

IN THE SUPREME COURT OF OHIO

STATE EX REL.,  
CLAUGUS FAMILY FARM, L.P.,

Case No. 2014-0423

Relator,

IN MANDAMUS AND  
PROHIBITION

v.

SEVENTH DISTRICT COURT OF  
APPEALS, ET AL.,

Respondents,

and

CLYDE A. HUPP, ET AL.,

Case No. 2014-1933

Appellants,

Court of Appeals Case Numbers

v.

BECK ENERGY CORPORATION

12 MO 6

13 MO 2

and

13 MO 3

13 MO 11

XTO ENERGY INC.

Appellees.

APPELLEE XTO ENERGY INC.'S MOTION FOR FURTHER TOLLING

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Appellee XTO Energy Inc. hereby moves under S.Ct.Prac.R. 4.01(A) and Civ.R. 62(D) for an order extending tolling of the oil and gas leases at issue in this consolidated matter until this Court issues its final decision. Without a tolling order, the mere pendency of this litigation will destroy the benefit of the bargain the parties struck in entering into their oil and gas leases—regardless of this Court’s ultimate disposition of the case on the merits.

Because this Court has accepted jurisdiction in Case No. 2014-1933, the tolling order entered by the Seventh District Court of Appeals has now expired by its own terms. Further tolling is necessary to maintain the status quo and protect XTO’s rights in the event this Court affirms the decision of the court of appeals.

### **WHY TOLLING IS NECESSARY**

Beck Energy Corporation entered into hundreds of oil and gas leases with various property owners throughout the State of Ohio on a standard lease form, the Form G&T (83) Oil and Gas Lease. Beck thereafter sold the deep rights to some of those leases to XTO.

As is true of oil and gas leases generally, the leases at issue in this case have primary and secondary terms. The primary term is the fixed period of time during which the lessee has an exclusive right to drill for oil and gas. The lessee bargains and pays for the primary term as part of the lease agreement. If the lessee fails to develop the property during the primary term, the lease terminates. On the other

hand, if the lessee drills a productive well, pools the lease with others in a production unit, or conducts other operations specified in the lease before the end of the primary term, the secondary term commences. The secondary term usually continues so long as there is a productive well.

All of the leases at issue in this case were in their primary term when Plaintiffs challenged their validity by filing this case in the trial court. The existence of this case is a cloud on the leases, making it economically impractical to develop any of the properties covered by those leases until this case is finally resolved. (Affidavit of Rodney Black, Intervening Respondent Beck Energy Corporation's Additional Evidence in Case No. 2014-0423 ("Black Aff."), Exhibit C, at ¶ 10.) If XTO, for example, commences drilling operations and the plaintiffs ultimately succeed in their attempt to invalidate the leases, XTO will not only face possible liability for trespass, it would also lose a substantial financial investment in exploring and drilling for oil and gas. (*Id.*)

In the absence of tolling, each day that this case is pending decreases the bargained-for period in which to drill a well under the primary terms of the leases. Tolling is necessary to preserve the benefit of the bargain by stopping the clock while this consolidated matter is resolved. In the event that this Court affirms the determination by the Seventh District that the leases are valid, Beck and XTO at that point would still have the same amount of time to develop the leases as they

had when Beck first moved for tolling—but only if the Court extends the Seventh District’s tolling order.<sup>1</sup>

Without the tolling order entered by the Seventh District, the leases covering approximately 5700 acres of the deep rights XTO acquired from Beck would already have expired, and leases covering approximately 1200 more acres of those deep rights would be expiring by September of this year. (*Id.* at ¶ 15, 16, 17.) In other words, the mere pendency of the litigation would destroy the parties’ bargain, regardless of the ultimate outcome.

Now that the Seventh District’s tolling order has expired, the clock is again running on the primary terms of all those leases. Without further tolling, XTO could lose the value of the lease rights it purchased merely because the litigation is continuing in this Court—even if this Court ultimately affirms the Seventh District’s holding that the leases are valid. Tolling is necessary so XTO will not lose its investment in the leases through the mere passage of time.

### **THE PROCEEDINGS THAT LED TO THE SEVENTH DISTRICT’S TOLLING ORDER**

In the trial-court proceedings below, Plaintiffs sought a declaratory judgment that the named plaintiffs’ leases with Beck were void ab initio. The trial

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<sup>1</sup>In the event this Court reverses the Seventh District’s decision and determines the leases to be void, class members would suffer no prejudice from a tolling order. The oil and gas in their property that existed at the start of the litigation will still be present at the conclusion of the litigation, and available for development or leasing.

court granted that relief. Following that ruling, Beck moved the trial court for an order tolling the named plaintiffs' leases during the period between the date the plaintiffs filed their original complaint and the date this case is finally resolved. Beck did not then seek tolling of the absent class members' leases because the trial court had not yet certified a class.

The trial court did not immediately rule on Beck's motion for tolling. It did, however, certify a class consisting of lessors with similar oil and gas leases with Beck, thereby extending its ruling that the named plaintiffs' leases were void ab initio to the leases of the members of the certified class. (Decision And Order (On Plaintiff's Motion for Class Action Certification), *Hupp v. Beck Energy Corp.*, Monroe Cty. Com. Pl. Ct., 2011-345, Feb. 8, 2013.)

