**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.,

Original Action in Mandamus

RESPONDENTS.

# RELATORS' REPLY TO MERIT BRIEFS OF RESPONDENTS AND AMICI CURIAE

Attorneys for Respondents:

BRIAN J. BECKER (0089738)
DANIEL J. MARTIN (0065249)
Assistant Attorneys General
Environmental Enforcement Section
2045 Morse Road, A-3
Columbus, OH 43229-6693
614-265-7071; fax 877-647-2513
brian.becker@ohioattorneygeneral.gov
daniel.martin@ohioattorneygeneral.gov

L. BRADFIELD HUGHES (0070997)
(COUNSEL OF RECORD)
CHRISTOPHER J. BARONZZI (0078109)
RYAN T. STEELE (0088304)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street Columbus, Ohio 43215-6194
Tel: (614) 227-2053/Fax: (614) 227-2100
bhughes@porterwright.com
cbaronzzi@porterwright.com
rsteele@porterwright.com
*Counsel for Amicus Curiae*
*The American Petroleum Institute*

Attorney for Relators:

PHILLIP J. CAMPANELLA (0010875)
7059 Gates Road
Gates Mills, OH 44040
440-655-1553
p.campanella@att.net

GREGORY D. RUSSELL (0059718)
(Counsel of Record)
John J. Kulewicz (0008376)
Ilya Batikov (0087968)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street/P.O. Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-6400
Fax: (614) 719-4954
E-mail: gdrussell@vorys.com jjkulewicz@vorys.com
ibatikov@vorys.com

*Counsel for Amici Curiae The Ohio Oil and Gas Association, Artex Energy Group LLC, Ascent Resources – Utica, LLC, Carrizo (Utica) LLC, EnerVest Operating, L.L.C., and Hess Ohio Developments, LLC*

BRUCE M. KRAMER (PHV-4489-2013)
MCGINNIS LOCHRIDGE
711 Louisiana Street, Suite 1600
Houston, Texas 77002
Tel: (713) 615-8508
Fax: (713) 328-1808
E-mail: bkramer@mcginnislaw.com

Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION



CASES



STATUTES

**STATEMENT OF UNCONTROVERTED FACTS**

The critical facts involved in this action are uncontroverted and are summarized as follows:

**Relators are owners of 120.549972 acres of land** located in Harrison County, Ohio. See Verified Complaint, paragraph 4; Relators' Affidavits filed herein.

**Relators own the fee title to the land** including the right to consent or not consent to the unitization of the land for drilling purposes, the right to consent or not consent to the drilling of a well, and the right to select the drilling entity. Relators' Affidavits filed herein.

**Relators own the oil, gas and natural gas liquids** located in the Utica Point Pleasant shale formation beneath their land. Relators' Affidavits filed herein.

**Respondents are instrumentalities** of the State of Ohio. Verified Complaint, paragraphs 5-7, admitted by Respondents in their Answer.

**Respondents have issued an Order**, at the request of Chesapeake Exploration, L.L.C. (Chesapeake):

> Unitizing, that is, aggregating, Relators' land with adjacent land to create an oil and gas drilling unit having a total of 592.8175310 acres; and
>
> authorizing Chesapeake to enter into said shale formation by horizontal drilling, and to inject millions of gallons of water, sand and chemicals to hydraulically fracture the shale, to cause the oil, gas and natural gas liquids on Relators' land to migrate to wellheads located on other land, and to sell the oil, gas and natural gas liquids. Verified Complaint, paragraphs 17, 19, 21 and 25; Chesapeake's Application to unitize, attached to the Verified Complaint filed herein and

marked as Respondents' Exhibit D, at page 2, and at Exhibit 4, Prepared Testimony of David F. Yard, P.E., at page 2, lines 22-26, and at Exhibit LE-2 on page 116 of the Application; Respondent Chief's Order filed herein with the Verified Complaint and marked as Respondents' Exhibit B; Relators' Affidavits filed herein; Affidavit of Robert W. Chase, P.E. filed herein.

**Chesapeake has commenced** excavation of the access road and the drilling pad on the Our Land Co South Unit which the subject of the instant case. Relators' Affidavit Re Facts and Authentication of Documents filed herein.

