

Who decides the fate of your land – and at what cost? Forced pooling and unitization in Ohio

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NARO Conference Cambridge, Ohio

Regional Commission To Study And Address Oil And Gas Well Drilling And Exploration

PURPOSE

MODEL ORDINANCES

REPORTS

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Regional Commission Concludes Deliberations, Spring 2017

2016 Summary and 2017 Actions:

The RCOG was charged in December, 2015 with five work objectives for 2016:

Quick Links

[Purpose of the Regional Commission](#)

[Mission Statement](#)

Windows taskbar showing search bar, task icons (File Explorer, Chrome, PowerPoint, Word), and system tray (clock, network, volume).

■ **Role of Local Governments:**

- *When States' Legislation and Constitutions Collide with Angry Locals: Shale Oil and Gas Development and its Many Masters*, 41 WM. & MARY ENVTL. L. & POL'Y REV. 55 (2016)

■ **Role of the Individual Landowner:**

- *Get Out from Under My Land: Hydraulic Fracturing, Unitization, and the Role of the Dissenting Landowner* 30 GEORGETOWN ENVTL. L. REV. 633 (2018).

■ **Role of Local Governments:**

- *Cities Seethe: A Case Study of Local Efforts to Influence Natural Gas Pipeline Routing Decisions*, 122 W. VA. L. REV. 881 (2020).

■ *Role of **Local Governments***

- CHAPTER 2. *Local Jurisdictions and Variations in State Law in the Marcellus Shale Region*, in *BOOM OR BUST? GOVERNANCE, PLANNING, AND ECONOMIC IMPACTS OF THE US SHALE BOOM* (Sabina Eva Dietrick and Ilia Murtazashvili, eds.) CORNELL UNIVERSITY PRESS (2021)

Topics for today

1. The unitization process in Ohio and how it relates to rights holders
2. Penalty/Interest for statutorily unitized landowners
3. Forced unitization of leased properties
4. HB 152

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Buried Secrets
 Gas Drilling's Environmental Threat

State Laws Can Compel Landowners to Accept Gas and Oil Drilling

by *Marie C. Baca*, Special to ProPublica -- May 19, 2011

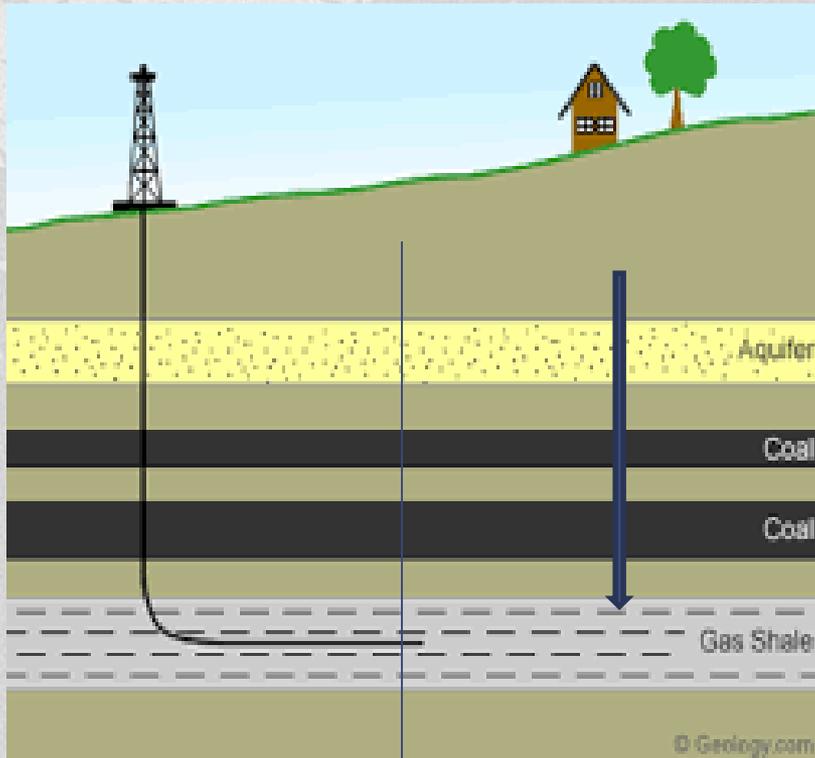
A legal tool called forced pooling allows drilling companies to gain access to minerals beneath private property, even if the landowners object. Thirty-eight states have some form of forced pooling law. The specific provisions vary from state to state, but drillers can generally extract minerals from a large area or "pool" -- in most states a minimum of 640 acres -- if leases have been negotiated for a certain percentage of that land. The company can then harvest gas or oil from the entire area. In most cases, drillers aren't allowed to build wells on the unleased land, so they use horizontal wells or other means to collect the minerals beneath those parcels. **Related Story:** [Forced Pooling: When Landowners Can't Say No to Drilling](#)

