

Landowners Plagued by Bad Leases

by Sue Smith-Heavenrich

Broader View Weekly, June 2, 2011

Recently, a landman representing Chesapeake sent another letter to one of the landowners he has been trying to sign up. Perhaps it was the proverbial straw – the landowner has, for the past three years, refused to sign any lease – or perhaps it was the language that set the landowner’s teeth on edge.

“It felt like he [landman] is trying to bully us into signing,” the landowner told *Broader View Weekly* over the phone.

In his letter, Craig LaPointe, from Redsky Land LLC, warned the landowners that if they don’t lease, their land can be “cut out of production forever”. Already Chesapeake has completed construction of a well pad on a neighbor’s property, just 4,000 feet away. And their unleased parcel sits within a planned drilling grid.

It’s not a unit because PA doesn’t have compulsory integration – at least not yet. And landman LaPointe uses that fact to note that “... current laws cannot keep the drilling from extracting the gas from under your property...” While the law prohibits drillers from going beneath unleased property, it can’t assure landowners that their gas won’t be sucked up by someone else, he says – despite the fact that the drillers claim they have GPS in the drill bits and know exactly where their fractures will go.

Meanwhile, on this side of the border, Chesapeake is busy trying to extend leases through whatever means it can. Because the Department of Environmental Conservation (DEC) has yet to complete its Supplemental Generic Environmental Impact Statement (SGEIS), Chesapeake and other companies are using that as an excuse to extend leases. They are claiming “force majeure”.

Force Majeure, says Elmira attorney Chris Denton, was originally intended to protect contractors from being held responsible when they couldn’t complete work due to events beyond their control. Floods, he said; the tornado that tore through Erin last month.

Now companies are using the force majeure clause to shift their economic risk onto the landowner, Denton explained. They claim that they cannot drill because NY does not allow hydro-fracking. If they can successfully extend the leases, that transfers economic risk to the landowner by trapping him in a lease at a market price that made sense five years ago.

The truth is that there is nothing preventing companies from drilling, Denton says. But that isn’t stopping Chesapeake from filing lease extensions.

“They bring them in batches of 30 to 40,” says Cortland County clerk Elizabeth Larkin. In a telephone interview she explained that she’s not accepting lease extensions because they are not signed by the landowners.

“They say that they need to extend the leases because of force majeure, or they claim that the original lease gives them an option to renew,” Larkin says. An option to renew,

however, is a lot different than an automatic renewal or extension, and so far Larkin has refused to file the extensions. The county attorney backs her up, too.

When landmen began filing the leases years ago, Larkin was hoping that the companies would find gas and that the county would see some economic benefit. But now ... “I’m not against drilling,” she says, “but I am very disheartened by how dishonest they [gas companies] are. How can we trust them to protect our water when they don’t even care about the landowners? These extensions just aren’t right.”

Larkin hopes that other county clerks will take a similar stand, but acknowledges that it’s hard to refuse recording a document when each one brings in much needed cash to the county. Every lease extension she refuses costs Cortland County \$20 – “and I’ve refused hundreds,” Larkin said. As far as she knows other county clerks, including Tompkins and Tioga Counties, simply take the fees and record the extensions.

At a meeting last month in Dryden, attorney Joe Heath told landowners that terminating gas leases is becoming more difficult. Heath, who serves as general counsel for the Onondaga Nation, said that energy companies are ignoring their obligations to landowners. They don’t notify landowners when they flip the leases to another corporation; they don’t mail required termination documents; they file affidavits for extending leases without giving reasons.

Now, says Heath, they are crafting leases that contain a non-termination clause. The law, he said, protects the gas companies, not the landowners.

That lack of landowner protection has real estate agents and mortgage lenders worried. A recent memo, originating from the desk of a vice president for residential mortgage lending at Tompkins County Trust, outlined a number of concerns. Topping that list: concern that drilling might reduce property value. That has already happened in other states, especially in neighborhoods where water has been contaminated.

Then there’s the question of financing. Neither FHA nor HUD will finance property where there is surface and/or subsurface activity within 300 feet of a structure or property line. Activity within 200 feet prevents most other conventional financing. Setbacks in NY are currently 150 feet, so potential buyers may find it impossible to get a loan on leased property.

Then there is the question of whether gas leases, which allow for “commercial venture”, will void title insurance. “Gas leasing could have potentially catastrophic impacts on mortgage lending and real estate values throughout the Marcellus Shale formation,” says Walter Hang of Toxics Targeting in Ithaca. A couple weeks ago Hang sent a letter to Governor Cuomo requesting that the SGEIS be expanded to include leasing and property concerns.

Ellen Harrison, who founded Fleased (fleased.org) says people need to put more political pressure on the Attorney General’s office (OAG). She hopes the OAG will force Chesapeake into an agreement similar to the one Fortuna signed two years ago. Meanwhile, 160 landowners in this area are challenging lease extensions in court.