The uncontroverted facts are detailed as follows:

1. 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. Verified Complaint, paragraph 5, admitted by Respondents in their Answer.
2. 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. Verified Complaint, paragraph 6, admitted by Respondents in their Answer.

3. 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. Verified Complaint, paragraph 7, admitted by Respondents in their Answer.

4. On November 10, 2014, Chesapeake Exploration, L.L.C. filed an Application with Respondents pursuant to Ohio Revised Code Section 1509.28 to compel unitization. Verified Complaint, paragraph 17, admitted by Respondents in their Answer; Application attached to the Complaint and as Respondents' Exhibit D.
5. Chesapeake's Application requested an order unitizing, that is, aggregating 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. Application at page 2, attached to the Complaint and as Respondents' Exhibit D; Relators' Affidavits filed herein.
6. Exhibit LE-2 attached to the Application at page 116, depicts the proposed drilling unit. Relators' acreage is shown in green with orange cross-hatching and is referred to as "NonConforming." See Relators' Affidavits filed herein.
7. 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. Verified Complaint, paragraph 19, admitted by the Respondents in their Answer.
8. The Application requested an order authorizing Chesapeake to enter into said shale formation by horizontal drilling; and further to inject water, sand and chemicals to hydraulically fracture said shale; and to remove oil, gas and natural gas liquids from Relators' land. Application attached to the Complaint and as Respondents' Exhibit D, at Exhibit 4, Prepared Testimony of David F. Yard, P.E., at page 2, lines 22-26; Affidavit of Robert W. Chase, P.E. filed herein; Relators' Affidavits filed herein.

9. On July 13, 2015, Respondent Chief Simmers issued an Order granting Chesapeake's Application. Verified Complaint, paragraph 21, admitted by Respondents in their Answer; Respondent Chief's Order filed herein with the Verified Complaint and as Respondents' Exhibit B.

10. 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. See Affidavit of Robert W. Chase, P.E. filed herein; Application filed herein with the Complaint and as Respondents' Exhibit D, Exhibit 4, Prepared Testimony of David F. Yard, P.E., at page 2, lines 22-26.

11. 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. See Affidavit of Robert W. Chase, P.E. filed herein.

12. 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. Verified Complaint, paragraph 25, admitted by the Respondents in their Answer.

**ESSENCE OF DISPUTE:**

At the essence of the dispute herein are the property rights of the Relators and the process for taking those property rights, all of which rights are secured to the Relators by the Ohio and federal constitutions. Respondents, at page 3 of their Brief, and Amici Curiae assert that

Relators' substantive and procedural rights can be taken by an administrative order. Relators and cases decided by this Court and the United States Supreme Court disagree. The statement by the United States Supreme Court in *Horne v. Department of Agriculture,* 576 U.S. _____ (2015), at page 9 of its slip opinion is both cogent and relevant to this dispute: "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' Brief ignores the uncontroverted facts of this case, and decisions of this Court and the U.S. Supreme Court, and moreover, does not address the Relators' propositions of law.

**ARGUMENT IN REPLY**

**PROPOSITION OF LAW NO. 1:**

**THE RESPONDENTS' BRIEF IS NOT SIGNED AS REQUIRED BY S.CT.PRAC.R. 3.08 AND SHOULD NOT BE CONSIDERED BY THIS COURT.**

Rule 3.08 of this Court's Rules of Practice requires that Respondents' Brief be signed by an attorney. Respondents' Brief is not signed and should not be considered by this Court.

