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ONE J

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Tim McKeen * & *Melissa Grimes* **

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I. Introduction

From August 1, 2019 to July 31, 2020, the Ohio Legislature did not pass any major oil and gas legislation; however, one relevant bill on injection wells was introduced and has been referred to committee. Some significant changes have been made through administrative law by the Ohio Department of Natural Resources-Division of Oil and Gas Resources Management. Therefore, while no legislative and few administrative changes have been made by the state of Ohio, the most noteworthy changes in Ohio oil and gas law between August 1, 2019 and July 31, 2020 have occurred in the courts.

II. Statutory Law

A. Injection Wells

Ohio Senate Bill 336 (“The Bill”) was introduced on July 9, 2020 to amend Sections 1509.02 and 1509.22 of the Ohio Revised Code in order to revise the law governing the permitting of oil and gas brine injection wells.

The Bill levies a 15 cent per barrel fee on the injection of brine at an injection well that an injection well owner must pay to the Division of Oil and Gas Resources Management, rather than the current 5 or 20 cent per barrel fee which depends on where the brine is generated. The Bill also modifies the requirements of the Chief of the Division in authorizing injection wells, including the requirements of injection well permits and published notice of applications. Finally, the Chief would be prohibited from issuing an injection well permit unless 50% of the real property owners located within a one-mile radius of the proposed location of the injection well consent in writing to the injection well.

The Bill was referred to the Government Oversight and Reform committee on July 21, 2020. No vote is scheduled at this time.

III. Administrative Law

A. Well Spacing

Ohio Administrative Code Chapter 1501:9-1-04 sets forth spacing requirements for wells, including new wells, reopened wells, and modifications to existing wells. The rule has been amended to decrease the minimum acreage required for spacing certain types of wells. Namely, the amendment decreases the minimum acreages of the subject tracts required for the production of oil or gas from pools of different specified depths.

B. Well Plugging

A significant revision to Ohio Administrative Code Chapter 1501:9-11 now includes the requirement for a well owner to develop a written plugging plan. The rule applies to horizontal and conventional wells drilled with both rotary and cable tools, Class II injection wells, enhanced recovery wells, Class III solution mining wells, underground natural gas storage wells, and wells drilled to extract brine or oil field waters. While the below is not an exhaustive listing of the amendments, the updated rule defines a “plugging plan” as follows:

(N) "Plugging plan" means a written plan that includes all information required by section 1509.13 of the Revised Code in addition to all of the following:

- (1) The diameter of each uncased segment of the wellbore;
- (2) The length, weight, and outer diameter of each casing string in the well;
- (3) The depth to the base and top of the cemented interval of each casing string;
- (4) The base and top of any mineable coal seams;
- (5) The name, if known, and depth to the base and top of the deepest underground source of drinking water;
- (6) The depth to the base and top of each reservoir rock, thief zone, underground mine zone, karst void, or mineable coal seam that will be plugged or isolated;
- (7) The proposed depth to the top and base of each plug;
- (8) The class of cement to be used to plug the well;

(9) The yield and optimum slurry density for each cement plug;
and

(10) If the well will be plugged with an approved clay, the total weight of clay in tons that will be emplaced across each interval plugged.

IV. Common Law

A. Statute of limitations on oil and gas lease terminations

In *Browne v. Artex Oil Co.*, the Supreme Court of Ohio ruled that a declaratory judgment claim that an oil and gas lease terminated for lack of production is subject to the 21-year statute of limitations for recovery of title to or possession of real property in O.R.C. 2035.04.¹ Here, property owners brought an action against oil and gas lessees for quiet title, declaratory judgment, intentional conversion, and unjust enrichment, claiming that the oil and gas lease was no longer valid due to the lack of production of oil or gas. Said lease was executed in 1975, with the primary term of one year, and a secondary term for as “long thereafter as oil and gas, or either of them, is produced by lessee from said land.”² The well has been operated since the initial lease, and royalty interests were paid as recent as 2015. The landowners filed a quiet title action against the lessees alleging that the well did not produce any oil or gas from its inception until 1999, and therefore it had been inoperative for a sufficient time to terminate the lease.³ The lessees argued that a 15-year statute of limitation was applicable to the claim, as this is the case for recovery of title to or possession of real property under O.R.C. 2305.041 and/or O.R.C. 2305.06.⁴ However, based on the conclusion that, in Ohio, an oil and gas lease vests a real property interest in the lessee, the Court held that O.R.C. 2305.04 was the controlling limitations statute.⁵ The Court determined that this was the operative statute because the oil and gas lease vested the lessee with a real property interest and the lessors were merely seeking recognition of their reversionary interest in that property. Therefore, O.R.C. 2305.04 applies to

1. *Browne v. Artex Oil Co.*, 158 Ohio St. 3d 398 (2019).

2. *Id.* at 399.

3. *Id.*

4. *Id.*

5. *Id.* at 406-409.

a claim for declaratory judgment that an oil and gas lease expired by its own terms for lack of production.⁶

B. Marketable Title Act to extinguish mineral interests

In *West v. Bode*, the Seventh District Court of Appeals of Ohio reaffirmed that claimants can use both the Marketable Title Act (“MTA”) to extinguish mineral interests and the Dormant Mineral Act (“DMA”) to abandon mineral interests.⁷ The court clarified that these two acts are not in conflict and issued a strong defense of the MTA, explaining that, pursuant to O.R.C. 1.51, the court must construe conflicting, but interrelated, statutory provisions together so it can give effect to both.⁸ The special provision prevails as an exception to the general provision only when there is a conflict between the two provisions and the conflict is irreconcilable.⁹ The court noted the two acts contained different look-back periods, savings events, and termination procedure and found that each applies to a particular situation independent of the other.¹⁰

On July 8, 2020, The Supreme Court of Ohio heard oral arguments in the appeal from the Seventh District Court of Appeals’ decision in *West*, in order to determine whether the DMA supersedes and controls over the MTA as to the termination of severed oil and gas interests, or whether the two statutes may both be used to quiet title to the severed interests. Following the Seventh District Court of Appeals’ initial decision on September 30, 2019, The Supreme Court of Ohio’s acceptance of the appeal on January 21, 2020, and oral arguments having been held on July 8, 2020, land and mineral owners are now only left awaiting the decision of the Court.

