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OHIO'S EXPERIENCE WITH PREEMPTING LOCAL REGULATION OF OIL AND GAS DEVELOPMENT

By Gregory D. Russell & Robert J. Krummen¹

TABLE OF CONTENTS

I.	INTRODUCTION.....	37
II.	OHIO—THE UTICA SHALE.....	39
III.	THE DEVELOPMENT OF STATEWIDE OIL AND GAS REGULATION IN OHIO	40
IV.	CURRENT LEGAL CHALLENGES	45
V.	GOING FORWARD.....	47

I. INTRODUCTION

As the national economy navigates a slow recovery, the oil and natural gas industry's recent boom has sparked optimism for economic growth and increased energy independence. Courtesy of technological improvements in horizontal drilling and hydraulic fracturing, the United States has managed to lower its crude oil imports while creating thousands of jobs from West Virginia to Wyoming.² The state of Oklahoma credited 60% of its November 2011 revenues to oil production alone.³ The discovery of the Haynesville Shale in northwestern Louisiana is expected to produce up to 200 trillion cubic feet of natural gas—the equivalent of eighteen years of current domestic oil production.⁴ Pennsylvania's Marcellus Shale natural gas boom contributed to saving Pennsylvania energy consumers \$13 billion in 2010 and 2011 by lowering the cost of energy.⁵ Meanwhile, the Bakken formation in North Dakota has added a 1 billion dollar surplus to the state's coffers through the steady addition of one hundred new wells in the state each month.⁶ Experts project that the Bakken formation could ultimately yield between 4 and 24 billion barrels of oil,

1. Attorneys at Vorys, Sater, Seymour and Pease LLP in Columbus, Ohio.

2. Russell Gold, *Oil and Gas Bubble Up All Over*, WALL STREET JOURNAL, Jan. 3, 2012, at A7, available at <http://online.wsj.com/article/SB10001424052970204464404577112681942517356.html>.

3. Jay F. Marks, *Energy Boom Reported in Oklahoma*, THE WASHINGTON EXAMINER, Dec. 30, 2011, <http://www.industryintel.com/news/read/3194748432/Oklahoma-experiences-prosperity-in-oil-natural-gas/uR/0>.

4. Ben Casselman, *U.S. Gas Fields Go From Bust to Boom*, WALL STREET JOURNAL, Apr. 30, 2009, at A1, available at <http://online.wsj.com/article/SB124104549891270585.html>.

5. *Marcellus Shale Natural Gas Boom*, THE ISN INSIDER BLOG (Dec. 19, 2011), <http://www.isnworld.com/~isn/blog/2011/12/19/marcellus-shale-natural-gas-boom/>.

6. Larry Oakes, *North Dakota's Great Oil Rush*, THE STAR TRIBUNE, Oct. 17, 2011, <http://www.startribune.com/local/131923403.html?page=all>.

requiring nearly forty-eight thousand additional wells in North Dakota alone.⁷ Similarly, in Colorado, the Niobrara Shale has companies investing billions of dollars in new wells and exploring the formation's potential.⁸

This explosion in growth has seen a corresponding increase in the challenges faced by operators across the country. This Article addresses one challenge in particular—the increasing reliance of opponents to oil and gas development on local regulation. Local regulation, whether prohibiting oil and gas development or simply placing additional burdens on the exercise of a valid state-authorized permit, can have detrimental effects on a state's policy to efficiently recover and utilize its oil and gas resources. One Pennsylvania township, for example, has promised a new “start” to regulating natural gas exploration by requiring explicit local approval for drilling activities and separate local approval for locating certain development activities.⁹ Similarly, Idaho oil and gas producers are hampered by inconsistent local regulations limiting well size and location and imposing requirements for expensive bonds and multi-million dollar insurance policies.¹⁰ In addition to its separate permitting process, a New Mexico county requires that the products and chemicals used in any hydraulic fracturing procedure be approved by the county.¹¹ Yet, a current proposal in the New York State Assembly erects the ultimate barrier for mineral and gas exploration by vesting local governments with unilateral veto power for oil and gas mining activities.¹² If the proposal passes the New York Assembly, a cloud of uncertainty will surround New York's oil and gas development because even after investing substantial capital in exploration and mineral leases, a local board could subsequently shut down operations at any moment through a simple majority vote.¹³

