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I. Introduction

For the period of August 1, 2021, through July 31, 2022, there were important changes in the landscape of oil and gas law in the state of Ohio. While there were no major changes in statutory or administrative law, the Ohio Courts were busy and decided a number of important cases. Of interest were cases about the Dormant Mineral Act, Marketable Title Act, arbitration of leases dispute, and transfer restrictions in deeds.

II. Statutory Law

A. Future Bills to Watch

There were not any notable administrative law developments in Ohio during the time period of August 1, 2021, to July 31, 2022. However, Ohio House bills 192, 282, 152, and Senate bill 171 are bills to watch in the oil and gas industry for the near future.¹

1. Ohio House Bill 192

Ohio House Bill 192 (the “Bill”) was introduced on March 9, 2021 to enact section 4933.40 of the Revised Code which will prohibit local governments such as counties, townships, and municipal corporations from prohibiting or limiting energy generation from fossil fuels and the construction or use of a pipeline to transport oil or gas.²

Proponents for this Bill advocate for protecting a person’s choice to use natural gas in their homes and address the possibility of increased prices for Ohio residents by local governments enacting potential prohibitions of natural gas.

This Bill was referred to the Committee of Energy and Natural Resources on March 10, 2021. No vote is scheduled at this time.

2. Ohio House Bill 282 and Senate Bill 171

Ohio House Bill 282 and Ohio Senate Bill 171 (the “Bills”) both propose to enact section 1509.228 of the Revised Code to establish, under certain conditions and requirements, brine as a commodity, which would allow the sale of brine from oil and gas operations and exempt it from requirements otherwise applicable to brine.³ Under the proposed Bills, in certain instances, brine from conventional wells can be permitted for use as a deicer and a dust suppressant on roads by municipalities and government agencies. Upon the passage of either of these Bills, oil and gas produced seawater, used to melt ice on roads, could become more prevalent within the State.

Ohio House Bill 282 was introduced to the House May 3, 2021 and referred to the Committee of Energy and Natural Resources May 4, 2021.

1. H.B. 192, 134th Gen. Assemb., Reg. Sess. (Ohio 2021-22); H.B. 282, 134th Gen. Assemb., Reg. Sess. (Ohio 2021-22); S.B. 171, 134th Gen. Assemb., Reg. Sess. (Ohio 2021-22); H.B. 152, 134th Gen. Assemb., Reg. Sess. (Ohio 2021-22).

2. H.B. 192, 134th Gen. Assemb., Reg. Sess. (Ohio 2021-22).

3. H.B. 282, 134th Gen. Assemb., Reg. Sess. (Ohio 2021-22); S.B. 171, 134th Gen. Assemb., Reg. Sess. (Ohio 2021-22).

Ohio Senate Bill 171 was introduced to the Senate April 27, 2021 and referred to the Committee of Agriculture and Natural Resources April 28, 2021. No vote is scheduled at this time.

3. *Ohio House Bill 152*

Ohio House Bill 152 (the “Bill”) proposes to amend section 1509.28 of the Revised Code to revise the law governing unit operation and to enact changes pertaining to how oil and gas leasing is managed when a landowner refuses to lease their lands.⁴ Under current Ohio law, unitization provides a process for an applicant to advance with its oil and gas operations if a small minority of mineral owners in a proposed unit refuse to lease their minerals. An oil and gas operator can seek an order from the Ohio Department of Natural Resources to mandate landowners into oil and gas well units. Upon an operator’s application approval, landowners without a lease have their oil and gas rights placed into the unit. Such changes to section 1509.28 will include, but are not limited to:

- 1) Creating a minimum charge against nonconsenting landowners in the amount of 300%.
- 2) Within 30 days of the Chief of the division of oil and gas resources management’s unitization order, the unleased mineral owner must choose one of the following options:
 - Enter a lease with the operator for the unleased acreage in the unit, with a 12.5% net royalty and a lease bonus in the amount of 75% of market value of lease bonus rate for the acreage within the proposed unit times the amount of the landowner’s acreage in the unit.
 - Consent to including the acreage in the unit and follow all terms of the proposed operating agreement.
 - Fail to consent and then be subject to the 300% charge on drilling and equipping costs.
 - Failure to elect within the time frame results in a lease at a 1/8th net royalty.
- 3) This law further adds protections in the trade secret, research, development, or commercial information of the operator secret,

4. 2021 Ohio House Bill No. 152, Ohio One Hundred Thirty-Fourth General Assembly - 2021-2022 Session.

allowing the Chief permission to not disclose such information to the public, including public hearings.

