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THE RUSH IS ON: HOW THE OIL AND GAS BOOM IN OHIO MAY AFFECT YOUR RIGHTS AS A MINERAL INTEREST OR LAND OWNER–AND WHAT YOU CAN DO TO PROTECT YOURSELF

The development of new technologies for the extraction of previously nonviable oil and gas reserves has spurred a "rush" in Ohio to identify and exploit land and mineral interests in furtherance of oil and gas production. Particularly in light of the heightened attention to natural gas in the Utica and Marcellus deposits, it is important for land and/or mineral interest holders to understand a few basic concepts of Ohio's mineral/oil and gas laws—especially concepts that can terminate or otherwise limit mineral rights by *inaction* upon the holder's receipt of written notices from other, often adverse, parties. (Please note that, under Ohio law, "mineral" interests include oil and gas.)

This *Commentary* identifies two scenarios threatening mineral rights that have been occurring with increasing frequency in Ohio. The first is the application of Ohio's Dormant Mineral Act, which permits an owner of surface land, under certain circumstances, to effectively terminate the rights of a severed mineral interest holder. The second is the concept of "mandatory pooling," whereby a developer/driller can "force" a neighboring property to be included in that developer's required minimum property assemblage in order to permit the location and operation of a working well (thereby preventing that neighboring property from being able to become the situs of another working well in the future).

DORMANT MINERAL ACT

The Ohio Dormant Mineral Act (section 5301.56 of the Ohio Revised Code) (the "Act"), which was originally enacted in 1989 and revised in 2006, provides a mechanism to terminate abandoned or unused mineral interests and reunite such interests with the related surface estate. The goal was to "clean up" the state's property records and encourage the development of often "abandoned" mineral interests. The Act, in effect, created a "use it or lose it" notice mechanism by which a surface owner can terminate

an "abandoned" mineral interest by providing notice to the severed mineral interest holder. The mineral interest holder can defeat the attempt to terminate the interest by either: (i) evidencing the fact that the mineral interest holder has been actively exploiting the interest, or (ii) asserting a "claim to preserve" the interest.

These provisions for termination do not apply to coal interests or to interests held by the United States, the State of Ohio, or any political subdivision thereof. In addition, termination cannot occur if, within 20 years prior to the date the notice is served, one or more of the following events (referred to as "Savings Criteria") have occurred:

- The interest has been the subject of a recorded title transaction (such as a sale or assignment);
- There has been actual production or withdrawal of mineral/gas/oil from the lands (including by virtue of a pooling arrangement);
- The interest has been used in underground storage operations;
- A drilling permit has been issued (and an appropriate affidavit thereof has been filed);
- A claim to preserve the interest has been filed; or
- A separate tax parcel has been created for the interest.

If a surface owner wishes to terminate the rights of an underlying mineral interest holder, the surface owner is required first to deliver a notice to the mineral interest holder pursuant to the terms of the Act. Upon receipt of that notice, the mineral interest holder can defeat the termination and preserve its interest by filing with the applicable county recorder, *within 60 days* of the date the notice was served: (i) an affidavit identifying one or more of the above-referenced Savings Criteria that have been satisfied, or (ii) a "claim to preserve" the interest.

If a severed mineral interest holder disregards the notice from the surface owner and none of the Savings Criteria has occurred, the surface owner can proceed to cause the county recorder to file a termination of the mineral interest (which then ceases to exist separately in the name of the prior holder and is "reunited" with the surface estate).

As a practical matter, it is rather simple to cause the filing of a claim to preserve an interest—but it must be done in a timely and procedurally sound manner. In addition, the intricacies and some of the technical interpretations of the law are still being developed by Ohio courts, and potential claims to terminate may continue to be pursued even if a "claim to preserve" is timely made. To proactively respond to this still-evolving threat, holders of significant or potentially significant severed mineral interests may wish to consider filing a claim or effecting other actions *in advance* of a possible notice to terminate from a surface owner in order to preserve their rights more effectively and preemptively.

OHIO MANDATORY POOLING

In order to receive a permit to drill an oil or gas well in Ohio, the owner of the rights which would permit drilling (the "Applicant") must, among other requirements, evidence that the Applicant has a tract of land (with mineral rights) surrounding the well site that is sufficient in size and shape for that purpose. In certain instances, where the size or shape of the Applicant's property does not meet the requirements for the location and operation of a well, the Applicant can apply for (*and thereby effectively force*) the neighboring properties to be included in a "drilling unit"—*i.e.*, to be "pooled" together to create a viable tract of the requisite size to permit a well. If this application (the "Application") is approved by the state, the driller is required to pay the pooled owners a share of a statutory royalty, but the result effectively precludes the pooled owners from forming their own "drilling units" and developing separate wells on their properties.

In order to accomplish such a forced "pooling," an Applicant must convince the Ohio Division of Mineral Resources Management (the "ODMRM") that mandatory pooling is necessary to adequately develop the mineral rights and that an alternate location is not possible. (The purpose of the law is to create a mechanism to favor development of working wells—so there is some deference given to an Applicant when neighboring property holders, whose underlying lands might not separately be able to support a well, need to be

included in a "drilling unit" to permit the location and operation of a well on the Applicant's land.) In order to proceed toward mandatory pooling, it is necessary for the Applicant to establish that it has previously attempted to contact the neighboring property owners and negotiate their voluntary participation in the "drilling unit" (a process referred to as "voluntary pooling").

If the Applicant satisfies the ODMRM's requirements for a petition for mandatory pooling, the ODMRM will send a certified-mail notice to the landowners whose lands are proposed for the mandatory-pooling order. *This letter will serve as the only notification of the date, time, and location that the mandatory-pooling request will be presented before the ODMRM's Technical Advisory Council on Oil and Gas* (the "TAC"). Although the Applicant is required to contact the neighboring landowners prior to submitting its Application, the Applicant is not required to notify the landowners of the hearing before the TAC. Therefore, it is important for any landowner to keep a watchful eye out for any correspondence coming from the ODMRM.

At the hearing, the TAC will analyze the requests and allow the affected property owners to present their objections to the mandatory pooling. The TAC will then recommend approving, denying, or revising the Application. It is important for affected landowners to have some actual presence at this meeting, whether by attending themselves or by sending legal counsel, in order to present their objections most effectively.

The entire process for a mandatory-pooling permit moves swiftly. Savvy Applicants will time their Applications so that there is minimal time between filing and the TAC's next scheduled hearing. As soon as a landowner receives a notice from the ODMRM that a hearing before the TAC has been scheduled, the landowner needs to act swiftly to prepare itself, as there may be no more than a few weeks between receipt of the notice and the actual hearing.

CONCLUSION

Care should be taken when formal notices are received regarding mineral rights and pooling requests. With appropriate, timely attention, steps which can be taken to protect current interests so that their potential can still be maximized; *but if notices are ignored, important rights can be forfeited*. In addition, it is important for landowners to understand their rights and the implications of pooling laws when they are approached by well developers with proposals to include their properties in "drilling units."

LAWYER CONTACTS

If you or your organization receives any notice or is contacted regarding the proposed termination of "abandoned" mineral interests or voluntary or mandatory "pooling" of properties, or if you have questions regarding the effects and application of either the Ohio Dormant Mineral Act or Ohio's mandatory-pooling arrangements, please feel free to contact the lawyers listed below for further discussion.

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