

Utica Shale & Pipeline

Update and Review

www.kwgd.com

Volume XIV April 2023

In This Issue

- Massive Jury Award in Favor of Landowners and Against Rice Energy and Gulfport Energy Upheld
- General Legal Update—Recent Ohio Court Cases

KWGD KRUGLIAK
WILKINS
GRIFFITHS &
DOUGHERTY
attorneys at law CO., L.P.A.

A Publication of

Krugliak, Wilkins, Griffiths &
Dougherty Co., L.P.A.

4775 Munson Street NW

Canton, OH 44735-6963

Ph: (330) 497-0700

Fax: (330) 497-4020

Toll Free: (877) 876-9958

www.kwgd.com

All contents herein are protected
by U.S. Copyright Laws. Copyright
© 2022 Krugliak, Wilkins,
Griffiths & Dougherty Co., L.P.A.

*Note: The content of this
Newsletter is for informational
purposes only, not legal advice.*

A Note from the Chairman



BEWARE OF CO2 STORAGE AGREEMENTS

Landmen are approaching Landowners and Mineral Owners in Eastern Ohio oil and gas producing counties to enter into an option to lease well injection sites or an option agreement for carbon sequestration.

Battelle Corporation conducted an almost 20-year study regarding carbon capture, utilization, and storage (CCUS) that recently concluded. Battelle designated the top 10 CCUS sites that included two in Eastern Ohio counties.

Tenaska, one of the largest privately held U.S. companies, is spearheading CO2 leasing, including affiliates/subsidiaries, Tri-State CCS, LLC and Greenbridge Land, LLC. A significant leasing play is currently occurring in Carroll and other Ohio counties for the leasing of tens of thousands of underground pore space acreage for storage of piped in CO2. A major push is currently occurring due to 2022 federal laws allowing for major federal tax credits and billions of dollars of federal grants. Shell and Exxon-Mobil have already announced their intention to spend billions of dollars in the next 7 years. Please google carbon dioxide storage.

In Ohio, the offers being made to landowners are horrible in every aspect, including monetary and non-monetary terms. Fast talking landmen are not disclosing the entire picture. Not too hard to believe. Let me relate a recent first-hand experience. The landowner was initially approached late last year with an offer. The First proposed Agreement included upfront signing option payments totaling over \$38,000. As of mid-April, the new and "better" April Proposal had the payment dropped to \$20,000. The First Proposal included a payment of \$5,000 plus \$40 a foot for pipeline easement to transport CO2 on the premises and now no payment for said pipeline easement.

Additionally, the First Proposal included an exercise price payment of over \$100,000 plus annual rent of \$16,350 plus 3% annual increase for 30 years. Both have vanished in the April Proposal. The road access payment for up to 40foot wide roads is being offered at \$20 a foot. The Landowner has no input as far as location approval for well injection lease sites, roadways or pipelines. There are prohibitions on further mortgaging, leasing, liens, etc. The real kicker is that the April Proposal is for 99 years, prohibits the Landowner from suing for punitive, exemplary, special and consequential damages, no matter how injurious or egregious the conduct of the Lessee plus the Landowner cannot sue to terminate the Agreement, only for regular money if payment is not made. There also is a Third-Party Beneficiary provision wherein the Landowner consents and agrees to allow the customers of the Lessee, companies who are selling the CO2, as well as the U.S. EPA, Ohio EPA and any and all governmental regulatory agencies the right to sue the Landowner, even if no privity of contract, for any and all reasons.

So, you have now been warned. These companies will make Billions of Dollars, subsidized by your own tax payer dollars, while you get paid peanuts. Oil and Gas producers who lease land for oil and gas well brine and by-products pay a monthly fee based upon the volume that is put underground. Cell towers pay a monthly fee to the Landowners, however, these CO2 Developers/Lessees are offering about \$200 a year for 99 years to store millions of metric tons under one's land wherein the storage will be daily into the subsurface via the injection wells. Anyone see what's wrong with this picture?

BTW, oil and gas leasing is extremely strong with signings from \$3,000 to \$5,000 a net mineral acre for a 5-year lease, especially in Carroll and Guernsey Counties.