- 4) It also allows for hearings on applications to be conducted remotely.
- 5) Requires hearings on unitization applications to be held within 30 to 60 days of an application for unitization.
- 6) Requires the issuance of the unit order within 30 days of the hearing unless it has been denied within that 30 days.

This Bill was introduced to the House February 23, 2021 and referred to the Committee of Energy and Natural Resources February 24, 2021. No vote is scheduled at this time.

III. Administrative Law

A. Ohio Administrative Law Gives Guidance on Tax Exemptions

Ohio Administrative Code Chapter 5703-9-63 provides that a person is exempt from sales or use tax on purchased tangible property if that personal property is directly used or consumed in the production of crude oil and natural gas for sale. Additionally, this rule also applies to persons engaged directly in providing oil and gas services to others.⁵

IV. Common Law

A. Ohio Supreme Court

1. Ohio Supreme Court Further Clarifies “Reasonable Diligence” Standard Under the Ohio Dormant Mineral Act

In the *Fonzi* cases,⁶ the Ohio Supreme Court discussed the level of due diligence required of a surface owner to provide notice to a severed mineral interest owner in order to abandon said mineral interest under the Ohio Dormant Mineral Act (DMA). The court held that surface owners did not exercise reasonable due diligence when they failed to conduct a public

5. OHIO ADMIN. CODE 5703-9-63 (2022).

6. *Fonzi v. Brown and Fonzi v. Miller*, __ N.E.3d __, 2022-Ohio-901 (Mar. 24, 2022). The Supreme Court consolidated the two appeals at the request of the *Fonzi* heirs. For the earlier, separate decisions by the 7th District Court of Appeals, see *Fonzi v. Brown*, 2020-Ohio-3631 (Ohio App.—7th Dist. June 1, 2020) and *Fonzi v. Miller*, 2020-Ohio-3739 (Ohio App. — 7th Dist. June 29, 2020).

record search in the county where the last known mineral interest holder resided, despite having knowledge of the same.⁷

These cases concern two adjoining parcels of land located in Monroe County, Ohio.⁸ For both parcels, prior deeds within the chain of title identified that the severed mineral interest holder, being Elizabeth Henthorn Fonzi (“Fonzi”), resided in Finleyville, Washington County, Pennsylvania.⁹ The surface owners, being appellants Gary D. Brown, Allen B. Miller, M. Craig Miller, and Brenda Thomas, subsequently began the process to have the Fonzi mineral interests declared abandoned. In doing so, their attorney searched the Monroe County public records and conducted “limited Internet searches,” but failed to uncover any information about Fonzi or any potential heirs to send notice by certified mail. Therefore, the surface owners published notices of intent to declare the Fonzi mineral interests abandoned in a Monroe County newspaper, and subsequently filed affidavits of abandonment.¹⁰ The Fonzi heirs then filed complaints in the Monroe County trial court for declaratory judgment, seeking to quiet title, alleging that the surface owners had failed to exercise reasonable due diligence in attempting to locate the holders of the Fonzi mineral interest.¹¹

The trial court disagreed with the Fonzis and held that the surface owners had made reasonable efforts to locate the Fonzi Heirs. However, the Seventh District Court of Appeals reversed and held that the surface owners failed to exercise reasonable due diligence in their search.¹² The Ohio Supreme Court agreed with the Seventh District and reasoned that though the surface owners are not required to do the impossible, they are still required to exercise reasonable diligence in their search. Here, the surface owners did not exercise reasonable due diligence because they failed to search the public records of Washington County, Pennsylvania.¹³

2. Ohio Supreme Court States That Arbitration Laws Do Not Apply to Title or Possession of Real Estate

The Ohio Supreme Court in the case of *French v. Ascent Resources-Utica LLC*,¹⁴ held that a lawsuit filed by the grantors of oil and gas leases

7. *Fonzi v. Brown*, 2022-Ohio-901 ¶ 28.

