

ORIGINAL

In the Supreme Court of Ohio

CHESAPEAKE EXPLORATION, L.L.C., et al.,	:	Case No. 2014-0067
	:	
	:	
Petitioners,	:	On Certified Questions from the United
	:	States District Court for the Southern
v.	:	District of Ohio, Eastern Division (Case
	:	No. 2:12-cv-00916)
KENNETH BUELL, et al.,	:	
	:	
Respondents.	:	

**BRIEF OF AMICUS CURIAE OHIO OIL AND GAS ASSOCIATION
IN SUPPORT OF PETITIONERS ON ONE ISSUE
RAISED BY AMICUS CURIAE STATE OF OHIO**

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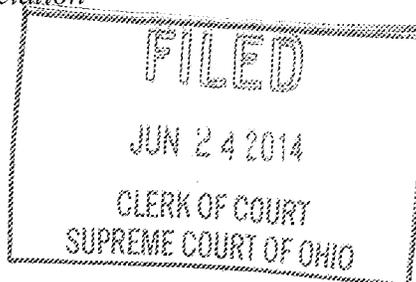
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STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae Ohio Oil and Gas Association (“OOGA”) has taken no position on the two certified questions from the District Court that this Court has agreed to answer: whether the recordation (Certified Question One) or the expiration (Certified Question Two) of a lease of a severed mineral estate is a “title transaction” for purposes of the Ohio Dormant Mineral Act (“ODMA”), R.C. 5301.56. Accordingly, OOGA did not submit an amicus brief in support of petitioners or in support of respondents when the parties filed their merit briefs.

The Attorney General of Ohio, however, has since filed an amicus merit brief in support of respondents’ contention that neither the recordation of an oil and gas lease nor its subsequent termination is a “title transaction” under the ODMA. As a major landowner, the State would potentially reap an enormous financial windfall under that reading of the statute. Among other things, the Attorney General argues that a recorded oil and gas lease is not a title transaction -- and thus does not preserve the lessee’s property interests from abandonment -- because it does not convey a “fee interest” in the property. (Merit Brief of Amicus Curiae State of Ohio in Support of Respondents, June 4, 2014, at 9-10.) But the Attorney General then goes further and also suggests that it does not convey any “interest” in the property described in the lease, *Id.*

OOGA and its members are deeply concerned that the Court might endorse the Attorney General’s erroneous suggestion that an oil and gas lease does not convey any property interests. As explained below, the vast majority of Ohio courts have properly concluded that these leases convey an interest in the leased property to the lessee at the time that the lease is executed. But resolution of that issue, which has not been briefed by the parties, is not necessary for the Court to answer the two certified questions. Moreover, the issue is complicated by the

fact that Ohio courts have described the nature and extent of property rights under oil and gas leases in different terms, depending upon the factual context of the dispute and the purpose of the legal analysis. Any attempt by this Court to define those property rights universally, in the context of this ODMA case, would have substantial unintended consequences in many other areas of Ohio law, including bankruptcy and partition actions. In any event, the Attorney General's position misstates Ohio law, and the Court should not suggest in dicta in its ruling in this case that a recorded lease of a severed mineral estate conveys no interest in real property, however it chooses to answer the certified questions regarding "title transactions" under the ODMA.

OOGA is a trade association with over 3,300 members who are involved in all aspects of the exploration, production, and development of oil and natural gas resources within Ohio. Its members include independent producers as well as major national and international energy companies that focus on discovering and developing these resources. OOGA members also include Ohio contractors, service and supply companies, manufacturers, utilities, accountants, lawyers, bankers, geologists, insurers, engineers, royalty owners, landowners, and others who depend upon oil and gas production activities. In fact, the Ohio oil and natural gas industry provides more than 17,000 jobs and pays three-quarters of a billion dollars in salaries and income each year, and these numbers will increase dramatically through further development of the Utica Shale.

OOGA and its members submit this amicus brief to urge that whether the Court answers the certified questions in the affirmative or in the negative, it should not stray beyond those questions and also find that recorded leases of severed mineral estates convey no real property interests, as amicus Attorney General has suggested. Resolution of that issue is not

necessary in order to decide the dispute between the parties as to whether a recorded oil and gas lease is a “title transaction” for purposes of the ODMA.

