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# Ohio

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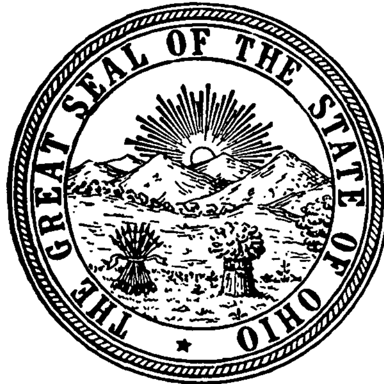
# OHIO




*By: Timothy M. McKeen*

Over the past year, minimal changes occurred in Ohio oil and gas law. The Ohio General Assembly passed one piece of legislation that alters the leasing process of state-owned lands for oil and gas development. Ohio case law has also remained largely unchanged, but several recent cases may be an indication of future trends in oil and gas litigation.

On June 30th, 2011, the 129th General Assembly adopted House Bill 133, the purpose of which was "to create the Oil and Gas Leasing Board and to establish a procedure by which the Board may enter into leases for oil and gas production on land owned or under control of a state agency for the purpose of providing funding for capital and operating costs for the agency."[1] House Bill 133 removed the power from several agencies to lease state-owned land and vested those powers with the newly created Oil and Gas Leasing Commission.[2] It should be noted that valid leases created before the effective date of this bill will remain valid until the termination of those leases.[3]

The Commission is comprised of five members: the Chief of the Division of Geological Survey, two members recommended by a statewide organization representing the oil and gas industry, one member of the public with expertise in finance or real estate, and one member representing a statewide environmental or conservation program.[4] The appointed members will serve staggered five-year terms.[5]

1. Act of June 30, 2011, 2011 Ohio Laws File 35 (codified at OHIO REV. CODE ANN. §§ 1509.70-.78).
2. *Id.*, sec. 1, § 1509.71(B).
3. *Id.*, sec. 3.
4. *Id.*, sec.1, § 1509.71(B)-(G).
5. OHIO REV. CODE ANN. § 1509.71(C) (LexisNexis through 129th Reg. Sess.).



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All leases that take place 270 days after September 30, 2011, must be awarded through the required nomination and bid process created by this bill.[6] An individual who is interested in leasing state land for oil and gas purposes must submit a lease nomination form with the Commission.[7] Before the Commission may approve the nominated land, the state agency in possession of the land must classify the property within one of four classes listed in the bill.[8]

Upon receiving the classification for the nominated land, the Commission considers nine factors in their analysis for approval: the economic benefit, compatibility with current uses of land, environmental impact, geological impact, impact on visitors and university operations, objections by state agencies that own or control the land, and comments or objections by Ohio residents or other users of the nominated land.[9]

Approved nominated lands are advertised on a quarterly basis. These advertisements are used to solicit bids for each formation within a parcel that is offered for lease by the state agency that owns or controls the land.[10] Bids submitted are kept confidential.[11] The Commission will select the highest bid and will consider the financial responsibility of the bidder as well as their capacity to perform the obligations under the lease.[12] Once the Commission has awarded an individual with a lease, the state agency is required to enter into a lease with that individual.[13] The funds collected as a result of the leases, with a few exceptions, are paid to the State Land Royalty Fund.[14] The monies collected are redistributed in proportion to the amount contributed by the individual state agencies.[15]

Although the Ohio legislature was more active than the courts in developing Ohio oil and gas law, the appellate courts heard several cases over the past year regarding growing legal issues within the field (it should be noted the Ohio Supreme Court did not hear any relevant oil and gas law cases). One such issue is the struggle between local municipalities and state legislators, and their attempt to regulate oil and gas. Local municipalities, regardless of their position on drilling, have pushed the limits of their delegated authority with their attempts to control oil and gas development within their community.[16] The

6. *Id.* § 1509.73(A)(2).
7. *Id.*
8. *Id.* § 1509.73(B)(1).
9. *Id.* §§ 1509.73(B)(1)(a)-(i), 1509.74(C).
10. *Id.* § 1509.73(C).
11. *Id.* § 1509.74.
12. *Id.*
13. *Id.* at § 123.01(A)(14)(c).
14. *Id.* § 131.50(A), § 1509.73(G)(1).
15. *Id.* § 131.50(A).
16. *See* Natale v. Everflow E., Inc., No. 2010-T-0088, 2011 WL 380985, at *6 (Ohio Ct. App. Aug. 26, 2011).