Unlike the aforementioned states, Ohio anticipated the challenges of local regulation. Ohio focused its regulatory efforts on establishing a uniform regulatory framework, holding a single regulator accounta-

7. *Id.*

8. Bobby Magill, *Niobrara: The Upcoming Oil Boom*, THE COLORADOAN, Jan. 4, 2012, available at 2012 WLNR 155421.

9. Valerie Myers, *North East Supervisors Approve Restrictions on Natural Gas Drilling*, ERIE TIMES-NEWS (Oct. 18, 2011, 12:01 AM), <http://www.goerie.com/article/20111018/NEWS02/310189956/North-East-supervisors-approve-restrictions-on-natural-gas-drilling>.

10. John Miller, *Gas Drillers to Ask Idaho to Curb Local Control*, BLOOMBERG BUSINESSWEEK (Dec. 21, 2011, 10:49 AM), <http://www.businessweek.com/ap/financialnews/D9ROVVT81.htm>.

11. *Colorado, New Mexico County Usher in Oil and Gas Regs*, PIPELINE NEWS, <http://www.pipeline-news.com/feature/colorado-new-mexico-county-usher-oil-and-gas-regs> (last visited July 20, 2012).

12. Mary Esch, *NY Gas Drilling Opponents Aim for Local Bans*, STAR GAZETTE (Jan. 6, 2012, 8:07 AM), <http://www.stargazette.com/article/20120106/NEWS10/120106014/NY-gas-drilling-opponents-aim-local-bans>.

13. *Id.*

ble for developing standards to govern oil and gas activity throughout the state.¹⁴

II. OHIO—THE UTICA SHALE

Today, as in other parts of the country, we are seeing the beginning of an oil and gas boom in Ohio.¹⁵ The current focus relates to a relatively deep formation known as the Utica Shale, which covers much of eastern and southern Ohio as well as parts of several other states, including New York, Pennsylvania, West Virginia, and Tennessee.¹⁶ Geologists and oil and gas operators believe that the Utica may contain not only natural gas, but also crude oil and natural gas liquids.¹⁷ In 2011, the Ohio Department of Natural Resources (“ODNR”) released a preliminary estimate that suggests that the Utica holds a recoverable reserve potential of between 5.5 and 15.7 trillion cubic feet of natural gas and between 1.31 and 3.75 billion barrels of oil.¹⁸

Industry’s interest in the Utica is also apparent: ODNR issued forty-two permits for horizontal wells in the Utica from January through September 2011, whereas only two such permits were issued for all of 2010.¹⁹ Given the proper development, some estimate that Ohio could be producing two hundred thousand barrels of crude oil a day by 2020.²⁰ While such development does not challenge Texas’s current 1.4 million barrels a day of production, based on current production rates, it would make Ohio the sixth largest oil-producing state in the country—putting Ohio ahead of such major producers as Wyoming and Louisiana.²¹

Unlike other states hoping to encourage oil and gas production, however, Ohio offers a distinct advantage for prospective oil and gas operators by providing a comprehensive, predictable, and favorable regulatory environment for oil and gas development.²² Through the enactment of Ohio Revised Code chapter 1509, Ohio has established a

14. OHIO REV. CODE ANN. §§ 1509.01–.99 (West 2011). Specifically, Ohio’s oil and gas operations are regulated by the Division of Oil and Gas Resources Management, which has the sole and exclusive power to regulate the permitting, location and spacing of oil and gas wells within the state and is tasked with developing and maintaining a uniform statewide regulation. *See id.* § 1509.02.

15. Steve Hargreaves, *Ohio Set to See Oil Boom Thanks to Fracking*, CNN MONEY (Dec. 20, 2011, 8:31 AM), http://money.cnn.com/2011/12/20/news/economy/ohio_oil/.

16. U.S. ENERGY INFO. ADMIN., OIL AND NATURAL GAS DRILLING IN OHIO ON THE RISE (Oct. 11, 2011), <http://www.eia.gov/todayinenergy/detail.cfm?id=3430>.