Ohio courts have described the interests conveyed by oil and gas leases in a variety of ways over the last 150 years, depending in part upon the factual context of the dispute and the legal purposes for which the courts were examining them. But even if a single, universal definition of these interests were possible, there would be no reason for the Court to attempt to do so in the present case. Worse, a ruling by this Court that the execution of oil and gas leases conveys no interests in real property would be inconsistent with Ohio law and would wreak havoc with legal principles and practices that treat oil and gas leases as interests in real property, such that they are not subject to rejection if the landowner enters bankruptcy, 11 U.S.C. § 365, but are subject to the protections of the Ohio Statute of Frauds, R.C. 1335.04, partition statute, R.C. 5307.01, and relevant conveyance statute, R.C. 5301.09.

Everyone involved in Ohio’s gas and oil industry, from landowners and lessors to lenders and lessees, needs certainty and predictability in the ways these statutes apply to oil and gas leases. That is one reason why courts in Ohio (and throughout the United States) have treated the execution of an oil and gas lease as a conveyance of an interest in real property since the mid-19th century. Any ruling by this Court that leases of severed mineral estates do not convey real property interests would upset settled expectations and understandings and impede the development of Ohio’s oil and gas resources. Particularly inasmuch as the issue has not been fully briefed by the parties, there is no reason for the Court to open this Pandora’s Box; it can adjudicate the present case by simply answering the certified questions as to whether the recordation and expiration of severed mineral leases are “title transactions.”

STATEMENT OF THE CASE AND FACTS

The two certified questions from the United States District Court for the Southern District of Ohio, Eastern Division, are pure questions of law, and all relevant facts are undisputed by the parties. Amicus curiae OOGA hereby adopts the statements of fact and statements of the case in the merit briefs that petitioners and respondents previously filed with this Court.

ARGUMENT

A. It is unnecessary for the Court to decide the precise nature of the property interests conveyed by a recorded or expired mineral lease.

The Ohio Dormant Mineral Act (“ODMA”) specifies the circumstances under which a severed mineral estate will be deemed abandoned and will vest in the owner of the surface estate. R.C. 5301.56. Among other things, the statute provides that abandonment does not occur if “[t]he mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder” within the preceding twenty years. R.C. 5301.56(B)(3)(a). The two certified questions now before the Court ask whether either the recordation or the expiration of a lease of a severed mineral estate constitutes a “title transaction” under the ODMA and thus restarts the twenty-year clock. Amicus OOGA takes no position on the certified questions.

Respondents have offered several reasons to support their contention that neither the recordation nor the expiration of a lease of a severed mineral estate is a “title transaction” for purposes of R.C. 5301.56(B)(3)(a). (Respondents’ Merit Brief, June 4, 2014.) The Attorney General has filed an amicus brief in support of respondents’ position. (Merit Brief of Amicus Curiae State of Ohio, June 4, 2014.) The Attorney General goes further, however, and also contends in the alternative that an oil and gas lease does not convey any real property interests to the lessee. (*Id.*, at 9-10.)

The Court does not need to rule on the Attorney General's newly-raised issue in order to determine whether the recordation or expiration of an oil and gas lease constitutes a "title transaction" under the ODMA. It may, inter alia, adopt or reject respondents' ODMA statutory construction arguments, including their contention that an oil and gas lease is unlike the examples of title transactions that are enumerated in R.C. 5301.47, without regard to the precise nature of the property interests that are conveyed.

In short, the District Court has not asked this Court to decide whether an oil and gas lessee has any interest in the real property that is subject to the lease; the certified questions ask whether a recorded or expired lease of severed minerals constitutes a "title transaction" within the meaning of R.C. 5301.56(B)(3). OOGA respectfully requests that the Court decline the Attorney General's invitation to rule, without benefit of briefing by the parties, that an oil and gas lessee does not have any legally cognizable property interests upon the execution of the lease.

B. Ohio courts have disagreed about the precise types of property interests that are conveyed by a recorded lease of a severed mineral estate.

