

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
KEITH J. KERNS, et al,

Relators

Case No. 2016-1011

v.

RICHARD J. SIMMERS, et al,

Respondents

Original Action in Mandamus

**RELATORS' AMENDED CASE CAPTION ADDING "STATE OF OHIO EX REL." TO
VERIFIED COMPLAINT
PURSUANT TO S.CT.PRAC.R. 3.13 AND CIVIL RULES 15(A) AND 17(A)**

Attorneys for Respondent:

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Pursuant to Civil Rules 15(A) and 17(A), S.Ct.Prac.R. 3.13(A) and this Court's decision in *State ex rel. Huntington Insurance Agency, Inc. v. Duryee, Superintendent*, 75 Ohio St.3d 530, 533 (1995),

Relators hereby amend the case caption to add that the instant action is brought in the name of the "State of Ohio ex rel." on relation of each of the named Relators.

As stated by this Court in the *Huntington* case at page 532, "R.C. 2731.04 provides that an action for a writ of mandamus 'must be *** in the name of the state on the relation of the person applying ***.'" In the *Huntington* case, this Court granted leave to amend the case caption after the time period when amendments are allowed as a matter of course.

In the instant case, the time period for amendment of the pleadings without leave of court has not expired, that is, 28 days after service of the Complaint or within 28 days after service of the responsive pleading. The Complaint herein was served on July 12, 2016 and the responsive pleading was mailed on August 2, 2016.

Accordingly, Relators hereby amend the case caption instanter in compliance with Ohio Revised Code Section 2731.04, Civil Rules 15(A) and 17(A), S.Ct.Prac.R. 3.13(A) and this Court's decision in the *Huntington* case.

The revised caption is set forth on the Verified Complaint attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Relators' Amended Case Caption Added to the Verified Complaint was served by e-mail upon Brian J. Becker, Esq. and Daniel J. Martin, Esq. counsel for Respondents on this 4th day of August 2016.

/s/ Phillip J. Campanella
Phillip J. Campanella (0010875)

Attorney for Relators

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
KEITH J. KERNS
COREY A. KERNS
5968 Norwalk Road
Medina, OH 44256

CASE NO. 2016-1011

MARK ZANTENE
35100 Gundy Ridge Road
Scio, OH 43988
LINDA ZANTENE
35100 Gundy Ridge Road
Scio, OH 43988

**VERIFIED COMPLAINT FOR
WRIT OF MANDAMUS
WITH ADDITION OF "STATE OF OHIO EX REL."
IN CASE CAPTION**

ROBERT J. ZANTENE TRUST,
MARK ZANTENE and
CATHY SKUBOVIOUS
TRUSTEES
39035 Hanover Ridge Rd
Scio, OH 43988

HELEN ZANTENE
35011 Gundy Ridge Road
Scio, OH 43988

CONNIE HUHN
107 Kari Lane
Byesville, OH 43723

RELATORS

v.

RICHARD J. SIMMERS, CHIEF
DIVISION OF OIL AND GAS RESOURCES MANAGEMENT
2045 Morse Road, Building F-2
Columbus, OH 43229-6693

and

DIVISION OF OIL AND GAS RESOURCES MANAGEMENT
OHIO DEPARTMENT OF NATURAL RESOURCES
2045 Morse Road, Building F-2
Columbus, OH 43229-6693

RESPONDENTS

PRELIMINARY STATEMENT

1. Relators seek a writ of mandamus to compel Respondents to commence appropriation proceedings pursuant to Ohio Revised Code Chapter 163.
2. This Court has jurisdiction pursuant to Article IV, Section 2 and Article I, Section 16 of the Ohio Constitution, and Ohio Revised Code Section 2731.02.
3. This action arises under Article I, Sections 1, 16 and 19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and Ohio Revised Code Section 163.02(A).
4. Relators are owners of 120.549972 acres of land located in Harrison County, Ohio, including the oil, gas and natural gas liquids located in the Utica Point Pleasant shale formation below the surface of such land.
5. The Respondent Division of Oil and Gas Resources Management (DOGRM) is created by Ohio Revised Code Section 1509.02 and is part of the Ohio Department of Natural Resources and conducts its business within the State of Ohio.