**PROPOSITION OF LAW NO. 2:**

**ALL OF THE ARGUMENTS OF RESPONDENTS AND AMICI CURIAE FAIL FOR THE REASONS THAT RELATORS' PROPERTY RIGHTS ARE TAKEN BY RESPONDENT CHIEF'S ORDER PURSUANT TO PROCESSES SET FORTH IN SECTIONS 1509.28, 1509.36 AND 1509.37 WHICH DO NOT COMPORT WITH THE OHIO AND FEDERAL CONSTITUTIONS AND OHIO'S APPROPRIATION STATUTES, OHIO REVISED CODE CHAPTER 163.**

**---RELATORS' PROPERTY INTERESTS HAVE BEEN APPROPRIATED BY RESPONDENTS.**

As set forth in the Affidavits of Relators filed herein, Relators own the land and the oil, gas and natural gas liquids located in the Utica Point Pleasant shale formation beneath the land. The Affidavits expressly state that the Relators "own the fee title to the land and the oil, natural gas, and natural gas liquids in the Utica Point Pleasant shale formation beneath the land, including the right to consent or not consent to the unitization of the land for drilling purposes, the right to consent or not consent to the drilling of a well, and the right to select the drilling entity."

The current assertion by the Respondents at pages 23-25 of their Brief that mandamus is not appropriate because Relators' mineral interests in the land are in question is without merit. The position is inconsistent with the statement at page 2 of Chesapeake's Application that a unitization process is required, and Relators submit that the unitization process must comply with the Ohio and federal constitutions and with Ohio Revised Code Chapter 163.

Chesapeake's Application at page 2 acknowledges that Relators have an interest when it states that the land "cannot be pooled without either the consent of the mineral owners, lease modifications, or a unitization proceeding." Chesapeake's Application is attached to the Verified Complaint filed herein and as Respondents Exhibit D. As set forth in the Affidavits of Relators filed herein, the Relators have not agreed to pooling or to any modification of any lease, leaving a unitization proceeding as the only alternative. It is the Respondents' unitization proceeding and subsequent Order that Relators submit are unlawful for the reasons that they fail to comport with the Ohio and federal constitutions and Ohio Revised Code Chapter 163.

Also, the Respondents, and the Ohio Oil & Gas Commission concede that they do not have the power to adjudicate property interests. See pages 6-7 of the Commission's Order marked as Respondents' Exhibit C. The Commission's Order at page 7 admits: "Only a court of competent jurisdiction can adjudicate property rights, can evaluate leases, or determine the subsurface legal relationship between parties … ." The Respondents concession that only a court of competent jurisdiction can adjudicate property rights, demonstrates the necessity of an appropriation action wherein the court will determine any claimed dispute regarding property rights. Respondents can name as a party in the appropriation action any person or entity that they believe has an interest in the property, and the court will adjudicate the property rights. Section 163.18 states that, "the court shall hear evidence as to the respective interests of the owners in the property and may make distribution of the deposit or award accordingly." The court in the appropriation proceedings has the judicial power to decide the property rights and secure the rights set forth in Article I, Section 19 of the Ohio Constitution, the Fourteenth Amendment to the United States Constitution and Ohio Revised Code Chapter 163.

Furthermore, Respondents' portrayal of the Respondent Chief's Order herein at pages 8-9 and 25 of their Brief as innocuous is obnoxious and erroneous. Indeed, Chesapeake has commenced excavation of an access road and drilling pad on the drilling unit that is at issue in this case. See Relators' Affidavit Re Facts and Authentication of Documents filed herein. As discussed by Relators herein and in their Brief on the Merits, the Order constitutes a taking of Relators' property. Respondents assertion that mandamus is not appropriate is without merit.

**---THE RESPONDENT CHIEF'S ORDER VIOLATES RELATORS' SUBSTANTIVE AND PROCEDURAL CONSTITUTIONAL RIGHTS, AND OHIO'S APPROPRIATION STATUTES.**

**---RESPONDENTS HAVE A LEGAL DUTY TO INSTITUTE APPROPRIATION PROCEEDINGS.**

Respondents erroneously assert in their Brief at pages 26-29, that they do not have a duty to comply with Ohio Revised Code Chapter 163 or with Article I, Section 19 of the Ohio Constitution or with the Fourteenth Amendment to the United States Constitution. Respondents further erroneously assert that they have the lawful administrative authority pursuant to Ohio Revised Code Section 1509.28 to compel the involuntary unitization of Relators' land and that they also have the authority to permit Chesapeake Exploration, L.L.C. to horizontally drill beneath Relators' land and to inject millions of gallons of water, sand and chemicals beneath Relators' land for the purpose of fracturing the shale beneath the land to cause the release of oil, gas and natural gas liquids beneath Relators' land to flow through the borehole to wellheads on other land.

