

**IN THE SUPREME COURT OF OHIO**

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

RELATORS

CASE NO. 2016-1011

v.

Original Action in Mandamus

RICHARD J. SIMMERS, et al

RESPONDENTS

**RELATORS' BRIEF ON THE MERITS**

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## STATEMENT OF FACTS

Relators are owners of 120.549972 acres of real property and the oil, gas and natural gas liquids in the Utica Point Pleasant shale formation beneath the surface of said real property located in Harrison County, Ohio. See Relators' Affidavits filed herein; Verified Complaint, paragraphs 4 and 18. Relators' ownership of the real property is set forth in the deeds recorded in the office of the Recorder of Harrison County, Ohio, copies of which are attached to Relators' Affidavits filed herein.

On July 13, 2015, Respondent Chief Simmers issued an administrative Order taking Relators' property by compelling the unitization, that is, aggregation, of Relators' land with other land into a drilling unit and by authorizing Chesapeake Exploration, L.L.C. (Chesapeake):

to enter into the Utica Point Pleasant shale formation below the surface of Relators' land in Harrison County, Ohio;

to trespass into said shale formation by horizontal drilling;

and further to trespass to inject millions of gallons of water, sand and chemicals to hydraulically fracture said shale and to thereby permanently alter the subsurface;

causing most of the injected water, sand and chemicals to permanently remain beneath the surface of the land;

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. Verified Complaint,

paragraphs 21 and 22; Respondents' Order filed with the Complaint herein and as

Respondents' Exhibit B; Chesapeake's Application filed with the Complaint herein

and as Respondents' Exhibit D; Affidavit of Robert W. Chase, P.E. filed herein.

In Chesapeake's Application at page 4, the Project Description states in part that "Chesapeake anticipates drilling three (3) wells from a pad located in the northeast area of the Our Land Co South Unit for the purpose of recovering oil and gas." At page 7 of its Application, Chesapeake states that "The Unit Plan contemplates the drilling of three (3) horizontal wells from a single well pad, all with lateral lengths of approximately 7,430 feet." Exhibit LE-2 attached to Chesapeake's Application depicts the location of the well pad and 3 wells and also depicts the horizontal drilling beneath Relators' land which is shown in green with orange cross-hatching. The Prepared Testimony of David F. Yard, P.E., attached to Chesapeake's Application as Exhibit 4 explains horizontal drilling and hydraulic fracturing as follows at page 2, lines 22-26: "The permeability of unconventional resource plays is so low ... that the hydrocarbons cannot be economically produced without the use of horizontal drilling, coupled with massive stimulation treatments (i.e. hydraulic fracturing). Horizontal drilling is the predominant method used to develop shale formations such as the Utica/Point Pleasant." As implied in Mr. Yard's testimony, and as testified to by Robert W. Chase, P.E. in his affidavit filed herein, 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 other land.

See also: Ohio Department of Natural Resources, *Geology Update of the Ohio Utica-Point Pleasant Play*, May 23, 2012, noting the low permeability of shale at pages 9-10, 19 and 41,

and a depiction of horizontal drilling at page 43,

[www.epa.Ohio.gov/portals/30/Brownfield/docs](http://www.epa.Ohio.gov/portals/30/Brownfield/docs); The Ohio Department of Natural

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Society of America, *Hydraulic Fracturing's History and Role in Energy Development*, and

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Zuckerman, Gregory, *The Frackers*, at pages 34-39, 73-80, 91-93 discussing the

development of hydraulic fracturing, and at pages 51-52, 55-56 discussing the history of horizontal drilling, (Portfolio/Penguin 2013).

Chesapeake's Application relied upon the provisions of Ohio Revised Code Section 1509.28 to deprive the Relators of their incidents of ownership including exclusive possession, control, custody, use, benefit and voluntary disposition of their land and the oil, gas and natural gas liquids beneath their land.

Ohio Revised Code Section 1509.02 created Respondent Division of Oil and Gas Resources Management (DOGRM) as part of the Ohio Department of Natural Resources "to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state ... ." Verified Complaint, paragraph 5. The DOGRM is administered by Respondent, Chief Richard J. Simmers, pursuant to Section 1509.02. Verified Complaint, paragraph 6.

Relators appealed the Respondent Chief's Order 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. Verified Complaint, paragraph 25. The decision of the Ohio Oil and Gas Commission is a final administrative order and Relators have exhausted their Ohio administrative procedures. Verified Complaint, paragraph 25.

Respondent Chief's Order is substantively and procedurally unlawful because it violates Relators' constitutional rights as granted by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 16 and 19 of the Ohio Constitution, and because the Respondents did not comply with Ohio's appropriation statutes as set forth in Ohio Revised Code Chapter 163. In particular, the Respondent Chief's Order violates: Relators' right to exclusive possession, control, custody, use, benefit and voluntary disposition of their property; Relators' right to due process of law in the taking of Relators' property, including a declaration of public use; Relators' right to have a jury assess the compensation due Relators for the taking of their property; and Relators' right to receive said compensation prior to the taking or to have said compensation secured prior to the taking; and Respondents' duty to comply with Ohio Revised Code 163. Verified Complaint, paragraphs 21, 22 and 26.

## **ARGUMENT**

### **PROPOSITION OF LAW NO. 1:**

**MANDAMUS IS THE PROCESS FOR COMPELLING APPROPRIATION PROCEEDINGS BY AN INSTRUMENTALITY OF THE STATE GOVERNMENT WHERE AN INVOLUNTARY TAKING OF PRIVATE PROPERTY IS ALLEGED.**

This Court has stated: "The United States and Ohio Constitutions guarantee that private

property shall not be taken for public use without just compensation.’ *State ex rel. Shemo v. Mayfield Hts. (2002)*, 95 Ohio St.3d 59, 63 ...Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution. ‘Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.’ *Shemo* at 63.” *State ex rel. Gilbert v. City of Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473 paragraph 14.