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Ohio legislature has passed broad legislation that expressly preempts the entire oil and gas field. This broad preemption language often renders local ordinances null, which was the result in *Natale v. Everflow Eastern, Inc.*[17]

In this case, Natale appealed from the trial court's summary judgment with three assignments of error.[18] One of these claims was that the local ordinances were not preempted by state legislation. Natale claimed that Everflow's installation and/or operation of a well was in violation of Warren ordinances requiring "storage tanks used in connection with any producing well may not be located within 200 feet of a residence of a plotted lot or parcel" and that "it is impermissible to drill, operate, or maintain any oil or gas well within the limits of the City in such a manner as to be injurious, noxious, offensive or dangerous to the health, safety, welfare, comfort or property of individuals."[19] Under Article XVIII of the Ohio Constitution, the powers of a municipality are "limited to the extent that they conflict with the general laws of the state."[20] The court stated that the municipality's ordinances attempted to control the location and operation of an oil and gas well, both of which are preempted by state law. Ohio Revised Code section 1509.02 provides, "The division [of mineral resources management] has sole and exclusive authority to regulate permitting, location, and spacing of oil and gas wells and production within the state."[21] This broad preemption holding reinforces the state's ability to provide a comprehensive plan for oil and gas development and leaves little room for municipalities to regulate the oil and gas industry.

Another reoccurring issue within the oil and gas industry is the interpretation of contracts. Within the past year, Ohio courts have strictly enforced the provisions of the written document and do not allow for parties to read additional provisions into the document. This issue is seen in *Swallie v. Rousenberg*, where the Profit Energy Company appealed the trial court's finding that its lease of the oil and gas on the subject estate was null and void.[22] C.J. and Rebecca Burkhart owned the property in question. On July 20, 1919, the Burkharts entered into an oil and gas lease with Ohio Fuel Supply.[23] The lease provided for "a term of twenty (20) years and so much longer thereafter as oil, gas, or their constituents are produced in paying quantities thereon."[24] The lease was assigned to Columbia Natural Resources,

17. *Id.*
18. *Id.*
19. *Id.* at *7.
20. *Id.* at *6 (citing Struthers v. Sokol, 140 N.E. 519, 519 (Ohio 1923)).
21. *Id.*
22. Swallie v. Rousenberg, 942 N.E.2d 1109, 1112 (Ohio Ct. App. 2010).
23. *Id.* at 1111.
24. *Id.*

Inc., who then assigned it to Profit Energy in 1993.[25] The well stopped producing gas in paying quantities in January 1994, but Profit Energy continued to pay $50 rental per year through 2007.[26]

On appeal Profit Energy claimed that "it ha[d] a valid lease because it is a flat-rate royalty lease and the royalties were timely paid. Profit Energy asserts that under a flat-rate lease, quantity of production is irrelevant to the expiration of the lease as long as the lessee has made the flat-rate rental payments."[27] The court rebuked this claim stating, "the rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument."[28] The lease at hand makes no mention of a flat-rate lease. It specifically states that payments shall only continue so long as the well is producing in paying quantities. Profit Energy does not have the power to convert a lease into a flat-rate lease simply by continuing to pay the lessor when it had no such obligation.[29] From this decision, the court has made it clear that the written contract will be strictly and objectively interpreted. This objective interpretation will dictate the rights of the parties, and any subjective assumptions outside of the writing will be ignored.

