ORIGINAL

In the Supreme Court of Ohio

CHESAPEAKE EXPLORATION, LLC, *Relator*, v. OIL AND GAS COMMISSION, *et al.*, *Respondents*,	:	Case No. 2012-1207 Original Action in Prohibition

BRIEF OF RELATOR CHESAPEAKE EXPLORATION, LLC

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INTRODUCTION

In our system of government, power resides in the People; the Government is instituted for their equal protection and benefit. *See* Ohio Constitution, Article I, Section 2. All powers not delegated to the Government remain with the people. *See* Ohio Constitution, Article I, Section 20. A fundamental precept of this system is that individuals and corporations must be free to conduct their lawful business without unwarranted government intrusion or interference. This includes the right of a corporate citizen to conduct its trade without having to unnecessarily defend itself before a tribunal without authority. The freedom to act without unnecessary governmental intrusion is secured by the unyielding requirement that a tribunal must have subject matter jurisdiction before exercising judicial or quasi-judicial power.[1] This jurisdictional requirement is of such importance that the Ohio Constitution vests this Court with original jurisdiction to stop and/or remedy such non-jurisdictional acts—specifically, through the issuance of a writ of prohibition. *See* Ohio Constitution, Article IV, Section 2(B)(1)(d). To correct the most egregious violations of this requirement, those where an individual or business is forced to appear and defend itself before a tribunal patently and unambiguously lacking jurisdiction, the Court will issue a writ to both prevent future action and to correct previous unauthorized rulings.

This case presents a clear example of government action despite a patent and unambiguous lack of jurisdiction. Respondents, the Oil and Gas Commission and its acting Commissioners (collectively, the "Commission"), patently and unambiguously lacked

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[1] "Subject-matter jurisdiction is fundamental." *Francis David Corp. v. Scrapbook Memories & More*, 8th Dist. No. 93376, 2010-Ohio-82, ¶ 17. Subject-matter jurisdiction is a "'condition precedent to the court's ability to hear the case'" and any action taken without jurisdiction is void. *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St. 3d 246, 248, 2006-Ohio-5202, 855 N.E.2d 1188 (*quoting Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11.

jurisdiction to hear an appeal brought by Summitcrest, Inc. ("Summitcrest") from the issuance of an oil and gas drilling permit to Relator Chesapeake Exploration L.L.C. ("Chesapeake"). The General Assembly has granted the Commission jurisdiction to hear appeals only from orders of the chief of the Division of Oil and Gas Resources Management (the "Division") and has expressly stated in R.C. 1509.06(F) that "the issuance of a permit shall not be considered an order of the chief." The Commission ignored this express statutory language, forcing Chesapeake to defend its lawful permit before a tribunal completely devoid of jurisdiction. Accordingly, the Court should issue a writ of prohibition to vacate the Commission's unauthorized order in this case and to prevent the Commission from infringing on the rights of Ohio's citizens and corporations in the future.

STATEMENT OF THE CASE AND FACTS

A. Statutory Background

The Oil and Gas Commission is a creature of statute that is authorized to exercise only the powers and jurisdiction that the General Assembly has expressly conferred upon it. *See* R.C. 1509.35 (attached at Appx. p. 1.) The Commission's limited appellate jurisdiction is set forth in R.C. 1509.36: "Any person adversely affected by an order by the chief of the division of oil and gas resources management may appeal to the oil and gas commission for an order vacating or modifying the order." R.C. 1509.36 (attached at Appx. p. 3.) Permits to drill oil and gas wells are issued by the chief of the Division pursuant to R.C. 1509.06 and, in 2010, the General Assembly modified R.C. 1509.06(F) to provide that "the issuance of a permit shall not be considered an order of the chief." R.C. 1509.06(F) (attached at Appx. p. 8.)

B. Procedural History of the Case

In 2004, Summitcrest entered into an oil and gas lease (the "Lease") with Mason Dixon. (Agreed Statement of Facts ¶ 1.)[2] Through a series of assignments, a portion of the Lease interests were assigned to Chesapeake in 2011. (Ag. St. ¶ 1.) Subsequently, Chesapeake submitted an application to the Division seeking a permit under R.C. 1509.06 to drill an oil and gas well on property included under the Lease. (Ag. St. ¶ 2.) On March 21, 2012, the chief of the Division granted the application and issued a permit to Chesapeake. (Ag. St. ¶ 3 & Exh. 1.) Summitcrest appealed the issuance of the permit to the Commission, seeking to reverse and vacate the same. (Ag. St. ¶ 4.) The chief of the Division was named as the appellee and the appeal was docketed as Appeal No. 843. (Ag. St. ¶¶ 4-5.) On July 5, 2012, the Commission granted Chesapeake's motion to intervene in the case as a party. (Ag. St. at ¶ 6 & Exh. 3.)

The Attorney General of Ohio, on behalf of the Division, filed a motion to dismiss Appeal No. 843. (Ag. St. ¶ 7 & Exh. 4.) Chesapeake filed a motion in support of and joining in the Division's motion to dismiss. (Ag. St. ¶ 8 & Exh. 5.) Both the Attorney General and Chesapeake argued that the Commission lacked jurisdiction because the Commission may only hear appeals from orders of the chief and R.C. 1509.06(F) expressly provides that the issuance of a permit is not an order of the chief. (Ag. St. Exh 4, at pp. 2-4 & Exh. 5, at pp. 3-6.) On July 10, 2012, the Commission denied the motion to dismiss and ordered that Appeal No. 843 would proceed to hearing upon its merits. (Ag. St. ¶ 9 & Exh. 6; attached at Appx. p. 12.)

On July 19, 2012, after the Commission denied the motion to dismiss but before the Commission held hearings or ruled on the merits of Appeal No. 843, Chesapeake instituted the current action by filing a Complaint for a Writ of Prohibition (the "Complaint") with this Court. (Ag. St. ¶ 10.) Chesapeake's Complaint requested that the Court issue a writ of prohibition to

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[2] Citations to the parties' Agreed Statement of Facts are hereafter noted as "Agr. St. __."

prohibit the Commission from taking any further action or exercising any further jurisdiction and to vacate any action taken by the Commission in absence of jurisdiction. (Complaint, at 11.) The same day it filed the Complaint, Chesapeake filed with the Commission a motion to stay the merits hearing of Appeal No. 843 pending the outcome of the prohibition action, which the Commission also denied. (Ag. St. ¶ 11 & Exh. 7.) The Commission heard Appeal No. 843 on July 23, 2012. (Ag. St. ¶ 12.) On August 8, 2012, the Commission issued a final order in Appeal No. 843, affirming the Division's issuance of the permit to Chesapeake and denying Appeal No. 843 on the merits. (Ag. St. ¶ 13 & Exh. 8; attached at Appx. p. 19.)[3]

On August 31, 2012, the Commission filed a motion to dismiss Chesapeake's prohibition action, arguing that 1) the Commission's August 8, 2012 order rendered the action moot, and 2) Chesapeake had failed to state a claim upon which relief could be granted. (*See* Motion of Respondents to Dismiss, filed August 31, 2012.) On October 10, 2012, the Court filed an entry rejecting those arguments and denying the motion to dismiss. (Entry, filed October 10, 2012.) The Court granted an alternative writ and set the schedule for briefing on the merits. (*Id.*)

ARGUMENT

Chesapeake is entitled to a writ of prohibition because the Commission exercised quasi-judicial power when it patently and unambiguously lacked jurisdiction to do so. Generally, a writ of prohibition will issue if a relator can prove that (1) respondents are about to exercise or have exercised quasi-judicial power; (2) the exercise of that power is unauthorized by law; and (3) there is no adequate alternative remedy. *See State ex rel. Miller v. Warren Cty. Bd. of Elections*, 130 Ohio St. 3d 24, 2011-Ohio-4623, 955 N.E.2d 3709, ¶ 12. In those cases where a

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[3] The fact that Chesapeake filed this writ of prohibition before the Commission ruled on Appeal No. 843 and is maintaining this action despite the favorable outcome of the August 8th decision demonstrates that this action is focused solely on the type of jurisdictional injury that a writ of prohibition is intended to remedy and is not a substitute for an appeal from the merits.

lower court patently and unambiguously lacks jurisdiction, a writ of prohibition will issue "'both to prevent the future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions.'" *State ex rel. Rogers v. Brown*, 80 Ohio St. 3d 408, 410, 686 N.E.2d 1126 (1997) (*quoting State ex rel. Litty v. Leskovyansky*, 77 Ohio St. 3d 97, 98, 671 N.E.2d 236 (1996)).

The Commission inarguably exercised quasi-judicial power when it conducted a hearing on Appeal No. 843 and issued a ruling on its merits. *See State ex rel. Miller*, at ¶ 13 (Quasi-judicial power is "'the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial.'" (*quoting State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections*, 119 Ohio St. 3d 478, 2008-Ohio-5093, 895 N.E.2d 177, ¶ 16)). As to the last two elements, where a respondent patently and unambiguously lacks jurisdiction, a relator "'need not establish the lack of an adequate remedy at law because the availability of alternate remedies like appeal would be immaterial.'" *State ex rel. Duke Energy Ohio, Inc. v. Hamilton Cty. Court*, 126 Ohio St. 3d 41, 2010-Ohio-2450, 930 N.E.2d 299, ¶ 17 (*quoting State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St. 3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 15). Therefore, the sole issue before the Court is whether the Commission patently and unambiguously lacked jurisdiction over Appeal No. 843.

PROPOSITION OF LAW: *The Oil and Gas Commission Patently and Unambiguously Lacks Jurisdiction to Hear Appeals from the Division's Issuance of Oil and Gas Well Permits.*

1. The Commission is Limited to Exercising Only the Jurisdiction and Powers That the General Assembly Has Expressly Conferred upon it by Statute.