In the instant action, the Respondents are instrumentalities of the State of Ohio and Respondent Chief Simmers issued an Order involuntarily taking Relators’ property without complying with Ohio Revised Code Chapter 163. Based on the foregoing authorities and the facts, Relators are entitled to a writ of mandamus compelling the Respondents to institute appropriation proceedings in compliance with Ohio Revised Code Chapter 163.

#### **PROPOSITION OF LAW NO. 2:**

##### **THE INCIDENTS OF OWNERSHIP OF PROPERTY INCLUDE EXCLUSIVE POSSESSION, CUSTODY, CONTROL, USE, BENEFIT AND VOLUNTARY DISPOSITION.**

In *Buchanan v. Warley*, 245 U.S. 60 (1917), the United States Supreme Court recognized that property rights include the incidents of acquisition, use, enjoyment, and disposition, all protected by the constitution. Also as stated by this Court in *City of Norwood v. Horney*, 110 Ohio St.3d 353, 361-62, 2006-Ohio-3799: “The rights related to property, i.e., to acquire, use, enjoy, and dispose property, *Buchanan v. Warley* (1917), 245 U.S. 60, 74, 38 S.Ct. 16, 62 L.Ed. 149, are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty. ...’The right of private property is an *original and fundamental right*, existing anterior to the formation of government itself; ... The right of private property being, therefore, an *original right*, which



it was one of the primary and most sacred objects of government to secure and protect, is widely and essentially distinguished in its nature, from those exclusive political rights and special privileges ... The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, \*\*\*were evidently designed to protect the right of private property as one of the primary and original objects of civil society \*\*\*.” See also, *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio 540 (1941).

Relators are the owners of land and the oil, gas and natural gas liquids located in the Utica Point shale formation beneath the land and therefore have all of the rights incident thereto: acquisition, use, enjoyment, exclusive possession, and disposition. Verified Complaint, paragraph 16; and Relators’ Affidavits filed herein.

**A. RIGHT TO EXCLUDE--THE RIGHT TO EXCLUSIVE POSSESSION INCLUDES THE RIGHT TO EXCLUDE AND IS A PROPERTY RIGHT WHICH CANNOT BE TAKEN BY GOVERNMENT ACTION WITHOUT THE PAYMENT OF COMPENSATION PURSUANT TO ARTICLE I, SECTION 19 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

In *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, paragraph 29, this Court stated that: “Any direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property, for which he is guaranteed a right of compensation by section 19 of the Bill of Rights.’ *Norwood v. Sheen* (1933), 126 Ohio St. 482, 186 N.E. 102, paragraph one of the syllabus.”

Similarly, the United States Supreme Court stated in *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979): “In this case, we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.” In *Kaiser*, the government issued a regulation taking the property owner’s right to exclude the public from accessing its pond.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982) the Supreme Court of the United States noted that a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking and stated that: “a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.”

In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) the U.S. Supreme Court dealt with a state law imposing a cap on the rent oil companies could charge dealers. The Court cited *Loretto* with approval in its holding stating that “Regulatory actions generally will be deemed per se takings for Fifth Amendment purposes (1) where government requires an owner to suffer a permanent physical invasion of her property ... .” *Lingle* at 528.

As noted in *Loretto*, 458 U.S. at 419, the Takings Clause of the Fifth Amendment to the United States Constitution was incorporated into the Fourteenth Amendment and applies to state action. *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 241 (1897).

In the instant action, Relators’ right to exclude has been taken by the Respondents’ Order authorizing Chesapeake to horizontally drill beneath Relators’ land, and to inject millions of

gallons of water, sand and chemicals, causing most of the water, sand and chemicals to remain beneath the surface, for the purpose of fracturing the shale beneath Relators' land, to cause the oil, gas and natural gas liquids to migrate through the bore hole, and to be removed and sold by Chesapeake. See Affidavit of Robert E. Chase, P.E. filed herein.

**B. PERMANENT PHYSICAL INVASION--WHEN AN INSTRUMENTALITY OF STATE GOVERNMENT IMPOSES A PERMANENT INVASION OF PRIVATE PROPERTY, THERE IS A PER SE TAKING OF THE PROPERTY REQUIRING COMPENSATION PURSUANT TO ARTICLE I, SECTION 19 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

Where the government requires a property owner to suffer a permanent invasion of property, there is a per se taking. *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).

In *Lingle* at page 528, the United States Supreme Court held that: "Regulatory actions generally will be deemed per se takings for Fifth Amendment purposes (1) where government requires an owner to suffer permanent physical invasion of her property, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 ... ."

In *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, paragraph 25, this Court quoted *Lingle*, 544 U.S. 528, 539: "[P]hysical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests."

In the instant action, the Order issued by the Respondent Chief is a physical taking because it compels the involuntary unitization of Relators' land into a drilling unit and imposes a permanent invasion of Relators' property by authorizing Chesapeake to horizontally drill

beneath Relators' land and to inject millions of gallons of water into the Utica Point Pleasant shale formation to fracture the shale resulting in most of the water remaining beneath Relators' land.

**C. OIL AND GAS LOCATED BENEATH THE LAND ARE PART OF THE REALTY AND ARE PROPERTY RIGHTS PROTECTED BY ARTICLE I, SECTIONS 1, 16 AND 19 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

In *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, paragraph 21, this Court stated that: "Ohio has long recognized that minerals underlying the surface, including oil and gas, are part of the realty. *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 201-202, 156 N.E. 119 (1927) ... *Kelly v. Ohio Oil Co.*, 57 Ohio St. 3117, 49 N.E. 399 (1897), paragraph one of the syllabus."

