

# Oil and Gas, Natural Resources, and Energy Journal

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Volume 5 | Number 2

*The 2019 Survey on Oil & Gas*

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September 2019

## Ohio

Timothy M. McKeen

Melissa S. Grimes

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### Recommended Citation

Timothy M. McKeen & Melissa S. Grimes, *Ohio*, 5 OIL & GAS, NAT. RESOURCES & ENERGY J. 207 (2019), <https://digitalcommons.law.ou.edu/onej/vol5/iss2/18>

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VOLUME 5

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OHIO



*Timothy M. McKeen & Melissa S. Grimes \**

## *I. Introduction*

Since August 1, 2018, the courts and legislature of Ohio have made important changes in the landscape of oil and gas law. These changes advance the industry as a whole while simultaneously clarifying existing standards.

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\* Timothy McKeen is a Member of the Wheeling office of Steptoe & Johnson, and Melissa Grimes is of counsel in the Wheeling office of Steptoe & Johnson.

## II. Statutory Law

In direct response to the Ohio Supreme Court's decision in *Dundics v. Eric Petroleum Co.*, described more fully below, the Ohio Legislature passed Senate Bill 263 ("SB 263").<sup>1</sup> SB 263 amended Section 4735 of the Ohio Revised Code to exempt oil and gas land professionals ("landmen") from the licensure requirements imposed on real estate agents and brokers.<sup>2</sup> The revisions to Section 4735.01 introduce the concept of an "oil and gas land professional"<sup>3</sup> and exempt this group from the definition of "real estate broker," "real estate salesperson," "foreign real estate dealer" and "foreign real estate salesperson."<sup>4</sup>

Additionally, SB 263 enacted Section 4735.023 which requires ongoing registration requirements for landmen, an annual fee, an obligation for landmen to maintain membership in a national oil and gas land professional group, and specific disclosure requirements to landowners.<sup>5</sup> These changes took effect in March 2019.

## III. Common Law

Over the past year, Ohio courts at every level have had the opportunity to address various cases involving the oil and gas industry. This article analyzes two important Supreme Court cases, several cases from Ohio's appeals level courts, and one case that recently appeared on the federal circuit.

### A. *Dundics v. Eric Petroleum Corp.*

First, the Ohio Supreme Court held in *Dundics v. Eric Petroleum Corp.* that landmen who negotiate oil and gas leases must be licensed as real estate agents and otherwise comply with the requirements set forth in section 4735 of the Ohio Revised Code.<sup>6</sup> In *Dundics*, an independent landman sued a producer for breach of contract, claiming the producer failed to pay the landman for work completed in obtaining oil-and-gas leases.<sup>7</sup> The producer moved to dismiss the lawsuit, arguing that because the landman was not a licensed real estate broker, the landman was not entitled to enforce his

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1. S.B. 263, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

2. *Id.* at 40.

3. *Id.*

4. *Id.* at 37–38.

5. *Id.* at 40–41.

6. 155 Ohio St.3d 192, 2018-Ohio-3826, 120 N.E.3d 758 (Ohio 2018).

7. *Id.*

agreement with the producer.<sup>8</sup> The trial court granted the motion to dismiss and the court of appeals affirmed.<sup>9</sup> The Ohio Supreme Court subsequently affirmed the lawsuit's dismissal, finding that because oil and gas interests were included within the broad definition of "real estate" under section 4735.01(B) of the Ohio Revised Code, negotiation of oil-and-gas leases requires a real-estate-broker's license.<sup>10</sup> Because the Code contained no exceptions for oil-and-gas leases or landmen, the statute applied and the landman was unable to seek compensation for his work as he was not a licensed broker.<sup>11</sup>

As noted above, in direct response to this case, Ohio's Legislature recently amended section 4735 of the Ohio Revised Code to explicitly exempt landmen from these licensure requirements.<sup>12</sup>

*B. Blackstone v. Moore*

Second, the Ohio Supreme Court held in *Blackstone v. Moore* that a reference in a deed to a prior oil and gas royalty reservation that includes (i) the type of interest reserved (in this case, a "one-half interest in oil and gas royalty"), and (ii) the name of the individual to whom the interest was originally reserved, is sufficiently specific to preserve interests in record title under the Marketable Title Act ("MTA").<sup>13</sup> In this case, surface-interest owners brought an action against holders of an oil-and-gas royalty interest, seeking to quiet title and a declaration that the interest, reserved in a 1915 deed, had been extinguished.<sup>14</sup> The trial court granted summary judgment in favor of the owners and the court of appeals reversed.<sup>15</sup> The Supreme Court affirmed, finding the landowners' title remained subject to the royalty interest.<sup>16</sup>

In reaching its conclusion, the court expounded a three-prong test considering: (1) whether there is an interest described within the chain of title, (2) whether the reference is a "general reference," and (3) if so, whether the general reference contains specific identification of a recorded title

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8. *Id.*

9. *Id.*

10. *Id.* ¶ 15.