8. *Id.* ¶ 2.

9. *Id.*

10. *Id.* ¶ 4.

11. *Id.* ¶ 5.

12. *Id.* ¶¶ 6,7.

13. *Id.* ¶ 26.

14. *French v. Ascent Resources-Utica, L.L.C.*, 2022-Ohio-869.

over the expiration of those leases because of the lessee's failure to obtain production or timely commence operations, as defined in the leases, fell within a statutory exception to Ohio's general policy in favor of arbitration provisions in contracts that exempts "controversies involving the title to or the possession of real estate" because the lawsuit would determine whether the lessee had the right to share possession of the leased premises with the lessors.¹⁵

In holding this, the court reasoned that the joint owners' lawsuit was not subject to Ohio's arbitration law because it was a controversy "involving the title to or the possession of real estate." To support this holding the court cited earlier decisions in which the court has held that an oil and gas lease grants property interests in the land and that the existence of an oil and gas lease would prevent a landowner from conveying title that was free from encumbrances.¹⁶ Therefore, such leases like the ones in issue here, are treated as "title transactions" as defined under the Marketable Title Act and are an exception to Ohio's general policy in favor of arbitration provisions.¹⁷

3. The Ohio Supreme Court Provides Further Clarity on the Distinction Between a Reservation and an Exception

In *Siltstone Resources LLC v. Ohio Public Works Commission*,¹⁸ the Ohio Supreme Court held that transfer restrictions in a deed to a local nonprofit corporation, which require the corporation to obtain the consent of the Ohio Public Works Commission prior to any conveyance of any interest from the land owned by the nonprofit corporation, render a subsequently granted oil and gas lease invalid.¹⁹

Years back, Ohio residents approved a constitutional amendment "giving local communities a means to conserve and revitalize natural areas, open spaces and lands devoted to agriculture." The approved amendment created a fund and left administration of that fund to the Ohio Public Works Commission. In 2006, the Commission and the Guernsey County Development ("CDC") entered into a grant agreement relating to 228 acres of property.²⁰ The resulting deed restricted development in an effort to preserve the green space and a transfer restriction which stated the CDC

15. *Id.* ¶ 21.

16. *Id.* ¶¶ 19, 20.

17. *Id.*

18. *Siltstone Resources, L.L.C. v. Ohio Pub. Works Comm'n.*, 2022-Ohio-483.

19. *Id.* ¶ 47.

20. *Id.* ¶¶ 4, 5.

must obtain the Commission's approval before transferring. A few years after this agreement the CDC entered into oil and gas leases without informing the Commission. After concerns were raised by the CDC that the transactions they made may have been restricted, subsequent lawsuits occurred.²¹

In deciding this case, the Ohio Supreme Court stated that the transfer restriction was valid because it was included in the deed and thus the CDC violated it. Therefore, the Commission was entitled to seek remedies at law and in equity to conserve the land for its intended purpose. In appealing to the Ohio Supreme Court neither party raised the issue of the "use restriction" included in the deed, but the Seventh Circuit held that the use restriction was inapplicable. Lastly, the Supreme Court in making its holding refused to distinguish between different types of restrictions in deciding whether or not the transfer restriction was enforceable.²²

4. The Ohio Supreme Court Draws a Distinction Between Fee Simple Interests and Life Estates

In the *Peppertree Farms* cases,²³ the Ohio Supreme Court considered a particularly convoluted set of facts out of which the court was asked to decide whether the grantors in a series of deeds had retained fee simple interests in the oil and gas or merely life estates. Both cases hinged on the technical difference between a "reservation" and an "exception" in a deed. Prior to a statutory change effective March 25, 1925, if a grantor "reserved" an interest from the lands being conveyed, then the interest would only be a life estate unless the grantor also used "words of inheritance," e.g., "and his heirs, successors and assigns," in the relevant deed provision, in which case the grantor retained a fee simple interest, but if the grantor "excepted" the interest, then a fee simple interest was retained regardless of whether the grantor had used words of inheritance. After the statutory change,

21. *Id.* ¶¶ 9, 10, 11.

22. *See generally* *Siltstone Resources, L.L.C.*, 2022-Ohio-483.