The United States Supreme Court noted in *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 202 that:

"No time need be spent in restating the general common law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them." The Court at page 209, compared the ownership of oil and natural gas to animals *ferae naturae*, stating: "The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field." The Court further observed at page 211 that: "there is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without divesting them of their property without adequate compensation, in violation of the Fourteenth Amendment ... ."

Relators' property rights in the oil, gas and natural gas liquids beneath their land are violated by the Respondents' Order authorizing Chesapeake to remove, take possession of, and sell the oil, gas and natural gas liquids and by Respondents failure to comply with Ohio Revised Code Chapter 163.

**PROPOSITION OF LAW NO. 3:**

**WHEN AN INSTRUMENTALITY OF THE STATE GOVERNMENT ISSUES AN ORDER AUTHORIZING A PRIVATE ENTITY TO REMOVE OIL, GAS AND NATURAL GAS LIQUIDS FROM PRIVATE PROPERTY THERE IS A PER SE TAKING OF SAID MINERALS FOR WHICH THE OWNER IS ENTITLED TO COMPENSATION PURSUANT TO ARTICLE I, SECTION 19 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

As stated by the United States Supreme Court, oil and gas are property rights protected by the Fourteenth Amendment to the United States Constitution. *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 209 (1900).

The Respondent Chief's Order in and of itself constitutes a per se taking of Relators' oil, gas and natural gas liquids. See *Horne v. Department of Agriculture*, 576 U.S. \_\_\_\_ (2015)(order taking raisins); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)(regulation denying the right to exclude others).

In the recent decision of *Horne v. Department of Agriculture*, 576 U.S. \_\_\_\_ (2015), the United States Supreme held that a marketing order issued by the Department of Agriculture imposing a reserve requirement on the owners of raisins is a per se taking. The Court stated in subparagraph (a)(2) of its syllabus that: "The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the

Government. Title to the raisins passes to the Raisin Committee. The Committee disposes of those raisins as it wishes, to promote the purposes of the raisin marketing order. The Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government's control and use, is 'of such unique character that it is a taking without regard to other factors that a court might ordinarily examine.' *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432."

In *Horne*, the raisins were not physically taken by the government because the owners refused to transfer them. Nevertheless, the Supreme Court held that the raisin marketing order in and of itself constituted an unlawful per se taking. *Horne* syllabus.

At pages 8-9 of its slip opinion in *Horne*, the Supreme Court stated: "Raisin growers subject to the reserve requirement thus lose the entire 'bundle' of property rights in the raisins—'the rights to possess, use and dispose of' them. *Loretto*, 458 U.S., at 435 ... ."

As noted above, the Respondent Chief's Order herein is in the same category as the raisin reserve requirement at issue in the *Horne* case.

The Takings Clause of the Fifth Amendment to the United States Constitution which was involved in the *Horne* case was incorporated into to the Fourteenth Amendment and therefore, the decision in *Horne* is of equal force in the instant case. *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 241 (1897); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The Respondent Chief's Order authorizes Chesapeake to remove the oil, gas and natural gas liquids from beneath Relators' land, and to take possession of and sell the minerals, all of which is a per se taking of Relators' property pursuant to the Supreme Court decisions noted above.

**PROPOSITION OF LAW NO. 4:**

**THE RESPONDENTS HEREIN ARE INSTRUMENTALITIES OF THE STATE OF OHIO, AND WHEN THEY AUTHORIZE A PRIVATE ENTITY TO ENTER UPON PRIVATE LAND BY WAY OF HORIZONTAL DRILLING, AND TO INJECT MILLIONS OF GALLONS OF WATER, SAND AND CHEMICALS BENEATH THE LAND, FOR THE PURPOSE OF FRACTURING THE SHALE FORMATION BENEATH THE LAND TO CAUSE THE OIL, GAS AND NATURAL GAS LIQUIDS TO MIGRATE FROM THE PRIVATE LAND TO WELLHEADS LOCATED ON OTHER LAND, THE RESPONDENTS MUST COMPLY WITH OHIO'S APPROPRIATION STATUTE AS SET FORTH IN OHIO REVISED CODE CHAPTER 163, AND WITH ARTICLE I, SECTION 19 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

The Respondent Chief's Order violates the procedural and substantive rights, and fundamental fairness, granted the Relators by Article I, Sections 1, 16 and 19 of the Ohio Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, and Ohio's appropriation statutes set forth in Ohio Revised Code Chapter 163. Verified Complaint, paragraph 26; *Horne v. Department of Agriculture*, 576 U.S. \_\_\_\_\_ (2015).

The Respondent Chief's Order deprives Relators of their exclusive possession, custody, control, use, benefit, and voluntary disposition of their property, and therefore, constitutes an unlawful involuntary taking of said property without a declaration of public use and without a jury determination of compensation in violation of the Ohio and federal Constitutions. Verified Complaint, paragraphs 11-13, 21 and 26.

This Court has stated: “The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation.’ *State ex rel. Shemo v. Mayfield Hts. (2002)*, 95 Ohio St.3d 59, 63 ...Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution.” *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, paragraph14.

Respondents are instrumentalities of the State of Ohio, and as set forth in the cases cited above, the rights secured to Relators by the Ohio and federal Constitutions impose a correlative duty upon the Respondents not to deprive Relators of their constitutional rights. Verified Complaint, paragraphs 4-7, 10-16, 21-22, and 26. The Respondent Chief’s Order deprives Relators of their property rights secured by the Ohio and federal Constitutions. Verified Complaint, paragraph 26. Moreover, the Respondent Chief’s Order violates his duty to comply with Ohio’s appropriation statute set forth in Ohio Revised Code Chapter 163.