The Respondents are wrong because 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).

Since there is a taking of Relators' property rights, the procedure set forth in Ohio Revised Code Section 1509.28 cannot insulate the Respondents from the duties imposed upon them by the Ohio and federal constitutions, and by Ohio Revised Code Chapter 163.

Article I, Section 19 of the Ohio Constitution states: "Private property shall ever be held inviolate, but servient to the public welfare. …where private property is taken for public use, a compensation shall first be paid in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury … ."

The Respondent Chief's Order violates Article I, Section 19 for the reasons that it does not declare a public use, it denies Relators the right to a jury determination of compensation, and compensation has not first been paid, or secured by a deposit of money.

Furthermore, as discussed hereinafter, the Respondent Chief's Order fails to comply with the mandatory requirements of Ohio' appropriation statutes, Ohio Revised Code Chapter 163.

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. See pages 5-14 of Relators' Brief on the Merits filed herein.

The process used in the taking of private property is a critical constitutional protection which has been violated by the Respondents. 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. See pages 16-17 of Relators' Brief on the Merits filed herein.

**----RESPONDENT CHIEF'S ORDER FAILS TO COMPLY WITH OHIO'S APPROPRIATION STATUTES, OHIO REVISED CODE CHAPTER 163**

Ohio Revised Code Chapter 163 sets forth a mandatory comprehensive procedure, compatible with the Fourteenth Amendment and Article I, Section 19 of the Ohio Constitution, for the appropriation of real property. It expressly mandates that "All appropriations of real property shall be made pursuant to sections 163.01 to 163.22 of the Revised Code … ." Section 163.02 (A). This section and the entirety of Ohio Revised Code Chapter 163 is ignored by the Respondents.

The Respondent Chief's Order is purportedly issued pursuant to Section 1509.28 and unconstitutionally authorizes Chesapeake to horizontally drill underneath Relators' land into the Utica Point Pleasant shale formation, and to inject millions of gallons of water, sand, and chemicals, and hydraulically fracture the shale to release oil, gas and natural gas liquids so they may be removed from Relators land and sold by Chesapeake, all without Relators' agreement. Contrasting Section 1509.28 with the provisions of Ohio Revised Code Chapter 163 demonstrates the constitutional infirmities of the Respondent Chief's Order.

Ohio Revised Code Section 163.04(A) requires that before proceedings are taken to appropriate property, written notice must be given to the property owner. No notice prior to filing the Application is required by Section 1509.28, and no such notice was given to Relators. 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. No prior offer is required by Section 1509.28, and no written offer was given to the Relators.

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 … ." Section 1509.28 contains no such provision.

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. As noted above, Section 1509.28 has no such prerequisites and does not require that the action be filed in court. Rather, Section 1509.28 provides for the Application to be filed with the Respondent Chief. The Respondent Chief, after an informal hearing, is authorized to issue an order compelling unitization of the landowners' property, fixing the value thereof and authorizing the oil and gas company: to enter upon the land by horizontal drilling; to invade the land with water, sand and chemicals for the purpose of hydraulically fracturing the shale beneath the land; to extract the oil, gas and natural gas liquids from the shale; and to sell the oil, gas and natural gas liquids to third parties. Section 1509.36 provides for an appeal de novo of the Respondent Chief's Order to the Ohio Oil and Gas Commission. However, the appeal of the decision of the Ohio Oil and Gas Commission to the Court of Common Pleas of Franklin County, Ohio is on the record, and is not a de novo appeal. Ohio Revised Code Section 1509.37.

Section 163.09(B) provides that after the property owner files an Answer to the Petition for Appropriation, the judge shall set a trial date to determine the necessity of the appropriation, that is, public use, and the burden of proof is upon the appropriating agency. In contrast, Section 1509.28 empowers the Respondent Chief to determine necessity and provides for an appeal de novo to the Ohio Oil and Gas Commission. The appeal to the trial court is limited to the record as set forth in Section 1509.37.

