Utica Shale & Pipeline

Update and Review

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In This Issue

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A Note from the Chairman

Good Day Former and Current Clients:
The rumor of my retirement is false.

KWGD attorneys Matt Onest, Dean Swift, and I, spend 80%+ of our practice on energy, mineral, oil, gas and coal law, primarily negotiating new leases, defending against mandatory unitization applications filed with the state of Ohio, handling title issues involving Dormant Mineral Title Act and Ohio's Marketable Title law, drafting pipeline right of ways and representing clients in various types of litigation, including breaches of oil and gas lease terms and getting payments in lieu of free gas. KWGD attorneys Joe Pasquarella, Wayne Boyer, and Scott Zurakowski also spend a fair amount of their time in the mineral law practice area.

KWGD has also had a large uptick in estate planning, such as Wills, Trusts, power of attorneys, etc., due to the pandemic and local residents having more income and increased assets. Upfront signing bonuses and royalties have somewhat stabilized, unlike the declining populations of the Eastern Ohio producing counties.

On a side note involving eastern Ohio demographics, only Holmes County has gained population from 2010 until the present and is the only County predicted to gain population from now to 2030. Stark County is predicted to lose 10,000 residents by 2030, with Mahoning County anticipated to lose approximately 17,000 persons. Carroll County is predicted to have the largest population decline of almost 14%. My guess for the population decrease is that our older population is either moving southward or heavenward, the younger generations are leaving the area for greener pastures and better paying jobs. Monthly royalty income is not a major motivating factor keeping residents local.

Finally, our firm will be handling claims on a contingency basis (meaning we get paid only if you get paid) for individuals/estates/heirs where persons have used Roundup products, such as weed killer, for at least 40 hours of lifetime exposure or used it at least 10 times after the year 2000 and had/have contracted one of the various forms of cancer, including leukemia, lymphoma, etc. and who have either died, currently living with pending illnesses or in remission. Bayer Corporation has set aside billions of dollars to compensate individuals who were both exposed to Roundup and also had a diagnosis of cancer. If you believe that you may qualify due to your use of Roundup and resulting disease of a form of cancer, feel free to contact me for further information.

Have an enjoyable summer.

William G. Williams
Attorney at Law

Bill Williams

Information on Contacting Your Elected Officials

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Governor's Office
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77 S. High Street
Columbus, Ohio 43215-6117
614-644-4357

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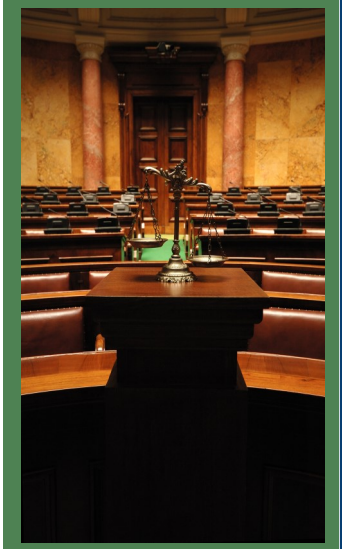
Columbus, Ohio 43215
800-282-0515

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 address as above
614-466-8076
Representing Guernsey County

Senator Michael Rulli
Same address as above
614-466-8285
Representing Columbiana County



The Utica Shale & Pipeline articles have been collaboratively written by these members of the KWGD Oil, Gas, and Mineral Law Practice Section Team unless otherwise indicated.

Matthew W. Onest, Esq.

Wayne A. Boyer, Esq.

Oil and Gas Lessors Cannot Be Forced to Arbitrate Lease Expiration or Termination Claims

By Matthew W. Onest, Esq.

In *French v. Ascent-Resources*, 2022-Ohio-869 (March 24, 2022), the Ohio Supreme Court held that a landowner-lessor cannot be forced to arbitrate whether his oil and gas leases had expired even though his oil and gas had an arbitration clause. The landowner sued Ascent Resources in Jefferson County, alleging that his oil and gas leases expired because Ascent had not produced oil or gas or commenced drilling operations within the lease's term. Ascent claimed that the leases were still effective because it had acquired permits to drill wells on the lands and had begun constructing those wells before the leases had expired.