The General Assembly created the Commission by enacting section 1509.35 of the Ohio Revised Code. *See* R.C. 1509.35. As a creature of statute, the Commission is limited to exercising only the jurisdiction and power that the General Assembly has expressly conferred upon it. *See, e.g., State ex rel. DeWine v. Court of Claims of Ohio*, 130 Ohio St. 3d 244, 2011-

Ohio-5283, 957 N.E.2d 280, ¶ 19 (affirming the issuance of a writ of prohibition because the Court of Claims is a creature of statute "limited by statute and specifically confined to the powers conferred by the legislature" and the court had exceeded its statutory grant). "When the General Assembly grants an administrative agency power to hear appeals, the statutory language determines the parameters of the agency's jurisdiction." *Cuyahoga Cty. Bd. of Cty. Comm'rs v. Daroczy*, 10th Dist. No. 08AP-123, 2008-Ohio-5564, ¶ 17 (*citing Waltco Truck Equip. Co. v. Tallmadge Bd. of Zoning Appeals*, 40 Ohio St. 3d 41, 43, 531 N.E.2d 685 (1988). The Commission's jurisdiction cannot be created or expanded beyond that expressed in the statute. *See Waltco*, 40 Ohio St. 3d at 43 ("[W]here jurisdiction is dependent upon a statutory grant, this court is without the authority to create jurisdiction when the statutory language does not. That power resides in the General Assembly.") The "express grant of power must be clear, and any doubt as to the extent of the grant must be resolved against it." *In re Guardianship of Spangler*, 126 Ohio St. 3d 339, 343, 2010-Ohio-2471, 933 N.E.2d 1067 (*citing State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917)).

2. The General Assembly Granted the Commission Jurisdiction to Hear Appeals Only from Orders of the Chief and Expressly Provided That the Issuance of a Permit is Not an Order of the Chief.

The General Assembly has not granted the Commission the power to hear appeals from the issuance of a permit; in fact, they have expressly prohibited it. The extent of the Commission's limited administrative appellate jurisdiction is found in R.C. 1509.36:

> Any person adversely affected by an order by the chief of the division of oil and gas resources management may appeal to the oil and gas commission for an order vacating or modifying the order.

R.C. 1509.36 (emphasis added). Thus, absent an order of the chief, the Commission patently and unambiguously lacks jurisdiction to hear an appeal. In 2010, the General Assembly modified R.C. 1509.06(F) to state unequivocally that "the issuance of a permit shall not be considered an

order of the chief." R.C. 1509.06(F) (emphasis added). Because the Commission may hear appeals only from orders and the issuance of a permit under R.C. 1509.06 is not an order, the Commission patently and unambiguously lacked jurisdiction over Appeal No. 843.

There is no ambiguity in R.C. 1509.36 and R.C. 1509.06(F). As the Ohio Attorney General argued before the Commission only a few months ago, "[t]his statutory language is specific and clearly sets forth the actions that are, and are not, appealable * * * there is no statutory ambiguity." (Ag. St. Ex. 4, at 3-4.) The Court need look no further than this clear statutory language to find that the Commission patently and unambiguously lacked jurisdiction over Appeal No. 843. *See Terry v. Sperry*, 130 Ohio St. 3d 125, 2011-Ohio-3364, 956 N.E.2d 276, ¶ 25 ("'[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written.'" (*quoting Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St. 3d 52, 2006-Ohio-6498, 858 N.E.2d 324, ¶ 15)); *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St. 3d 549, 553, 721 N.E.2d 1057 (2000) ("When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation." (*citing Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 190, 404 N.E.2d 159 (1980)).

Courts have issued writs of prohibition to restrain statutorily created government bodies that are acting without express statutory authority, even in cases lacking the type of clear statutory language described above. *See DeWine,* 2011-Ohio-5283. In *DeWine*, this Court affirmed the issuance of a writ of prohibition to prevent the Court of Claims from exercising jurisdiction over appeals from decisions of the Attorney General of Ohio regarding the award of fees to attorneys who prepare applications for reparations on behalf of claimants under the Victims of Crimes Act. *Id.* at ¶ 1. The Court held that that the Court of Claims is a creature of

statute "specifically confined to the powers conferred by the legislature"[4] and that no statute had granted it jurisdiction over this type of appeal. *Id.* at ¶¶ 19-24. In so holding, the Court conducted a thorough statutory analysis to determine that the General Assembly did not intend to grant the Court of Claims jurisdiction over the claimant's attorney's appeal from decisions regarding fees for preparing the reparations application. *Id.* at ¶¶ 22-24. Unlike in *DeWine*, however, in this case no statutory analysis is necessary to determine that the Commission has not been granted jurisdiction over appeals from the issuance of an oil and gas permit because R.C. 1509.06(F) unequivocally states that the issuance of a permit is not an order. Just as a writ of prohibition was appropriate to correct the Court of Claims' lack of jurisdiction in *DeWine*, it is even more appropriate here where the General Assembly has expressed its intent so clearly.

3. The Commission's Arguments in Support of its Unlawful Exercise of Jurisdiction Exhibit a Fundamental Misunderstanding of its Limited Jurisdiction That Must Be Corrected.

The Commission's arguments in support of its unlawful exercise of jurisdiction not only fail to cure the Commission's lack of jurisdiction, they reveal a fundamental misunderstanding of the Commission's limited jurisdiction that must be corrected. The Commission has turned its entire jurisdiction on its head—instead of identifying a statute that expressly provides the Commission with jurisdiction, the Commission justified its actions by stating that nothing would "specifically preclude" the Commission from exercising jurisdiction. (Ag. St. Exh. 6, at p. 6) (emphasis added).[5] The Commission then eschews the express statutory language in

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[4] In its opinion, the Court adopted the Attorney General's argument that "because the Court of Claims is a statutorily created court, it may exercise only the jurisdiction specifically conferred upon it by the General Assembly and therefore its appellate jurisdiction may not be implied but must be expressly provided by statute." *DeWine*, at ¶ 9.

[5] The Commission also cites to its own regulations and past practices to justify its assumption of jurisdiction (Ag. St. Exh. 6, at p. 6), but the Commission may not expand its statutory authority by rule or practice. *See Time Warner AxS v. Public Utils. Comm'n*, 75 Ohio St. 3d 229, 240, 661 N.E.2d 1097 (1996).

R.C. 1509.06(F) that does specifically preclude it from exercising jurisdiction in favor of a misreading of R.C. 1509.03(B) that the Commission believes "suggests" jurisdiction.

As an initial matter, the Commission simply misreads R.C. 1509.03(B).[6] R.C. 1509.03(B) does not purport to define an "order of the chief" and it is therefore irrelevant to the question of whether or not the Commission had subject matter jurisdiction over Appeal No. 843. R.C. 1509.03(B) simply describes, in those instances where the issuance, denial, or modification of a permit is an order of the chief, how the order should be treated under R.C. 119. Furthermore, on its face, R.C. 1509.03(B) applies only to actions "described as" orders. The General Assembly has not described the issuance of a permit under R.C. 1509.06 as an order. Therefore, the Commission cannot rely on R.C. 1509.03(B) as a source of jurisdiction.

More importantly, the Commission compounds this mistake by basing its jurisdiction on an implication in R.C. 1509.03 that the Commission believes "suggests" that the issuance of a permit "may" be done by order. (Ag. St. Exh. 6, at p. 6.) As a creature of statute, however, the Commission does not gain jurisdiction through tenuous implications but through express statutory language. *See, e.g., Waltco*, 40 Ohio St. 3d at 43. Furthermore, the mere "suggestion" that some permits "may be" issued through an order of the chief cannot plausibly be read to contravene the specific language in R.C. 1509.06(F) stating that they are not. *See State v. Taylor*, 113 Ohio St. 3d 297, 2007-Ohio-1950, 865 N.E.2d 37, ¶ 12 ("'It is a well settled rule of statutory construction that where a statute couched in general terms conflicts with a specific statute on the same subject, the latter must control.'" (*quoting Humphrys v. Winous Co.*, 165 Ohio St. 45, 48, 133 N.E.2d 780 (1956)). Even if the Court were to accept the Commission's argument that R.C. 1509.03(B) implies that the General Assembly intended to grant the

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6 The version of R.C. 1509.03(B) applicable to Appeal No. 843 is attached at Appx. p. 10.

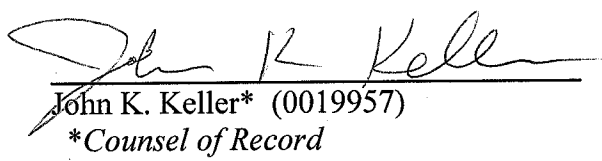
Commission jurisdiction over appeals from the issuance of permits, which it does not, the General Assembly patently and unambiguously divested the Commission of jurisdiction in this case with its 2010 amendment to R.C. 1509.06(F). *See Rosen v. Celebrezze*, 117 Ohio St. 3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶ 46 (granting a writ of prohibition and holding that "the mere fact that the Ohio court has basic statutory jurisdiction * * * does not preclude a more specific statute * * * from patently and unambiguously divesting the court of such jurisdiction.").

In sum, the Commission's analysis of its own jurisdiction is flawed and should be corrected by the Court. If the Commission is permitted to continue to base its jurisdiction on what is not "specifically precluded" instead of what it is expressly conferred by statute, or on tenuous implications rather than express statutory language, it is unclear what other unauthorized actions the Commission might take in the future.