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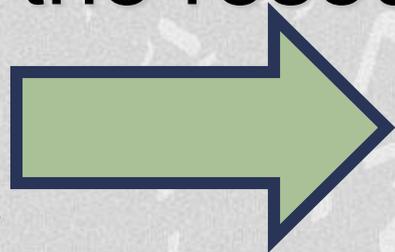
State	Type of Regulation(s)	The Law	Section Number	Supervising Agency
Alabama	1) Forced pooling 2) Compulsory unitization	http://bit.ly/c64zdw	400-7	Alabama State Oil and Gas Board
Alaska	Involuntary unitization	http://bit.ly/fpcdiv	31.05.110	Alaska Oil and Gas Conservation Commission
Arizona	Compulsory unitization	http://bit.ly/ewnUd5	27-506	Arizona Oil and Gas Conservation Commission

Forced inclusion is legal. Why is it controversial?



How did we get to forced pooling/unitization?

- Ferae naturae
- Rule of capture
- Rush to drill
- Spacing requirements
- Deprivation of the ability to realize value from the resource



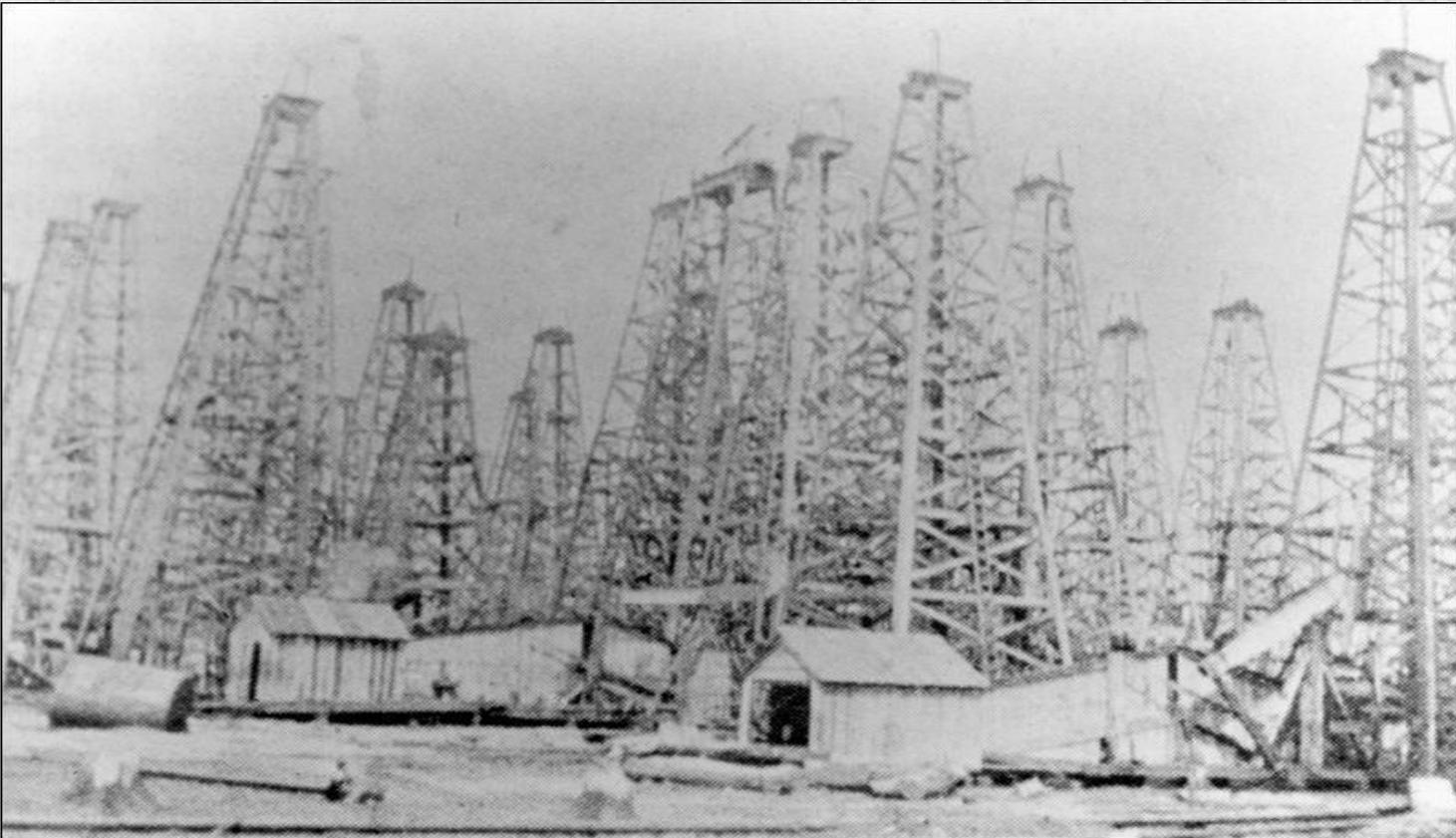
»Mandatory unitization

Ferae Naturae and the Rule of Capture



Gerald and Buff Corsi © California Academy of Sciences

Vertical wells – with no spacing requirements



Is the state Oil and Gas law in contravention to the common law rights of Property Owners?