Ascent moved to stay the trial court case in favor of arbitration because the leases said "Any questions concerning th[e] lease or performance there under shall be ascertained and determined by three disinterested arbitrators * * * and the award of such collective group shall be final and conclusive." The landowner attacked Ascent's arbitration demand, citing to R.C. 2711.01(B)(1) of the Ohio Revised Code. That statute says that a contract's arbitration clause or an arbitration agreement does not apply "to controversies involving the title to or the possession of real estate." If the arbitration clause or agreement does not apply that means the parties to that clause or agreement will have their dispute decided in court, not through arbitration.

The question in *French* then was whether a claim about oil and gas lease expiration is a controversy involving title or possession of the leasehold-real estate. The Ohio Supreme Court held that a claim seeking confirmation of lease expiration necessarily involves answering the title or possessory rights of the real estate, including its oil and gas rights. If that claim is successful, the land's title will be quieted in favor of the landowner and it would restore the landowner's possession of the lands free and clear of the lessee's right to possess and produce the lands. If that claim is unsuccessful, the lessee will continue to have the right to possess and produce the lands under the lease.

What does this mean for lessors in Ohio? It means if you believe your oil and gas lease expired, any lawsuit will be decided in a court, not through arbitration. The next question to likely be answered in the future is whether a mixed-claim lawsuit, meaning one where the lessor sues to have a lease confirmed as expired and to also receive monetary damages, will be subject to arbitration.

A Landowner Secures a Large Judgment Against Protégé Energy III, LLC for Surface Use Damages and Breaches of Surface Use Agreements

By Matthew W. Onest, Esq.

A landowner secured an appellate victory when the Fourth District Court of Appeals upheld a judgment for over $750,000 against Protégé Energy III, LLC. In *Zimmerman Dairy Farms, LLC v. Protégé Energy III, LLC*, 2022-Ohio-1282 (4th Dist.), a landowner secured affirmation of the trial court's judgment for the landowner for (1) $349,093 in breach of contract damages for failing to remediate the property, (2) $450,000 for conversion of the topsoil, and (3) $20,000 for trespass, for lack of access by the plaintiff. The details of this Case are quite extensive and cannot be retold in their entirety here, but I will attempt to summarize what happened.

This Case involved 4 interrelated contracts: (1) a 2014 oil and gas lease, (2) a supplemental agreement relating to oil and gas development, (3) a surface and subsurface agreement, and (4) a damage release agreement. Protégé drilled a well pad on the plaintiff's acreage and there were multiple attempts to re-seed a hill and each time the seed washed away and gullies were created. ODNR issued a notice that Protégé needed to properly reclaim the area. A fourth reclamation attempt failed and the plaintiff began having issues with cattle being harmed on site. Protégé left the site and there were multiple issues still on site, including exposed wires and landscaping issues.

The appellate court affirmed the trial court's judgment. It held that the lease imparted on the lessee a continuing duty to restore the property to a condition pre-development. The lease had a specific surface restoration provision and generally provided that the lessee "shall use commercially reasonable efforts to repair and restore such damaged portion of the surface of the Leased Premises as nearly as practicable to the condition in which said land existed before commencement of operations." The lease provided further that the lessee had to pay for 100% of restoration work. The lease did not define "commercially reasonable efforts", so the parties submitted evidence about what that meant to the parties and the oil and gas industry generally. The trial court appears to have relied heavily on Protégé's own witness, Jason Pugh, in reaching its conclusions.

The supplement agreement between the parties provided that the topsoil was to be retained by plaintiff and placed at a mutually agreeable location. Protégé converted the topsoil by using it during reclamation efforts and not leaving it at the site for plaintiff's sole use. That agreement said that the topsoil was to be a form of consideration for the agreement. The topsoil would have no value as a form of consideration unless plaintiff were allowed to retain the topsoil stockpile for its use. The topsoil would have no value as consideration if Protégé were allowed to use it for its own purposes. Protégé could not get around that topsoil provision by arguing it needed to use the topsoil to comply with the reclamation efforts.