11. *Id.*

12. *See* S.B. 263, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

13. *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132 (Ohio 2018).

14. *Id.* ¶ 2.

15. *Id.*

16. *Id.*

transaction.<sup>17</sup> Based on the plain meanings of “general” and “specific,” the court determined that the reference in question was a “specific reference” under the second prong of the test.<sup>18</sup> The court concluded that neither volume and page numbers nor the date that the interest was recorded are required to successfully preserve an interest, noting that if the legislature had intended to require such specificity, it would have expressly done so as it did in the 2006 Dormant Minerals Act (“DMA”).<sup>19</sup>

Judge DeGenaro’s concurrence stressed the narrow nature of the holding and its interplay with the DMA, emphasizing that the opinion should not be read to implicitly hold that the more general MTA continues to apply to mineral interests following the enactment of the DMA.<sup>20</sup> Judge DeGenaro recognized that the legislature’s adoption of the DMA “strongly suggests that the [DMA] should be the controlling law and the exclusive remedy for” mineral interests; however, as the question was not raised on appeal, it “remains an open issue that is ripe” for the court’s future review.<sup>21</sup>

### C. District Courts of Appeals

Ohio’s District Courts of Appeals decided numerous cases this year. The following cases decided in the Seventh District of Ohio were particularly significant for the oil and gas industry.

Most recently, the Court decided a case involving a private oil and gas lease and Ohio’s statutory unitization law. In *Paczewski v. Antero Resources Co.*, the original contracting parties struck a voluntary unitization clause from their oil and gas lease.<sup>22</sup> When the producer was unable to secure an amendment to give the producer/successor-lessee the contractual authority to form the horizontal drilling unit, the producer applied to Ohio’s Division of Oil and Gas Resources Management (“the Division”) for a statutory unitization order.<sup>23</sup> In turn, the successor-lessors sued, claiming the producer breached the lease by applying for the order, and that the Division’s issuance of the order effected an unconstitutional taking.<sup>24</sup> Affirming the trial court’s decision, the appellate court held that striking the provision rendered the

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17. *Id.* ¶ 12.

18. *Id.* ¶¶ 13–15.

19. *Id.* ¶¶ 16–17.

20. *See id.* (DeGenaro, J., concurring).

21. *Id.* ¶¶ 22–23.

22. *Paczewski v. Antero Resources Corp.*, No. 18 MO 0016, 2019 WL 2722600 (June 19, 2019).

23. *Id.* ¶ 10.

24. *Id.* ¶ 2.

lease silent on the issue, but such “deletion does not prohibit the parties from engaging in the action that is the subject of the voided clause.”<sup>25</sup> The court also rejected the lessors’ takings claim, noting that Ohio’s statutory unitization process serves to protect property rights in oil and gas and constitutes a proper exercise of the state’s police power.<sup>26</sup> This case is somewhat similar to *Kerns v. Chesapeake Expl., L.L.C.*, a recent federal case decided by the Sixth Circuit, discussed *infra*.<sup>27</sup>

In *Sharp v. Miller*, the court reaffirmed its earlier ruling in *Shilts v. Beardmore* that Ohio’s DMA only requires a surface owner to exercise reasonable due diligence to ascertain the names and addresses of mineral holders prior to serving its notice of abandonment by publication.<sup>28</sup> The court further held that whether a surface owner’s actions constitute “reasonable due diligence” is case-specific,<sup>29</sup> as such, there is no bright-line rule or definition of “reasonable due diligence” for future cases.

In *Miller v. Mellott*, the court signaled that the MTA applies to fee mineral interests.<sup>30</sup> Here, surface owners claimed title under the MTA, while the mineral owners claimed title through a reservation included in a 1947 deed.<sup>31</sup> The trial court granted summary judgment in favor of the mineral owners, holding that the DMA controls with regard to severed, fee mineral interests rather than the MTA.<sup>32</sup> On appeal, the seventh found the trial court erred in refusing to apply the MTA, citing the Ohio Supreme Court’s recent holding in *Blackstone* that “a royalty interest is subject to both the MTA and DMA.”<sup>33</sup> Although the court concluded that the error did not require reversal when the surface owners were found to lack “root of title” (precluding them from extinguishing the severed oil and gas interest),<sup>34</sup> its reasoning still points to the MTA as a tool that can be used to extinguish fee oil and gas reservations.

In *Stalder v. Bucher*, the court again held that fee oil and gas interests are subject to possible extinguishment under the MTA, reiterating its prior decision in *Miller*.<sup>35</sup> Here, the Court rejected the argument that the DMA’s

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25. *Id.* ¶ 34.

26. *Id.*

27. 762 F. App’x 289, 297 (6th Cir. 2019).