**A. THE PROCESSES OF HORIZONTAL DRILLING AND HYDRAULIC FRACTURING ARE AN INVASION OF RELATORS’ LAND AND ARE POTENTIALLY HAZARDOUS.**

The process of horizontal drilling into the Utica Point Pleasant shale formation beneath Relators’ land is invasive and the hydraulic fracturing of the shale with millions of gallons of water, chemicals and sand is not only invasive, it is also, potentially hazardous. See The Prepared Testimony of David F. Yard, P.E., attached to Chesapeake’s Application as Exhibit 4 explaining horizontal drilling and hydraulic fracturing at page 2, lines 22-26; Affidavit of Robert W. Chase, P.E., filed herein.

Also, the United States Environmental Protection Agency has published information describing the hydraulic fracturing process and the potential hazards associated with



hydraulic fracturing including the release of chemicals to the surface, ground water, and water wells, and also the flowback of contaminated liquids from the well, and the treatment of wastewater. See United States Environmental Protection Agency, *The Process of Hydraulic Fracturing*, and *The Hydraulic Fracturing Water Cycle*, [www.epa.gov/hydraulicfracturing](http://www.epa.gov/hydraulicfracturing).

The Ohio Environmental Protection Agency has noted that between 2 million and 6 million gallons of water per well are needed to fracture a Utica shale well. See Ohio Environmental Protection Agency, *Sources of Water for Hydraulic Fracturing Fluids*, January 2014, [www.epa.ohio.gov/Portals/0/generalpdfs](http://www.epa.ohio.gov/Portals/0/generalpdfs).

An Ohio Department of Natural Resources article briefly discusses hydraulic fracturing in the Utica Point Pleasant shale formation noting that hydraulic fracturing is needed to release the oil and gas trapped in the shale located 5,000 to 7,000 feet below the surface and that the water contains chemicals and sand. See Ohio Department of Natural Resources, *The Facts About Hydraulic Fracturing*, [www.oilandgas.ohionr.gov/portals/oilgas/pdf/Facts-about-HFracturing.pdf](http://www.oilandgas.ohionr.gov/portals/oilgas/pdf/Facts-about-HFracturing.pdf).

The Geological Society of America has described the hydraulic fracturing process and its history noting that millions of gallons of water are needed to fracture the shale and to release the oil and gas from the shale because of the low porosity and low permeability of the shale. See The Geological Society of America, *Hydraulic Fracturing's History and Role in Energy Development*, and *Hydraulic Fracturing Defined*, and *Water Use*, [www.geosociety.org/criticalissues/hydraulicFracturing/history.asp](http://www.geosociety.org/criticalissues/hydraulicFracturing/history.asp).

The hydraulic fracturing process as described above is also discussed in the following:

*Hydraulic Fracturing of Oil and Gas Wells Drilled in Shale*, [www.Geology.com](http://www.Geology.com);

University of Denver, Sturm College of Law, Brady, William J., Professor, *An Introduction To Hydraulic Fracturing in the U.S.*,

[www.law.du.edu/documents/faculty/-highlights/Intersol-2012-HydroF](http://www.law.du.edu/documents/faculty/-highlights/Intersol-2012-HydroF);

National Conference of State Legislatures, *Hydraulic Fracturing (Fracking)*,

[www.ncsl.org/documents/standingcomm/scagee/FrackinginfoSheet.pdf](http://www.ncsl.org/documents/standingcomm/scagee/FrackinginfoSheet.pdf);

U. S. Geological Survey, *Introduction to Hydraulic Fracturing*,

[www2.usgs.gov/hydraulic\\_fracturing](http://www2.usgs.gov/hydraulic_fracturing).

**B. WHEN AN INSTRUMENTALITY OF THE STATE GOVERNMENT  
ISSUES AN ORDER AUTHORIZING A PRIVATE ENTITY TO HORIZONTALLY  
DRILL ON PRIVATE LAND AND TO HYDRAULICALLY FRACTURE SHALE LOCATED  
BENEATH THE PRIVATE LAND FOR THE PURPOSE OF REMOVING AND TAKING  
POSSESSION OF THE OIL, GAS AND NATURAL GAS LIQUIDS BENEATH THE  
PRIVATE LAND, THE ORDER IS UNLAWFUL AND THE ELEMENTS FOR THE  
ISSUANCE OF A WRIT OF MANDAMUS ARE MET, AND THE  
INSTRUMENTALITY OF THE STATE WILL BE ORDERED TO COMMENCE  
APPROPRIATION PROCEEDINGS.**

**1. OHIO REVISED CODE CHAPTER 163 SETS FORTH A COMPREHENSIVE  
MANDATORY PROCEDURE, COMPATIBLE WITH ARTICLE I, SECTION 19  
OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO  
THE UNITED STATES CONSTITUTION FOR THE APPROPRIATION OF LAND.**

Article I, Section 19 of the Ohio Constitution, the Fourteenth Amendment to the United States Constitution, and Ohio Revised Code Chapter 163, jointly and severally, enjoin a duty upon Respondents to commence appropriation proceedings when the Respondent Chief's Order takes Relators' property. Respondents have violated their duty by the issuance of an unlawful Order depriving Relators of their property and by failing to comply with Ohio Revised Code Chapter 163.

Section 163.02 (A) expressly mandates that "All appropriations of real property shall be made pursuant to sections 163.01 to 163.22 of the Revised Code ... ." This section and the entirety of Ohio Revised Code Chapter 163 is ignored by the Respondents. Ohio Revised Code Chapter

163 implements the protections granted by Article I, Section 19 of the Ohio Constitution by providing for a court determination of public use for the taking of private property and a jury determination of the compensation to be paid.

The process used in the taking of private property is a critical constitutional protection. As noted by the Supreme Court in *Horne* at page 9 of the slip opinion: “The Constitution, however, is concerned with the means as well as the ends. The Government has broad powers, but the means it uses to achieve its ends must be ‘consist[ent] with the letter and spirit of the constitution.’ *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). As Justice Holmes noted, ‘a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way.’ *Pennsylvania Coal*, 260 U.S., at 416.”