17. *Id.*

18. LARRY WICKSTROM ET AL., OHIO DEP’T OF NATURAL RESOURCES, THE MARCELLUS & UTICA SHALE PLAYS IN OHIO (Mar. 11, 2011), http://www.dnr.state.oh.us/portals/10/energy/Marcellus_Utica_presentation_OOGAL.pdf.

19. U.S. ENERGY INFO. ADMIN., *supra* note 16.

20. Hargreaves, *supra* note 15.

21. *Id.*

22. *See* OHIO REV. CODE ANN. §§ 1509.01–.99 (West 2011).

uniform statewide legislative and administrative scheme that expressly preempts local regulation of oil and gas development.²³ Ohio law thereby assures operators that if they adhere to the state program—obtain the proper permits and observe certain health and safety requirements—they may conduct their business without undue interference or harassment from local authorities. These laws provide individuals and industry with a stable, uniform system of regulation in order to encourage oil and gas production while also ensuring the health, safety, and welfare of Ohio’s citizens.²⁴

This Article discusses the history and development of Ohio’s oil and gas regulatory program. It also explores Ohio’s efforts to preempt local regulation as well as recent municipal legal challenges thereto.

III. THE DEVELOPMENT OF STATEWIDE OIL AND GAS REGULATION IN OHIO

Oil and gas development is not new to Ohio. Indeed, in the final years of the nineteenth century, Ohio was one of the nation’s leading oil producers, supplying nearly one-third of all of the oil produced in the United States.²⁵ At the time, and even up through the 1960s, statewide oil and gas regulations were virtually nonexistent.²⁶ For instance, until March 1964, there were no minimum acreage, well-spacing, or other conservation requirements in the state.²⁷ In fact, townlot drilling was a common practice.²⁸ Thus, at the time, the state of Ohio was apt to experience many of the same problems experienced by other states—namely, conflicting local regulation of the industry and occasional, scattered opposition to resource development.

Fortunately, in 1965, the Ohio General Assembly adopted legislation governing oil and gas development.²⁹ Article II, section 36 of the Ohio Constitution provides the state with authority “to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and all other minerals.”³⁰ Pursuant to this authority and pursuant to the general police power of the state to control and conserve the natural resources of Ohio,³¹ the Ohio General Assembly

23. *See id.* § 1509.02.

24. *Newbury Twp. Bd. of Twp. Trs. v. Lomak Petroleum (Ohio), Inc.*, 583 N.E.2d 302, 304 (Ohio 1992).

25. OHIO LEGIS. SERV. COMM’N, OIL & GAS LAW IN OHIO, STAFF RESEARCH REPORT NO. 63, at 12 (1965).

26. Charles J. Meyers & Howard R. Williams, *Petroleum Conservation in Ohio*, 26 OHIO ST. L.J. 591, 591 (1965).

27. *Id.*

28. INTERSTATE OIL COMPACT COMM’N, XXIV OIL AND GAS COMPACT BULLETIN 63 (1965).

29. Chapter 1509 of the Ohio Revised Code, signed by the Governor July 16, 1965, became effective 90 days from that date. The act was based on Sub. H.B. No. 234, introduced by an *ad hoc* legislative committee.

30. OHIO CONST. art. II, § 36.

31. *See State v. Martin*, 151 N.E.2d 7, 10 (Ohio 1958).

enacted a number of statutes regulating the production of coal, oil, and gas, including Ohio Revised Code chapter 1509 ("R.C. 1509" or the "Act").³²

R.C. 1509 was originally designed to fulfill two important goals with respect to oil and gas. The first of these goals was to "conserve," or prevent the waste of, oil and gas resources.³³ The second important goal of R.C. 1509 was to regulate the health and safety aspects of drilling and operating oil and gas wells.³⁴ This required a careful balancing by the Ohio General Assembly to make sure that there was sufficient regulation to protect citizens, but not so much as to stifle the development of these natural resources.