The trial court eventually entered a Decision and Entry that tolled the leases of the named plaintiffs, but refused to toll the leases of the other members of the class:

This court believes the leases of the original Plaintiffs in this action should be tolled pending the Defendant's appeal. This is the relief previously requested by the Defendant and not decided by this court. This decision is in keeping with the current line of decisions of the Monroe County Common Pleas Court. If the Defendant desires to

have this order expanded it can present that issue to the Court of Appeals.

(Decision and Entry, *Hupp v. Beck Energy Corp.*, Monroe Cty. Com. Pl. Ct., Case No. 2011-345, Aug. 2, 2013.)

On appeal, Beck followed the trial court's suggestion and asked the Seventh District to toll the leases of the absent class members. In response, the Seventh District extended the tolling order to all the members of the class:

The trial court's August 2, 2013, order tolling the lease terms as to the named plaintiffs only is hereby modified and continued. The lease terms are also tolled as to the proposed defined class members. The tolling period for all leases shall commence on October 1, 2012, the date Beck Energy first filed a motion in the trial court to toll the terms of the oil and gas leases. The tolling period shall continue during the pendency of all appeals in this Court, and in the event of a timely notice of appeal to the Ohio Supreme Court, until the Ohio Supreme Court accepts or declines jurisdiction. At the expiration of the tolling period, Beck Energy, and any successors and/or assigns shall have as much time to meet any and all obligations under the oil and gas lease(s) as they had as of October 1, 2012.

(Judgment Entry, *Hupp v. Beck Energy Corp.*, Seventh Dist., Case Nos. 12 MO 6, 13 MO 3, and 13 MO 11, Sept. 26, 2013.)

With this Court's acceptance of jurisdiction over plaintiffs' Propositions of Law I and II, the Seventh District's tolling order has expired. XTO hereby moves this Court to continue tolling the leases until it issues its final decision in this matter.

### **XTO'S INTEREST IN EXTENDING THE TOLLING ORDER**

In 2011, XTO purchased from Beck the right to drill, develop, and explore properties covered by many of the leases at issue below certain depths greater than 3860 feet. (Black Aff., Exhibit C, ¶ 3.) In an attempt to protect its investment in those leases, XTO sought to intervene in the trial-court proceedings. The trial court denied that motion, and XTO appealed that denial to the Seventh District Court of Appeals, Seventh Dist. Case No. 2013 MO 2. The Seventh District consolidated XTO's appeal with three appeals filed by Beck from decisions of the trial court in *Hupp*, Seventh Dist. Case Nos. 12 MO 6, 13 MO 3, and 13 MO 11. (Judgment Entry, *Hupp v. Beck Energy Corp.*, Seventh Dist., 13 MO 2, Sept. 26, 2014.)

The Seventh District resolved the consolidated appeals by reversing the trial court's judgment in favor of the plaintiffs on its merits, affirming the trial court's certification of a class, and determining that XTO's assignment of error based on

the trial court's denial of its motion to intervene was moot. XTO is an appellee in these consolidated cases based on its role as a party to the consolidated cases before the Seventh District Court of Appeals.

**A TOLLING ORDER WOULD NOT CONFLICT WITH  
CLAUGUS FAMILY FARM L.P.'S ORIGINAL ACTION**

Through its mandamus action, Claugus Family Farm L.P. (a member of the certified class) challenges that aspect of the Seventh District's tolling order that affects Claugus's oil and gas lease with Beck. Claugus's original action seeks relief only for itself, and no other class member has raised the same challenge.

Granting this motion would not interfere with the Court's consideration of the merits of Claugus's requested mandamus relief. If Claugus ultimately succeeds in its challenge, its lease with Beck will already have expired, and an order from this Court extending tolling will not revive it.<sup>2</sup> But an extended tolling order would at least preserve XTO's rights with respect to the other class members who have not challenged the tolling order. On the other hand, if Claugus is not entitled to avoid the Seventh District's tolling order, then there is no reason it should not likewise honor a tolling order this Court would enter.

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<sup>2</sup> Like any other lessors in the class, Claugus will still have all of its oil and gas under its property and will be able to develop or lease it.

## **XTO'S DILEMMA**

Litigation seeking to declare leases invalid during the primary term obstructs lessees like Beck and XTO from exercising rights they bargained for – if they drill and the leases are ultimately held to be invalid, they will face trespass claims and could lose a substantial part of their investment, but if they do not drill, the primary term can expire before the validity of the leases is decided. The clock runs out for Beck and XTO to develop the leases if litigation over the validity of the leases extends beyond the primary term. As one commentator described the dilemma posed by the obstruction of litigation:

During the existence of such an obstruction, it would be unreasonable to expect the lessee to make expenditures on a lease when to do so involves substantial risk of loss without a compensating prospect of gain. If the attack upon his title is successful, and if his expenditure results in a dry hole, he faces the possibility for substantial damages for loss of speculative value. Further, if the expenditure should result in production, he will be required to account to the successful litigant for the oil and gas which he produced, and he may be deprived of the right to recover his costs.

