

## Publications

### Road Projects, Eminent Domain And Oil And Gas Operations

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**AUTHORED ARTICLE** | 10.1.2013

*Vorys Shale Report*

Thomas Fusonie, a partner in the Vorys Columbus office and a member of the litigation group, authored an article for a 2013 edition of the Vorys Shale Report. The full text of the article is included below.

#### Road Projects, Eminent Domain And Oil And Gas Operations

by **Thomas H. Fusonie**

Drive around Ohio and you can see road projects wherever you go. The government is widening roads, expanding roads and making new roads. Such projects almost always involve in part the government's power of eminent domain, the power to seize private property for public use. Under both the Ohio and United States Constitutions, the government has the power to do so, but must pay just compensation to the owners of the private property. In addition, under various state and federal statutes, public utilities and telecommunications providers have limited powers of eminent domain. Oil and gas operators must be cognizant of both the government's power and the protections provided by constitutional right and, in Ohio, by statute. They must also be aware of the process by which a governmental entity must condemn private property for public use.

Before condemning private property under Ohio law, the government must take certain steps designed to protect the property rights and due process of the owner. The government must identify the owners of any estate, title or interest in the property to be seized and then obtain an appraisal of the property. For the acquisition of a fee simple absolute seizure, the appraisal must provide two values of the property. First, it must include a "before" value, i.e., before the planned seizure as if it was on the open market. Then, it must also provide an "after" condemnation value of any remainder of the property left after the seizure. Both values are determined by what the property would sell for on the open market between a ready and willing buyer and ready and willing seller in a voluntary sale. The government then must make a "good faith" offer to the owners along with a copy of the appraisal. It

must also provide a notice of intent to acquire setting forth certain mandated information, including that the owners have a right to have a jury decide just compensation. By law, the government cannot file a lawsuit to condemn the property until the owner has had 30 days to consider the offer and notice of intent to acquire.

The condemnation process poses pitfalls for oil and gas operators with lessee rights in property the government intends to seize. At times, the government fails to provide the offer and notice of intent to acquire to the oil and gas lessee. This failure poses two problems for a lessee. First, the lessee has not been provided any notice of the planned condemnation. Second, the fee owner of the private property may accept the offer and allow the government's seizure to occur without any determination as to how the amount being offered is to be allocated among various parties with an interest in the land. The government is not required to determine in its offer any allocation between the various parties that may have an estate, title or right in the land. The various interests must sort that issue out. When the fee owner is the only interested party that receives the offer and accepts it, the lessee may have to institute action against the owner for any share of the compensation to which it may be entitled. Notice requirements in leases may provide some protection or at least provide a specific provision to rely upon when pursuing a portion of the compensation from the fee owner.

Condemnation of valuable mineral land also poses additional problems for oil and gas operators. First, in determining just compensation for the seizure of land with mineral deposits, the value of minerals cannot be considered separate and apart from the value of the land. This means that the market value for compensation may not be reached by determining a number for the land and then a separate value number for the deposits. This limitation creates considerable risk to any oil and gas lessee with an active and profitable well producing on land to be condemned. The future profits of the well are not able to be considered as part of the just compensation for the seizure of the property. Instead, at best, the appraisal of the land's value before the seizure and, thus, just compensation may be increased by the existence of the mineral deposits. Unfortunately, as well, then the lessee and other interested parties in the land have to determine the allocation of the compensation amongst themselves. This determination may require court action. Oil and gas lessees should consider protecting themselves from such allocation fights through lease drafting.

Another issue to be aware of is that, at times, the government does not mean to condemn the mineral interests in a property, but sends out a notice of intent to do so and may even proceed to file the condemnation lawsuit to take the mineral interests. We have seen this problem arise when the department of transportation condemned a small portion of a piece of private property for roadway expansion that was encumbered by an oil and gas lease with an active well. The description of the seizure did not include any reservation of mineral rights/interests, including any and all oil and gas underneath the property being condemned. In that situation, we were able to get the department to revise its seizure so that it was not taking the mineral rights/interests. Thus, oil and gas lessees should discuss with the governmental authority intending to take the land if it really seeks to acquire the mineral rights/interests.

Finally, we have one other word of caution. If the government has to file a lawsuit to condemn property for a road project, it can deposit with the court the amount of compensation it believes the owners are entitled to and then immediately seize possession of the private property. It does not need to wait for a final determination of just compensation. The government does not always move immediately to seize possession. However, it does it enough that lessees must be aware and ready for this possibility.

Certainly, transportation projects are designed to aid in safe and efficient transportation, which can aid oil and gas operations. Operators though must be ready for the problems and pitfalls when such projects include property that risks their operations.