CONCLUSION

The Commission has infringed upon Chesapeake's right to conduct its business free from unnecessary governmental intrusion. Indeed, the Commission turned the concept of limited government on its head by concluding it possessed jurisdiction in those instances where jurisdiction was not "specifically precluded" by statute. Thereafter, Chesapeake was forced to defend its lawfully-obtained oil and gas well permit before the Commission, even though the Commission patently and unambiguously lacked any authority over the permit or the appeal. For these reasons, Chesapeake requests that the Court issue a writ of prohibition that vacates, nullifies, and invalidates the actions taken by the Commission in the absence of jurisdiction and corrects the Commission's misunderstanding of its own limited jurisdiction to prevent future jurisdictionally-unauthorized actions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2012, I served copies of the foregoing *Brief of Relator Chesapeake Exploration LLC* by regular U.S. mail on the following:

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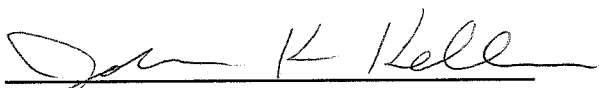

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APPENDIX

PAGE

1509.35 Oil and gas commission.

(A) There is hereby created an oil and gas commission consisting of five members appointed by the governor. Terms of office shall be for five years, commencing on the fifteenth day of October and ending on the fourteenth day of October, except that the terms of the first five members of the board shall be for one, two, three, four, and five years, respectively, as designated by the governor at the time of the appointment. Each member shall hold office from the date of appointment until the end of the term for which the member was appointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall hold office for the remainder of that term. Any member shall continue in office subsequent to the expiration date of the member's term until a successor takes office, or until a period of sixty days has elapsed, whichever occurs first. Each vacancy occurring on the commission shall be filled by appointment within sixty days after the vacancy occurs. One of the appointees to the commission shall be a person who, by reason of the person's previous vocation, employment, or affiliations, can be classed as a representative of a major petroleum company. One of the appointees to the commission shall be a person who, by reason of the person's previous vocation, employment, or affiliations, can be classed as a representative of the public. One of the appointees to the commission shall be a person who, by reason of the person's previous training and experience, can be classed as a representative of independent petroleum operators. One of the appointees to the commission shall be a person who, by reason of the person's previous training and experience, can be classed as one learned and experienced in oil and gas law. One of the appointees to the commission shall be a person who, by reason of the person's previous training and experience, can be classed as one learned and experienced in geology or petroleum engineering. Not more than three members shall be members of the same political party. This division does not apply to temporary members appointed under division (C) of this section.

(B) Three members constitute a quorum and no action of the commission is valid unless it has the concurrence of at least a majority of the members voting on that action. The commission shall keep a record of its proceedings.

(C) If the chairperson of the commission determines that a quorum cannot be obtained for the purpose of considering a matter that will be before the commission because of vacancies or recusal of its members, the chairperson may contact the technical advisory council on oil and gas created in section 1509.38 of the Revised Code and request a list of members of the council who may serve as temporary members of the commission. Using the list provided by the council, the chairperson may appoint temporary members to the commission. The appointment of temporary members shall be for only the matter for which a quorum cannot be obtained. The number of temporary members appointed by the chairperson shall not exceed the number that is necessary to obtain a quorum for the matter. A temporary member of the commission has the same authority, rights, and obligations as a member of the commission, including the right to compensation and other expenses as provided in this section. The authority, rights, and obligations of a temporary member cease when the temporary member's service on the commission ends.

(D) Each member shall be paid an amount fixed pursuant to division (J) of section 124.15 of the Revised Code per diem when actually engaged in the performance of work as a member and when engaged in travel necessary in connection with that work. In addition to such compensation each member shall be reimbursed for all traveling, hotel, and other expenses necessarily incurred in the performance of work as a member.

(E) The commission shall select from among its members a chairperson, a vice-chairperson, and a secretary. These officers shall serve for terms of one year.

(F) The governor may remove any member of the commission from office for inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance.

(G) The commission, in accordance with Chapter 119. of the Revised Code, shall adopt rules to govern its procedure.

Amended by 128th General Assembly File No. 27, SB 165, § 1, eff. 6/30/2010.

Effective Date: 12-02-1996; 06-30-2006

See 129th General Assembly File No. 39, SB 171, §4.

The amendment to this section by 129th General Assembly File No. 10, SB 5, § 1 was rejected by voters in the November, 2011 election.

1509.36 Appeal to commission.

Any person adversely affected by an order by the chief of the division of oil and gas resources management may appeal to the oil and gas commission for an order vacating or modifying the order.

The person so appealing to the commission shall be known as appellant and the chief shall be known as appellee. Appellant and appellee shall be deemed to be parties to the appeal.

The appeal shall be in writing and shall set forth the order complained of and the grounds upon which the appeal is based. The appeal shall be filed with the commission within thirty days after the date upon which the appellant received notice by certified mail and, for all other persons adversely affected by the order, within thirty days after the date of the order complained of. Notice of the filing of the appeal shall be filed with the chief within three days after the appeal is filed with the commission.

Upon the filing of the appeal the commission promptly shall fix the time and place at which the hearing on the appeal will be held, and shall give the appellant and the chief at least ten days' written notice thereof by mail. The commission may postpone or continue any hearing upon its own motion or upon application of the appellant or of the chief.

The filing of an appeal provided for in this section does not automatically suspend or stay execution of the order appealed from, but upon application by the appellant the commission may suspend or stay the execution pending determination of the appeal upon such terms as the commission considers proper.

Either party to the appeal or any interested person who, pursuant to commission rules has been granted permission to appear, may submit such evidence as the commission considers admissible.

For the purpose of conducting a hearing on an appeal, the commission may require the attendance of witnesses and the production of books, records, and papers, and it may, and at the request of any party it shall, issue subpoenas for witnesses or subpoenas duces tecum to compel the production of any books, records, or papers, directed to the sheriffs of the counties where the witnesses are found. The subpoenas shall be served and returned in the same manner as subpoenas in criminal cases are served and returned. The fees of sheriffs shall be the same as those allowed by the court of common pleas in criminal cases. Witnesses shall be paid the fees and mileage provided for under section 119.094 of the Revised Code. Such fees and mileage expenses incurred at the request of appellant shall be paid in advance by the appellant, and the remainder of those expenses shall be paid out of funds appropriated for the expenses of the division of oil and gas resources management.

In case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matter regarding which the witness may be lawfully interrogated, the court of common pleas of the county in which the disobedience, neglect, or refusal occurs, or any judge thereof, on application of the commission or any member thereof, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from that court or a refusal to testify therein. Witnesses at such hearings shall testify under oath, and any member of the commission may administer oaths or affirmations to persons who so testify.

At the request of any party to the appeal, a record of the testimony and other evidence submitted shall be taken by an official court reporter at the expense of the party making the request for the record. The record shall include all of the testimony and other evidence and the rulings on the admissibility

thereof presented at the hearing. The commission shall pass upon the admissibility of evidence, but any party may at the time object to the admission of any evidence and except to the rulings of the commission thereon, and if the commission refuses to admit evidence the party offering same may make a proffer thereof, and such proffer shall be made a part of the record of the hearing.

If upon completion of the hearing the commission finds that the order appealed from was lawful and reasonable, it shall make a written order affirming the order appealed from; if the commission finds that the order was unreasonable or unlawful, it shall make a written order vacating the order appealed from and making the order that it finds the chief should have made. Every order made by the commission shall contain a written finding by the commission of the facts upon which the order is based.

Notice of the making of the order shall be given forthwith to each party to the appeal by mailing a certified copy thereof to each such party by certified mail.

The order of the commission is final unless vacated by the court of common pleas of Franklin county in an appeal as provided for in section 1509.37 of the Revised Code. Sections 1509.01 to 1509.37 of the Revised Code, providing for appeals relating to orders by the chief or by the commission, or relating to rules adopted by the chief, do not constitute the exclusive procedure that any person who believes the person's rights to be unlawfully affected by those sections or any official action taken thereunder must pursue in order to protect and preserve those rights, nor do those sections constitute a procedure that that person must pursue before that person may lawfully appeal to the courts to protect and preserve those rights.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No. 28, HB 153, § 101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No. 27, SB 165, § 1, eff. 6/30/2010.

Effective Date: 06-14-2000; 2008 HB525 07-01-2009

1509.06 Application for permit to drill, reopen, convert, or plug back a well.

(A) An application for a permit to drill a new well, drill an existing well deeper, reopen a well, convert a well to any use other than its original purpose, or plug back a well to a different source of supply, including associated production operations, shall be filed with the chief of the division of oil and gas resources management upon such form as the chief prescribes and shall contain each of the following that is applicable:

(1) The name and address of the owner and, if a corporation, the name and address of the statutory agent;

(2) The signature of the owner or the owner's authorized agent. When an authorized agent signs an application, it shall be accompanied by a certified copy of the appointment as such agent.

(3) The names and addresses of all persons holding the royalty interest in the tract upon which the well is located or is to be drilled or within a proposed drilling unit;

(4) The location of the tract or drilling unit on which the well is located or is to be drilled identified by section or lot number, city, village, township, and county;

(5) Designation of the well by name and number;

(6)(a) The geological formation to be tested or used and the proposed total depth of the well;

(b) If the well is for the injection of a liquid, identity of the geological formation to be used as the injection zone and the composition of the liquid to be injected.

(7) The type of drilling equipment to be used;

(8)

(a) An identification, to the best of the owner's knowledge, of each proposed source of ground water and surface water that will be used in the production operations of the well. The identification of each proposed source of water shall indicate if the water will be withdrawn from the Lake Erie watershed or the Ohio river watershed. In addition, the owner shall provide, to the best of the owner's knowledge, the proposed estimated rate and volume of the water withdrawal for the production operations. If recycled water will be used in the production operations, the owner shall provide the estimated volume of recycled water to be used. The owner shall submit to the chief an update of any of the information that is required by division (A)(8)(a) of this section if any of that information changes before the chief issues a permit for the application.

(b) Except as provided in division (A)(8)(c) of this section, for an application for a permit to drill a new well within an urbanized area, the results of sampling of water wells within three hundred feet of the proposed well prior to commencement of drilling. In addition, the owner shall include a list that identifies the location of each water well where the owner of the property on which the water well is located denied the owner access to sample the water well. The sampling shall be conducted in accordance with the guidelines established in "Best Management Practices For Pre-drilling Water Sampling" in effect at the time that the application is submitted. The division shall furnish those guidelines upon request and shall make them available on the division's web site. If the chief

determines that conditions at the proposed well site warrant a revision, the chief may revise the distance established in this division for purposes of pre-drilling water sampling.