28. *Sharp v. Miller*, 2018-Ohio-4740, 114 N.E.3d 1285 (Ohio 2018), *appeal rejected*, 155 Ohio St.3d 1421, 2019-Ohio-1421, 120 N.E.3d 867 (Ohio 2019).

29. *Id.*

30. *Miller v. Mellott*, 2019-Ohio-504 (Ohio Ct. App. Feb. 6, 2019).

31. *Id.* ¶ 3.

32. *Id.* ¶ 22.

33. *Id.* ¶ 25; *see supra* note 13.

34. *Miller*, 2019-Ohio-504, ¶ 28.

35. *Stalder v. Bucher*, 2019-Ohio-936. (Ohio Ct. App. Mar. 13, 2019).

specificity as to mineral interest termination supersedes the MTA, finding instead that oil and gas interests are subject to both the MTA and DMA.<sup>36</sup> However, using the Ohio Supreme Court's three-prong inquiry from *Blackstone*, the seventh district found that the exception to extinguishment under section 5301.49(A) of the Ohio Rev. Code Ann. applied in this case, thus preserving the oil and gas interest at issue in the mineral owners' favor.<sup>37</sup>

#### *D. Federal Court Cases*

The United State Court of Appeals for the Sixth Circuit recently affirmed the United States District Court for the Northern District of Ohio's decision upholding the constitutionality of Ohio's statutory pooling scheme.<sup>38</sup> In *Kerns v. Chesapeake Exploration, L.L.C.*, plaintiff landowners brought a class action suit against defendants, an oil and natural gas drilling company and the chief of Ohio's Division of Oil and Gas Resources Management, following the issuance of a mandatory pooling order that permitted the company to drill below the landowners' tracts. The landowners' Section 1983 claim alleged that the drilling constituted a "taking" in violation of the Fourteenth Amendment.<sup>39</sup>

To avoid the waste of oil and gas, Ohio legally requires "pooling" or "unitization" prior to drilling.<sup>40</sup> Pooling combines separate-yet-adjointing tracts of land with a common natural resource below them into a single "unit."<sup>41</sup> After tracts are pooled, drilling operations must be coordinated and spaced within the unit.<sup>42</sup> Tract owners can agree to voluntarily pool their properties, but in the absence of agreement, any party who collectively owns sixty-five percent of the land in question may apply to Ohio's Division of Oil and Gas Resources Management ("the Division") for a mandatory pooling order.<sup>43</sup>

Here, the drilling company effectively owned more than sixty-five percent of the land in question, but could not reach a voluntary pooling agreement as to the remaining tracts.<sup>44</sup> As such, the company applied to the Division for a

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36. *Id.* ¶¶ 15–19.

37. *Id.* ¶¶ 24–33.

38. *See Kerns v. Chesapeake Expl., L.L.C.*, 762 Fed. App'x 289 (6th Cir. 2019), *cert. denied*, 139 S.Ct. 2033, 204 L.Ed.2d 218 (2019).

39. *Id.* at 291.

40. *Id.*; *see also* OHIO REV. CODE ANN. §1509 (Lexis through the 133d Gen. Assemb.).

41. *Kerns*, 762 Fed. App'x at 291.

42. *Id.*

43. *Id.* at 292 (citing OHIO REV. CODE ANN §§ 1509.27, 1509.28(A) (Lexis through the 133d Gen. Assemb.)).

44. *Id.*

mandatory pooling order, which the Division's chief approved.<sup>45</sup> Although the Sixth Circuit found that the landowners had standing to challenge the pooling order, the Section 1983 claim failed because the drilling company could not be considered a state actor for merely using the state's process to obtain the order "without overt and significant assistance of state officials."<sup>46</sup> The Court additionally found Ohio's pooling procedure does not amount to a taking of landowners' subsurface rights, but rather constitutes "a proper exercise of [the state's] police power" by protecting property rights through the use of a "just, orderly, and efficient process for neighbors to extract common resources."<sup>47</sup> Moreover, a takings claim based on subsurface occupation was found to be conceivable under Ohio law, but the landowners' failed to meet the state's "actual-interference requirement."<sup>48</sup>

#### *IV. Conclusion*

As oil and gas law further develops in Ohio, courts will continue clarify existing precedent while the legislature adapts through new legislation. Building upon its growing number of state and federal case law, Ohio will undoubtedly continue to expand its body of law in this industry.

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45. *Id.*

46. *Id.* at 295.

47. *Id.* at 296 (agreeing with *Redman v. Ohio Dep't of Indus. Relations*, 75 Ohio St. 3d 399, 1996-Ohio-196, 662 N.E.2d 352, 361 (Ohio 1996) and *Burtner-Morgan-Stephens Co. v. Wilson*, 63 Ohio St. 3d 257, 586 N.E.2d 1062, 1064-65 (Ohio 1992)).

48. *Id.*