Dickie McCamey
ATTORNEYS AT LAW

2/8/2019 | Articles

6th Circuit Affirms Constitutionality of Ohio's Statutory Unitization Process

On February 4, 2019, the United States Court of Appeals for the Sixth Circuit found that application of Ohio's statutory unitization regime under Ohio Rev. Code § 1509.28 does not constitute an unconstitutional taking. *Kerns v. Chesapeake Exploration, LLC,* No. 18-636 (6th Cir. Feb. 4, 2019). The *Kerns* decision echoes prior federal decisions, including one from the U.S. Supreme Court, holding that other state regulatory regimes (Oklahoma, Arkansas, for example) permitting mandatory pooling of oil and gas interests are not akin to eminent domain proceedings or unconstitutional takings.

When an unconventional operator seeks to produce from a collection of contiguous lands, they often unitize their leasehold interests covering a "unit" of parcels in order to drill fewer wells, reduce surface impact, and maximize their ability to produce all of resource from the target formation or "common pool or resource." Unitization (in unconventional development) is typically achieved voluntarily, through negotiated and presently-held leasehold agreements. However, if certain landowners refuse to lease to the operator, or in situations where ownership is indeterminable or in dispute, "holes" in the unit appear, preventing the operator from producing the oil and gas in the most efficient manner, which negatively impacts the correlative rights of consenting landowners and/or working interest owners.

In Ohio, if an operator controls 65% of the property to be pooled or unitized, it may apply for an order from the Chief of the Division of Oil and Gas Resources Management permitting development of all property in a proposed unit, even those properties not covered by a lease, pursuant to joint operating agreement. Ohio Rev. Code §§ 1509.27, 1509.28. The Plaintiffs in *Kerns*, upon issuance of the Chief's Order mandating inclusion of their property into a unit, sued both the operator and the Division under federal law, claiming an unconstitutional taking of their property.

The 6th Circuit, however, pointed out that similar statutes have been challenged in other states, and none of those cases had found that an unconstitutional taking had occurred. In fact, the Court's decision essentially indicated that no taking at all had occurred, constitutional or otherwise. Rather, the Court held that the landowners retained their rights in the minerals, though those rights were subject to regulations. Courts also weigh the public policy favoring development of the common natural resource together with the protection of correlative rights of consenting landowners against a minority of landowners either opposed to development or who, for some reason, are unreachable (or unknowable) to negotiate a lease.

Additionally, the Court, quoting *Chance v. BP Chemicals, Inc.,* 670 N.E.2d 985, 992 (Ohio 1996), indicated that the landowner's rights to exclude invasions from the subsurface of their property extended only to those invasions which "actually interfere with [their] reasonable and foreseeable use of the subsurface." The *Kerns* Court stated that the plaintiff landowners had failed to adequately plead that any such damage or interference had occurred.

While the 6th Circuit's ruling is not surprising, given the decisions of other federal courts in similar cases, the concept of an unlawful taking under these types of regulatory schemes continue to arise. Notably, a challenge to Colorado's forced pooling statute was just filed against that state's governor and its Oil and Gas Conservation Commission just last month challenging its constitutionality under the U.S. Constitution. *Wildgrass Oil and Gas Comm. v. State of Colorado,* 1:19-cv-00190 (D. Colo. Jan. 23, 2019). This recent ruling in *Kerns* will likely come into play.

John R. Seeds
412-392-5349
jseeds@dmclaw.com

Barbara Y. Strnad
412-392-5430
bstrnad@dmclaw.com