(c) For an application for a permit to drill a new horizontal well, the results of sampling of water wells within one thousand five hundred feet of the proposed horizontal wellhead prior to commencement of drilling. In addition, the owner shall include a list that identifies the location of each water well where the owner of the property on which the water well is located denied the owner access to sample the water well. The sampling shall be conducted in accordance with the guidelines established in "Best Management Practices For Pre-drilling Water Sampling" in effect at the time that the application is submitted. The division shall furnish those guidelines upon request and shall make them available on the division's web site. If the chief determines that conditions at the proposed well site warrant a revision, the chief may revise the distance established in this division for purposes of pre-drilling water sampling.

(9) For an application for a permit to drill a new well within an urbanized area, a sworn statement that the applicant has provided notice by regular mail of the application to the owner of each parcel of real property that is located within five hundred feet of the surface location of the well and to the executive authority of the municipal corporation or the board of township trustees of the township, as applicable, in which the well is to be located. In addition, the notice shall contain a statement that informs an owner of real property who is required to receive the notice under division (A)(9) of this section that within five days of receipt of the notice, the owner is required to provide notice under section 1509.60 of the Revised Code to each residence in an occupied dwelling that is located on the owner's parcel of real property. The notice shall contain a statement that an application has been filed with the division of oil and gas resources management, identify the name of the applicant and the proposed well location, include the name and address of the division, and contain a statement that comments regarding the application may be sent to the division. The notice may be provided by hand delivery or regular mail. The identity of the owners of parcels of real property shall be determined using the tax records of the municipal corporation or county in which a parcel of real property is located as of the date of the notice.

(10) A plan for restoration of the land surface disturbed by drilling operations. The plan shall provide for compliance with the restoration requirements of division (A) of section 1509.072 of the Revised Code and any rules adopted by the chief pertaining to that restoration.

(11)(a) A description by name or number of the county, township, and municipal corporation roads, streets, and highways that the applicant anticipates will be used for access to and egress from the well site;

(b) For an application for a permit for a horizontal well, a copy of an agreement concerning maintenance and safe use of the roads, streets, and highways described in division (A)(11)(a) of this section entered into on reasonable terms with the public official that has the legal authority to enter into such maintenance and use agreements for each county, township, and municipal corporation, as applicable, in which any such road, street, or highway is located or an affidavit on a form prescribed by the chief attesting that the owner attempted in good faith to enter into an agreement under division (A)(11)(b) of this section with the applicable public official of each such county, township, or municipal corporation, but that no agreement was executed.

(12) Such other relevant information as the chief prescribes by rule.

Each application shall be accompanied by a map, on a scale not smaller than four hundred feet to the inch, prepared by an Ohio registered surveyor, showing the location of the well and containing such other data as may be prescribed by the chief. If the well is or is to be located within the excavations and workings of a mine, the map also shall include the location of the mine, the name of the mine, and the name of the person operating the mine.

(B) The chief shall cause a copy of the weekly circular prepared by the division to be provided to the county engineer of each county that contains active or proposed drilling activity. The weekly circular shall contain, in the manner prescribed by the chief, the names of all applicants for permits, the location of each well or proposed well, the information required by division (A)(11) of this section, and any additional information the chief prescribes. In addition, the chief promptly shall transfer an electronic copy or facsimile, or if those methods are not available to a municipal corporation or township, a copy via regular mail, of a drilling permit application to the clerk of the legislative authority of the municipal corporation or to the clerk of the township in which the well or proposed well is or is to be located if the legislative authority of the municipal corporation or the board of township trustees has asked to receive copies of such applications and the appropriate clerk has provided the chief an accurate, current electronic mailing address or facsimile number, as applicable.

(C)(1) Except as provided in division (C)(2) of this section, the chief shall not issue a permit for at least ten days after the date of filing of the application for the permit unless, upon reasonable cause shown, the chief waives that period or a request for expedited review is filed under this section. However, the chief shall issue a permit within twenty-one days of the filing of the application unless the chief denies the application by order.

(2) If the location of a well or proposed well will be or is within an urbanized area, the chief shall not issue a permit for at least eighteen days after the date of filing of the application for the permit unless, upon reasonable cause shown, the chief waives that period or the chief at the chief's discretion grants a request for an expedited review. However, the chief shall issue a permit for a well or proposed well within an urbanized area within thirty days of the filing of the application unless the chief denies the application by order.

(D) An applicant may file a request with the chief for expedited review of a permit application if the well is not or is not to be located in a gas storage reservoir or reservoir protective area, as "reservoir protective area" is defined in section 1571.01 of the Revised Code. If the well is or is to be located in a coal bearing township, the application shall be accompanied by the affidavit of the landowner prescribed in section 1509.08 of the Revised Code.

In addition to a complete application for a permit that meets the requirements of this section and the permit fee prescribed by this section, a request for expedited review shall be accompanied by a separate nonrefundable filing fee of two hundred fifty dollars. Upon the filing of a request for expedited review, the chief shall cause the county engineer of the county in which the well is or is to be located to be notified of the filing of the permit application and the request for expedited review by telephone or other means that in the judgment of the chief will provide timely notice of the application and request. The chief shall issue a permit within seven days of the filing of the request unless the chief denies the application by order. Notwithstanding the provisions of this section governing expedited review of permit applications, the chief may refuse to accept requests for expedited review if, in the chief's judgment, the acceptance of the requests would prevent the issuance, within twenty-one days of their filing, of permits for which applications are pending.

(E) A well shall be drilled and operated in accordance with the plans, sworn statements, and other information submitted in the approved application.

(F) The chief shall issue an order denying a permit if the chief finds that there is a substantial risk that the operation will result in violations of this chapter or rules adopted under it that will present an imminent danger to public health or safety or damage to the environment, provided that where the chief finds that terms or conditions to the permit can reasonably be expected to prevent such violations, the chief shall issue the permit subject to those terms or conditions, including, if applicable, terms and conditions regarding subjects identified in rules adopted under section 1509.03 of the Revised Code. The issuance of a permit shall not be considered an order of the chief.

The chief shall post notice of each permit that has been approved under this section on the division's web site not later than two business days after the application for a permit has been approved.

(G) Each application for a permit required by section 1509.05 of the Revised Code, except an application to plug back an existing well that is required by that section and an application for a well drilled or reopened for purposes of section 1509.22 of the Revised Code, also shall be accompanied by a nonrefundable fee as follows:

(1) Five hundred dollars for a permit to conduct activities in a township with a population of fewer than ten thousand;

(2) Seven hundred fifty dollars for a permit to conduct activities in a township with a population of ten thousand or more, but fewer than fifteen thousand;

(3) One thousand dollars for a permit to conduct activities in either of the following:

(a) A township with a population of fifteen thousand or more;

(b) A municipal corporation regardless of population.

(4) If the application is for a permit that requires mandatory pooling, an additional five thousand dollars.

For purposes of calculating fee amounts, populations shall be determined using the most recent federal decennial census.

Each application for the revision or reissuance of a permit shall be accompanied by a nonrefundable fee of two hundred fifty dollars.

(H)(1) Prior to the commencement of well pad construction and prior to the issuance of a permit to drill a proposed horizontal well or a proposed well that is to be located in an urbanized area, the division shall conduct a site review to identify and evaluate any site-specific terms and conditions that may be attached to the permit. At the site review, a representative of the division shall consider fencing, screening, and landscaping requirements, if any, for similar structures in the community in which the well is proposed to be located. The terms and conditions that are attached to the permit shall include the establishment of fencing, screening, and landscaping requirements for the surface facilities of the proposed well, including a tank battery of the well.

(2) Prior to the issuance of a permit to drill a proposed well, the division shall conduct a review to identify and evaluate any site-specific terms and conditions that may be attached to the permit if the

proposed well will be located in a one-hundred-year floodplain or within the five-year time of travel associated with a public drinking water supply.

(I) A permit shall be issued by the chief in accordance with this chapter. A permit issued under this section for a well that is or is to be located in an urbanized area shall be valid for twelve months, and all other permits issued under this section shall be valid for twenty-four months.

(J) An applicant or a permittee, as applicable, shall submit to the chief an update of the information that is required under division (A)(8)(a) of this section if any of that information changes prior to commencement of production operations.

(K) A permittee or a permittee's authorized representative shall notify an inspector from the division at least twenty-four hours, or another time period agreed to by the chief's authorized representative, prior to the commencement of well pad construction and of drilling, reopening, converting, well stimulation, or plugback operations.

Amended by 129th General Assembly File No. 125, SB 315, § 101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No. 28, HB 153, § 101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No. 27, SB 165, § 1, eff. 6/30/2010.

Effective Date: 09-05-2001; 09-16-2004; 09-29-2005

Except as provided in section 1509.021 of the Revised Code, the surface location of a new well that will be drilled using directional drilling may be located on a parcel of land that is not in the drilling unit of the well.

Added by 129th General Assembly File No. 28, HB 153, § 101.01, eff. 9/29/2011.

1509.03 Administrative rules.

(A) The chief of the division of oil and gas resources management shall adopt, rescind, and amend, in accordance with Chapter 119. of the Revised Code, rules for the administration, implementation, and enforcement of this chapter. The rules shall include an identification of the subjects that the chief shall address when attaching terms and conditions to a permit with respect to a well and production facilities of a well that are located within an urbanized area. The subjects shall include all of the following:

(1) Safety concerning the drilling or operation of a well;

(2) Protection of the public and private water supply;

(3) Fencing and screening of surface facilities of a well;

(4) Containment and disposal of drilling and production wastes;

(5) Construction of access roads for purposes of the drilling and operation of a well;

(6) Noise mitigation for purposes of the drilling of a well and the operation of a well, excluding safety and maintenance operations.

No person shall violate any rule of the chief adopted under this chapter.

(B) Any order issuing, denying, or modifying a permit or notices required to be made by the chief pursuant to this chapter shall be made in compliance with Chapter 119. of the Revised Code, except that personal service may be used in lieu of service by mail. Every order issuing, denying, or modifying a permit under this chapter and described as such shall be considered an adjudication order for purposes of Chapter 119. of the Revised Code.

Where notice to the owners is required by this chapter, the notice shall be given as prescribed by a rule adopted by the chief to govern the giving of notices. The rule shall provide for notice by publication except in those cases where other types of notice are necessary in order to meet the requirements of the law.