William G. Williams
Attorney at Law

Information on Contacting**Your Elected Officials**

Governor Mike DeWine
Governor's Office
Riffe Center, 30th Floor
77 S. High Street
Columbus, Ohio 43215-6117
614-644-4357

Dave Yost
Ohio Attorney General
30 E. Broad Street, 14th Floor
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.

Massive Jury Award in Favor of Landowners and Against Rice Energy and Gulfport Energy Upheld

By Matthew W. Onest, Esq.

In *Tera, LLC v. Rice Drilling D, LLC*, 7th Dist. Belmont No. 21 BE 0047, 2023-Ohio-273, the Seventh District Court of Appeals upheld most of the \$40,129,357.62 jury award to a lessor on its bad-faith trespass claim against Rice Drilling D, LLC ("Rice Drilling")¹ and Gulfport Energy Corporation ("Gulfport Energy"). In July 2021, the Belmont County Court of Common Pleas issued a judgment on a jury verdict awarding total damages in the amount of \$40,129,357.62 to Tera, LLC ("TERA") on TERA's bad-faith trespass claim. The oil and gas companies appealed, claiming, among other things, that (1) extrinsic evidence [meaning evidence outside the express terms of the parties' oil and gas lease] should have been used to interpret the relevant provisions of the leases, because circumstances of the agreement gave the lease's language special meaning or the lease was ambiguous, (2) that the oil and gas companies had not engaged in bad-faith trespass, (3) that the trial court failed to properly instruct the jury on the computation of damages, (4) that TERA failed to prove its damages to a reasonable degree of certainty.

Two leases covered about 271 acres of property in Belmont County, Ohio. In 2016, a 31.31-percent interest in the leases was assigned from Rice Drilling to Gulfport Energy. Article One of the leases, the granting clause of the lease, reads:

Lessor, in consideration of the payments described herein and the covenants

and agreements hereafter contained, hereby leases and lets exclusively to the Lessee all the oil, gas, minerals and their constituents (not including coal) in the formations commonly known as the Marcellus Shale and the Utica Shale, underlying the land described below for the sole purpose of exploring for, drilling, operating, producing and gathering the oil, gas, casinghead gasoline and all other gases and their respective vapors, liquid or gaseous hydrocarbons produced in association therewith other than as reserved unto Lessor below.

Article One also contained a depth reservation clause:

The Lessor reserves all rights not specifically granted to Lessee in this Lease. Lessor specifically reserves the right to all products contained in any formation: (1) from the surface of the Leased Premises to the top of the formation commonly known as Marcellus Shale,

Massive Jury Award in Favor of Landowners and Against Rice Energy and Gulfport Energy Upheld

(Continued)

By Matthew W. Onest, Esq.

(2) in any and all formations below the base of Marcellus Shale to the top of the formation commonly known as Utica Shale, and (3) in all formations below the base of the Utica Shale.

The geological expert retained by the oil and gas companies admitted that each of the six wells landed in the Point Pleasant. There was no dispute that the parties hadn't engaged in any negotiation about the Point Pleasant and that the Point Pleasant was never mentioned during the lease negotiations.

TERA claimed the Point Pleasant was a distinct geological formation from "the formation[] commonly known as the Utica Shale," and that TERA was the sole owner of the Point Pleasant, based on the leases' reservation of certain depths. The oil and gas companies admitted that the Utica Shale and the Point Pleasant are separate rock units. Yet they claimed the Point Pleasant was an interval contained within what was "the formation commonly known as the Utica Shale" in in December 2013 and August 2014 (when the leases were executed).

The jury awarded actual and future damages in the amount of \$40,129,357.62. comprised of: (1) Compensatory damages equaling \$23,171,454.37, (2) Consequential damages equaling \$18,958,462.25, (3) Total damages equaling \$42,129,916.62, and (4) crediting against the damages for royalty payments equaling \$2,000,559.00.

The trial court concluded that the phrase "the formation commonly known as the Utica Shale" was unambiguous, and therefore, did not consider any evidence of the parties' negotiations or the history of the nomenclature surrounding the Utica Shale play. The trial court said, "it is undisputed that the Point Pleasant formation is the geological formation immediately below the Utica Shale formation." The parties offered expert reports from a geologist and a chemical engineer. The geologists' reports addressed (1) whether the Utica Shale and the Point Pleasant are separate geological units and (2) whether the phrase "the formation commonly known as the Utica Shale" had a special meaning in Ohio in 2013 and 2014, when the leases were executed.