Respondents are required to adhere to the constitutional way and this Court should command Respondents to do so for the reason that Relators meet the elements for the issuance of a writ of mandamus pursuant to the decisions of this Court including *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, paragraph 15.

As discussed above, relators have a right to compel Respondents to commence appropriation proceedings because Relators are the owners of property taken by the Respondents;

Also as discussed above, the Respondents have a correlative duty to institute appropriation proceedings because Respondents are instrumentalities of the State and have issued an unlawful Order taking Relators property; and

The Relators lack an adequate remedy in the ordinary course of law that is complete, beneficial and speedy. This Court has stated that: “In order for an alternative remedy to

constitute an adequate remedy at law, it must be complete, beneficial, and speedy.” *State ex rel. Shemo v. City of Mayfield Heights*, 93 Ohio St.3d 1, 5 (2001), quoting from *State ex rel. Nat’l Elec. Contractors Ass’n v. Ohio Bureau of Employment Services*, 83 Ohio St.3d 179, 183 (1998). See also, *State ex rel. Arnett v. Winemiller*, 80 Ohio St.3d 255, 259 (1997).

In the instant case, an appeal of the Respondent Chief’s Order to the Court of Common Pleas pursuant to Ohio Revised Code 1509.37 is not an adequate remedy because it is an appeal on the record, not a de novo appeal; the court can only review the order to determine whether it is just and reasonable; it cannot order the Respondent Chief to commence appropriation proceedings; nor can the court determine whether a public use exists for the taking; nor can the court invade the jury’s function of awarding compensation for the taking.

**C. THE RIGHT TO DISPOSE OF PROPERTY—WHEN AN INSTRUMENTALITY OF THE STATE GOVERNMENT ISSUES AN ORDER COMPELLING THE UNITIZATION OF PRIVATE LAND INTO AN OIL AND GAS DRILLING UNIT, AND HORIZONTAL DRILLING AND HYDRAULIC FRACTURING BENEATH THE LAND, THERE IS A TAKING OF THE LANDOWNERS’ RIGHT TO THE VOLUNTARY DISPOSITION OF HIS PROPERTY FOR WHICH THE LANDOWNER IS ENTITLED TO COMPENSATION PURSUANT TO ARTICLE I, SECTIONS 1, 16, AND 19 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; THE ORDER IS UNLAWFUL AND THE ELEMENTS FOR THE ISSUANCE OF A WRIT OF MANDAMUS ARE MET, AND THE INSTRUMENTALITY OF THE STATE WILL BE ORDERED TO COMMENCE APPROPRIATION PROCEEDINGS.**

The Respondent Chief’s Order deprives the Relators of their property right to dispose of their property on terms acceptable to them as secured by Article I, Sections 1, 16, and 19 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

As noted above, a constitutionally protected incident of property ownership is the right to dispose of property upon terms acceptable to the owner, that is, the right to contract to sell

or otherwise dispose of the property. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Buchanan v. Warley*, 245 U.S.60, 74 (1917); *City of Norwood v. Horney*, 110 Ohio St.3d 353, 361, 2006-Ohio-3799; *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540 (1941).

In *Buchanan v. Warley*, 245 U.S. 60 (1917), the United States Supreme Court recognized that property rights include the incident of disposition. Also as stated by this Court in *City of Norwood v. Horney*, 110 Ohio St.3d 353, 361-62, 2006-Ohio-3799: “The rights related to property, i.e., to acquire, use, enjoy, and dispose property, *Buchanan v. Warley* (1917), 245 U.S. 60, 74, 38 S.Ct. 16, 62 L.Ed. 149, are among the most revered in our law and traditions.” In *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540 (1941), syllabus, this Court recognized that Article I, Section 19 of the Ohio Constitution protects the freedom of contract and held an ordinance that violates the freedom of contract unconstitutional. The Respondent Chief’s Order compelling unitization of Relators’ land and horizontal drilling and hydraulic fracturing beneath the land deprives the Relators of a vital component of their property, that is, the right to voluntarily dispose of the property, by contract or otherwise, on terms agreeable to them. The Respondent Chief’s Order disposes of Relators’ property and dictates the terms of the disposition of the Relators’ property without regard to the protections of Article I, Section 19 of the Ohio Constitution mandating that a jury determine compensation, and that a court determine public use. Ohio’s appropriation statutes set forth the lawful procedure for the appropriation of land. Ohio Revised Code Chapter 163.

Ohio’s appropriation law mandates specific procedures to be followed in compliance with the constitutional protections. Respondents failed to follow the procedures.

Section 163.04(B) requires that before proceedings are taken to appropriate property, a written good faith offer to purchase the property shall be made to the property owner.

Also, Section 163.04 (D) provides that property may be appropriated “only after the agency is unable to agree on a conveyance or the terms of a conveyance, for any reason, with the owner ... .”

In addition, Section 163.05 provides that only after the foregoing prerequisites have been complied with may appropriation proceedings be instituted. Moreover, the proceedings must be filed in a court.

The Respondent Chief’s Order compelling the involuntary unitization of Relators’ land to form a drilling unit and horizontal drilling and hydraulic fracturing beneath the land deprives Relators of their right to dispose of their property and therefore, the Order constitutes a taking of Relators’ property. As noted above, the taking fails to comport with the dictates of Article I, Section 19 of the Ohio Constitution and with Ohio Revised Code Chapter 163 setting forth the requirements for the appropriation of land.

Accordingly, a writ of mandamus should be issued compelling the Respondents to commence appropriation proceedings.

## CONCLUSION

Based on the facts and the law as set forth herein, Relators pray that this Court issue a writ of mandamus compelling the Respondents to forthwith commence appropriation proceedings pursuant to Ohio Revised Code Chapter 163, and to award such other and further relief as the Court deems just and proper in the premises.