Section 163.09(B)(2) requires that, pursuant to Article I, Section 19 of the Ohio Constitution, a jury assess the compensation to the property owner. Sections 1509.28, 1509.36 and 1509.37 have no provision for a jury to assess compensation to the property owner.

Section 163.18 provides that the court shall hear evidence to determine the respective interests of the property owners and make distribution of the jury assessment accordingly. Sections 1509.28, 1509.36 and 1509.37 have no such provision. Moreover, 1509.28 does not authorize the Respondents to adjudicate the validity of a leasehold interest.

Section 163.22 directs that all proceedings shall be governed by law applicable to civil actions and the Ohio Rules of Civil Procedure. Sections 1509.28, 1509.36 and 1509.37 have no such provisions.

It is apparent from the foregoing that Chapter 163 secures the property rights of the owners as mandated by the Fifth and Fourteenth Amendments and Article I, Sections 1, 16 and 19 of the Ohio Constitution and it is equally apparent that Sections 1509.28, 1509.36 and 1509.37 do not secure such constitutional rights. Any one of the foregoing deficiencies renders the Respondent Chief's Order unconstitutional. In combination, the foregoing deficiencies render

the Respondent Chief's Order woefully unconstitutional and this Court should issue a writ of mandamus compelling the Respondents to comply with Ohio Revised Code Chapter 163.

**PROPOSITION OF LAW NO. 3:**

**MANDAMUS IS THE APPROPRIATE PROCESS TO COMPEL COMPLIANCE WITH THE LAW.**

Contrary to Respondents' erroneous assertions at pages 14-26 of their Brief, the Relators lack an adequate remedy in the ordinary course of law that is complete, beneficial and speedy; Relators have a clear right to compel mandamus; and Respondents have a clear duty to inititate appropriation proceedings. These issues were the subject of Respondents' Motion for Judgment on the Pleadings filed herein. Respondents' arguments were rejected when this Court granted the alternative writ of mandamus herein. Relators incorporate herein their Memorandum In Opposition to Respondents' Motion for Judgment on the Pleadings.

This Court has stated: "'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.

Furthermore, this Court stated in *Gilbert* at paragraph 15 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 … paragraph one of the syllabus."

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).

Also, this Court has stated that: "In general where declaratory judgment would not be a complete remedy unless coupled with ancillary extraordinary relief in the nature of a mandatory injunction, the availability of declaratory judgment does not preclude a writ of mandamus." *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. There is no basis for asserting that the Relators must pursue a process that is constitutionally infirm and lacks the power to provide the relief sought by mandamus.

**-----RESPONDENTS' PRIOR INCONSISTENT POSITIONS**

Moreover, Respondents have asserted a position contrary to their assertions herein. In the prior case in federal court involving the Relators, the Respondents asserted in support of their motion to dismiss that a declaratory judgment action is not appropriate and that "Mandamus is the Proper Course of Action to Challenge an Alleged Taking in Ohio." See Respondents'

Memorandum, at page 12, filed on June 29, 2015 in the case of Kerns, et al v. Chesapeake Exploration, LLC, et al, In the United States District Court, Northern District of Ohio, Eastern Division, Case No. 1:15-cv-00346. The Memorandum is filed herein. The federal court case was dismissed by the court on September 1, 2015 at the urging of Respondents herein. The court noted in its decision at page 6 that the Relators had not filed a mandamus action.

In that same Memorandum, Respondents asserted at page 12 that: "Until the Chief decides whether to approve the unitization of the mineral interests at issue, the case is not ripe for judicial review."

So that the Respondents herein assert that mandamus is not the proper course of action and asserted the exact opposite in the prior federal case. Furthermore, the Respondents stated in the federal action that the case is not ripe for judicial review until the Respondent Chief approves the unitization and Respondents now assert that the Respondent Chief's Order is not sufficient to constitute a taking of Relators' property. Moreover, the Respondents now assert that court action could be taken pursuant to Ohio Revised Code Section 1509.36. However, it sought to have the prior pending action dismissed notwithstanding the provisions of 1509.36. This Court should not countenance such conflicting assertions.