In its order certifying the two questions of state law that are now before this Court, the District Court found that "[t]he nature of an oil and gas agreement in Ohio is unsettled," and that these agreements "have been characterized as leases, licenses, corporeal hereditaments, rights, easements, and/or interests in real estate." Opinion and Order, Jan. 2, 2014, at 17, *quoting Rayl v. East Ohio Gas Co.*, 46 Ohio App.2d 167, 348 N.E.2d 385 (9th App. Dist. 1973). The District Court noted that two early decisions by this Court "take divergent views of the nature of oil and gas leases but neither concerns whether a lease of severed subsurface mineral rights is a title transaction under the ODMA" Opinion and Order, *supra*, at 17-18, *citing Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N.E. 502 (1887) (finding that an oil and

gas lease is “more than a mere license” and conveys “a fee estate” to the lessee); and *Back v. Ohio Fuel Gas Co.*, 160 Ohio St. 81, 113 N.E.2d 865 (1953) (finding that an oil and gas lease is “no more than a license”).

Respondents do not argue in their merit brief that an oil and gas lease conveys no property interests to the lessee; they argue that a lease is not a “title transaction” under the ODMA because “it does not affect title.” (Respondents’ Merit Brief, *supra*, at 12.) The issue of whether such a lease “affects title” may be relevant to the certified questions regarding “title transactions” under the ODMA, but the issue of whether it conveys any property interest to the lessee is not.

Ohio common law jurisprudence is unsettled in the sense that Ohio courts have disagreed about the precise nature of the leasehold interest in a severed mineral estate in different factual and legal contexts, but the vast majority have recognized that the lessee has a legally cognizable property interest in the leased premises. For example, the Court of Appeals in *Maverick Oil & Gas, Inc. v. Barberton City School Dist. Bd. of Ed.*, 171 Ohio App.3d 605, 2007 Ohio 1682, at ¶ 13, recognized that an oil and gas lease “creates a limited property right.” Similarly, in *Binder v. Trinity OG Land Development & Exploration*, No. 4:11-cv-02621, 2012 U.S. Dist. Lexis 76183 (N.D. Ohio 2012), the Court held that mineral rights to oil and gas fall within the definition of “real estate.” *See also Secrist v. St. Croix, Ltd.*, 9th App. Dist. No. 23619, at ¶ 9, 2007 Ohio 4803 (holding that “an oil and gas lease creates a limited property right”).

Other Ohio courts have gone further and have found that oil and gas leases create a legally recognized “fee interest” in the realty. *See, e.g., Tisdale v. Walla*, 11th App. Dist. No. 94-A-0008, 1994 Ohio App. Lexis 5941, at *9-*10, and *Kramer v. PAC Drilling Oil & Gas*,

LLC, 197 Ohio App.3d 554, 558, 968 N.E.2d 64 (9th App. Dist. 2011). The principle that an oil and gas lessee's interest in real property is a possessory interest has been judicially accepted for over 100 years in Ohio. *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 176, 44 N.E. 1093 (1896) ("it is a lease of the land, oil and gas for a limited time and purpose, with a right of possession") (emphasis added); *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129-130, 48 N.E. 502 (1897) ("the lessee has a vested right to the possession of the land"). These pronouncements are consistent with the near-universal view that an oil and gas lease grants the lessee a defeasible fee simple interest: a fee simple determinable or a fee simple subject to a condition subsequent, as defined in the granting and habendum clauses of the lease. 3 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 604 (2013). See also Lawrence Mills & J.C. Willingham, *The Law of Oil and Gas* §§ 3, 30-32 (1926). Ohio courts have tacitly recognized that the leasehold estate is a fee simple determinable estate because they consistently hold that, when production of oil or gas ceases in the secondary term of the oil and gas lease, the leasehold estate automatically terminates and re-vests the mineral estate in the lessor. *American Energy Services, Inc. v. Lekan*, 75 Ohio App.3d 205, 212 598 N.E.2d 1315 (5th App. Dist. 1992); *Gisinger v. Hart*, 115 Ohio App. 115, 116, 184 N.E.2d 240 (4th App. Dist. 1961).

Once again, however, it is not necessary for this Court to attempt to specify precisely what kind of property interests are conveyed by the recordation or expiration of an oil and gas lease. Thus, the Court should not address the Attorney General's suggestion that no property interests are conveyed.

C. An unnecessary ruling by this Court that an oil and gas lease conveys no interest in the leased property would have unintended consequences in other areas of Ohio law.

As explained above, this Court need not consider the Attorney General's suggestion that an oil and gas lease conveys no interests in property, in order to answer the two

certified questions regarding what constitutes a “title transaction” under the ODMA. In fact, a finding by the Court embracing the Attorney General’s position would confuse currently settled law in a number of areas and have dire consequences for the development of Ohio’s hydrocarbon resources.