Respectfully submitted,

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Attorney for Relators

## CERTIFICATE OF SERVICE

A copy of the Relators' Brief on the Merits and Appendix was served by e-mail upon Brian J. Becker, Esq. and Daniel J. Martin, Esq., counsel for Respondents on this 1st day of December 2016.

*/s/ Phillip J. Campanella*  
Phillip J. Campanella 0010875

Attorney for Relators

## **APPENDIX**

### **CONSTITUTIONS:**

#### **UNITED STATES**

##### **Amendment V. Rights of**

##### **Persons**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

##### **Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection**

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



## **Ohio Article**

I,

### **§ 1. Inalienable Rights**

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

### **§ 16. Redress in courts**

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

### **§ 19. Inviolability of private property**

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor 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 of the owner.

## STATUTES

### § 163.01. Appropriation of property definitions

As used in sections 163.01 to 163.22 of the Revised Code:

- (A) "Public agency" means any governmental corporation, unit, organization, instrumentality, or officer authorized by law to appropriate property in the courts of this state.
- (B) "Private agency" means any corporation, firm, partnership, voluntary association, joint-stock association, or company that is not a public agency and that is authorized by law to appropriate property in the courts of this state.
- (C) "Agency" means any public agency or private agency.
- (D) "Court" means the court of common pleas or the probate court of any county in which the property sought to be appropriated is located in whole or in part.
- (E) "Owner" means any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated.
- (F) "Real property," "land," or "property" includes any estate, title, or interest in any real property that is authorized to be appropriated by the agency in question, unless the context otherwise requires.
- (G) "Public utility" has the same meaning as in section 4905.02 of the Revised Code and also includes a public utility owned or operated by one or more municipal corporations, an electric cooperative, and an agency holding a certificate of public convenience and necessity granted by the federal energy regulatory commission.
- (H) (1) "Public use" does not include any taking that is for conveyance to a private commercial enterprise, economic development, or solely for the purpose of increasing public revenue, unless the property is conveyed or leased to one of the following:
  - (a) A public utility, municipal power agency, or common carrier;A private entity that occupies a port authority transportation facility or a incidental area within a publicly owned and occupied project;

- (b) A private entity when the agency that takes the property establishes by a preponderance of the evidence that the property is a blighted parcel or is included in a blighted area.
- (2) All of the following are presumed to be public uses: utility facilities, roads, sewers, water lines, public schools, public institutions of higher education, private institutions of higher education that are authorized to appropriate property under section 3333.08 of the Revised Code, public parks, government buildings, port authority transportation facilities, projects by an agency that is a public utility, and similar facilities and uses of land.
- (I) "Electric cooperative" has the same meaning as in section 4928.01 of the Revised Code.
- (J) "Good faith offer" means the written offer that an agency that is appropriating property must make to the owner of the property pursuant to division (B) of section 163.04 of the Revised Code before commencing an appropriation proceeding.
- (K) "Goodwill" means the calculable benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances that result in probable retention of old, or acquisition of new, patronage.
- (L) "Municipal power agency" has the same meaning as in section 3734.058 of the Revised Code.
- (M) "Port authority transportation facility" means any facility developed, controlled, or operated by a port authority for the purpose of providing passenger, cargo, or freight transportation services, such as airports, maritime ports, rail facilities, transit facilities, and support facilities directly related to any airport, maritime port, rail facility, or transit facility.

## **§ 163.02. Appropriations of real property**

- (A) All appropriations of real property shall be made pursuant to sections 163.01 to 163.22 of the Revised Code, except as otherwise provided in this section, as otherwise provided to abate a health nuisance or because of a public exigency as provided in division (B) of section 307.08, 6101.181, 6115.221, 6117.39, or 6119.11 or division (D) of section 504.19 of the Revised Code, or as otherwise provided to abate a health nuisance or because of a public exigency as provided in a municipal charter or ordinance.

## **§ 163.04. Notice of intent to acquire - purchase offer - inability to agree**

- (A) At least thirty days before filing a petition pursuant to section 163.05 of the Revised Code, an agency shall provide notice to the owner of the agency's intent to acquire the property. The notice shall be substantially in the form set forth in section 163.041 of the Revised Code. The notice shall be delivered personally on, or by certified mail to, the owner of the property or the owner's designated representative.
- (B) Together with the notice that division (A) of this section requires, or after providing that notice but not less than thirty days before filing a petition pursuant to section 163.05 of the Revised Code, an agency shall provide an owner with a written good faith offer to purchase the property. The agency may revise that offer if before commencing an appropriation proceeding the agency becomes aware of conditions indigenous to the property that could not reasonably have been discovered at the time of the initial good faith offer or if the agency and the owner exchange appraisals prior to the filing of the petition.
- (C) An agency may appropriate real property only after the agency obtains an appraisal of the property and provides a copy of the appraisal to the owner or, if more than one, each owner or to the guardian or trustee of each owner. The agency need not provide an owner with a copy of the appraisal when that owner is incapable of contracting in person or by agent to convey the property and has no guardian or trustee or is unknown, or the residence of the owner cannot with reasonable diligence be ascertained. When the appraisal indicates that the property is worth less than ten thousand dollars, the agency need only provide an owner, guardian, or trustee with a summary of the appraisal. The agency shall provide the copy or summary of the appraisal to an owner, guardian, or trustee at or before the time the agency makes its first offer to purchase the property. A public utility or the head of a public agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a fair market value of ten thousand dollars or less.

An agency may appropriate real property only after the agency is unable to agree on a conveyance or the terms of a conveyance, for any reason, with any owner or the guardian or trustee of any owner unless each owner is incapable of contracting in person or by agent to convey the property and has no guardian or trustee, each owner is unknown, or the residence of each owner is unknown to the agency and the residence of no owner can with reasonable diligence be ascertained.

- (D) An agency may appropriate real property for projects that will disrupt the flow of traffic or impede access to property only after the agency makes reasonable efforts to plan the project in a way that will limit those effects. This division does not apply to an agency if it initiated the project for which it appropriates the property under Title LV of the Revised Code.