**PROPOSITION OF LAW NO. 4:**

**THE RESPONDENTS' ARGUMENTS HEREIN SHOULD BE CONSIDERED IN THE LIGHT OF THEIR STATEMENTS, ACTS AND OMISSIONS IN THE PRIOR FEDERAL CASE.**

**----THE RESPONDENTS FAILED TO GIVE NOTICE OF THE CHIEF'S ORDER.**

When Chesapeake's Application for unitization was pending before the Respondent Chief, the attorney for the Respondent Chief informed the Relators that: **"THE DIVISION DOES NOT**

**PROVIDE A TIME FRAME FOR ORDER ISSUANCE, BUT YOU WILL RECEIVE A COPY OF THE ORDER ONCE IT IS ISSUED, REGARDLESS OF WHETHER YOU ATTEND THE HEARING."** See Respondents' Exhibit F, Letter from attorney for the DOGRM to Relator Landowners, dated January 23, 2015.

On July 13, 2015, the Respondent Chief issued his Order stating as part of the Order: **"ADDRESSEE IS HEREBY NOTIFIED THAT THIS ACTION IS FINAL AND EFFECTIVE AND MAY BE APPEALED PURSUANT TO SECTION 1509.36 OF THE OHIO REVISED CODE."** Chief's Order No. 2015-348, dated July 13, 2015, filed herein as part of the Verified Complaint and as Respondents' Exhibit B. The Relator landowners are not included on the list of addressees and were not provided a copy of the order; nor was a copy of the order provided to the federal court in the case then pending between the Respondents and the Relators wherein the Relators were seeking a declaratory judgment. (Kern, et al v. Chesapeake Exploration, L.L.C., et al, In the United States District Court for the Northern District of Ohio, Eastern Division, Case No. 1:15-cv-346)

On August 7, 2015, three weeks after the Respondent Chief issued his Order, the Respondents filed a REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT IN FEDERAL COURT **BUT DID NOT INFORM THE COURT OR THE RELATOR LANDOWNERS THAT THE CHIEF HAD ISSUED AN ORDER ON THE UNITIZATION APPLICATION.** Filed on August 7, 2015 in Case No. 1:15-cv-346.

**ON SEPTEMBER 1, 2015, THE FEDERAL COURT ENTERED ITS ORDER STATING AT PAGE 2 THAT "TO DATE, THE APPLICATION HAS NOT YET BEEN RULED ON BY SIMMERS." IN FACT, THE**

**RESPONDENT CHIEF HAD ISSUED HIS ORDER, BUT FAILED TO INFORM THE COURT OR THE RELATORS.**

The Respondent Chief's failure to notify the Relators and the federal court are consistent with the Respondents' specious arguments herein and should not be countenanced by this Court.

**PROPOSITION OF LAW NO. 5:**

**THE ASSERTION BY RESPONDENTS AND AMICI CURIAE, THAT RELATORS' PROPERTY HAS NOT BEEN TAKEN IS ERRONEOUS.**

**---THE CASES RELIED UPON BY RESPONDENTS AND AMICI CURIAE DO NOT ADDRESS THE INVASION OF THE LAND OF A NON-CONSENTING OWNER BY HORIZONTAL DRILLING AND HYDRAULIC FRACTURING.**

The reliance by Respondents and Amicus Curiae upon cases from other jurisdictions for the proposition that a unitization order does not constitute a taking of property is misplaced. The cases cited by the Respondents and Amicus Curiae are factually distinguishable and at odds with decisions of this Court and the United State Supreme Court cited in Relators' Merit Brief. While the cases cited by Respondents and Amici Curiae involved an order compelling unitization, the cases either do not discuss the Takings Clause of the constitution, and/or involved statutes substantively different from Ohio's statutes, and/or the cases do not expressly authorize horizontal drilling and hydraulic fracturing beneath private land owned by a non-consenting property owner, that is, the cases do not discuss the invasion of the property of a non-consenting owner.