Ohio Oil and Gas Law



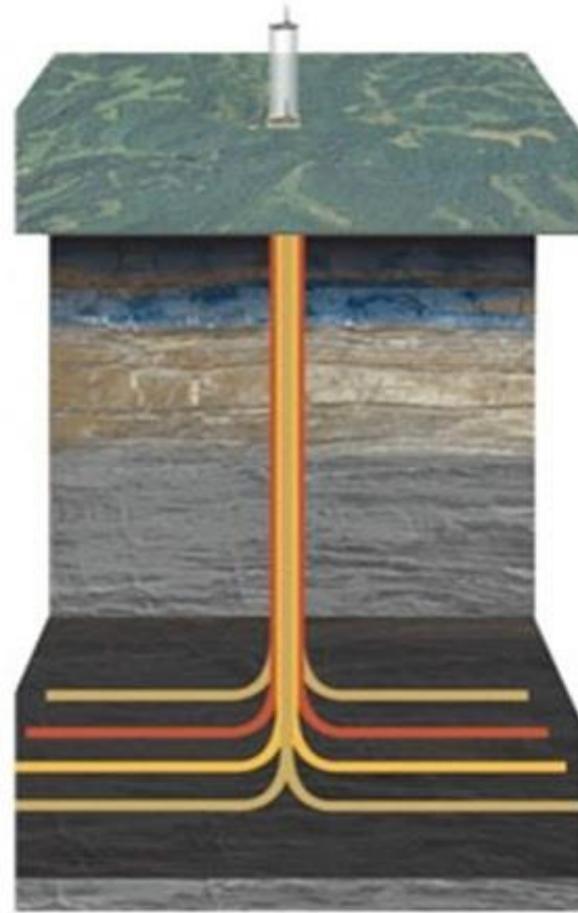
Oil and Gas Conservation Statues



Vertical well spacing versus horizontal well spacing



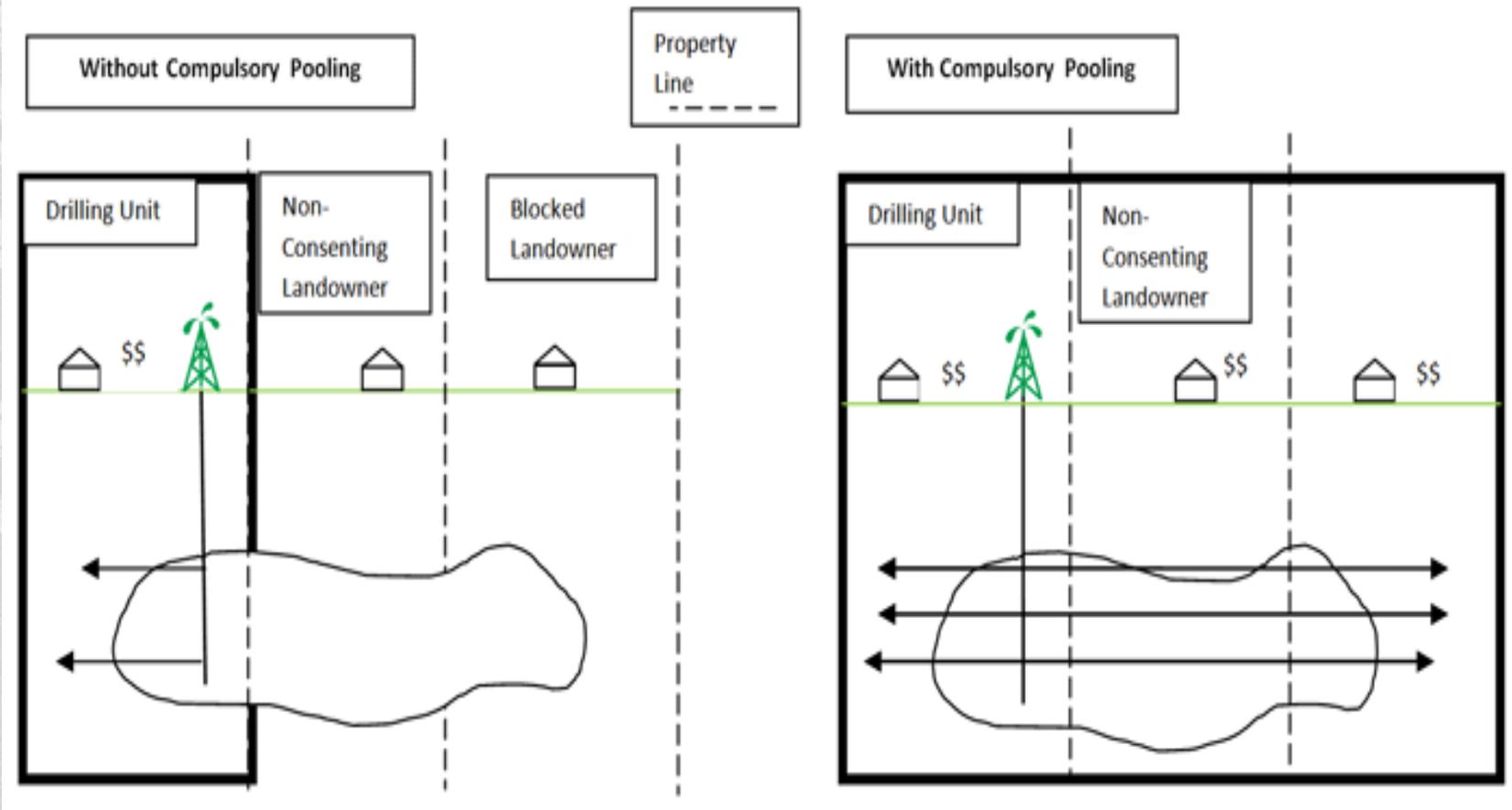
Traditional Vertical Well Spacing:
32 Separate Padsites Needed For 32 Wells.



Idealized Horizontal Well Spacing:
1 Padsite Yields Up To 32 Wells.







Mandatory Pooling v. Forced Unitization??