C. Oil and gas royalties

In *Henceroth v. Chesapeake Exploration, LLC*, a royalty dispute was heard by the Sixth Circuit Court of Appeals for the Northern District of Ohio, and the court affirmed summary judgement for the lessees in a royalty class action.¹¹ At issue in this case was the lessee’s sale of gas to an

6. *Id.*

7. *West v. Bode*, 2019-Ohio-4092, 145 N.E.3d 1190 (7th Dist. Ct. App.), appeal allowed, 2020-Ohio-122, 157 Ohio St. 3d 1535, 137 N.E.3d 1196 (2019).

8. *Id.* at 1201.

9. *Id.* at 1196-1203.

10. *Id.* at 1198.

11. *Henceroth v. Chesapeake Expl., LLC*, No. 19-3942, 2020 WL 2569356 (6th Dist. Ohio Ct. App., May 21, 2020).

affiliate. Chesapeake Exploration produced oil and gas and sold it to its affiliate Chesapeake Marketing. Chesapeake Exploration paid the landowners the amounts it received from its affiliate, which adjusted its prices based on what its affiliate received from third parties. A group of landowners sued Chesapeake Exploration claiming that it underpaid their royalties because the royalties were based on the amount Chesapeake Exploration received from its affiliate, and not on the higher prices that were paid by third parties.¹² The Sixth Circuit Court held that the key language of the contract “produced and marketed from the leasehold” indicated that the first sale price was the proper royalty base.¹³ The Court held that Chesapeake’s evidence for the legitimacy of the intercompany transfer was un rebutted, and there was nothing unusual about the multi-level vertical supply chains that included sales and marketing at each level.¹⁴

D. Transfer of royalty and fee oil and gas reservations to heirs

In *Peppertree Farms, LLC v. Thonen*, the Fifth District Court of Appeals of Ohio considered whether certain ancient royalty and fee oil and gas reservations terminated upon the grantor’s death.¹⁵ Here, the “ancient” royalties considered were those reserved in 1916 and 1920, respectively. The court concluded that a deed that stated that “the 1/4 of oil Royalty and one half of the gas is hereby reserved and not made part of this transfer” was a reservation, rather than merely an exception from the grant, that created a newly severed oil and gas interest. The court held that, for ancient royalty and fee oil and gas reservations to transfer to heirs and assigns, grantors must include words of inheritance in their reservation clause. Therefore, if the language used in the deed constituted a “reservation,” then words of inheritance were required because the grantor was deemed to be creating a new property interest.¹⁶ This decision is in conflict with the Seventh District Court of Appeals of Ohio’s decision in *Headley v. Ackerman*, where the court examined a deed wherein the appellants argued that the reserved royalty interest was limited to a life estate due to the lack of words of inheritance in the reservation.¹⁷ There, the court held that no words of inheritance were required to extend the royalty interest past a life

12. *Id.* at 68-69.

13. *Id.* at 70-71.

14. *Id.*

15. *Peppertree Farms, LLC v. Thonen*, 2020-Ohio-3042 (5th Dist. Ct. App.).

16. *Id.* ¶¶ 39-40.

17. *Headley v. Ackerman*, 2017-Ohio-8030 (7th Dist. Ct. App.).

estate.¹⁸ Therefore, it is possible we will see this case reach the Supreme Court of Ohio for a determination of the interplay between words of inheritance and the reservation of life estates in oil and gas interests.

E. Reasonable due diligence in search for potential heirs

In *Fonzi v. Brown*, the Seventh District Court of Appeals of Ohio again considered the level of “reasonable due diligence” necessary in the search for potential interest holders under the Ohio Dormant Mineral Act.¹⁹ In this case, the court found that the researcher failed to exercise reasonable due diligence in search for potential heirs to the considered interest before serving notice by publication.²⁰ The researcher searched only in Monroe County, Ohio, where the property at interest was located, despite having knowledge that the original owners of the property lived in Washington County, Pennsylvania.²¹ The court found that the researcher’s efforts were not sufficient for a reasonable, diligent search and therefore, failed to comply with statutory notice requirements.

In this case, the court again declined to establish a bright-line rule for what constitutes due diligence and that “what constitutes reasonable due diligence will depend of the facts and circumstances of each case.”²² The Court emphasized that O.R.C. 5301.56(E)(1) “makes it clear that since notice by publication is a last resort, a sincere, diligent effort by the researcher is required before service by publication is appropriate.”²³

V. Conclusion

Therefore, while there were not many statutory or administrative law updates in Ohio during this time period, there were several substantial decisions made in the courts, with some already leading to or presumably heading towards important decisions to be made in the Supreme Court of Ohio during the next year.

18. *Id.* ¶ 49.

19. *Fonzi v. Brown*, 2020-Ohio-3631 (7th Dist. Ct. App.).

20. *Id.* ¶ 32.

21. *Id.*

22. *Id.* ¶ 31.

23. *Id.*