Because of the significant capital required to drill an oil and gas well, lessees often must obtain loans that are secured by recorded mortgages against their leases. This financing makes it possible for lessees to explore, develop, and produce Ohio’s oil and gas resources, and it has been utilized throughout Ohio history to support hundreds of millions of dollars of loans secured by oil and gas wells and leases. A ruling that an oil and gas lease conveys no property interests would undermine the availability of financing through mortgages on the leasehold estate.

Furthermore, it is a near-universal fact that oil and gas leases utilize traditional conveyancing language to describe the transaction and typically include granting clauses that clearly indicate that the parties to the lease are treating it as a conveyance of an interest in real property.

In addition, parties to oil and gas leases understand that they convey interests in real property that will not be subject to rejection in any subsequent bankruptcy proceedings of the landowner under 11 U.S.C. § 365. Administrative spacing regulations as well as voluntary pooling of separately-owned leasehold estates often lead lessees to combine parcels of leased property into a single “unit,” in order to qualify for a drilling permit and to produce oil and gas in a way that prevents waste, protects correlative rights, and conserves natural resources. The loss of even one of the leases from such a pooled unit due to a landowner’s bankruptcy would jeopardize the ability of the lessor to drill and operate an oil and gas well for the entire unit.

Similarly, oil and gas leases have long been subject to statutory partition under R.C. 5307.01 as property interests. *See, e.g., Black v. Sylvania Producing Co.*, 105 Ohio St. 346, 350, 137 N.E. 904 (1922) (“a leasehold for oil and gas...is an estate of land such as contemplated by the [partition] statute” and therefore “may be the subject of partition”); *Figge v. Ohio L&M Co.*, 5th App. Dist. No. CA-463, 1994 Ohio App. Lexis 4325, at *4, *app. denied*, 71 Ohio St.3d 1458, 644 N.E.2d 1030 (1995) (same).

A finding that oil and gas leases do not convey any interest in property would also undermine the settled rule that they convey an “interest...in or out of lands,” and therefore must be in writing under the Ohio Statute of Frauds, R.C. 1334.04. *See Sutherland v. Fox*, 5th App. Dist. No. 04COA080, 2005 Ohio 1786, *app. denied*, 106 Ohio St.3d 1533, 2005 Ohio 5146; and *Columbia Gas Transmission Corp. v. Ogle*, 51 F.Supp.2d 866, 873-74 (S.D. Ohio 1997). A ruling in this case that they convey no property interests would create substantial uncertainty regarding leases that do not satisfy the requirements of the Statute of Frauds and would spawn litigation regarding the ownership of oil and gas and the validity of parol oil and gas leases. This would add tremendous transaction costs and risks to the development of oil and gas resources because a lessee could no longer rely on recorded title instruments to ensure that it is not a trespasser on the leased premises.

Moreover, oil and gas leases are specifically treated as interests in property by the Ohio conveyancing statute, R.C. 5301.09, which applies to “leases of gas and oil lands,” and in foreclosure proceedings under R.C. 1509.31(D), which provides that oil and gas leases are not terminated by a foreclosure sale of a lessor’s mortgaged property.

In short, everyone involved in the oil and gas industry -- including landowners, lessees, and lenders -- understands that oil and gas leases convey property interests and are

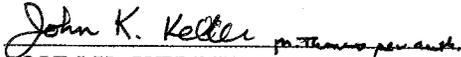
subject to myriad Ohio statutes regulating and protecting property interests. There is no reason to upset these settled expectations and established practices by making an unnecessary and erroneous ruling in this case that oil and gas leases do not convey any interests in property.

CONCLUSION

This Court does not need to rule upon amicus Attorney General's erroneous suggestion that oil and gas leases do not convey any interests in property. The two certified questions in this proceeding ask only whether the recordation or expiration of a lease of a severed mineral interest is a "title transaction" under the ODMA, and there is no reason for the Court to stray beyond those questions. More importantly, any suggestion by the Court that oil and gas leases do not convey any property interests would be inconsistent with the treatment of such leases under other Ohio statutes and would unsettle currently settled principles of Ohio law, impeding the development of this State's natural resources.

Although amicus OOGA takes no position on the certified questions, it requests that this Court not address the Attorney General's contention in the absence of any briefing by the parties on this issue.

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