- **Mandatory pooling**
 - “joining together of small tracts, or portions of tracts for the purpose of having sufficient acreage to receive a well drilling permit under the relevant state or local spacing laws and regulations for the purpose of shared production

UNIT

- **Forced Unitization**
 - **Consolidation of mineral or leasehold interests covering all or part of a common source of supply.**

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1. **The unitization process in Ohio and how it relates to rights holders**
2. **Penalty/Interest for statutorily unitized landowners**
3. **Forced unitization of leased properties**
4. **HB 152**

Unitization in Ohio

- Unitization: section 1509.28 of the Ohio Revised Code
 - When the owners of 65% percent of the land overlying the pool apply to the Division for an order to operate a **as a unit**.
 - The applicant must demonstrate that formation of the unit 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 unitization process in Ohio



1. Driller wants to develop oil/gas and asks the Chief for a unit order to get control over the underground resources



2. Who applies? The developer or the owners of >65%. Can be on their petition or the Chief's



3. The Chief holds a hearing re the need for the unitization order and if unitization is reasonably necessary to substantially increase yield – it's a yes.



4. Unitization order needs to specify an allocation of oil/gas to each tract in the unit. Not valid until plan approval.

5. For a non-consenting mineral owner . . . the Chief decides royalty interest, working interest, risk penalty . . .

Requirements of the Chief's Order

- Must be upon terms and conditions that are just and reasonable and shall prescribe a plan of the unit's operation. Section 1509.28.
- Must determine the value of each separately owned tract in the unit. Section 1509.28.
- Must specify the production allocated to each tract within the unit shall be the proportion that the value bears to the value of all tracts in the unit area. Section 1509.28.

Appealing the Chief's Order

- Within 30 days of the Chief's order, any party to it may appeal it to the Ohio Oil and Gas Commission (Commission). Section 1509.36.
- Appeal does not automatically suspend or stay the Chief's order. However, the Commission may suspend or it. Section 1509.36.
- Witnesses can testify and documents may be introduced as exhibits. Section 1509.36.
- May be recorded by a court reporter. Section 1509.36.

Appealing the Commission's decision

- Appeal within 30 days to the Court of Common Pleas in Franklin County. Section 1509.37
 - appeal is **on the record; it is not an appeal de novo.** Section 1509.37.
 - does not automatically suspend or stay execution of the Commission's order but court may suspend or stay the Commission's order. Section 1509.37
 - Appeal from the Common Pleas Court is pursuant to the appellate process.

Quick look at landowner representation at Commission



10 not represented



39 unitization cases

What about the dissenting landowner?

Pressure to join voluntarily so operator can reach 65% (can even reach that amount w/in 6 months)

Notice of hearing by certified letter and publication 2 weeks in advance of the hearing

Applicant can revise and update the application up until the hearing

PowerPoint presentation – three days prior to the hearing – goes to the Division – not the dissenters.

Opportunity to present testimony

Appeal of Chief's decision to the Commission



Once pooled by order, the dissenter may:



1. Participate in the pooled unit:

- must contribute, up front, the portion of reasonable costs and expenses for drilling and production as specified in the mandatory pooling order.
- the dissenting landowner essentially becomes a working interest owner and shares in the risks associated with the drilling operations.





"DON'T JOIN"

RIBBON

2. Not participate in the drilling unit and be designated as a *nonparticipating* owner.

- Well operator pays the share of the nonparticipating owners upfront share of the costs and expenses.
- Nonparticipating owner is subject to a risk penalty.
- Well operator keeps the nonparticipating owner's share of production (\$) until the nonparticipating owner pays its share of the reasonable drilling costs and expenses.
- Chief may assess an "additional percentage of the share of costs" against the nonparticipating landowner to reward the operator for taking the risk of drilling a dry well.

