

## Publications

### **Oil and Gas Alert: Sixth Circuit Affirms Constitutionality of Ohio's Statutory Unitization Procedures**

#### **Related Professionals**

Timothy B. McGranor

Gregory D. Russell

Ilya Batikov

#### **CLIENT ALERT | 2.6.2019**

On February 4, 2019, the Sixth Circuit Court of Appeals affirmed a lower court decision upholding the constitutionality of Ohio's statutory unitization procedures. See *Kerns v. Chesapeake Exploration, L.L.C.*, 6th Cir. No. 18-3636 (Feb. 4, 2019).

You can read the decision [here](#).

### **Background**

Chesapeake planned to develop a horizontal drilling unit in Harrison County, Ohio, but could not reach a voluntary agreement with another operator in the proposed unit because that operator's leases did not permit the voluntary consolidation of the leased property and the plaintiff-landowners were unwilling to sign pooling agreements. Otherwise unable to form the unit, Chesapeake applied for and received a statutory unitization order from Ohio's Division of Oil and Gas Resources Management.

The plaintiffs-landowners opposed the unitization application and then unsuccessfully appealed to Ohio's Oil and Gas Commission. They then sued Chesapeake and the Division in federal court, alleging, among other things, that the Division's unitization order resulted in an unconstitutional taking of their oil and gas and subsurface rights.

The District Court upheld the constitutionality of the Division's unitization order and dismissed the complaint. The plaintiffs-landowners then appealed to the Sixth Circuit.

### **Decision**

Affirming the District Court, the Sixth Circuit first observed that a takings analysis requires a protected property interest, which, in turn, is defined by state law. And in Ohio, oil and gas ownership is subject to the doctrine of correlative rights, by which "each landowner has both a property interest in the subsurface minerals of his lot and an attendant right to recover those minerals without needless waste-as does his

neighbor.”

The Court pointed to decisions from the United States Supreme Court and state courts unanimously holding that states may adopt reasonable regulations to protect correlative rights in oil and gas. And that includes statutory pooling/unitization laws. The Court then quoted with approval decisions from the high courts of Oklahoma, Arkansas, and New York affirming those states’ statutory pooling laws against takings challenges. “We see no reason the same does not hold true in Ohio,” the Court concluded, also observing that Ohio’s Supreme Court previously found that statutory pooling and unitization procedures were a proper exercise of state police powers. Rather than constitute a taking, with statutory pooling/unitization, “[e]ach landowner’s property interest in the minerals remains intact; it is simply regulated.”

The Court also rejected the plaintiffs-landowners’ related claim that the unitization effected a taking because Chesapeake’s drilling would result in a physical occupation of their subsurface. The Court noted that in Ohio, subsurface ownership is not absolute, but qualified to only prohibit invasions that “actually interfere with [the plaintiffs-landowners] reasonable and foreseeable use of the subsurface.” Here, the plaintiffs-landowners neglected to plead sufficient facts that Chesapeake’s drilling would actually interfere with their reasonable and foreseeable use of their subsurface property and thus failed to state a viable takings claim.

[Disclosure: Vorys attorneys [Timothy B. McGranor](#) and [Daniel E. Shuey](#) represented Chesapeake Exploration, L.L.C. in this case].