6. Respondent Richard J. Simmers is the Chief of the DOGRM and is empowered by Section 1509.02 to administer the DOGRM and to issue orders pursuant to Section 1509.28 compelling the unitization of land for oil and gas drilling.
7. Pursuant to Section 1509.02, the DOGRM has the sole and exclusive authority to regulate the permitting, location and spacing of oil and gas wells and production operations within the State of Ohio.

LAW

8. This Court has “held that mandamus is the vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged.” *State ex rel. Levin v. City of Sheffield Lake*, 70 Ohio St.3d 104, 108 (1994). “In such actions, the court, as the trier of fact and law, must determine whether any property rights of the owner have been taken by the public authority.” *Id. at 108*.
9. This Court has stated that “when the state takes an individual’s private property for transfer to another individual or to a private entity rather than for the use by the state itself, the judicial review of the taking is paramount.” *City of Norwood v. Horney*, 110 Ohio St.3d 353, 376 (2006).
10. Where regulatory action authorizes a permanent physical invasion of private property there is a per se taking for Fifth and Fourteenth Amendment purposes. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

11. Article I, section 19 of the Ohio Constitution states: "Private property shall be held inviolate, but subject to the public welfare. ...and in all other cases, where private property shall be taken for public use, a compensation shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property to the owner."

12. The Fifth and Fourteenth Amendments to the United States Constitution state that property cannot be taken except for public use and if taken for public use there shall be payment of just compensation.

13. Ohio Revised Code Chapter 163 sets forth a comprehensive procedure, compatible with Article I, Section 19 of the Ohio Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, for the appropriation of real property. Section 163.02(A) mandates that "All appropriations of real property shall be made pursuant to sections 163.01 to 163.22 of the Revised Code"

14. This Court has held that oil and gas beneath the surface are part of the realty.

Chesapeake Exploration, L.L.C. v. Buell, Slip Opinion No. 2015-4551, paragraph 21 (2015); *Pure Oil Co. v. Kendall*, 116 Ohio St. 188, 201-02 (1927); *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 328 (1897).

15. Oil and gas rights are property rights protected by the Fifth and Fourteenth Amendments to the United States Constitution and the owners "could not be absolutely deprived of this right which belongs to them without a taking of private property. *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 209, 211 (1900). See also, *Loretto v. Teleprompter*

Manhattan CATV Corp., 458 U.S. 419, 425-26, 435 (1982); *Horne v. Department of Agriculture*, 576 U.S. ____ (2015).

16. The incidents of ownership of property include exclusive possession, custody, control, use, benefit and voluntary disposition. See *City of Norwood v. Horney*, 110 Ohio St.3d 353, 361-62 (2006); *Buchanan v. Warley*, 245 U.S. 60 (1917).

FACTS

17. On November 10, 2014, Chesapeake Exploration, L.L.C. filed an Application with Respondents pursuant to Ohio Revised Code Section 1509.28 to compel the unitization, that is, the aggregation of Relators' land with adjacent land to create an oil and gas drilling unit having a total of 592.8175310 acres of which Relators own 120.5499722 acres. The Application is attached hereto.

18. Exhibit LE-2 attached to the Application depicts the proposed drilling unit. Relators' acreage is shown in green with orange cross-hatching and is referred to as "Non Conforming."

19. The Application requested that Respondent Chief Simmers issue an order authorizing Chesapeake to enter into the Utica Point Pleasant shale formation below the surface of Relators' land in Harrison County, Ohio; and to trespass into said shale formation by horizontal drilling; and further to trespass to inject water, sand and chemicals to hydraulically fracture said shale and to thereby permanently alter the subsurface; to remove oil, gas and natural gas liquids from Relators' land; and to sell the oil, gas and

natural gas liquids, and thereby deprive the Relators of their exclusive possession, control, custody, use, benefit of their land and oil, gas and natural gas liquids.