## § 163.05. Petition for appropriation

An agency that has met the requirements of sections 163.04 and 163.041 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action. All petitions shall contain:

- (A) A description of each parcel of land or interest or right therein sought to be appropriated, such as will permit ready identification of the land involved;
- (B)
  - (1) A statement that the appropriation is necessary, for a public use, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;
  - (2) If the property being appropriated is a blighted parcel that is being appropriated pursuant to a redevelopment plan, a statement that shows the basis for the finding of blight and that supports that the parcel is part of a blighted area pursuant to the definition in section 1.08 of the Revised Code.
- (C) A statement of the purpose of the appropriation;
- (D) A statement of the estate or interest sought to be appropriated;
- (E) The names and addresses of the owners, so far as they can be ascertained;
- (F) A statement showing requirements of section 163.04 of the Revised Code have been met;
- (G) A prayer for the appropriation.

In the event of an appropriation where the agency would require less than the whole of any parcel containing a residence structure and the required portion would remove a garage and sufficient land that a replacement garage could not be lawfully or practically attached, the appropriation shall be for the whole parcel and all structures unless, at the discretion of the owner, the owner waives this requirement, in which case the agency shall appropriate only the portion that the agency requires as well as the entirety of any structure that is in whole or in part on the required portion.

In the event of the appropriation of less than the fee of any parcel or of a fee in less than the whole of any parcel of property, the agency shall either make available to the owner or shall file in the office of the county engineer, a description of the nature of the improvement or use which requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement. A set of highway construction plans shall be acceptable in providing such description for the purposes of the preceding sentence in the appropriation of land for highway purposes.

**§ 1509.02. Division of oil and gas resources management - chief - oil and gas well fund**

There is hereby created in the department of natural resources the division of oil and gas resources management, which shall be administered by the chief of the division of oil and gas resources management. 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 sections 6111.02 to 6111.028 of the Revised Code. The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells. In order to assist the division in the furtherance of its sole and exclusive authority as established in this section, the chief may enter into cooperative agreements with other state agencies for advice and consultation, including visitations at the surface location of a well on behalf of the division. Such cooperative agreements do not confer on other state agencies any authority to administer or enforce this chapter and rules adopted under it. In addition, such cooperative agreements shall not be construed to dilute or diminish the division's sole and exclusive authority as established in this section. Nothing in this section affects the authority granted to the director of transportation and local authorities in section 723.01 or 4513.34 of the Revised Code, provided that the authority granted under those sections shall not be exercised in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under this chapter.

The chief shall not hold any other public office, nor shall the chief be engaged in any occupation or business that might interfere with or be inconsistent with the duties as chief.

All moneys collected by the chief pursuant to sections 1509.06, 1509.061, 1509.062, 1509.071, 1509.13, 1509.22, 1509.222, 1509.28, 1509.34, and 1509.50 of the Revised Code, ninety per cent of moneys received by the treasurer of state from the tax levied in divisions (A)(5) and (6) of section 5749.02 of the Revised Code, all civil penalties paid under section 1509.33 of the Revised

Code, and, notwithstanding any section of the Revised Code relating to the distribution or crediting of fines for violations of the Revised Code, all fines imposed under divisions (A) and (B) of section 1509.99 of the Revised Code and fines imposed under divisions (C) and (D) of section 1509.99 of the Revised Code for all violations prosecuted by the attorney general and for violations prosecuted by prosecuting attorneys that do not involve the transportation of brine by vehicle shall be deposited into the state treasury to the credit of the oil and gas well fund, which is hereby created. Fines imposed under divisions (C) and (D) of section 1509.99 of the Revised Code for violations prosecuted by prosecuting attorneys that involve the transportation of brine by vehicle and penalties associated with a compliance agreement entered into pursuant to this chapter shall be paid to the county treasury of the county where the violation occurred.

The fund shall be used solely and exclusively for the purposes enumerated in division (B) of section 1509.071 of the Revised Code, for the expenses of the division associated with the administration of this chapter and Chapter 1571. of the Revised Code and rules adopted under them, and for expenses that are critical and necessary for the protection of human health and safety and the environment related to oil and gas production in this state. The expenses of the division in excess of the moneys available in the fund shall be paid from general revenue fund appropriations to the department.

#### **§ 1509.28. Order providing for unit operation of a pool or part thereof**

- (A) The chief of the division of oil and gas resources management, upon the chief's own motion or upon application by the owners of sixty-five per cent of the land area overlying the pool, shall hold a hearing to consider the need for the operation as a unit of an entire pool or part thereof. An application by owners shall be accompanied by a nonrefundable fee of ten thousand dollars and by such information as the chief may request.

The chief shall make an order providing for the unit operation of a pool or part thereof if the chief finds that such operation is reasonably necessary to increase substantially the ultimate recovery of oil and gas, and the value of the estimated additional recovery of oil or gas exceeds the estimated additional cost incident to conducting the operation. The order shall be upon terms and conditions that are just and reasonable and shall prescribe a plan for unit operations that shall include:

- (1) A description of the unitized area, termed the unit area;
- (2) A statement of the nature of the operations contemplated;
- (3) An allocation to the separately owned tracts in the unit area of all the oil and gas that is produced from the unit area and is saved, being the production that is not used in the conduct of operations on the unit area or not unavoidably lost. The allocation shall be in accord with the agreement, if any, of the interested parties. If there is no such agreement, the chief shall determine the value, from the evidence introduced at the hearing, of each



separately owned tract in the unit area, exclusive of physical equipment, for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the value of each tract so determined bears to the value of all tracts in the unit area.