Kuntz, Law of Oil and Gas, Section 26.14 (2014).

Case law supports the use of tolling orders to address the obstruction of lessees' time-sensitive rights during litigation over lease validity. For example, in *Sw. Energy Prod. Co. v. Elkins*, 2010 Ark. 481, 374 S.W.3d 678, 685 (2010), the Arkansas Supreme Court held that, when the lessors under an oil and gas lease sued the lessee seeking a determination that the lease had terminated, the lessee was entitled to an order tolling its obligations under the lease, beginning the day the lessors had filed their complaint and continuing until such time as all appeals were completed or the time for appeal had expired:

Not to toll Southwestern Energy's obligation to drill as of [the date the lawsuit was filed] would create an impossible dilemma for Southwestern Energy: either use the contested lands and potentially expose itself to more liability or refrain from using the lands and lose its investment \* \* \*.

*Id.*, 374 S.W.3d at 685. In reaching its decision, the court relied on its own earlier decision in *Winn v. Collins*, 207 Ark. 946, 183 S.W.2d 593 (1944), a case in which the lessors under a lease for the mining of bauxite sought cancellation of the lease. The court determined in that case that, not only had the lessors not been entitled to cancellation at the time they filed suit, but also that they could not take advantage of the lessee's failure to perform under the lease during the time the case was pending: "The appellants could not claim a forfeiture that occurred after the filing

of this suit to cancel the lease, because the period of time the suit was pending would not count against the appellees.” *Id.* at 953.

In a series of recent cases, the United States District Court for the Southern District of Ohio has recognized that tolling challenged oil and gas leases may be appropriate for the period during which that challenge prevents a lessor from exercising its rights. According to those decisions, a motion to toll a challenged lease is appropriate once there has been a judicial determination that the challenged lease is valid. The Seventh District decision in this case represents such a determination regarding the leases challenged by the plaintiff class in *Hupp*. And even under the timing rule applied by those federal decisions, tolling is now appropriate. See *Feisley Farms Family L.P. v. Hess Res. LLC*, S.D. Ohio No. 2:14-CV-146, 2014 U.S. Dist. LEXIS 118519, at \*10-\*11 (Aug. 25, 2014); *Cameron v. Hess Corp.*, S.D. Ohio No. 2:12-CV-00168, 2014 U.S. Dist. LEXIS 56510, at \*11-\*18 (Apr. 23, 2014); *Griffith v. Hess Corp.*, S.D. Ohio No. 2:14-CV-00337, 2014 U.S. LEXIS 50468, at \*10-\*18 (Apr. 11, 2014); *Wiley v. Triad Hunter LLC*, S.D. Ohio No. 2:12-CV-00605, 2013 U.S. LEXIS 143058, at \*31-\*35 (Sept. 27, 2013).

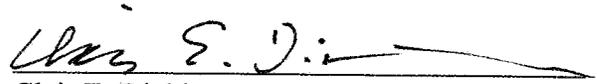
A tolling order preserves the bargained-for rights of both lessors and lessees until the issue of lease validity is finally determined. The lessors here agreed that the lessee here (Beck, and by assignment, XTO) would have a primary term of a fixed number of years to develop the leasehold properties. The litigation over the

validity of the leases is occurring during the primary term of the leases, effectively blocking lessees from exercising their right to develop the leases. A tolling order simply ensures that, if the leases are held to be valid, the lessees will have the same amount of time left to exercise their rights as they would have had without the litigation obstruction. The lessors are not harmed – if they win their appeal, their oil and gas is still in the ground and they can develop their property or lease it; if the leases are held to be valid, the lessees get the agreed period of time to develop without obstruction.

### **CONCLUSION**

Civ.R. 62(D) recognizes this Court's power, during the pendency of an appeal, "to make any order appropriate to preserve the status quo or the effectiveness of the judgment to be entered." In the absence of an order tolling the oil and gas leases at issue, many of those leases will expire before this matter is resolved on the merits, thereby destroying the bargain the parties struck when they entered into the leases. For those leases that do not expire while this case is pending, Beck and XTO will lose the benefit of their bargains to the extent that the primary terms will be effectively reduced by the amount of time between this Court's exercise of its jurisdiction over plaintiffs' appeal and its resolution of the issues presented by the appeal. XTO hereby requests that this Court immediately enter an order further tolling the leases at issue.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Motion for Further Tolling were served via ordinary U.S. mail this 12<sup>th</sup> day of February 2015 to the following:

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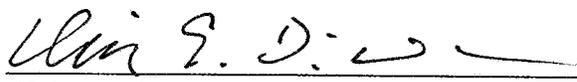
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3. The Motion to Dismiss is denied.

Consistent with this Court's September 16, 2013 order setting a briefing schedule in these consolidated appeals, oral argument on the merits is tentatively set for November 20, 2013 before this Court.

All until further order of this Court.

  
JUDGE GENE DONOFRIO

  
JUDGE JOSEPH J. VUKOVICH

  
JUDGE MARY DeGENARO