(C) The chief or the chief's authorized representative may at any time enter upon lands, public or private, for the purpose of administration or enforcement of this chapter, the rules adopted or orders made thereunder, or terms or conditions of permits or registration certificates issued thereunder and may examine and copy records pertaining to the drilling, conversion, or operation of a well for injection of fluids and logs required by division (C) of section 1509.223 of the Revised Code. No person shall prevent or hinder the chief or the chief's authorized representative in the performance of official duties. If entry is prevented or hindered, the chief or the chief's authorized representative may apply for, and the court of common pleas may issue, an appropriate inspection warrant necessary to achieve the purposes of this chapter within the court's territorial jurisdiction.

(D) The chief may issue orders to enforce this chapter, rules adopted thereunder, and terms or conditions of permits issued thereunder. Any such order shall be considered an adjudication order for the purposes of Chapter 119. of the Revised Code. No person shall violate any order of the chief issued under this chapter. No person shall violate a term or condition of a permit or registration certificate issued under this chapter.

(E) Orders of the chief denying, suspending, or revoking a registration certificate; approving or denying approval of an application for revision of a registered transporter's plan for disposal; or to implement, administer, or enforce division (A) of section 1509.224 and sections 1509.22, 1509.222, 1509.223, 1509.225, and 1509.226 of the Revised Code pertaining to the transportation of brine by vehicle and the disposal of brine so transported are not adjudication orders for purposes of Chapter 119. of the Revised Code. The chief shall issue such orders under division (A) or (B) of section 1509.224 of the Revised Code, as appropriate.

Amended by 129th General Assembly File No. 28, HB 153, § 101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No. 27, SB 165, § 1, eff. 6/30/2010.

Effective Date: 06-14-2000; 09-16-2004

1509.04 Enforcement - injunction against violation.

(A) The chief of the division of oil and gas resources management, or the chief's authorized representatives, shall enforce this chapter and the rules, terms and conditions of permits and registration certificates, and orders adopted or issued pursuant thereto, except that any peace officer, as defined in section 2935.01 of the Revised Code, may arrest for violations of this chapter involving transportation of brine by vehicle. The enforcement authority of the chief includes the authority to issue compliance notices and to enter into compliance agreements.

(B)(1) The chief or the chief's authorized representative may issue an administrative order to an owner for a violation of this chapter or rules adopted under it, terms and conditions of a permit issued under it, a registration certificate that is required under this chapter, or orders issued under this chapter.

(2) The chief may issue an order finding that an owner has committed a material and substantial violation.

(C) The chief, by order, immediately may suspend drilling, operating, or plugging activities that are related to a material and substantial violation and suspend and revoke an unused permit after finding either of the following:

(1) An owner has failed to comply with an order issued under division (B)(2) of this section that is final and nonappealable.

(2) An owner is causing, engaging in, or maintaining a condition or activity that the chief determines presents an imminent danger to the health or safety of the public or that results in or is likely to result in immediate substantial damage to the natural resources of this state.

(D)(1) The chief may issue an order under division (C) of this section without prior notification if reasonable attempts to notify the owner have failed or if the owner is currently in material breach of a prior order, but in such an event notification shall be given as soon thereafter as practical.

BEFORE THE

OIL & GAS COMMISSION

SUMMITCREST, INC.,	:	
Appellant,	:	Appeal No. 843
-vs-	:	
DIVISION OF OIL & GAS RESOURCES MANAGEMENT,	:	Review of Permit Issuance; Chesapeake Exploration, LLC
Appellee,	:	
and	:	**ORDER OF THE COMMISSION DENYING APPELLEE'S MOTION TO DISMISS**
CHESAPEAKE EXPLORATION, LLC,	:	
Intervenor.	:	

Appearances: Steven A. Friedman, Nancy A. White, Counsel for Appellant Summitcrest, Inc.; Molly Corey, Daniel Martin, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; John K. Keller, Robert J. Krummen, Counsel for Intervenor Chesapeake Exploration, LLC.

On April 19, 2012, Appellant Summitcrest, Inc. ["Summitcrest"] filed with the Oil & Gas Commission, a notice of appeal from a decision of the Division ["DOGRM"] Chief granting to Chesapeake Exploration, LLC ["Chesapeake"] a permit to drill an oil & gas well on property owned by Summitcrest. Upon motion, Chesapeake has been granted intervenor status in this matter.

On June 1, 2012, the DOGRM filed a Motion to Dismiss, arguing that the Oil & Gas Commission lacks jurisdiction to hear and decide this appeal. All parties were heard on this motion. In seeking dismissal, the DOGRM argues that Ohio law does not authorize appeals of production well permits to this Commission. Chesapeake supports the Division's motion. Summitcrest opposes the motion.

A hearing on the merits of this appeal has been scheduled for July 23 & 24, 2012. As no administrative hearing has yet been conducted in this matter, the factual basis supporting the parties' arguments is drawn from averments made in the notice of appeal or statements contained in the filings made relative to the pending Motion to Dismiss.

Background

On or about August 8, 2011, Chesapeake filed an application with the DOGRM for a permit to drill a horizontal well on property owned by Summitcrest. On August 22, 2011, the Division granted this application, and issued a drilling permit to Chesapeake [the first permit].

On September 21, 2011, Summitcrest filed an appeal with the Oil & Gas Commission from the Chief's issuance of the first drilling permit. This appeal was assigned case number 838 [the *Summitcrest I* appeal]. Chesapeake was granted intervenor status in the *Summitcrest I* appeal. Chesapeake filed a Motion to Dismiss the *Summitcrest I* appeal, arguing: (1) that the issuance of a drilling permit is not an "order" that may be appealed to the Commission, and (2) that the *Summitcrest I* appeal addressed only issues of "property rights," which issues must be decided by a court, rather than by the Commission.

On December 8, 2011, the Commission issued an order in the *Summitcrest I* appeal, denying Chesapeake's Motion to Dismiss. The Commission found that it was not precluded from hearing appeals from the issuances of drilling permits, and that Summitcrest had properly invoked the Commission's jurisdiction.

As regards "property rights issues" the Commission, in its December 8, 2011 order, acknowledged that the issues relating to property rights are not within the Commission's authority to decide:

> Thus, the Commission is not the proper forum for the resolution of issues regarding the validity of leases or the determination of who possesses superior property rights. These questions must be decided by the courts.

(Order of the Commission, *Summitcrest Inc. vs. Division & Chesapeake Exploration*, #838, December 8, 2011, p. 5.)

Also regarding property rights issues, the Commission held in the *Summitcrest I* appeal:

> While the Commission is not authorized to rule upon the validity of a lease or to determine who holds superior property rights where a dispute exists, the Commission is authorized to review the actions of the DOGRM Chief, and to determine whether the Chief properly considered and evaluated an application for a drilling permit. Issues regarding the "integrity" of the DOGRM's permitting process may be considered by this Commission. Therefore the Commission **FINDS** that it is proper for the Commission to review the DOGRM Chief's evaluation of the "Affidavit of Ownership" filed in support of Chesapeake's proposed wells.

(Order of the Commission, *Summitcrest Inc. vs. Division & Chesapeake Exploration*, #838, December 8, 2011, p. 6.)

The *Summitcrest I* appeal was scheduled for a hearing upon its merits. On January 17, 2012, prior to the scheduled hearing, Chesapeake voluntarily cancelled its first permit to drill on the Summitcrest property. On January 20, 2012, the parties to the *Summitcrest I* appeal filed an Agreed Joint Motion for Dismissal of that appeal. The parties' Agreed Joint Motion for Dismissal was accepted by the Commission, and on January 23, 2012, the *Summitcrest I* appeal was closed.

On February 16, 2012, Chesapeake filed with the DOGRM a second application to drill a horizontal well on the Summitcrest property. This application appears to address the same well that had been proposed under the first permit. On March 21, 2012, the DOGRM granted the second application, and issued a drilling permit to Chesapeake [the second permit].

On April 19, 2011, Summitcrest filed a second appeal with the Oil & Gas Commission. This appeal was taken from the Chief's issuance of the second drilling permit. The second appeal was assigned case number 843 [the current appeal, *Summitcrest II*]. As grounds for its appeal, Summitcrest asserts that Chesapeake is not an "owner" within the meaning of O.R.C. §1509.01(K) and, does not hold the requisite interests in Summitcrest's property to support the issuance of a drilling permit.

On October 20, 2011 (during the pendency of the *Summitcrest I* appeal), Summitcrest filed a Complaint for Declaratory Relief with the Columbiana County Court of Common Pleas (*Summitcrest, Inc. v. Eric Petroleum Corp. et al.*, case no. 2011-CV-745). In the Columbiana County Court, Summitcrest seeks a declaration that Chesapeake possesses no right to drill on Summitcrest's property. The action in the Columbiana County Court remains pending, and is scheduled for trial on October 3, 2012.

The Commission's jurisdiction over the issuance of a drilling permit

In its Motion to Dismiss, the DOGRM argues that a drilling permit is not an "order" that may be appealed to the Commission. Chesapeake concurs with the DOGRM's argument. Summitcrest counters, asserting that granting of a drilling permit is an appealable order, and that Summitcrest is entitled to administrative review of such a decision.

O.R.C. §1509.36 addresses the jurisdiction of the Oil & Gas Commission, and provides in part:

> Any person adversely affected by an **order** by the chief of the division of [oil and gas] resources management may appeal to the oil and gas commission for an order vacating or modifying the **order**.

(Emphasis added.)

O.R.C. §1509.06(F) addresses decisions of the Chief relative to applications for permits, and contains the following language:

> (F) The chief shall issue an order denying a permit if the chief finds that there is a substantial risk that the operation will result in violations of this chapter or rules adopted under it that will present an imminent danger to public health or safety or damage to the environment, provided that where the chief finds that terms or conditions of the permit can reasonably be expected to prevent such violations, the chief shall issue the permit subject to

> those terms or conditions, including, if applicable, terms and conditions regarding subjects identified in rules adopted under section 1509.03 of the Revised Code. **The issuance of a permit shall not be considered an order of the chief.**

(Emphasis added.)