This is an important case for all lessors who have wells drilled on their surfaces. It provides a framework for determining whether reclamation efforts are being followed. It also helps show how to negotiate surface use agreements.

Ohio Shale Production Update

By Wayne A. Boyer, Esq.

The Ohio Department of Natural Resources ("ODNR") reported that as of June 11, 2022, it had issued a total of 3,645 permits to drill horizontally through the Utica Shale and further reported that a total of 3,108 horizontal wells have been drilled to the Utica Shale. As of June 11, 2022, 2,876 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 first quarter of 2022, there was a total oil production of more than 3.876 million barrels and gas production of more than 456 billion cubic feet. ODNR reported that as of June 11, 2022, there were 12 active rigs operating in Ohio.

Top Oil Producing Wells in the State of Ohio as of 1st Quarter 2022

WELL NAME	WELL NUMBER	OWNER NAME	COUNTY	TOWNSHIP	OIL PRODUCED
BETTS NE LND GR	7H	ASCENT	GUERNSEY	LONDONDERRY	103,438
BETTS N LND GR	5H	ASCENT	GUERNSEY	LONDONDERRY	95,128
K WALLACE 4-11-6	1H	EAP OHIO	HARRISON	NOTTINGHAM	89,380
K WALLACE 4-11-6	3H	EAP OHIO	HARRISON	NOTTINGHAM	80,851

Top Gas Producing Wells in the State of Ohio as of 1st Quarter 2022

WELL NAME	WELL NUMBER	OWNER NAME	COUNTY	TOWNSHIP	GAS PRODUCED
PFALZGRAF S	U1H	EQUINOR	MONROE	SALEM	3,654,058
VANNELLE SW WHL BL	2H	ASCENT	BELMONT	WHEELING	3,077,415
SCOUT E SHC HR	5H	ASCENT	HARRISON	SHORT CREEK	3,061,508
VANNELLE S WHL BL	4H	ASCENT	BELMONT	WHEELING	3,031,865

WTI Crude and Natural Gas Market Prices

Price: $117.52/barrel

Source: CSX:NMX nasdaq.com as of 6/17/22.

Price: $7.46/mcf

Source: NG:NMX nasdaq.com as of 10/29/21.

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A Severed Mineral Owner Cannot Mortgage the Surface Estate

By Matthew W. Onest, Esq.

In *re Murray Energy Holdings Co.*, 2022 WL 970340 (S.D. Ohio Bank. Ct. E.Div) (March 31, 2022), the federal bankruptcy court for the Southern District of Ohio held that a severed mineral owner cannot mortgage the surface estate. This case involved answering whether a bankruptcy-debtor who owns a severed mineral estate can mortgage the surface rights, creating a secured interest in the mortgagee.

This was a fight between holders of mechanic's liens who held liens secured against the surface estate. They had done work at the lands at issue and had placed mechanic's liens on the properties. Some of the bankruptcy-debtors had granted mortgages before the mechanic's liens but those debtors only owned the mineral rights and the right to use the surface for mineral mining activities. The question became which of the creditors (mortgage-holders and holders of mechanic's liens) had perfected liens and in what order.

The bankruptcy court held for the holders of mechanic's liens. The court reasoned that a subsurface mineral owner does not own the right to mortgage the surface—it is not one of the bundle of sticks relating to ownership of the mineral estate. The right to use the surface for mineral mining activities cannot by itself bootstrap to the right to mortgage the surface estate itself. The right to use the surface for mining and also for ingress and egress is not fee simple and cannot mortgage the actual surface estate. The surface estates were owned by either bankruptcy-debtors who had not entered into a mortgage or a third-party non-debtor. The court finished by saying: the mineral holder had no right to mortgage the surface any more than it had the right to sell the surface.

The case represents more clarification of the rights between surface owners and severed mineral owners.

Information on Contacting Other Outlets

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Biographies of all KWGD attorneys can be found at kwgd.com.

We're growing!

We have expanded into Mahoning County!
The office is staffed by Attorney Matthew W. Onest and Paralegal Diana Tschantz. They can also meet clients in any of our other offices as needed.

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