This strict construction of contracts was also performed in *Strahm v. Buckeye Pipe Line Co.*[30] In this case, Strahm appealed from the trial court's summary judgment in favor of Buckeye Pipe Line Company.[31] Strahm argued that Buckeye's easements across his land did not grant them the right to clear away trees and shrubs without compensation.[32]

Buckeye held two sets of easements over Strahm's property that were acquired from Sohio and Trans-Ohio.[33] The Sohio easements granted the company the right to "lay, maintain, operate, repair, replace and remove pipe line and all necessary fixtures, equipment and appurtenances thereto."[34] The lease further stated that "Grantor and Grantor's heirs reserve the right fully to use and enjoy the said premises except insofar as such use and enjoyment shall be inconsistent with the exercise by the Grantee of the rights herein granted."[35] The Trans-Ohio easement granted the right to "construct, lay, maintain, operate, alter, repair, remove, change the size of, and replace a pipe line and appurtenances thereto."[36] The lease further stipulated that "Grantors are to fully use and enjoy the said premises, except for the

25. *Id.*
26. *Id.*
27. *Id.* at 1116.
28. *Id.* (citing Harris v. Ohio Oil Co., 48 N.E. 502, 505 (Ohio 1897)).
29. *Id.* at 1117.
30. Strahm v. Buckeye Pipe Line Co., No. 1-10-60, 2011 WL 915575, at *1 (Ohio Ct. App. Mar. 14, 2011).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*


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purposes granted to the said Grantee and provided that the said Grantors shall not construct nor permit to be constructed any house, structures or obstructions on or over, or that will interfere with the construction, maintenance or operation of, any pipe line or appurtenances constructed hereunder, and will not change the grade over such pipe line."[37] Mr. Strahm planted trees and shrubs throughout his property, including over the Buckeye easements.[38] Buckeye sent a letter of notice stating it had the right to clear any obstruction over the easements so that it could properly maintain its pipe line.[39]

The central issue of this case was the definition of "maintain" within the easement contract.[40] At the time of the removal of the trees and shrubs, Buckeye was not performing any maintenance on the pipe line itself.[41] The court took a strict stance on Buckeye's interpretation of the word "maintenance" and the rights associated with that interpretation. The court required that the company must perform actual maintenance on the pipe line itself in order to clear timber and vegetation without compensation.[42] The court ruled that because the company was not performing maintenance on the pipe line itself, it did not have the right to remove the timber or vegetation from the easement without compensating Strahm.[43] The concurring opinion took this interpretation one step further by stressing the belief that pipe line companies have been given too much leeway with the interpretation of their easements and that the courts should strictly interpret provisions in light of the time of execution.[44]

Despite the fact that these cases merely preserve the status quo in Ohio oil and gas law, they may be a precursor for developing issues in Ohio oil and gas law. A pertinent issue will be whether the Ohio courts maintain their broad interpretation of the state's ability to preempt the entire oil and gas field as communities continue their attempt to extend their powers. With the strict interpretation of oil and gas contracts, Ohio courts are giving notice to all parties that their rights and remedies are found within the written contract language and any ambiguous term should be given its full meaning within the contract.

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37. *Id.* at *2.
38. *Id.*
39. *Id.*
40. *Id.* at *6.
41. *Id.*
42. *See id.* at *8 (holding that the trial court committed error prejudicial to the Strahms by ruling, as a matter of law, that Buckeye may remove trees and vegetation without compensation to facilitate aerial inspection of pipe line rights of way).
43. *See id.* at *9 (holding that "[w]ithout uncontroverted evidence that it was necessary for Buckeye to clear all vegetation from all areas of the easements in order to 'maintain' its pipe line, summary judgment was not proper.").
44. *Id.* at *9–10 (Rogers, J., concurring (quoting Voisard v. Marathon Ashland Pipeline, LLC., No. 09-05-49, 2006 WL 3803868, ¶ 12 (Ohio Ct. App. Dec. 28, 2006) (Rogers, J., Dissenting))).