Citing the language of O.R.C. §1509.06(F), the DOGRM argues that the issuance of a drilling permit is not an **order** of the Chief, and, therefore, is not appealable to the Commission under the language of O.R.C. §1509.36.

However, O.R.C. §1509.03(B) suggests that the issuance of a permit may be accomplished through the issuance of an order by the DOGRM Chief:[1]

> (B) Any **order issuing**, denying, or modifying **a permit** or notices required to be made by the chief pursuant to this chapter shall be made in compliance with Chapter 119. of the Revised Code, except that personal service may be used in lieu of service by mail. Every order issuing, denying, or modifying a permit under this chapter and described as such shall be considered an adjudication order of purposes of Chapter 119. of the Revised Code.

(Emphasis added.)

The Oil & Gas Commission is created pursuant to O.R.C. §1509.35 to provide an administrative forum for the review of orders issued by the DOGRM Chief.

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[1] O.R.C. §1509.03(B) has been amended, effective June 11, 2012, as follows:

> (B) Any order issuing, denying, or modifying a permit or notices required to be made by the chief pursuant to this chapter shall be made in compliance with Chapter 119. of the Revised Code, except that personal service may be used in lieu of service by mail. Every order issuing, denying, or modifying a permit under this chapter and described as such shall be considered an adjudication order of purposes of Chapter 119. of the Revised Code. **Division (B)(1) of this section does not apply to a permit issued under section 1509.06 of the Revised Code.**

(Emphasis applied to language added to O.R.C. §1509.03(B)(1) through Amended Substituted Senate Bill 315, effective June 11, 2012.) Summitcrest's current appeal was filed on April 19, 2012, prior to the amendment of O.R.C. §1509.03. Summitcrest's appellate rights vested under the previous version of O.R.C. §1509.03(B). While the amended language of O.R.C. 1509.03(B) may affect the ability of appellants to bring appeals from the issuance of drilling permit to the Commission in the future, the amended language of O.R.C. §1509.03(B) may not be retroactively applied to the appellate rights, which were vested in Summitcrest prior to the enactment of this amendment.

Despite the language of O.R.C. §1509.06(F), which states that "[t]he issuance of a permit shall not be considered an order of the chief," on April 19, 2012, O.R.C. §1509.03(B) also provided that the DOGRM Chief may make orders issuing a permit, which shall be considered adjudication orders.[2] This inconsistency in statutory language was significant to the Commission, and supported the Commission's denial of the Motion to Dismiss in the *Summitcrest I* appeal. At the time of the filing of the *Summitcrest II* appeal, the same statutory language applied. Therefore, there is no cause for a different result.

Moreover, the statutory and regulatory provisions directly addressing the jurisdiction of the Oil & Gas Commission did not specifically preclude an appeal of the Chief's issuance of a drilling permit to the Oil & Gas Commission on April 19, 2012 (the date of appeal). *See O.R.C. §1509.36, and O.A.C. §1509-1-01 thru §1509-1-26.*[3]

Based upon the statutory language in effect when Summitcrest filed its appeal to the Commission on April 19, 2012, the Commission cannot find that it is precluded from hearing Summitcrest's appeal from the issuance of the second Chesapeake permit. The Commission **FINDS** that Summitcrest has properly invoked the Commission's jurisdiction to consider the Chief's issuance of the second drilling permit, and this matter shall proceed to hearing as scheduled on July 23 & 24, 2012.[4]

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[2] In fact, prior to June 11, 2012, this Commission had heard, and decided, appeals addressing the issuances of drilling permits. See: *Lawrence & Shalyne Fox vs. Division & Everflow Eastern*, # 822 (September 29, 2010); *City of Munroe Falls vs. Division & D&L Energy*, # 793 (August 7, 2008).

[3] The recent amendment of O.R.C. §1509.03(B) attempts to clarify the inconsistencies in statutory language that existed prior to June 11, 2012. Whether the Commission accepts jurisdiction over appeals from the issuances of drilling permits in the future will be determined in light of the newly amended statutory language.

[4] The Commission is aware of the pending action in the Columbiana County Court of Common Pleas. Summitcrest's Notice of Appeal suggests that this Commission may choose to hold appeal 843 in abeyance, until the court resolves the property rights issues raised in the common pleas court action. If a motion to hold the Commission's appeal in abeyance is filed, the Commission will evaluate the question of whether delaying the Commission's proceedings is appropriate in this case.

ORDER

Wherefore, based upon the foregoing discussion, Appellee's Motion to Dismiss is **DENIED**, and this appeal shall **proceed** to hearing upon its merits.

Date Issued: July 10, 2012

Karen H. Fryer WD
KAREN H. FRYER, Acting Chairman

RECUSED
ROBERT W. CHASE

RECUSED
M. HOWARD PETRICOFF, Chairman

Jerry D. Jordan WD
JERRY D. JORDAN

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BEFORE THE

OIL & GAS COMMISSION

SUMMITCREST, INC.,	:	
Appellant,	:	Appeal No. 843
-vs-	:	
DIVISION OF OIL & GAS RESOURCES MANAGEMENT,	:	Review of Permit Issuance; Chesapeake Exploration, LLC
Appellee,	:	
and	:	**FINDINGS, CONCLUSIONS AND ORDER OF THE COMMISSION**
CHESAPEAKE EXPLORATION, LLC,	:	
Intervenor.	:	

Appearances: Steven A. Friedman, Nancy A. White, Counsel for Appellant Summitcrest, Inc.; Molly Corey, Daniel Martin, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; John K. Keller, Robert J. Krummen, Counsel for Intervenor Chesapeake Exploration, LLC.

Date Issued: August 8, 2012

BACKGROUND

This matter came before the Oil & Gas Commission upon appeal by Summitcrest, Inc. ["Summitcrest"] from a decision of the Chief of the Division Oil & Gas Resources Management [the "Division"] granting to Chesapeake Exploration, LLC ["Chesapeake"] a permit to drill a horizontal oil & gas well on property owned by Summitcrest in Columbiana County, Ohio. The drilling permit issued by the Division Chief granted to Chesapeake the authority to drill a well to be known as the Summitcrest 35-14-4 #3H Well [the "#3H Well"]. Chesapeake was the recipient of this drilling permit, and intends to drill and operate the #3H Well.

Summitcrest filed its appeal from the issuance of this drilling permit with the Commission on April 19, 2012. Chesapeake moved for intervention into this action. The Commission granted Chesapeake's request for intervention, and Chesapeake has participated in this appeal with full-party status. Chesapeake's position is adverse to Summitcrest's position.

On July 23, 2012, this cause came on for hearing before three members of the Oil & Gas Commission.[1] Commission members Howard Petricoff and Robert Chase recused themselves from this appeal, and did not participate. Douglas Gonzalez participated as a temporary Commission member, pursuant to the provisions of O.R.C. §1509.35(C).[2] At hearing, the parties presented evidence and examined witnesses appearing for and against them.

ISSUE

The issue presented by this appeal is: **Whether the Chief acted lawfully and reasonably in granting a drilling permit to Chesapeake for the well to be known as the Summitcrest 35-14-4 #3H Well.**

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[1] Prior to hearing, the Division filed a Motion to Dismiss this appeal, asserting that the Commission lacks jurisdiction in this matter. The Division's motion was supported by Chesapeake, and opposed by Summitcrest. By order dated July 10, 2012, the Commission denied the Division's motion, and held that the Commission's jurisdiction was properly invoked, and that this matter would proceed to hearing.

[2] The Oil & Gas Commission is created pursuant to O.R.C. §1509.35. O.R.C. §1509.35(B) provides in part:

> Three members constitute a quorum and no action of the commission is valid unless it has the concurrence of at least a majority of the members voting on that action.

In this matter, as the result of one vacancy and two recusals, the Commission was unable to seat a quorum of three members. Where a quorum of regularly-appointed Commission members cannot be achieved, O.R.C. §1509.35(C) provides:

> If the chairperson of the commission determines that a quorum cannot be obtained for the purpose of considering a matter that will be before the commission because of vacancies or recusal of its members, the chairperson may contact the technical advisory council on oil and gas created in section 1509.38 of the Revised Code and request a list of members of the council who may serve as temporary members of the commission. Using the list provided by the council, the chairperson may appoint temporary members to the commission. The appointment of temporary members shall be for only the matter for which a quorum cannot be obtained. The number of temporary members appointed by the chairperson shall not exceed the number that is necessary to obtain a quorum for the matter. A temporary member of the commission has the same authority, rights, and obligations as a member of the commission, including the right to compensation and other expenses as provided in this section. The authority, rights, and obligations of a temporary member cease when the temporary member's service on the commission ends.

Acting Chairperson Karen Fryer followed the procedures of O.R.C. §1509.35(C), and Technical Advisory Council member Douglas Gonzalez was appointed as a temporary Commission member for the purpose of hearing and deciding the immediate appeal.

THE LAW

1. Pursuant to O.R.C. §1509.36, the Commission will affirm the Division Chief if the Commission finds that the order appealed is lawful and reasonable.

2. In accordance with O.R.C. §1509.05, all oil & gas wells, operated within the State of Ohio, must be permitted by the Chief of the Division of Oil & Gas Resources Management. O.R.C. §1509.05 provides in pertinent part:

> No person shall drill a new well . . . without having a permit to do so issued by the chief of the division of oil and gas resources management ... .

Pursuant to O.R.C. §1509.02:

> The division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state, excepting only those activities regulated under federal laws for which oversight has been delegated to the environmental protection agency and activities regulated under section 6111.02 to 6111.029 [regarding wetland protection] of the Revised Code.

3. O.R.C. §1509.06(A) requires that an application for a permit to drill an oil & gas well be filed with the Division Chief, upon such form as the Chief prescribes.

4. O.A.C. §1501:9-1-02(A)(4) requires that an application for a permit to drill include:

> (4) An affidavit that the applicant is the owner as defined in section 1509.01 of the Revised Code. ... .