Moreover, the majority opinion in *Gawenis v. Arkansas Oil & Gas Commission,* 2015 Ark. 238 (2015) cited by Respondents and Amici Curiae runs afoul of the United States Supreme Court decision in *Horne v. Department of Agriculture, 576 U.S. _____ (2015)* when the *Gawenis* court

stated that there is no taking if landowner shares in the general benefits. In *Horne,* in the syllabus of the slip opinion, the U.S. Supreme Court held otherwise, stating: "Any net proceeds the raisin growers receive from the sale of the reserve raisins goes to the amount of compensation they have received for the taking—it does not mean the raisins have not be appropriated … ."

The majority opinion in *Gawenis* did not even reference the invasion of a non-consenting landowners' property by horizontal drilling and hydraulic fracturing. The dissenting opinion references "secondary recovery methods" and determines that a taking of property has occurred. Also, the court in *Gawenis* did not address a state appropriation statute such as Ohio Revised Code Chapter 163.

**---THE RULE OF CAPTURE AND THE DOCTRINE OF CORRELATIVE RIGHTS DO NOT SUPERSEDE THE PROPERTY RIGHTS SECURED BY THE OHIO AND FEDERAL CONSTITUTIONS.**

Section 1509.28 authorizes the Respondent Chief to consider the need for the operation of an entire "pool" of oil, gas and natural gas liquids. Pool is defined in Section 1509.01(E) as meaning "an underground reservoir containing a common accumulation of oil or gas, or both …." A reservoir is a receptacle for the storage of liquid or gas. The statutory definition is based on the common law rule of capture which contemplated the capture of oil and gas that would migrate from a pool to a well drilled on adjacent land, a process commonly referred to as conventional drilling. The migration gave rise to the doctrine of correlative rights whereby each landowner above the pool would share in the oil and gas regardless of where the well was located. The Utica Point Pleasant shale formation is a low porosity and low permeability reservoir containing

liquid and/or gas. See Affidavit of Robert W. Chase, P.E. filed herein; and Chesapeake's Application to unitize, attached to the Verified Complaint filed herein and marked as Respondents' D, at Exhibit 4, Prepared Testimony of David F. Yard, P.E., at page 2, lines 22-26. The shale rock must be fractured in order to release oil, gas or natural gas liquids. In the absence of the invasion of Relators' land by horizontal drilling and hydraulic fracturing beneath Relators' land, a process commonly referred to as unconventional drilling, the oil, gas, and natural gas liquids beneath Relators' land would not migrate to adjacent land. The rule of capture and the related doctrine of correlative rights do not apply to the oil, gas and natural gas liquids in the Utica Point Pleasant shale formation because: they are not migratory in the absence of horizontal drilling and hydraulic fracturing beneath the adjacent land; and cannot be extracted without intrusion beneath the adjacent land. Under the facts of this case, the rule of capture and the doctrine of correlative rights to do not supersede the property rights secured by the Ohio and federal constitutions.

The Respondents herein, and Amici Curiae, not only fail to grasp the significant factual differences, they also fail to comprehend the legal significance, that is, that the invasion of private land by horizontal drilling and hydraulic fracturing violates the rights of the landowner secured by the Ohio and federal constitutions and Ohio's appropriation statutes, Ohio Revised Code Chapter 163.

**CONCLUSION**

Based on the facts and the law as set forth herein and in their Brief on the Merits filed 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 award such other and further relief as the Court deems just and proper in the premises.

Respectfully submitted,

*/s/ Phillip J. Campanella*
Phillip J. Campanella 0010875
7059 Gates Road
Gates Mills, OH 44040
440-655-1553
p.campanella@att.net

Attorney for Relators

## CERTIFICATE OF SERVICE

A copy of the Relators' Reply Brief was served by e-mail upon Brian J. Becker, Esq. and Daniel J. Martin, Esq., counsel for Respondents, and upon counsel for Amici Curiae: l. Bradfield Hughes, Esq., Christopher J. Baronzzi, Esq., Ryan T. Steele, Esq., Gregory D. Russell, Esq., John J. Kulewicz, Esq., Ilya Batikov, Esq., and Bruce M. Kramer, Esq., on this 26th day of December 2016.

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

Attorney for Relators