The Seventh District agreed the leases were unambig-



uous. The court held that words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, will be construed accordingly. "The Utica Shale" has a technical stratigraphic meaning. The oil and gas companies contend that the phrase "commonly known as," which modifies the term "Utica Shale," compels us to conclude that the contract language is ambiguous. The court held that the Point Pleasant is a formation below the Utica Shale and as such, the lessor reserved the Point Pleasant formation. Because the leases were unambiguous, the appellate court refused to consider evidence outside the four corners of the leases. This then led the court to uphold most of the verdict, while sending the case back down to the jury to decide how much in damages TERA sustained because it didn't own the leaseholds during the entire time of production.

In late March 2023, the Federal District Court for the Southern District of Ohio declined to certify a class action lawsuit relating to the lease form at issue in TERA. The case is *J&R Passmore, LLC v. Rice Drilling D, LLC*, S.D. Ohio No. 2:18-CV-01587.

For landowners this case highlights the need to consider careful planning when drafting lease language, particularly depth limitations on oil and gas leases.

Ohio Shale Production Update

By Wayne A. Boyer, Esq.

The Ohio Department of Natural Resources ("ODNR") reported that as of April 1, 2023, it had issued a total of 3,869 permits to drill horizontally through the Utica Shale and further reported that a total of 3,230 horizontal wells have been drilled to the Utica Shale. As of April 1, 2023, 3,060 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 fourth quarter of 2022, there was a total oil production of more than 5.855 million barrels and gas production of more than 539 billion cubic feet. ODNR reported that as of April 1, 2023, there were 15 active rigs operating in Ohio.

Top Oil Producing Wells in the State of Ohio as of 4th Quarter 2022

WELL NAME	WELL NUMBER	OWNER NAME	COUNTY	TOWNSHIP	OIL PRODUCED
Jennings W WLS GR	2H	ASCENT	GUERNSEY	WILLS	173,591
Jennings E WLS GR	8H	ASCENT	GUERNSEY	WILLS	129,613
Williams CR MON	5H	EAP OHIO	CARROLL	MONROE	127,688
Jennings E WLS GR	6H	ASCENT	GUERNSEY	WILLS	126,734

Top Gas Producing Wells in the State of Ohio as of 4th Quarter 2022

WELL NAME	WELL NUMBER	OWNER NAME	COUNTY	TOWNSHIP	GAS PRODUCED
Gabriel SW WEL JF	2H	ASCENT	JEFFERSON	WELLS	3,850,259
Gabriel SW WEL JF	4H	ASCENT	JEFFERSON	WELLS	3,745,260
DAWSON 8-11-4	10H	EAP OHIO	HARRISON	WAYNE	3,404,689
DAWSON 8-11-4	8H	EAP OHIO	HARRISON	WAYNE	3,395,147

WTI Crude and Natural Gas Market Prices

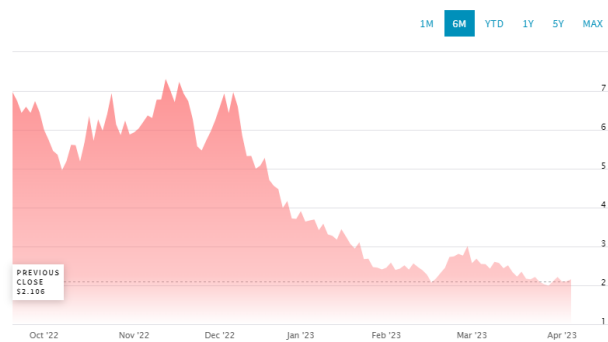
Apr 5, 2023



Price: \$80.70/barrel

Source: CSX:NMX nasdaq.com as of 4/5/23.

Apr 5, 2023



Price: \$2.11/mcf

Source: NG:NMX nasdaq.com as of 4/5/23.

General Legal Update—Recent Ohio Court Cases

By Matthew W. Onest, Esq.