5. O.R.C. §1509.01(K) defines an "owner," in the following manner:

> (K) "Owner," . . . means the person who has the right to drill on a tract or drilling unit, to drill into and produce from a pool, and to appropriate the oil or gas produced therefrom either for the person or for others, ...

6. O.R.C. §1509.06 addresses the Division Chief's processing of permit applications, and provides in part:

> (C)(1) Except as provided [with regards to wells that will be located within an urbanized area] the chief shall not issue a permit for at least ten days after the date of filing of the application for the permit, ... However, the chief shall issue a permit within twenty-one days of the filing of the application unless the chief denies the application by order.
>
> * * *
>
> (F) The chief shall issue an order denying a permit if the chief finds that there is a substantial risk that the operation will result in violations of this chapter or rules adopted under it that will present an imminent danger to public health or safety or damage to the environment, provided that where the chief finds that terms or conditions to the permit can reasonably be expected to prevent such violations, the chief shall issue the permit subject to those terms or conditions, including, if applicable, terms and conditions regarding subjects identified in rules adopted under section 1509.03 of the Revised Code... .

FINDINGS OF FACT

1. Summitcrest, Inc. is an Ohio corporation, engaged in farming, ranching and beef genetics. Summitcrest is the surface owner of approximately 2,734 acres of land in Columbiana County, Ohio.

2. On April 24, 2004, Summitcrest signed a lease with Mason Dixon, leasing the oil & gas rights on its 2,734 acres of land in Columbiana County, Ohio. This lease contained specific terms relating to the "continuous development" of the oil & gas resources underlying the Summitcrest property.

3. On August 30, 2004, Mason Dixon assigned this lease to Burlington Resources. Through a series of assignments, the 2004 Summitcrest lease was ultimately assigned to Chesapeake. Between 2004 and 2012, one well, the #I-35 Well, was drilled on this property.

4. In September and October 2010, Summitcrest filed with the Columbiana County Recorder's Office an Affidavit of Noncompliance and an Affidavit of Forfeiture, relating to the 2004 oil & gas lease. (See Summitcrest's Exhibit A.) These documents indicate Summitcrest's belief that the 2004 lease had expired as a result of the lessee's (or its assignees') failure to achieve continuous development under this lease.

5. On August 8, 2011, Chesapeake (now the assignee of the 2004 Summitcrest lease) filed with the Division an application to drill a well on the Summitcrest property.

6. On August 22, 2011, the Division granted Chesapeake's drilling permit.[3] On August 25, 2011, Summitcrest received from Chesapeake a Notice of Intent to Drill this well. Summitcrest maintains that this was its first notice that Chesapeake had been assigned the 2004 lease, and its first notice that Chesapeake intended to drill a well on its property.

7. On September 21, 2011, Summitcrest filed an appeal from the Chief's issuance of the 2011 permit to the Oil & Gas Commission (appeal #838, also known as the *Summitcrest I* appeal). In the *Summitcrest I* appeal, Summitcrest contested the issuance of the 2011 permit, asserting that the Division Chief's issuance of this permit was unlawful or unreasonable. Chesapeake participated in this appeal as an intervenor.

[3]This well permit, issued in 2011 [the "2011 permit"], is not the subject of this appeal. However, information regarding the 2011 permit is provided as factual background.

8. On October 20, 2011, Summitcrest filed a Complaint for Declaratory Relief in the Columbiana Court of Common Pleas, challenging Chesapeake's right to drill under the 2004 lease (*Summitcrest, Inc. vs. Eric Petroleum Corporation, et al.*, case # 2011 CV 745; see Summitcrest's Exhibit A.). This action remains pending before the court.

9. On January 17, 2012, Chesapeake voluntarily cancelled the 2011 permit. Cancellation of the 2011 permit led to the termination of the *Summitcrest I* appeal (#838), without hearing.

10. On February 16, 2012, Chesapeake submitted a second application to drill an oil & gas well on the Summitcrest property. This well would be known as the Summitcrest 35-14-4 #3H Well (the "#3H Well," and the subject of this appeal). The proposed #3H Well would be horizontally drilled, and would produce from the Point Pleasant Formation. The application included an Affidavit of Ownership, signed by a representative of Chesapeake, and notarized, which attested to the following:

> I, the undersigned, further depose and state that I am the person who has the right to drill on the tract of drilling unit and to drill into and produce from a pool and to appropriate the oil or gas that I produce therefrom either for myself or others as described in the application.

11. On February 16, 2012, counsel for Chesapeake notified counsel for Summitcrest, of the filing of the second application for a drilling permit.

12. On February 21, 2012, counsel for Summitcrest sent a letter to the Division, notifying the Division of the declaratory relief action pending in the Columbiana County Court of Common Pleas. (See Summitcrest's Exhibit B.) This letter concluded as follows:

> By reason of the foregoing, Summitcrest hereby challenges and objects to the Application [for a permit to drill the #3H Well] filed by Chesapeake, and respectfully requests that the Division deny the Application for lack of adequate property rights on the part of Chesapeake, or, in the alternative, hold the Application in abeyance until final adjudication of the property dispute between the parties.

At hearing, Division geologist Steve Opritza testified that he considered the information submitted by Summitcrest, through the February 21, 2012 letter, during his review of Chesapeake's application for a drilling permit for the #3H Well. During his review of the application for the #3H Well, Mr. Opritza discussed the information included in the February 21, 2012 letter with Division staff, the Division Chief and legal counsel for the Division.

13. On March 21, 2012, the Division issued a drilling permit for the #3H Well. The permit is effective for a two-year period, and will expire on March 21, 2014.

14. On April 19, 2012, Summitcrest filed an appeal with the Oil & Gas Commission from the Division Chief's issuance of the #3H Well permit to Chesapeake (appeal #843, also known as the *Summitcrest II* appeal).

CONCLUSIONS OF LAW

1. Pursuant to O.R.C. §1509.36, the Commission will affirm the Division Chief, if the Commission finds that the order appealed is lawful and reasonable.

2. It is not unlawful or unreasonable for the Division to grant a drilling permit, where an applicant has submitted an application, that is proper in form, and which application includes information to support the applicant's oil & gas rights in the property subject to the permit, even if such rights may be contested between the parties to a lease.

3. In the permitting process, it is not unlawful or unreasonable for the Division to fail to give, or require, certain notification to landowners or royalty interest holders, where such notice is not required by statute or regulation.

4. The Division's issuance of a drilling permit for the Summitcrest 35-14-4 #3H Well was not unlawful or unreasonable.

DISCUSSION

Ohio's oil & gas law requires that the drilling and operation of oil & gas wells be permitted by the Division of Oil & Gas Resources Management. See O.R.C. §1509.05. By statute, the Division Chief possesses the sole permitting authority for such operations. See O.R.C. §1509.02. In determining whether the permitting of a particular well site is appropriate, the Division will review, and evaluate, an application filed in support of the proposed well. See O.R.C. §1509.06.

At hearing, counsel for Chesapeake astutely recognized that the drilling of an oil & gas well must "stand on two legs." First, the driller must have the oil & gas rights (the "property rights") to support the drilling of a well. And, second, the driller must be in possession of a drilling permit issued by the State of Ohio. Both of these items are necessary to the drilling and development of a proposed well.[4]

Here, Chesapeake has sought, and received, a drilling permit from the Division of Oil & Gas Resources Management. One requirement of an application for such a permit is that the applicant file an Affidavit of Ownership, attesting to its ownership of the oil & gas rights necessary to drill the well.

In this regard, O.A.C. §1501:9-1-02(A)(4) requires that an application for a permit to drill include:

> (4) An affidavit that the applicant is the owner as defined in section 1509.01 of the Revised Code. ... .

The Affidavit of Ownership is set forth on the Division's application form. And, in this case, Chesapeake signed and submitted this form, attesting that:

[4] If an operator obtains a drilling permit, there is nothing in the law that would preclude the operator from commencing drilling operations. In this case, counsel for Chesapeake indicated that, in light of the pending declaratory judgment action in the Columbiana County Court of Common Pleas, Chesapeake would not commence drilling operations until the common pleas action is resolved. However, should Chesapeake decide to exercise its rights under the drilling permit, Summitcrest would have the opportunity to seek an injunction from the common pleas court.

> I, the undersigned, further depose and state that I am the person who has the right to drill on the tract of drilling unit and to drill into and produce from a pool and to appropriate the oil or gas that I produce therefrom either for myself or others as described in the application.

Summitcrest asserts that the lease, under which Chesapeake claims its rights, as an owner, to drill and produce the oil & gas from the Summitcrest property, has expired. Summitcrest argues that the Division should have denied, or delayed, the issuance of the #3H Well permit, based upon the pending common pleas court action that challenges Chesapeake's lease rights.

Is it reasonable and lawful for the Division to grant a drilling permit, to an assignee of an oil & gas lease whose ownership rights are contested?

In this case, Chesapeake has sought, and received, a drilling permit for the #3H Well, which is to be drilled on land owned by Summitcrest. Chesapeake attests to possessing the oil & gas rights for this well, under a 2004 lease between landowner Summitcrest and Mason Dixon. Chesapeake is an assignee of this lease. While an assignment of 2004 lease rights to Chesapeake appears to be documented (see attachments to Summitcrest's Exhibits A & B), Summitcrest claims: (1) that certain provisions of the 2004 lease have not been honored, (2) that the lease has, therefore, terminated, and (3) that Chesapeake does not currently possess sufficient property rights to support a drilling permit.

Summitcrest has taken this property rights dispute to the Court of Common Pleas for Columbiana County, Ohio, which is the appropriate forum to address such a conflict.

This Commission has consistently held that it does not possess the authority to adjudicate property rights, or to determine who possesses superior rights under a lease. See *Bass Energy v. Division & Duck Creek Energy*, #815 (Jan. 29, 2010); *Clarence Tussel Jr., et al. v. Division & Kastle Resource s Enterprises*, #818, Order Granting Motion in *Limine* (July 16, 2010); *City of Munroe Falls v. Division & Beck Energy*, Order Granting Motion in *Limine*, #835 (Oct. 14, 2011); *Summitcrest, Inc. v. Division & Chesapeake Exploration*, # 838, Order Denying Motion to Dismiss (Dec. 8, 2011); *Summitcrest, Inc. v. Division & Chesapeake Exploration*, # 843, Order Denying Motion to Dismiss (July 10, 2012) and Order on Motion in *Limine* (July 21, 2012); see also *Doolittle v. Transcontinental Oil and Gas, Inc.*, Franklin Cty. C.P. 94-CVF-02-039 (Nov. 30, 1994).