- (4) A provision for the credits and charges to be made in the adjustment among the owners in the unit area for their respective investments in wells, tanks, pumps, machinery, materials, and equipment contributed to the unit operations;
  - (5) A provision providing how the expenses of unit operations, including capital investment, shall be determined and charged to the separately owned tracts and how the expenses shall be paid;
  - (6) A provision, if necessary, for carrying or otherwise financing any person who is unable to meet the person's financial obligations in connection with the unit, allowing a reasonable interest charge for such service;
  - (7) A provision for the supervision and conduct of the unit operations, in respect to which each person shall have a vote with a value corresponding to the percentage of the expenses of unit operations chargeable against the interest of that person;
  - (8) The time when the unit operations shall commence, and the manner in which, and the circumstances under which, the unit operations shall terminate;
  - (9) Such additional provisions as are found to be appropriate for carrying on the unit operations, and for the protection or adjustment of correlative rights.
- (B) No order of the chief providing for unit operations shall become effective unless and until the plan for unit operations prescribed by the chief has been approved in writing by those owners who, under the chief's order, will be required to pay at least sixty-five per cent of the costs of the unit operation, and also by the royalty or, with respect to unleased acreage, fee owners of sixty-five per cent of the acreage to be included in the unit. If the plan for unit operations has not been so approved by owners and royalty owners at the time the order providing for unit operations is made, the chief shall upon application and notice hold such supplemental hearings as may be required to determine if and when the plan for unit operations has been so approved. If the owners and royalty owners, or either, owning the required percentage of interest in the unit area do not approve the plan for unit operations within a period of six months from the date on which the order providing for unit operations is made, the order shall cease to be of force and shall be revoked by the chief. An order providing for unit operations may be amended by an order made by the chief, in the same manner and subject to the same conditions as an original order providing for unit operations, provided that:
- (1) If such an amendment affects only the rights and interests of the owners, the approval of the amendment by the royalty owners shall not be required.
  - (2) No such order of amendment shall change the percentage for allocation of oil and gas as

established for any separately owned tract by the original order, except with the consent of all persons owning interest in the tract.

The chief, by an order, may provide for the unit operation of a pool or a part thereof that embraces a unit area established by a previous order of the chief. Such an order, in providing for the allocation of unit production, shall first treat the unit area previously established as a single tract, and the portion of the unit production so allocated thereto shall then be allocated among the separately owned tracts included in the previously established unit area in the same proportions as those specified in the previous order.

Oil and gas allocated to a separately owned tract shall be deemed, for all purposes, to have been actually produced from the tract, and all operations, including, but not limited to, the commencement, drilling, operation of, or production from a well upon any portion of the unit area shall be deemed for all purposes the conduct of such operations and production from any lease or contract for lands any portion of which is included in the unit area. The operations conducted pursuant to the order of the chief shall constitute a fulfillment of all the express or implied obligations of each lease or contract covering lands in the unit area to the extent that compliance with such obligations cannot be had because of the order of the chief.

Oil and gas allocated to any tract, and the proceeds from the sale thereof, shall be the property and income of the several persons to whom, or to whose credit, the same are allocated or payable under the order providing for unit operations.

No order of the chief or other contract relating to the sale or purchase of production from a separately owned tract shall be terminated by the order providing for unit operations, but shall remain in force and apply to oil and gas allocated to the tract until terminated in accordance with the provisions thereof.

Notwithstanding divisions (A) to (H) of section 1509.73 of the Revised Code and rules adopted under it, the chief shall issue an order for the unit operation of a pool or a part of a pool that encompasses a unit area for which all or a portion of the mineral rights are owned by the department of transportation.

Except to the extent that the parties affected so agree, no order providing for unit operations shall be construed to result in a transfer of all or any part of the title of any person to the oil and gas rights in any tract in the unit area. All property, whether real or personal, that may be acquired for the account of the owners within the unit area shall be the property of such owners in the proportion that the expenses of unit operations are charged.

### **§ 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.

### **§ 1509.37. Appeal to court of common pleas**

Any party adversely affected by an order of the oil and gas commission may appeal to the court of common pleas of Franklin county. Any party desiring to so appeal shall file with the commission a notice of appeal designating the order appealed from and stating whether the appeal is taken on questions of law or questions of law and fact. A copy of the notice also shall be filed by appellant with the court and shall be mailed or otherwise delivered to appellee. Such notices shall be filed and mailed or otherwise delivered within thirty days after the date upon which appellant received notice from the commission by certified mail of the making of the order appealed from. No appeal bond shall be required to make either an appeal on questions of law or an appeal on questions of law and fact effective.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of the commission. If it appears to the court that an unjust hardship to the appellant will result from the execution of the commission's order pending determination of the appeal, the court may grant a suspension of the order and fix its terms.

Within fifteen days after receipt of the notice of appeal the commission shall prepare and file in the court the complete record of proceedings out of which the appeal arises, including a transcript of the testimony and other evidence that has been submitted before the commission. The expense of preparing and transcribing the record shall be taxed as a part of the costs of the appeal. Appellant shall provide security for costs satisfactory to the court. Upon demand by a party the commission shall furnish at the cost of the party requesting the same a copy of the record. If the complete record is not filed in the court within the time provided for in this section either party may apply to the court to have the case docketed, and the court shall order such record filed.

In the hearing of the appeal the court is confined to the record as certified to it by the commission. The court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the commission. The court shall conduct a hearing on the appeal and shall give preference to the hearing over all other civil cases irrespective of the position of the proceedings on the calendar of the court. The hearing in the court shall proceed as in the trial of a civil action and the court shall determine the rights of the parties in accordance with the laws applicable to such an action. At the hearing counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request

for the presentation of additional evidence.

If the court finds that the order of the commission appealed from was lawful and reasonable, it shall affirm the order. If the court finds that the order was unreasonable or unlawful, it shall vacate the order and make the order that it finds the commission should have made. The judgment of the court is final unless reversed, vacated, or modified on appeal.