Recognizing the unique and technical nature of oil and gas exploration, drilling, and operating, R.C. 1509 also created a Division of Oil and Gas (the "Division") within the Ohio Department of Natural Resources and delegated to the chief of the Division (the "Chief") the power and duty to enforce the provisions of the Act and to make such additional rules as necessary for its administration and implementation.³⁵ Under R.C. 1509, the Chief has the principal responsibility for administering the Act. The Ohio General Assembly also created two other agencies with certain authority in connection with R.C. 1509—the Technical Advisory Council and the Oil and Gas Board of Review.³⁶ The Technical Advisory Council is tasked with consulting with and advising the Chief in the performance of his duties.³⁷ The Oil and Gas Board of Review, now known as the Oil and Gas Commission, hears appeals from orders of the Chief.³⁸

Importantly, R.C. 1509 also began addressing potential conflicts between state and local regulation of the oil and gas industry. The basic scheme that describes the areas of local regulation of oil and gas that were initially preempted by state law was explicitly set forth in the Act, which stated as follows:

Chapter 1509 of the Revised Code or rules promulgated thereunder shall not be construed to prevent any municipal corporation, county, or township from enacting and enforcing health and safety standards for the drilling and exploration for oil and gas, provided that such standards are not less restrictive than the provisions of this chapter or the rules adopted thereunder by the division of oil and

32. *Redman v. Ohio Dep't of Indus. Relations*, 662 N.E.2d 352, 356 (Ohio 1996).

33. *Meyers & Williams*, *supra* note 26, at 594.

34. *Id.* at 595.

35. OHIO REV. CODE ANN. §§ 1509.02–.03 (1965) (current version at OHIO REV. CODE ANN. §§ 1509.02–.03 (West 2011)). The Division of Oil and Gas was later rebranded as the Division of Mineral Resources Management. Effective October 1, 2011, R.C. 1509 created a Division of Oil and Gas Resources Management within the Ohio Department of Natural Resources, which succeeded the DMRM.

36. *Meyers & Williams*, *supra* note 26, at 592–93; *see* OHIO REV. CODE ANN. §§ 1509.35, .38 (West 2011).

37. § 1509.38.

38. OHIO REV. CODE ANN. § 1509.36 (West 2011).

gas, and provided further that no county, or township may adopt or enforce any ordinances, resolutions, rules, or requirements relative to the minimum acreage requirements for drilling units, and minimum distances from which a new well may be drilled or an existing well deepened, plugged back, or reopened to a source of supply different from the existing pool from boundaries of tracts, drilling units, other wells, and from streets, roads, highways, railroad tracks, or the restoration or plugging of an oil and gas well. **No county, or township may require any permit or license for the drilling, operation, production, plugging, or abandonment of any oil or gas well, nor any fee, bond or other security, or insurance for any activity associated with the drilling, operation, production, plugging, or abandonment of a well, except for the permits provided for in [the Revised Code] and any bond or other security associated therewith.**³⁹

The preemptive effect of R.C. 1509 over local regulation of oil and gas drilling operations was directly challenged and upheld by the Supreme Court of Ohio, in *Newbury Township Board of Township Trustees v. Lomak Petroleum (Ohio), Inc.*⁴⁰ In that case, the Board of Trustees of Newbury Township sought review as to whether certain portions of its zoning rules were invalid because they conflicted with, and were therefore preempted by, R.C. 1509.⁴¹ Newbury's zoning rules prohibited certain activities in residential areas, including both drilling and locating tanks and other related materials.⁴² The rules also prohibited drilling within minimum distances from streets and roads.⁴³ In striking down the Township's zoning rules, the Ohio Supreme Court formally endorsed the state's preemptive authority, declaring it the "public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety, and welfare of the citizens of Ohio."⁴⁴ The Court further stated that "[t]o further this policy and to ensure some degree of uniformity through the state, local regulation of some aspects of oil and gas well exploration and development is preempted by the statutory plan embodied in R.C. Chapter 1509."⁴⁵

39. OHIO REV. CODE ANN. § 1509.39 (repealed 2004) (emphasis added).

40. *Newbury Twp. Bd. of Twp. Trs. v. Lomak Petroleum (Ohio), Inc.*, 583 N.E.2d 302 (Ohio 1992).

41. *Id.* at 304.

42. *Id.* at 304–05.

43. *Id.* at 306.

44. *Id.* at 304. The Ohio Supreme Court did not strike down Newbury Township Zoning Resolution Section 801.0 B, however, because the Court reasoned it could not determine from the record (on summary judgment) whether the zoning rule related to permissible health and safety goals. *Id.* at 307.