23. ___ N.E.3d ___ (Ohio 2022), 2022-Ohio-395 (Feb. 15, 2022) ("*Peppertree I*") and ___ N.E.3d ___, 2022-Ohio-396 (Feb. 15, 2022) ("*Peppertree II*"). *Peppertree I* addressed the issues related to the interests retained by W.T. Fleahman and Mary Fleahman, respectively, while *Peppertree II* addressed the very similar issues related to the interest retained by H.J. Jones. The *Peppertree* cases were decided by a divided court. Justice Michael P. Donnelly, in an opinion joined by Justice Patrick F. Fischer, dissented from the court's decision in *Peppertree I*, while Justice Donnelly, in an opinion joined by Justices Fischer and Jennifer Brunner, dissented from the court's decision in *Peppertree II*. The dissenters would have preferred that the court had not accepted the appeals.

reservations were to be in fee simple even if words of inheritance had not been used by the grantor.

In April 1916, W.T. and Katharine Fleahman conveyed two tracts of land in Monroe County to W.A. Gillespie, but their deed also provided that “Grantor W.T. Fleahman excepts and reserves from this deed the one half of the royalty of the oil and gas under the above-described real estate.” Mary Fleahman acquired Gillespie’s interest, and in September 1920 she conveyed the two tracts to H.J. Jones, but her deed provided that “the 3/4 of oil Royalty and one half of the gas is hereby reserved and is not made a part of this transfer.” In February 1921, Jones conveyed the two tracts to James Foughty; his deed provided: “All the oil and gas underlying the above-described premises is hereby reserved and is not made a part of this transfer.” In September 1921, Jones conveyed “the one-half part of his one fourth royalty of all the oil and gas” to S.E. Headley. In October 1929, Mary Fleahman conveyed three-fourths of her oil and gas rights back to W.T. Fleahman, but she kept the rest of what she had retained in the 1920 deed. A week later, W.T. Fleahman conveyed to S.E. Headley “the one fourth (1/4) part of his royalty of all oil and gas in and under the ... premises.” Over time, Mary Fleahman’s interest was acquired by Richard Reinholtz and Sylvia Ann Miller, W.T. Fleahman’s interest was acquired in part by KOAG Inc., and Jones’ interest was acquired in part by the heirs of Earl S. Ward, while the surface of the lands subject to these various oil and gas interests were acquired by Peppertree Farms LLC and Jay and Amy Moore.

Peppertree Farms filed two lawsuits in the Stark County Court of Common Pleas seeking declarations that the interests retained by Mary Fleahman, W.T. Fleahman, and H.J. Jones had been life estates only because none of their deeds had used words of inheritance when the respective interests were created, along with further declarations that if the interests had been fee simple interests, then they had been extinguished by operation of the Marketable Title Act. The trial court entered summary judgment in favor of Peppertree Farms and held that these interests were all life estates and further held that all of them would have also been extinguished by the Marketable Title Act. On appeal, the 5th District Court of Appeals affirmed the trial court on both points. While the Supreme Court affirmed the lower courts’ decisions that the Fleahman and Jones interests had been extinguished by the Marketable Title Act, it disagreed with their determination that the pre-1925 deeds had only created life estates.

In reaching its determination that the pre-1925 deed provisions should be treated as exceptions, which did not require words of inheritance, and not

reservations, which did, the court emphasized the fact that the oil and gas were already in existence at the time of the conveyances and that the deeds did not create the oil and gas. Reservations have always been understood as creating a new right or privilege, such as a right of first refusal, rather than merely limiting the scope of a deed's grant so that the grantor retained ownership of some part of the land that was already in existence at the time of the conveyance. Even though the Ohio Supreme Court disagreed with the appeals court and the trial court regarding what kind of interests had been created in the pre-1925 deeds, it agreed that those interests had been extinguished by the Marketable Title Act, rejecting an argument by Reinholtz, Miller, and KOAG that the Dormant Mineral Act, and not the Marketable Title Act, governed the question of whether the surface owners could eliminate the severed oil and gas interests; however, the court reversed summary judgment against KOAG because the lower courts had not determined whether its interest was protected against extinguishment under the Marketable Title Act. The Supreme Court also affirmed the lower courts' decision against the Ward heirs under the Marketable Title Act, determining that the heirs had failed to identify any recorded title transaction that protected their interests against extinguishment.