20. Relators objected to Chesapeake's Application and asserted, among other things, that the Application sought to unlawfully and involuntarily take Relators' property.

21. On July 13, 2015, Respondent Chief Simmers issued an Order granting Chesapeake's Application and directing that Relators' land be unitized and authorized Chesapeake to trespass beneath Relators' land by horizontal drilling into the Utica-Point Pleasant shale formation; and further to trespass to inject water, sand and chemicals to hydraulically fracture said shale and to thereby permanently alter the subsurface; to remove oil, gas and natural gas liquids from Relators' land; and to sell the oil, gas and natural gas liquids, and thereby deprive the Relators of their exclusive possession, control, custody, use, benefit of their land and oil, gas and natural gas liquids, all in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 16, and 19 of the Ohio Constitution, and Ohio Revised Code chapter 163. A copy of Order is attached hereto.

22. The Order issued by Respondent Chief Simmers granting Chesapeake possession, control, custody, use, benefit and disposition of Relators' property constitutes an unlawful involuntary taking of Relators' property and violates Relators' property rights secured by the Fifth and Fourteenth Amendments, and Article I, Sections 1, 16 and 19 of the Ohio Constitution.

23. In the absence of horizontal drilling and hydraulic fracturing beneath the surface of Relators' land, the oil, gas and natural gas liquids located in the shale beneath Relators' land would not migrate to any wellhead located upon land not owned by the Relators.
24. There is no pool of oil, gas or natural gas liquids in the shale located beneath Relators' land which would migrate in the absence of drilling and fracturing beneath Relators' land.
25. Relators appealed the Order of Respondent Chief Simmers to the Ohio Oil and Gas Commission pursuant to Ohio Revised Code Section 1509.36 and on July 7, 2016, the Ohio Oil and Gas Commission dismissed the appeal. The decision of the Ohio Oil and Gas Commission is a final administrative order and Relators have exhausted their Ohio administrative procedures.
26. The Order of Respondent Chief Simmers unlawfully and involuntarily denies Relators of their property; deprives Relators of their constitutional right to have a court and jury assess compensation for the taking of their property; deprives the Relators of their constitutional right to contract; deprives the Relators of exclusive possession, custody, control, use and benefit of their property without a lawful declaration and determination that the property is taken for a public use, or a public purpose, or for the public welfare; denies the Relators of their right to have a court of law determine whether a lawful public use exists for the taking of their property; and impairs Relators' existing contract rights.

PRAYER FOR RELIEF

Relators respectfully request that:

- a. This Court issue a writ of mandamus pursuant to Ohio Revised Code Chapter 2731 compelling the Respondents to forthwith commence appropriation proceedings in accordance with Ohio Revised Code Chapter 163 regarding Relators' property.
- b. Award such other and further relief as the Court deems just and proper in the premises.

Respectfully submitted,

/s/ Phillip J. Campanella
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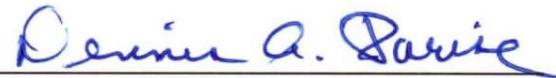
VERIFICATION

Phillip J. Campanella, being first duly sworn accordingly to law, deposes and says:

1. I am the attorney for the Relators and I have represented them in the proceedings before the Respondents and before the Ohio Oil and Gas Commission.
2. I have personal knowledge of all facts set forth in the foregoing Complaint and I am competent to testify thereto.
3. The facts set forth in the foregoing Complaint are true based upon my personal knowledge and belief.


Phillip J. Campanella

Sworn to before me and subscribed in my presence this 8th day of July, 2016.


Dennis A. Parise, Notary Public
My commission expires February 16, 2018

