

Old Country Lawyer, December, 2010 The Fracking Legal System

Persons far more learned than this writer have publicized in written and video forms, the geological processes, and chemical and biological effects, of the business of drilling for natural gas held in deep rock formations beneath land owned by private citizens. A description of the legal maneuvers undertaken by the Leasing Agents for the drilling operators is an equally unpleasant revelation.

In Portage County, Leasing Agents have been persistently promoting oil-and-gas “leases” to private landowners for the past year. The Leasing Agents approach individual owners with lengthy documents in detailed legal language, which documents seem to discourage a non-attorney from looking at more than a few paragraphs. One proposed lease that this writer reviewed, that was offered to an owner of Windham Township property, was seven pages in length, with a two-page Memorandum for recording. It set out in detail what activities the landowner was permitting the drilling operator to conduct on the land, but did not require the drilling operator to begin operations, and permitted the drilling operator to extend the lease from five years to ten years upon the payment of two dollars per acre per year. More details on this later.

The key legal characteristic is that the Leasing Agent is a separate legal entity from the drilling operator. While the Leasing Agent may tell a landowner that “We represent one of the biggest drilling companies in the country and it's been in business for eighty years and it's got plenty of money to pay your signing bonus,” that drilling company is not the business entity that signs the lease. The Leasing Agent signs the lease and gets it recorded at the County Recorder, so that parcel is off the market for any other Leasing Agent to bid on. But, the Leasing Agent itself doesn't have any money to pay signing bonuses, and the Leasing agent certainly doesn't have any drilling operation of its own to start producing gas or oil. The Leasing Agent's business model is to sign up enough landowners to pool a sufficient area to drill, then sell that group of leases to the drilling operator. Only at the point that the Leasing Agent gets paid from the drilling operator, does the Leasing Agent have the funds to pay the bonuses which the Leasing Agent promised to the various landowners.

If the Leasing Agent fails to pay the landowner, whether because the leasing agent was unable to re-sell the lease, or because of incompetence, theft, or fraud, the landowner's lease has already been recorded so the gas-and-oil rights may not be used by the landowner or leased to another without a lawsuit to have a court declare the lease invalid. If the landowner were to attempt to collect an unpaid bonus, the landowner would find that the Big Drilling Company that the landowner thought was supposed to pay the bonus, is not signed on the lease and had no legal liability. The landowner will likely find that the lawsuit may only claim damages from the Leasing Agent which signed the lease, and may find that the Leasing Agent does not have any assets from which to pay a judgment. The lease itself will only set out in writing a token signing bonus, “Ten dollars cash in hand paid”, and a royalty of one-eighth of the actual oil-and-gas production. The drilling operator to which the lease is assigned will promptly pay that. The eight hundred dollar an acre signing bonus promised by the Leasing Agent may not appear on the lease, and may not be legally enforceable against the drilling operator.

Among the activities which a drilling operator may conduct on the leased land under the

proposed gas-and-oil lease for the Windham Township parcel I reviewed, were “injecting gas, water, other fluids, air and any other substances into subsurface areas,” “laying pipelines, storing leased substances, building road, bridges, tanks, power lines, telephone lines and any other structures and things thereon to produce, save, take care of, process, store and transport said leased substances,” and “housing and otherwise caring for its employees,” and pretty much anything else the drilling operator might want to do.

If a landowner were selling a part of the real estate that can be easily seen, like “the North two acres” of a multi-acre parcel, that landowner might easily realize that competent legal counsel could make the transaction be completed in a way that would protect the landowner's interest. One hopes that landowners who are leasing the right to use ALL of their land, for a very long period of time, might also seek competent legal counsel BEFORE signing off on legal documents that give a company the right to build employee housing on their land.

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