Four approaches to the problem of the dissenting landowner



- (1) give the non-participating owner a “free ride,”
- (2) impose a risk-penalty, \$\$\$\$
- (3) provide the non-participating tract owner with options, or
- (4) allow the agency to decide what to do with the non-participating owner’s interest

Some problems with Ohio's unitization process

- As compared to appropriation of land (eminent domain)
 - Chapter 163 sets forth a comprehensive procedure, compatible with the fourteenth amendment
 - Section 1509.28 essentially ignores it
 - No written notice to the property owner
 - No requirement that unitization occur only after the agency is unable to agree on terms for a conveyance of rights
 - Jury to determine compensation for property owners' loss of rights
 - Allows Chief to determine necessity for unitization without any trial – burden of proof should be on the Commission
 - Appeal should be de novo not on the record alone

Potential fixes

- Increase %age of land/rights ownership required to file an application from 65% to a higher #
- Provide for a de novo review of the Chief's order
- Allow the land owner a reasonable time to respond to an application to unitize
- Provide for jury determination of the compensation to be paid to a land owner for loss of property rights, terms of the lease, etc
- Make unitization statute compliant with Chapter 163 requirements of eminent domain

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Penalty/Interest for statutorily pooled land owners

- After being forced into a pool, (dissenting) landowners receive their pro rata share of the production **minus the costs of production and a risk penalty**.
 - Reward the developer for taking the risks associated with drilling.
 - Can be **up to 200% of the costs of production**.
- Landowners who refuse to consent can be forced to participate and pay a penalty.

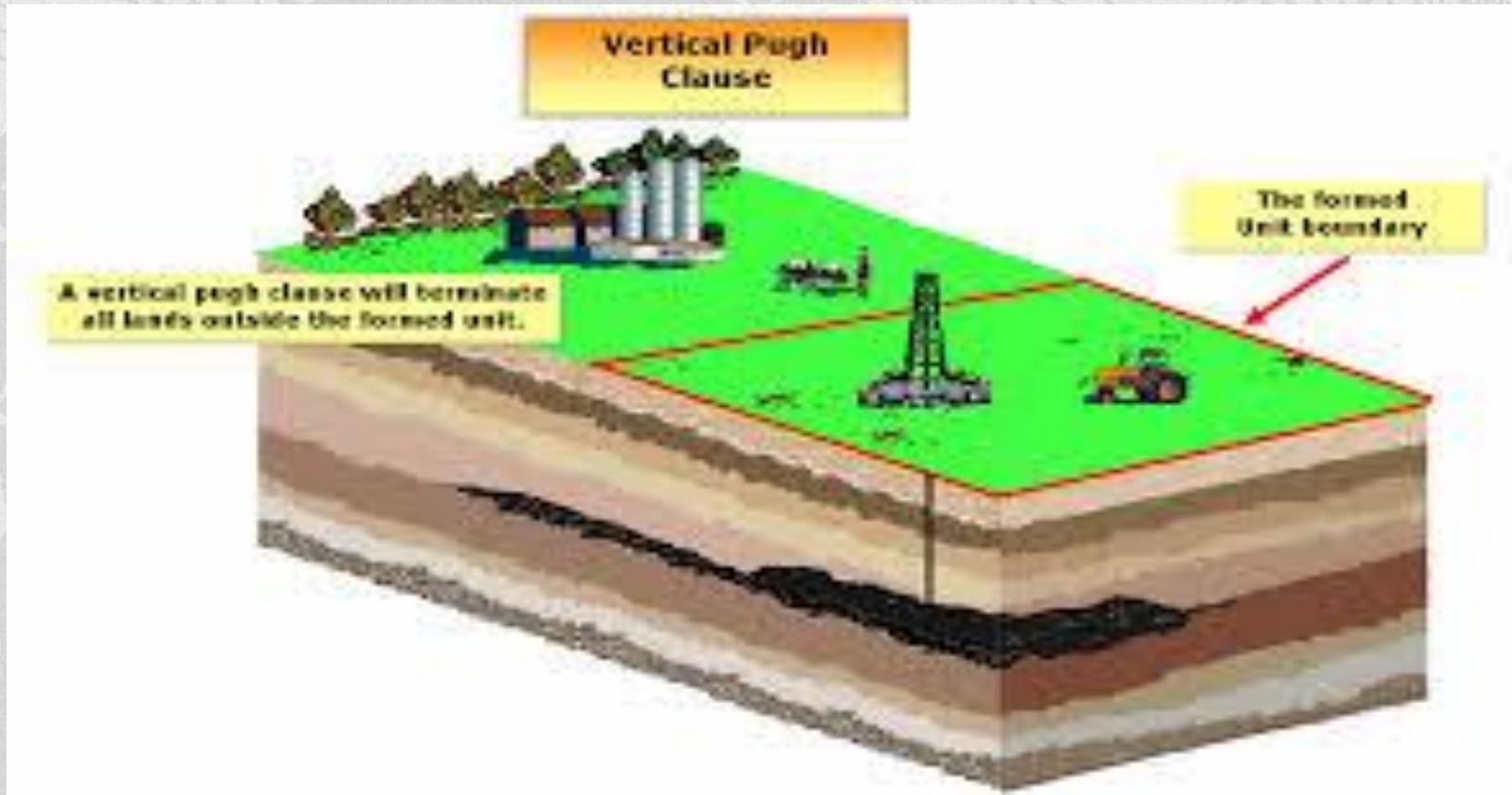
Why is this not a taking?