45. *Id.* at 304.

Other Ohio courts have followed the Ohio Supreme Court's directive in *Newbury Township*, finding local regulation of oil and gas exploration and development preempted under R.C. 1509.⁴⁶

Since that time, the Ohio General Assembly has taken additional action to broaden and expand the scope of state regulation over the oil and gas industry. Through later amendments, the Ohio General Assembly has expanded the state's legislative and administrative scheme. In particular, in 2004, the Ohio General Assembly passed H.B. 278, which declared that the state has the sole and exclusive authority to regulate the permitting, locating, and spacing of oil and gas wells. The intended result was the effective elimination of duplicate local regulation that disrupted or unnecessarily delayed oil and gas developments.

These amendments too were challenged as unconstitutional. Filed in 2005, plaintiffs Richard Kellner, Melville Moses, and "the Concerned Residents Opposed to Well Drilling" brought suit seeking to have H.B. 278 declared unconstitutional by the Common Pleas Court of Cuyahoga County, Ohio.⁴⁷ In its review, the trial court dismissed the challenge on summary judgment, determining that H.B. 278 was constitutional and a valid enactment of state statute.⁴⁸ The case was not further appealed.

R.C. 1509 has since been further amended, and today, it regulates virtually every aspect of oil and gas production in Ohio. As the Act makes clear, the Division of Oil and Gas Resources Management exercises comprehensive statewide authority (to the exclusion of local authorities):

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 6111.029 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. **Nothing in this section af-**

46. See, e.g., *St. Croix, Ltd. v. Bath Twp.*, 693 N.E.2d 297, 299 (Ohio Ct. App. 1997) (township zoning resolution setting minimum distance between oil and gas wells and habitable structures preempted under section 1509).

47. *Kellner v. Sponsler*, No. CV-05-561362 (Ohio Ct. of Common Pleas 2006).

48. *Id.*

fects 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.⁴⁹

As is clear from the above-quoted language, R.C. 1509.02 no longer provides the broad exceptions to statewide preemption of local regulation in the areas of health and safety that were included in R.C. 1509.39. Instead, R.C. 1509.02 now makes clear that oil and gas regulation is a statewide concern that is regulated solely by the Division of Oil and Gas Resources Management, except in three discrete instances: (1) where oversight for the implementation of federal law has been delegated to the environmental protection agency; (2) for certain activities regulated under R.C. 6111 (related to water pollution controls); and (3) relating to certain authorities over local roads under R.C. 723.01 (municipal authority over roadways and bridges) and R.C. 4513.34 (permits for oversized vehicles).

Because the Ohio General Assembly has limited the exceptions to the state's preemptive authority, Ohio's Division of Oil and Gas Resources Management exercises extensive authority over oil and gas operations. The regulations that the Division now exclusively oversees and enforces include the following: (1) minimum distance regulations on the location of wells and other facilities relative to existing property lines and dwellings;⁵⁰ (2) terms and conditions that ensure safe operations of wells, protect public and private water supplies, require fencing and screening, and mitigate noise;⁵¹ (3) enforcement mechanisms to ensure compliance and allow the state to suspend any well operations that threaten public safety or damage natural resources;⁵² and (4) insurance and surety requirements.⁵³ The Division also has additional enforcement tools enabling it to plug wells that cause or threaten harm to health, safety, or the environment⁵⁴ and to establish mandatory standards for well construction and operation.⁵⁵

There are good reasons for the exercise of exclusive statewide authority over oil and gas operations. The oil and gas industry has progressively become a more technical industry. On one hand, state officials at the Division of Oil and Gas Resources Management have, over time, acquired both the resources and extensive scientific and technical expertise necessary to regulate and permit the industry. On the other hand, municipalities, townships, and counties cannot be ex-

49. OHIO REV. CODE ANN. § 1509.02 (West 2011) (emphasis added).

50. OHIO REV. CODE ANN. § 1509.021 (West 2011).

51. OHIO REV. CODE ANN. § 1509.03 (West 2011).

52. OHIO REV. CODE ANN. § 1509.04 (West 2011).

53. OHIO REV. CODE ANN. § 1509.07 (West 2011).

54. OHIO REV. CODE ANN. §§ 1509.12, .23 (West 2011).

55. *See, e.g.*, OHIO REV. CODE ANN. §§ 1509.17, .22, .221 (West 2011).

pected to have the expertise to meet the state's dual goals of encouraging resource utilization while also providing the necessary safeguards for ensuring the public welfare.⁵⁶ Moreover, had Ohio not exerted its preemptive authority, conflict between local and state authorities would have been inevitable and would likely have had the effect of suppressing needed economic and resource development.⁵⁷ Thus, it makes good policy for the interests of the state to have these matters regulated only at the state level.