There have been several court decisions released in the past few months which landowners, like yourselves, may find useful:

Carpenter v. Antero Resources Appalachian Corporation, 7th District Court of Appeals (Dec. 15, 2022)

The Carpenters leased their mineral rights to Antero Resources in 2013. That lease contained a general warranty of title clause. It stated, "Lessor hereby warrants and agrees to defend the title to the lands and interest described in Paragraph 1, but if the interest of Lessor covered by this lease is expressly stated to be less than the entire fee or mineral estate, Lessor's warranty shall be limited to the interest so stated." The Carpenters' title to the minerals was challenged and it was determined they owned, at most, a little over half of the oil and gas rights. Antero sued the Carpenters after the Carpenters lost their mineral title lawsuit with the other putative mineral owners and sought monetary damages for breach of warranty of title. The trial court awarded Antero damages for overpayment of royalties and its attorneys' fees incurred in the mineral title lawsuit. The Court of Appeals upheld the award, holding "a warrantee [Antero] may recover attorney's fees expended in litigation with third parties to defend the warranted title. This is true when, as in this case, the warrantee incurs attorney's fees in litigation with others as a result of the warrantor's breach."

So, you should always attempt to remove a warranty of title clause from your lease

or at least try to limit the scope of the warranty by asking for a limited warranty clause.

Ischy v. Northwood Energy Corporation, 7th District Court of Appeals (Dec. 20, 2022)

The landowners sued the lessees, including Equinor USA Onshore Properties, Inc. (Equinor), for a declaratory judgment that an oil and gas lease expired by its terms, mineral trespass, and breach of an implied duty of good faith and fair dealing. The lease's secondary term (the undetermined term occurring after the fixed-year primary term) said the lease would continue if any of the following happened: (1) actual production in paying quantities; (2) "operations," as defined in the lease, in the pursuit of oil and gas on the property or land pooled with the property; (3) advanced minimum royalty payments for wells drilled but not yet producing; and (4) the lessee paying an extension payment of \$5,000 per net mineral acre. The landowners did not sue for breach of contract, but sued for breach of the implied duty of good faith and fair dealing.

However, the Court held that the landowners couldn't maintain their breach of the implied duty of good faith and fair dealing claim because that claim cannot exist independent of a claim for breach of the underlying contract. Thus, the landowners couldn't sue the producers for breach of good faith and fair dealing even when the producers included .19 acres of the property in a unit because the lessee was given sole discretion to create units.

Information on Contacting Other Outlets

Barry Browne, President
Ohio Chapter NARO
blbrowne@earthlink.net
281-229-0867

Ohio Farm Bureau
Federation
280 N. High St., 6th Floor
Columbus, Ohio 43215
614-249-2400

Frank Burkett III, President
Ohio Farm Bureau
fburkett@ofbf.org

Herald Star
Heraldstaronline.com
Steubenville – to submit
news

The Repository
Shane Hoover
Shane.hoover@Cantonrep.com
330-580-8338
letters@cantonrep.com

The Columbus Dispatch
letters@dispatch.com
news tips: go
online: @dispatch.com



KWGD
attorneys at law
KRUGLIAK
WILKINS
GRIFFITHS &
DOUGHERTY
CO., L.P.A.



Oil, Gas, and Mineral Law Practice Section

Wayne A. Boyer
wboyer@kwgd.com

Dean A. Swift
dswift@kwgd.com

Edward V. Buehrle
ebuehrle@kwgd.com

William G. Williams*
bwilliams@kwgd.com

Matthew W. Onest
monest@kwgd.com

Scott M. Zurakowski
szurakowski@kwgd.com

Joseph J. Pasquarella
jpasquarella@kwgd.com

**Chairman of Practice
Section*

Toll Free: 877-876-9958

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.

The Canfield office is located at:

6715 Tippecanoe Road, Suite C2

Canfield Ohio 44406

Phone: 330-286-7065 Fax: 330-286-7115



4775 Munson St. NW PO Box 36963 Canton, OH 44735-6963

Canton
4775 Munson Street NW
Canton, OH 44718
Ph: (330) 497-0700

Canfield
6715 Tippecanoe Rd.
Suite C2
Canfield, OH 44406
Ph: (330) 286-7065

Alliance
960 West State Street
Alliance, OH 44601
Ph: (330) 821-4232

Hudson
5 East Main Street
Hudson, OH 44236
Ph: (330) 535-4830

New Philadelphia
405 Chauncey Ave. NW
New Philadelphia, OH 44663
Ph: (330) 364-3472

Massillon
First North Building
50 North St. NE, Suite 101
Massillon, OH 44646
Ph: (877) 876-9958

ADVERTISEMENT ONLY