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BILL ANALYSIS

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Senate Bill 1408 (Substitute S-2 as passed by the Senate)
Senate Bill 1409 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Patricia L. Birkholz (S.B. 1408)
Senator Liz Brater (S.B. 1409)
Committee: Natural Resources and Environmental Affairs

Date Completed: 10-11-06

RATIONALE

In 1999, amendments to the General Property Tax Act (GPTA) revised the process for foreclosing on property for which the taxes are delinquent. The 1999 amendments essentially replaced annual tax lien sales with an annual forfeiture and judicial foreclosure process. Although counties remain responsible for the foreclosure and sale of tax-reverted property, they had the opportunity to opt-out of those responsibilities and elect to have the State act as the foreclosing governmental unit. (For a very brief description of the previous foreclosure process and the 1999 changes, please see **BACKGROUND**, below.) In 2002, the treasurer of Antrim County, as the foreclosing governmental unit, brought an action in the circuit court seeking a declaratory judgment concerning the effect of the revised foreclosure process on oil and gas rights owned by someone other than the owner of the surface rights.

In Michigan, mineral rights may be sold or retained separately from the surface rights. In such a case, the mineral rights are said to be "severed". Often, an owner of mineral rights leases them to a developer and receives royalties for the extraction of the minerals. In the Antrim County case, the treasurer was unsure whether she had to notify the owners of severed oil and gas rights of the foreclosure upon the surface property, since the GPTA requires notice of a hearing to be given to the owners of property for which the foreclosure process has been initiated.

The Antrim County Circuit Court held that the GPTA does not extinguish oil and gas interests: "Title to severed oil and gas interests simply does not pass through the property tax reversion process." The court based its conclusion on several grounds, including the enactment of a separate and distinct scheme for the taxation of oil and gas under Public Act 48 of 1929, commonly called the Severance Tax Act. In April 2003, the court granted summary disposition to several defendants (*Comben, Antrim County Treasurer* v *State of Michigan, et al.*, No. 02-7860-PS). On appeal by the State, the Michigan Court of Appeals affirmed in August 2004, agreeing with the circuit court that the severance tax wholly exempts interests in oil and gas rights from the ad valorem property tax, and that tax foreclosures of parcels with severed oil and gas interests do not include those interests (263 Mich App 474). The State then appealed to the Michigan Supreme Court which, in July 2006, vacated that judgment, on the ground that the Court of Appeals lacked jurisdiction where the appellants were not aggrieved by the trial court's decision (475 Mich 901). (These decisions, as well as another Antrim County case involving severed oil and gas interests, are discussed in more detail in **BACKGROUND**.)

As a result of the Michigan Supreme Court decision, the Antrim County Circuit Court's holding in *Comben* is binding only on that circuit. This leaves foreclosing governmental units in the remainder of the State without appellate guidance as to the application of the amended GPTA to severed oil and gas rights. There also is concern that potential future litigation could have a significant impact on the State, which acquired much of the land constituting State parks, recreation areas, and conservation areas through the tax reversion process. Because severed mineral rights frequently are not recorded with the county register of deeds, in many of those cases the State obtained the mineral rights in addition to the surface rights. In addition, some are concerned that the Michigan Natural Resources Trust Fund could be affected significantly. Royalties the State receives from its oil and gas interests are deposited into the Fund, so it has been identified as the source from which settlements with former oil and gas interest owners could be paid if it is determined that those rights were wrongfully foreclosed upon.

To address these issues, some people believe that the GPTA and Public Act 42 of 1963, which governs the termination of oil or gas interests in land, should make it explicit, from this point forward, that severed oil and gas rights would not be subject to foreclosure when the accompanying surface rights were foreclosed upon, if the owner of the severed mineral rights properly recorded them.

CONTENT

Senate Bill 1408 (S-2) would amend Public Act 42 of 1963 (commonly called the Dormant Minerals Act) to provide that an oil or gas interest held by a person other than the owner of the surface of property for which a judgment of foreclosure had been entered would not be preserved from foreclosure under the General Property Tax Act unless that interest had been recorded with the county register of deeds within 20 years before the foreclosure petition was filed.

Senate Bill 1409 (S-2) would amend the General Property Tax Act to do the following:

- **Require the notice of hearing and a final judgment in a foreclosure proceeding to include a statement that all existing oil and gas interests would be extinguished except for those of a lessee or assignee of an interest of a lessee under an oil or gas lease recorded with the county register of deeds before the foreclosure petition was filed, and interests preserved as provided under Senate Bill 1408 (S-2).**
- **Exempt from foreclosure the interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease recorded with the county register of deeds before the foreclosure petition was filed, and interests preserved as provided in Senate Bill 1408 (S-2).**

The bills are described below in further detail.

Senate Bill 1408 (S-2)

Under Public Act 42 of 1963, any interest in oil or gas in land owned by a person other than the owner of the surface, that has not been sold, leased, mortgaged, or transferred by instrument recorded with the county register of deeds for a period of 20 years (in the absence of the issuance of a permit to drill an oil or gas well by the Department of Environmental Quality) is deemed abandoned, unless the owner within 20 years of the last sale, lease, mortgage, or transfer of record or the last issuance of a drilling permit or actual production or withdrawal of oil or gas, records a claim of interest under Section 2 (described below).

Under the bill, notwithstanding any other provision of the Act to the contrary, if a judgment of foreclosure were entered under the GPTA for the nonpayment of delinquent taxes levied on property, an oil or gas interest in the property held by a person other than the owner of the surface would not be preserved from foreclosure unless that interest were sold, leased, mortgaged, transferred, reserved, or subject to a claim of interest under Section 2 and an instrument evidencing the sale, lease, mortgage, transfer, reservation, or claim of interest were recorded in the office of the register of deeds in the county in which the property was located during the 20-year period immediately preceding the date a foreclosure petition was filed.