IV. CURRENT LEGAL CHALLENGES

Not all individuals and local authorities are enamored with the loss of authority over oil and gas drilling and operations. In certain instances, some individuals and local authorities fear the loss of control, believing that regulation must stay at the local level.⁵⁸ In other instances, those opposed to oil and gas resource development have resisted state regulation because they do not support the state's public policy of encouraging oil and gas production. For these reasons and others, a number of challenges are being mounted to the state's comprehensive oil and gas regulatory system.

For example, in 2011, the City of Munroe Falls, Ohio (the "City") filed suit against Beck Energy Corporation for alleged violations of several of the City's municipal ordinances.⁵⁹ Beck Energy had received approval from the Division for a permit to drill within the City's municipal boundaries.⁶⁰ As Beck Energy began to proceed with its operations, the City issued a stop-work order based on an alleged violation of the City's zoning code.

The City sought both a preliminary and permanent injunction against any drilling activities by Beck Energy. In support, the City cited additional ordinances that it claimed prohibited Beck Energy from drilling its well. Many of these ordinances were expressly targeted at gas and oil operations. For example, the City's ordinance 1329.03 mandated that no one "shall commence to drill a well for oil, gas, or other hydrocarbons" unless the City granted a zoning certifi-

56. *Newbury Twp. Bd. of Twp. Trs. v. Lomak Petroleum (Ohio), Inc.*, 583 N.E.2d 302, 304 (Ohio 1992).

57. Sabrina Tavernise, *As Gas Drilling Spreads, Towns Stand Ground Over Control*, N.Y. TIMES, Dec. 14, 2011, at A20, available at http://www.nytimes.com/2011/12/15/us/towns-fighting-to-stand-ground-against-gas-drillers.html?_r=1&scp=1&sq=gas%20rights&st=cse.

58. *Id.*

59. *Order Granting Preliminary Injunction, State ex rel. Morrison v. Beck Energy Corp.*, No. 2011-04-1897 (Ohio Ct. of Common Pleas May 3, 2011). Lawyers from the firm Vorys, Sater, Seymour and Pease LLP represented Beck Energy Corporation in this litigation. All information included in this Article regarding this case is based on public records. No attorney-client information is divulged or discussed, and no privilege is, in any way, waived.

60. *Id.* at 1.

cate for the drilling.⁶¹ An application for the necessary zoning certificate required a payment of a non-refundable fee of eight hundred dollars⁶² and an additional deposit of two thousand dollars.⁶³ By their express terms, these ordinances applied only to oil and gas operations. The City's suit also cited ordinances involving the City's rights-of-way. These include the requirement for a special city permit when a right-of-way will be obstructed⁶⁴ and a permit fee to be paid to the City for the application.⁶⁵ Finally, the City cited a local ordinance requiring an additional permit and fee for any excavations on or under city streets.⁶⁶

Beck Energy countered that these local ordinances were preempted because they conflicted with the state's comprehensive, statewide oil and gas permitting and regulation scheme.⁶⁷ The state of Ohio, through the Department of Natural Resources, filed a brief in support of the state's preemption of the local ordinances.

Despite the clear language of section 1509.02, the trial court sided with the City, determining that the local regulations did not conflict with state law and were thus not preempted.⁶⁸ The trial court further granted the City's motion for injunctive relief, enjoining Beck Energy from engaging in drilling operations within the City's boundaries until it complied with all relevant local ordinances.⁶⁹

Following the trial court's order, Beck Energy promptly appealed to Ohio's Ninth District Court of Appeals. The case is briefed, has recently been argued, and is awaiting a decision. No matter how the court of appeals decides the issue, the case is likely to be appealed to the Supreme Court of Ohio.