5. Ohio Supreme Court Limits the Applicability of the Duhig Rule in Specific Situations

On July 26, 2022, the Supreme Court of Ohio issued its decision in *Senterra, Ltd. v. Winland*, discussing the application of the *Duhig* rule to a fact pattern involving a grantor purporting to convey more interest than he held, and finding that the *Duhig* rule is inapplicable where the grantor did not own, at the time of the execution of the conveyance, the *exact interest* necessary to remedy the breach. As such, the court reasoned that Ohio's Marketable Title Act ("MTA") controlled in this case and analyzed the same.

In 1925, the property at issue, being a 77.5-acre tract of land located in Belmont County, Ohio ("Subject Property"), was conveyed, excepting and reserving a one-quarter interest in the oil and gas underlying the same. Next, in 1941, the Subject Property was conveyed, excepting and reserving "all the oil and gas rights", and not mentioning the 1925 reservation. In 1954, the Subject Property was again conveyed, excepting and reserving a one-quarter interest in the oil and gas ("Russell Reservation") to the grantor, George Russell, and again not mentioning the 1925 or 1941 exceptions or reservations. Between 1971 and 2012, the Subject Property was conveyed several times before Appellee *Senterra, Ltd.* ("Senterra")

acquired the same, with each conveyance during that time referring to the Russell Reservation. Senterra subsequently filed a complaint in the Belmont County Court of Common Pleas seeking the quiet title to the oil and gas interests underlying the Subject Property, arguing that the 1925 and 1941 reservations were extinguished by the MTA, and the Russell Interest was *void ab initio* under the *Duhig* rule. The trial court granted summary judgment in favor of Senterra, agreeing with Senterra on both counts. The Seventh District Court of Appeals affirmed the trial court's decision regarding the MTA but reversed the trial court's decision regarding the Russell Reservation, finding that the *Duhig* rule was inapplicable and the same was preserved under the MTA. After the court's decision in *West v. Bode* finding that there is not an irreconcilable conflict between the MTA and the Ohio Dormant Mineral Act, the court in *Senterra* was left primarily to discuss the application of the *Duhig* rule.

The Supreme Court of Ohio ultimately affirmed the Seventh District Court of Appeals' holding by distinguishing the present facts from fact patterns to which the *Duhig* rule was found applicable. The court cited *Trial v. Dragon* in stating that the *Duhig* rule only applies "if the grantor owns the exact interest to remedy the breach *at the time of the* execution and equity otherwise demands it." Here, analyzing the chain of title, the court found that, at the time of the execution of the Russell Reservation, George Russell only owned a three-eighth interest in the oil and gas, but purported to convey a three-quarter interest by his reservation of a one-quarter interest and lack of reference to prior reservations. As such, George Russell did not own the *exact interest* necessary to remedy the breach at the time of the conveyance, therefore rendering the *Duhig* rule inapplicable. Further, the facts at issue were determined to be distinguishable from *Talbot v. Ward*, being the Seventh District Court of Appeals case analyzing the *Duhig* rule in Ohio, in noting that *Talbot* did not involve an unbroken chain of title of record for 40 years, which is necessary for the MTA to apply. Here, the court determined that a 1971 deed was the root of title deed as it pertains to the Russell Reservation, and as it restated the Russell Reservation of one-quarter interest in the oil and gas, the MTA did not operate to extinguish the Russell Reservation interest. As the court found the *Duhig* rule to be inapplicable and that the interest was preserved under the MTA, the court affirmed the judgment of the Seventh District Court of Appeals.

Notably, citing the rule, "when 'the grantor's interest is insufficient to give effect to both the grant and a reservation, the reservation must fail and the risk of title loss is on the grantor,'" the dissent argued that the Russell Reservation was void, as effect could not be given to both the exception and

conveyance. As such, the dissent argued that George Russell did not reserve any interest, as the Russell Reservation deed must be read to convey all of his three-eighths interest. As the MTA “cannot invalidate defunct interests,” the dissent argued that the majority misapplied the MTA.