- Surface property rights don't seem to apply as deeply underground as drilling occurs
- Forced pooling and unitization do provide some compensation – so even if a taking, it's not one without just compensation

Topics for today

1. Landowners under unitization agreements
2. Penalty/Interest for statutorily unitized landowners
3. **Forced unitization of already leased properties**
4. HB 152

Pugh Clauses



Topics for today

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3. Forced unitization of leased properties
4. **HB 152**

As Introduced

**134th General Assembly
Regular Session
2021-2022**

H. B. No. 152

Representatives Stewart, Ginter

A BILL

To amend section 1509.28 of the Revised Code to
revise the law governing unit operation. 1
2

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 1509.28 of the Revised Code be
amended to read as follows: 3
4

Sec. 1509.28. (A) ~~The~~ As used in this section: 5

(1) "Bonus payment" means a payment for the execution of
an oil and gas lease. 6
7

(2) "Net acres" means the pro rata undivided interest in
oil and gas in a tract, expressed on an acreage basis and
determined by multiplying an unleased mineral owner's percentage 8
9
10

Options for unleased mineral rights owners

Lease

Lease their interests under terms established at the hearing.

Royalty of 1/8th of the net, plus bonus of 75% of current market rate for a bonus payment per acre within the proposed unit area, multiplied by the net acres the unleased mineral owner's interest contributes to the unit

Consenting Party

Participate in the unit operations as a consenting party under the terms of the joint operating agreement

Nonconsenting Party

Participate as a nonconsenting party under the terms of the agreement, provided, a 300% nonparticipation charge applies to the nonconsenting owner's interests, payable out of the owner's share of production.

What changed from HB152 to SUB HB152?



- From HB152 to SUB HB152
- 1. Meaning of “net proceeds” in the Lease Option
- 2. Bonus payments in the Lease Option
- 3. Nonparticipation charge in the nonconsenting party option
- 4. Timing requirement for unitization hearing

What changed in Sub HB152?

1. “Net proceeds” in the Lease Option

HB152

- “Net proceeds” means the proceeds received on the sale of production less taxes and fees and less post-production costs incurred between the wellhead and the point of sale (R.C. 1509.28(A)(3) and (F)(9)(a)).

Sub HB152

- “gross proceeds” received on the sale of production of oil or gas **without deduction** of any post-production costs incurred between the wellhead and the point of sale, but less a proportionate share of any taxes or fees (R.C. 1509.28(A)(2) and (F)(9)(a)).

Market Enhancement Clause



PRE HB 152



HB 152



SUB HB 152



SUGGESTED
LANGUAGE

What changed in the Sub HB152?

2. Lease option and bonus payment

HB152

- Lease option must include a royalty of 1/8th of the “net proceeds” received by the applicant plus a per acre bonus payment of 75% of the current market rate for a bonus payment, (R.C. 1509.28(F)(9)(a)).

SUB HB152

- 1. Specifies that the lease option must include a royalty of 1/8th of **the gross proceeds** received by the applicant on the sale of production; and
- 2. Reduces the bonus payment percentage to 50% (R.C. 1509.28(F)(9)(a).)