In another challenge to the scope of the preemptive effect of R.C. 1509, Paul Natale sued Everflow Eastern, Inc. on claims of common law nuisance and qualified nuisance relating to the placement of (and conditions resulting from) oil and gas storage tanks on his next door neighbor's property.⁷⁰ Among other things, Natale argued that the installation and operation of Everflow's oil and gas storage tanks amounted to a qualified nuisance because they were allegedly placed within two hundred feet of a residence, which was prohibited by a

61. MUNROE FALLS, OHIO, CODIFIED ORDINANCE § 1329.03(a) (2011).

62. MUNROE FALLS, OHIO, CODIFIED ORDINANCE § 1329.04 (2011).

63. MUNROE FALLS, OHIO, CODIFIED ORDINANCE § 1329.06 (2011).

64. MUNROE FALLS, OHIO, CODIFIED ORDINANCE § 919.05 (2011).

65. MUNROE FALLS, OHIO, CODIFIED ORDINANCE § 919.08 (2011).

66. MUNROE FALLS, OHIO, CODIFIED ORDINANCE § 905.02 (2011).

67. *State ex rel. Morrison v. Beck Energy Corp.*, No. 2011-04-1897, at 1 (Ohio Ct. of Common Pleas May 3, 2011).

68. *Id.* at 3.

69. *Id.* at 4.

70. *Natale v. Everflow E., Inc.*, 195 Ohio App. 3d 270, 2011-Ohio-4304, 959 N.E.2d 602, at ¶¶ 1–2.

local municipal ordinance, and the operation of which was allegedly in violation of other ordinances.⁷¹

Everflow responded by moving for summary judgment because the state of Ohio had approved of and permitted the location and operation of its storage tanks at the property.⁷² Everflow further argued that any city ordinance that conflicted with its state permit was preempted by R.C. 1509 and thus, could not form the basis for a qualified nuisance.⁷³

The trial court granted Everflow summary judgment on Natale's nuisance claims.⁷⁴ In review, the Eleventh District Court of Appeals affirmed the decision of the trial court, finding that any issues relating to the well operation (or tank location) were preempted by state law.⁷⁵ The court emphasized that "it is manifest that the ordinances referenced by [Natale] are preempted by the clear, unequivocal language in [R.C. § 1509.02]."⁷⁶

Natale petitioned the Supreme Court of Ohio for discretionary review, arguing that the municipal ordinances should not be preempted because they do not conflict with state law. However, the Court denied the opportunity to review the court of appeals's decision, likely because the Court reasoned that the court of appeals had properly determined that the conflicting municipal ordinances were preempted by state law.⁷⁷

V. GOING FORWARD

The state of Ohio has taken steps to create a broad, uniform, and generally predictable statewide system for the regulation of oil and gas development. The law is an attempt to give individuals and industry a stable, predictable, and uniform system of regulation governing oil and gas activities, including regulations that define both an operator's rights under state law and its responsibilities to the public welfare, without the additional burden of conflicting and obtrusive local regulation.

As previously discussed, the Supreme Court of Ohio has taken the formal position that it is the public policy of Ohio to encourage oil and gas production where the extraction can be accomplished without undue risks to health and safety.⁷⁸ However, the Court has not explicitly addressed the full preemptive reach of R.C. 1509. In general, Ohio's

71. *Id.* ¶ 48.

72. *Id.* ¶ 49.

73. *Id.* ¶¶ 50–51.

74. *Id.* ¶ 11.

75. *Id.* ¶ 55–56.

76. *Id.* ¶ 50.

77. *See Natale v. Everflow E., Inc.*, 131 Ohio St. 3d 1413, 2011-Ohio-4304, 959 N.E.2d 1057.

78. *Newbury Twp. Bd. of Twp. Trs. v. Lomak Petroleum (Ohio), Inc.*, 583 N.E.2d 302, 304 (Ohio 1992).

lower courts have been supportive of the statewide effort to promote responsible resource development and have, in piecemeal, approved of the state's preemption of local regulation. However, until the Supreme Court of Ohio finally adjudicates and endorses the preemptive reach of R.C. 1509, litigation involving conflicts between state and local regulation will continue.