the names and potential locations for their children, being those same individuals identified as grantees in the 1990 Deed.”

The Court noted the DMA shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title. The term “records,” by statute, includes “probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situated.” Regarding general online searches, the Court of Appeals noted that the information available on the internet is not always reliable and changes continually. The availability of information may vary depending on the search engine used, the exact search terms employed, the use of quotation marks, and even the searcher's geographic location and past search history. Accordingly, the re-creation of a general internet search conducted years in the past is difficult. A search of the official public records does not engender these same difficulties.

Therefore, the Court of Appeals concluded the surface owners engaged in reasonable efforts by using the names of the record holders to search the public records of Monroe County. It is undisputed that no heirs were revealed by these searches. Further, the Court held a general internet search is not a mandate in determining the identity of the heirs of a record holder, and that position is not changed based on the last names of some of the surface grantees in the deed severing and retaining the minerals in favor of the grantor-record holders.

Ohio Shale Production Update

The Ohio Department of Natural Resources (“ODNR”) reported that as of October 17, 2020, it had issued a total of 3,300 permits to drill horizontally through the Utica Shale and further reported that a total of 2,810 horizontal wells have been drilled to the Utica Shale. As of October 17, 2020, 2,592 wells were listed as producing (which includes wells that have been plugged back) from the Utica Shale (source: ohiodnr.gov). ODNR reported that, during the second quarter of 2020, there was a total oil production of more than 5.18 million barrels and gas production of more than 569 billion cubic feet. Baker Hughes reported that as of October 17, 2020, there were 6 active rigs operating in Ohio.

Top Oil Producing Wells in the State of Ohio for 2nd Quarter 2020

WELL NAME	WELL NUMBER	OWNER NAME	COUNTY	TOWNSHIP	OIL PRODUCED
KRAMER 1-13-7	10H	EAP OHIO LLC	HARRISON	FRANKLIN	80,766
FINERAN A	3H	ECLIPSE	GUERNSEY	WILLS	69,581
FINERAN B	7H	ECLIPSE	GUERNSEY	WILLS	69,321
AKERS 25-12-6	6H	EAP OHIO LLC	HARRISON	FRANKLIN	68,184

Top Gas Producing Wells in the State of Ohio for 2nd Quarter 2020

WELL NAME	WELL NUMBER	OWNER NAME	COUNTY	TOWNSHIP	GAS PRODUCED
HENDERSON E RCH BL	6H	ASCENT	BELMONT	RICHLAND	3,141,723
STARVAGGI 210725	1A	GULFPORT	BELMONT	PEASE	3,133,534
HENDERSON W RCH BL	4H	ASCENT	BELMONT	RICHLAND	3,042,348
STARVAGGI 210727	4A	GULFPORT	BELMONT	PEASE	3,015,529

WTI Crude and Natural Gas Prices

Oct 23, 2020



Price: \$40.09/barrel

Source: CSX:NMX nasdaq.com as of 10/23/20.

Oct 23, 2020



Price: \$2.97/mcf

Source: NG:NMX nasdaq.com as of 10/23/20.

Further Refinements to Ohio Oil and Gas Lease Law

By Matthew W. Onest, Esq.

Over the past few months, Ohio courts have released several decisions which further refine Ohio law relating to oil and gas leases:

- *Talbott v. Condevco, Inc.*— The Seventh District Court of Appeals held the following: (1) a lessee's failure to make change of ownership reports to the ODNR does not cause the lease to terminate unless the lease specifically says that failure causes the lease to terminate; (2) a lessee need not account for the fair market rental value of a swab rig if the lessee owns its own swab rig and the use of the swab rig is not specifically charged to the lessee; (3) that the hours and wages for the lessee's employees who are paid to conduct the swabbing are operating expenses, meaning they are used to determine paying quantities profit; and (4) the employees' labor rate need not be set, for purposes of paying quantities analysis, at the fair market labor rate for workers generally.
- *Tewanger v. Stonebridge Operating Co.*— The Seventh District Court of Appeals held the following: (1) assumed a paying quantities claim accrues when production under the lease begins and (2) held that the lease terminated based on six consecutive years of non-production.
- *Fiocca v. AIM Energy, LLC*— The Seventh District Court of Appeals held that a lessee may common meter or common tank production from multiple wells located on the same leasehold or leaseholds. The production from those wells at issue was not commingled with production from wells located on other leaseholds. The lease at issue did not require that each well drilled under the lease separately produce in paying quantities. This eliminated any issues with commingling the wells' production.
- *Head v. Victor McKenzie Drilling, Inc.*— The Fifth District, for the second time, held that Ohio courts lack the authority to order an oil and gas well be plugged. Instead, that authority is held solely by the Chief of the Ohio Department of Natural Resources.

Leasing Update

By Wayne A. Boyer, Esq.

At present, the oil and gas leasing market remains stagnant. Of the dozen producers that we interact with on a regular basis, only two have shown any interest in leasing during the calendar year 2020: Encino Energy ("Encino") and Ascent Resources – Utica, LLC ("Ascent"). Furthermore, Encino and Ascent have only shown interest in tracts that lie within current units that they are planning, and have shown no interest in leasing tracts in attempts to create new units. As a result, lease offers on the whole remain down, both in volume and offered price. Additionally, the COVID-19 pandemic has continued to negatively affect communication and interaction with the oil and gas companies. Finally, with just six active drilling rigs operating in Ohio, drilling activity is at approximately one-third of the levels of the same time in

2019.

With that said, there are signs that the market is rebounding. As of October 30, 2020, the price of natural gas was \$3.30 per mcf, and the price of WTI Crude Oil was \$36.17 per barrel. For comparison's sake, at the outset of the pandemic on March 30, 2020, the price of natural gas was \$1.63 per mcf, while the price of WTI Crude Oil was \$22.04 per barrel. The market has rebounded substantially from the outset of the pandemic, and we have begun to see an increase in contact from oil and gas companies relating to oil and gas offers. We believe that the markets will continue to improve as the economy and demand for oil and gas improve. We are optimistic and look forward to continual improvement in the market as the calendar turns to 2021.

Information on

Contacting Other Outlets

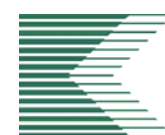
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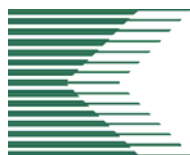
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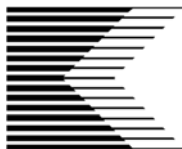
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