B. District Courts

1. Ohio’s Seventh District Further Clarifies Reasonable Diligence Under the Dormant Mineral Act

In the case of *Beckett v. Rosza*,²⁴ the Ohio Seventh District Court of Appeals held that the surface owners failed to use reasonable diligence to locate all severed mineral interest holders because the surface owners failed to comply with the Dormant Mineral Act’s notice requirements.²⁵ Leroy Beckett owned 110 acres of property which was inherited by Leroy’s two children when he died.²⁶ After inheriting the property, each child conveyed their interests in the property while reserving all the oil and gas rights underlying the property. The property was eventually transferred to the current surface owners who published DMA notices in the local newspaper of their intent to declare the Beckett oil and gas reservation abandoned.²⁷

In holding, the Seventh District reasoned that the surface owners must make a reasonable effort pursuant to the DMA to locate the severed mineral interest holders.²⁸ Here, the surface owners’ search began and ended with the public records in Jefferson County, even though a search of the Jefferson County probate records would have revealed addresses for the Beckett heirs. Therefore, the search was unreasonable because the surface owners should have used these addresses to serve DMA abandonment notices before publishing their notice of abandonment in the local newspaper.²⁹ Lastly, the court also made it a point to say that they are concerned with the scope of the search conducted rather than the result of the search and here the surface owners failed that test.³⁰

24. *Beckett v. Rosza*, 181 N.E.3d 1216 (Ohio App. 7th Dist. 2021), *appeal not allowed*, 181 N.E.3d 1215 (Ohio 2022), *reconsideration denied*, 186 N.E.3d 839 (Ohio 2022).

25. *Id.* ¶ 35.

26. *Id.* ¶ 5.

27. *Id.* ¶ 16.

28. *Id.* ¶ 26.

29. *Id.* ¶¶ 31, 32.

30. *Id.*

2. *Ohio's Seventh District Accepts Notice by Publication*

In a similar case (*4 Quarters LLC v. Hunter*),³¹ the Ohio Court of Appeals for the Seventh District held that the plaintiffs exercised due diligence to locate heirs and service by publication was indeed appropriate under the Marketable Title Act.³² The property at issue here was in Belmont County, Ohio, and that is where the plaintiffs searched records to locate heirs. The defendants claimed that the plaintiff should have searched in counties outside of the property location because a deed was notarized in Marshall County and a marriage and death record existed there for someone in the chain of title. However, the court rejected this argument because defendant failed to provide evidence that the marriage and death records would have led him to being identified. Therefore, notice by publication was proper.³³

3. *Ohio's Seventh District Addresses the "Specific Reference" Exception to Ohio's Marketable Title Act*

In the case of *Cattrell Family Woodlands, LLC v. Baruffi*,³⁴ the Ohio Seventh District Court of Appeals held that the "specific reference" exception to Ohio's Marketable Title Act does not apply. Cattrell attempted to extinguish an oil and gas interest under the MTA, but Ragsdale argued that this could not be done because the root of title deed contained a specific reference to the oil and gas interest.³⁵

In addressing these arguments, the court stated that an issue like this must be determined on a case-by-case basis. The court first considered whether the reference retaining the interest is specific or unclear. The court answered this in the negative and stated that the reservation is unclear and that nothing within the reference alerts the reader of a prior reservation. The court then looks at whether the specific reference contained the same reservation language as the severance deed. The court found the language here to be different. Lastly, the court considers whether the original reservation had been consistently included or referenced within the chain of

31. *4 Quarters, LLC v. Hunter*, 2021-Ohio-3586, *reconsideration denied*, 2022-Ohio-1448.

32. *Id.* ¶ 42.

33. *Id.* ¶ 7.

34. *Cattrell Family Woodlands, LLC v. Baruffi*, 2021-Ohio-4660, 184 N.E.3d 186.

35. *Id.* ¶ 11.

title. Here, the reservation was not referenced in any other deed within the chain of title other than the root of title deed.³⁶

After weighing these three considerations the court held that the root of title contained a general reference and does not fall within the “specific reference” exception to Ohio’s Marketable Title Act.

V. Conclusion

While there were not any major statutory or administrative developments, the Ohio courts were busy deciding cases about the Marketable Title Act, Dormant Mineral Act, Arbitration Clause Leases, and transfer restrictions in deeds.

36. *Id.* ¶ 34.