What changed in the Sub HB152?

3. Nonconsenting party option

HB152

- The nonparticipation charge applicable to the unleased mineral owner's interest under the joint operating agreement is 300% of the carried amounts, payable out of the unleased mineral owner's share of production
(R.C. 1509.28(F)(9)(c))

SUB HB152

- Reduces the nonparticipation charge to 200% of the carried amounts
(R.C. 1509.28(F)(9)(c)).

What changed in the Sub HB152?

4. Timing of the unitization hearing

HB152

- Requires the Chief of the Division of Oil and Gas Resources Management to hold a hearing on a unit application not less than 30 days and not more than 60 days after the date of a Chief's motion for unit operation or the date the Chief received a unitization application (R.C. 1509.28(D)(2)).

SUB HB152

- Eliminates the 30-day minimum time period that must pass before the
- hearing may be held (R.C. 1509.28(D)(2)).

HB 152 - Status

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Address bar: legislature.ohio.gov/legislation/legislation-status?id=GA134-HB-152

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House Bill 152

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Brian Stewart
District 78

HISTORY

DATE	CHAMBER	ACTION	COMMITTEE
2/24/21	House	Refer to Committee	Energy and Natural Resources
2/23/21	House	Introduced	

HB 152 – Action in Committee

The screenshot shows a web browser displaying the Ohio Legislature website. The browser's address bar shows the URL: legislature.ohio.gov/legislation/legislation-committee-documents?id=GA134-HB-152. The website header includes the text "THE OHIO LEGISLATURE" and "134TH GENERAL ASSEMBLY". The navigation menu contains links for SCHEDULES, LEGISLATION, LEGISLATORS, COMMITTEES, SESSION, BUDGET, LAWS, and PUBLICATIONS. The main content area is titled "Energy and Natural Resources" and "March 24, 2021". It features a table of witnesses and a table of committee hearings. On the left side, there are two portraits of legislators: Brian Stewart, District 78, and another legislator. The bottom of the page shows a Windows taskbar with various application icons and the system clock displaying 2:35 PM on 9/2/2022.

legislature.ohio.gov/legislation/legislation-committee-documents?id=GA134-HB-152

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Energy and Natural Resources | March 24, 2021 | 1st Hearing | [Download](#)

WITNESS	ORGANIZATION	TESTIFYING AS	DOCUMENT
Representatives Ginter and Stewart	Ohio House of Representatives	Proponent	Download

COMMITTEE	DATE	STATUS	BILL TEXT
Energy and Natural Resources	April 15, 2021	2nd Hearing	Download

WITNESS	ORGANIZATION	TESTIFYING AS	DOCUMENT
Matt Hammond	Ohio Oil and Gas Association	Proponent	Download

COMMITTEE	DATE	STATUS	BILL TEXT
Energy and Natural Resources	June 16, 2021	3rd Hearing	Download

COMMITTEE	DATE	STATUS	BILL TEXT
Energy and Natural Resources	June 24, 2021	4th Hearing	Download

Brian Stewart
District 78

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9/2/2022

HB 152 - Votes

House Bill 152

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VOTES			
DATE	CHAMBER	RESULTS	VOTE



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House Bill 152 - 134th General Assembly

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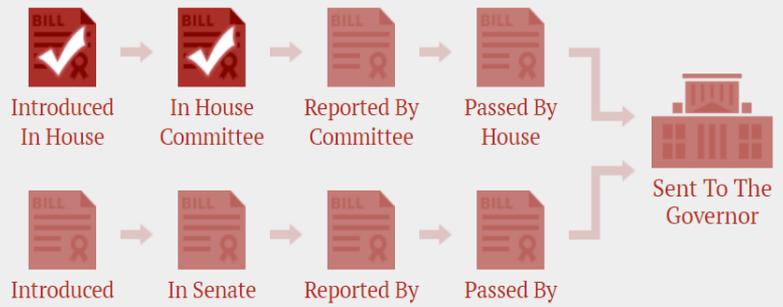
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Revise the law governing unit operation [Long Title +](#)



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