In this case, a true controversy exists between Summitcrest and Chesapeake relating to the effect of certain language contained in the 2004 lease. This language will be reviewed and adjudicated by the Columbiana County Court of Common Pleas. Summitcrest believes that Chesapeake lacks the right to drill on its property. And Chesapeake believes that it possesses this right under the 2004 lease. Both parties are firmly convinced of their respective positions, and it will be the task of the Columbiana County to determine whose position will prevail.

Issues relating to the interpretation of clauses within a lease are, clearly, not items that this Commission may consider. Likewise, the Division has no authority to decide such property rights issues or to interpret the specific language of leases. However, this Commission does have the authority to evaluate the adequacy of the Division's review of a permit application.

Division geologist Steve Opritza (who was ultimately responsible for the review of the #3H Well application) was made aware of the conflict being addressed by the Columbiana County court. During his review of the application for the #3H Well, Mr. Opritza was in possession of the February 21, 2012 letter from Summitcrest's counsel, indicating Summitcrest's contention that Chesapeake did not possess adequate property rights to support this permit. However, Mr. Opritza was also in possession of Chesapeake's Affidavit of Ownership, wherein Chesapeake attests to its rights as an owner of the oil & gas interest in the property at issue.

In past cases, Mr. Opritza has discussed his evaluation of Affidavits of Ownership. Indeed, regarding the Summitcrest property at issue in this case, Mr. Opritza has stated that if:

> . . . the veracity of an Affidavit of Ownership is called into question or challenged during the application review, I would have taken all necessary steps to assure that Chesapeake possessed adequate property rights.[5]

Here, Summitcrest argues that the Division did not take "all necessary steps" to assure that Chesapeake possessed adequate oil & gas rights in the proposed #3H Well.

[5] From the Affidavit of Steve Opritza, filed in support of a Motion for Summary Judgment in the *Summitcrest I* appeal, and admitted as part of Summitcrest's Exhibit B in the immediate appeal.

The Commission is aware that, in prior cases, where the Division had concerns relative to the veracity of an Affidavit of Ownership, or concerns relating to the validity of leases, the Division has required applicants to provide the Division with copies of the actual leases at issue. See *Seagull Development Corporation v. Division*, #817 (April 19, 2010). In this case, Mr. Opritza was in possession of documents that supported Chesapeake's rights as an assignee of the 2004 Summitcrest lease. (See Attachments to February 21, 2012 letter, Summitcrest's Exhibit B.) However, Mr. Opritza was also aware that Summitcrest was contesting these lease rights, and alleging non-compliance with specific lease language. Neither Mr. Opritza, nor the Division, could resolve these issues. Therefore, Mr. Opritza testified that he discussed this matter with Division personnel, including the Chief, and sought advice of counsel.

Had Summitcrest presented to the Division a court order, clearly determining that Chesapeake lacked the requisite lease rights to support a permit, the Division would have been required to deny the #3H Well permit. But, no such court order has been entered. Moreover, the permitting statute (O.R.C. §1509.06) does not provide a procedure by which the Division may "hold applications in abeyance," awaiting the results of litigation between parties to a lease.

The Commission cannot find that it was unreasonable or unlawful for the Division to grant a drilling permit to an assignee of a lease, even in light of a conflict between the parties to that lease regarding possible interpretations of specific lease provisions.

Is it reasonable and lawful for the Division to grant a drilling permit, in a situation where notice of the filing of the permit application has not been provided to affected landowners?

In this case, Summitcrest actually received notice of Chesapeake's submission of a permit application for the #3H Well. In fact, notice to Summitcrest was given on the same day that the application was submitted. Therefore, Summitcrest has not been prejudiced by any perceived failures of notice.

However, Summitcrest has argued that the failure of the Division, or the permit applicant, to provide notice to property owners or royalty holders, upon applying for a drilling permit, is unreasonable. Summitcrest notes that the Division has committed to enhanced review of the Affidavit of Ownership, in situations were the "veracity of an Affidavit of Ownership is called into question or challenged." But, Summitcrest maintains that the failure to provide notice to affected landowners effectively precludes landowners from raising such issues at the time of application.

For wells proposed in non-urbanized settings, there is no statutory requirement that the Division, or the permit applicant, provide notice of the filing of a permit application to any persons, including the landowners whose oil & gas rights are under lease to the permit applicant.[6] Where notice is not required by statute, it cannot be unreasonable or unlawful for the Division, or a permit applicant, to fail to provide such notice. See *City of Munroe Falls v. Division and D&L Energy, Inc.*, #793 (August 7, 2008).

To the extent to which Summitcrest argues that failure to provide notice of events associated with the permitting of an oil & gas well violates due process, this Commission is without authority to address constitutional issues of this nature. See *Mobil Oil Corp. v. City of Rocky River*, 38 Ohio St.2d 23, 26, 309 N.E.2d 900 (1974); *Jones v. Village of Chagrin Falls*, 77 Ohio St.3d 456, 460, 674 N.E.2d 1388 (1997); *Bass Energy v. Division & Duck Creek Energy*, *supra*. To the extent to which Summitcrest argues that failure to provide notice of permitting events **should**, reasonably, be required by the Division, the Commission notes that the failure of Chapter 1509 to require notice is an issue that must be addressed with the legislators of the State of Ohio. Neither the Commission, nor the Division, can add requirements to the law, any more than they can remove requirements that have been enacted by the legislature.

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[6] An "urbanized area" is defined at O.R.C. §1509.01(Y) as:

> "Urbanized area" means an area where a well or production facilities of a well are located within a municipal corporation or within a township that has an unincorporated population of more than five thousand in the most recent federal decennial census prior to the issuance of the permit for the well or production facilities.

The #3H Well is not proposed to be located in an "urbanized area." However, where wells are proposed to be located in "urbanized areas," O.R.C. §1509.06(9) requires the following notice:

> (9) For an application for a permit to drill a new well within an urbanized area, a sworn statement that the applicant has provided notice by regular mail of the application to the owner of each parcel of real property that is located within five hundred feet of the surface location of the well and to the executive authority of the municipal corporation or the board of township trustees of the township, as applicable, in which the well is to be located.

The drilling of oil & gas wells could not occur without the cooperation of landowners, as leases are an essential component of an oil & gas operation, and a significant asset to any oil & gas operator. The Commission is aware that some operators voluntarily provide various notices to their landowner/lessors, even though not required by law to do so. The Commission would encourage such "openness" between operators and the landowner/lessors who have elected to participate in the development of a well. However, as the notice suggested by Summitcrest is not required by law, the Commission cannot find it unlawful or unreasonable when such notice is not provided.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **AFFIRMS** the Division's issuance of the Summitcrest #3H drilling permit to Chesapeake Exploration, LLC.

Date Issued: 8/8/2012

Karen H. Fryer w/o
KAREN H. FRYER, Acting Chairman

RECUSED
ROBERT W. CHASE

RECUSED
M. HOWARD PETRICOFF, Chairman

Jerry D. Jordan w/o
JERRY D. JORDAN

Douglas W. Gonzalez w/o
DOUGLAS W. GONZALEZ

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Common Pleas for Franklin County, within thirty days of your receipt of this decision, in accordance with Ohio Revised Code §1509.37.

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BEFORE THE

OIL & GAS COMMISSION

SUMMITCREST, INC., Appellant, -vs- DIVISION OF OIL & GAS RESOURCES MANAGEMENT, Appellee, and CHESAPEAKE EXPLORATION, LLC, Intervenor.	:	Appeal No. 843 Review of Permit Issuance; Chesapeake Exploration, LLC **INDEX OF EVIDENCE PRESENTED AT HEARING**

Before: Karen Fryer

In Attendance: Jerry Jordan, Douglas Gonzalez

Appearances: Steven A. Friedman, Counsel for Appellant Summitcrest, Inc.; Molly Corey, Daniel Martin, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; John K. Keller, Robert J. Krummen, Counsel for Intervenor Chesapeake Exploration, LLC.

WITNESS INDEX

Appellant's Witnesses:

EXHIBIT INDEX

Appellant Summitcrest's Exhibits:

Appellant Summitcrest's Exhibit A	Verified Complaint for Declaratory Relief, *Summitcrest, Inc. v. Eric Petroleum Corporation, et al.*, with attachments, case no. 2011 CV 745, Court of Common Pleas, Columbiana County; filed October 20, 2011 (37 pages)
Appellant Summitcrest's Exhibit B	Letter, Friedman (counsel to Summitcrest) to Opritza (Division); dated February 21, 2012, with attachments (99 pages)

Appellee Division's Exhibits:

Appellee Division's Exhibit A	Application aPATT020417 package for the re-issuance of the Summitcrest permit; Summitcrest 35-14-4 #3H Well; received February 16, 2012 (10 pages)
Appellee Division's Exhibit B	Well Permit # 34-029-2-1696-00-00; issued March 21, 2012 (4 pages)
Appellee Division's Exhibit C	Series of E-mails between Friedman (counsel for Summitcrest) and Opritza (Division) (3 pages)

Intervenor Chesapeake's Exhibits:

Intervenor Chesapeake's Exhibit 1	Letter, Carlisle (Burlington) to Johnson (Summitcrest); dated April 18, 2005, with attached record of payment #0000905398 (3 pages)
Intervenor Chesapeake's Exhibit 2	Letter, Hill (Eric Petroleum) to Summitcrest, Inc.; dated December 22, 2008, with attached copy of check #37263 (3 pages)
Intervenor Chesapeake's Exhibit 3	Affidavit of Forfeiture, filed by Frederick H. Johnson, III, recorded in Columbiana County on October 26, 2010 (19 pages)