Under Section 2, a person may preserve any interest in oil or gas by recording in the county register of deeds office within the 20-year period specified in Public Act 42 a written notice stating that the owner desires to preserve the interest and does not intend to abandon it. A person holding interests in oil or gas in any land for use in underground gas storage operations may preserve the interests, as well as the rights of any lessor, by recording a written notice defining the boundaries of and the formations included in the underground gas storage field or pool within which the interests are located. Recording a written notice of such an interest operates to preserve it from termination under the Act for 20 years after the recording. At the end of the 20-year period, the interest in oil or gas is deemed abandoned if, during that 20-year period, the nondormant character of the interest has not been evidenced by sale, lease, mortgage, or transfer by instrument recorded in the county register of deeds office. In the absence of prior abandonment, an interest in oil or gas in any land may be preserved indefinitely from abandonment by the filing of the notices or the performance of any of the acts specified in the Act evidencing nondormancy of the interest in oil or gas within each succeeding 20-year period.

The bill would amend Section 2 to refer to a person other than the owner of the surface, in the provision that allows a person holding oil or gas interests for use in underground gas storage operations to preserve the interests, and the interests of a lessor, by recording a notice. The bill also would refer to an interest in oil or gas in any land owned by any person other than the owner of the surface, in the provision under which an interest in oil or gas may be preserved indefinitely by the filing of the notices or the performance of the acts specified in the Act.

Senate Bill 1409 (S-2)

Notice of Hearing

The GPTA sets forth the process for foreclosing on certified abandoned property and property that is delinquent for taxes, interest, penalties, and fees. Under this process, a foreclosing governmental unit must file a petition with the circuit court, seeking a judgment vesting absolute title to the property in the governmental unit. The court clerk must schedule a hearing on the petition.

Annually, immediately after the forfeiture of property to the county treasurer, the foreclosing governmental unit must initiate a search of records to identify the owners of an interest in the property who are entitled to notice of the foreclosure hearing and the show cause hearing under Section 78j. (Under that section, the governmental unit must hold a hearing before the foreclosure hearing; the owner and anyone with a property interest in the forfeited property may appear at the show cause hearing and redeem the property or show cause why absolute title should not vest in the governmental unit.) After the search, the governmental unit must send a notice to the owners and to a person entitled to notice of the return of delinquent taxes.

The required notice must contain specified information, including the date and time of the hearing on the foreclosure petition, and a statement that unless the forfeited unpaid delinquent taxes, interest, penalties, and fees are paid by the March 31 immediately following the entry of a foreclosure judgment, or in a contested case, within 21 days of the entry of a judgment, the title to the property will vest absolutely in the foreclosing governmental unit.

Under the bill, the notice also would have to include a statement that all existing interests in oil or gas in that property would be extinguished, except for the following:

-- The interests of a lessee or an assignee of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease were recorded in the office of the register of deeds in the county in which the property was located before the date the foreclosure petition was filed.
-- Interests preserved as provided in Section 1(3) of Public Act 42 of 1963.

(Under Senate Bill 1408 (S-2), Section 1(3) contains the provision under which an oil or gas interest held by a person other than the owner of the surface would not be preserved from foreclosure, if a foreclosure judgment were entered for the nonpayment of delinquent taxes, unless the interest were sold, leased, etc. and an instrument evidencing that transaction were recorded within 20 years before the foreclosure petition was filed.)

Entry of Judgment

Under the GPTA, a foreclosure judgment must specify that all existing recorded and unrecorded interests in the property are extinguished, except a visible or recorded easement or right-of-way, private deed restrictions, or restrictions or other governmental interests imposed under the Natural Resources and Environmental Protection Act, if all forfeited delinquent taxes, interest, penalties, and fees are not paid by the March 31 following the entry of a foreclosure judgment, or, in a contested case, within 21 days of the entry of a judgment. The bill would add to the exceptions the interests of a lessee or an assignee of a lessee under a recorded oil or gas lease, and interests in oil or gas in that property that were owned by a person other than the owner of the surface that had been preserved as provided in Section 1(3) of Public Act 42 of 1963.

Title to the Property

Under the GPTA, fee simple title to property set forth in a foreclosure petition on which forfeited delinquent taxes, interest, penalties, and fees are not paid by the March 31 following entry of a judgment, or in a contested case within 21 days, vest absolutely in the foreclosing governmental unit, and the governmental unit has absolute title to the property. The bill specifies that this would include all interests in oil or gas in that property except those of a lessee or an assignee of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease were recorded in the office of the register of deeds in the county in which the property was located before the date the foreclosure petition was filed, and interests preserved as provided in Section 1(3) of Public Act 42 of 1963.

Application of the Bill

The bill would apply only to property foreclosed by a judgment of foreclosure entered after the bill's effective date.

MCL 554.291 et al. (S.B. 1408)
211.78i & 211.78k (S.B. 1409)

BACKGROUND

Foreclosure Process

Previously, under the General Property Tax Act, 26 months after unpaid taxes on property became officially delinquent, the property would be subject to a county's annual tax lien sale, at which buyers could purchase the right to become lienholders. If a lienholder did not perfect the lien, or if a tax lien was not purchased at the sale, it reverted to the State. If the property was not redeemed while the State held the lien, the Department of Treasury had to hold an administrative hearing at which people with a recorded property interest could show cause why the property should not revert to State ownership. Throughout this process, the property owner had various rights to redeem the property by paying the delinquent taxes plus increasing amounts of interest, fees, and penalties. The State did not acquire absolute title to the property until the expiration of all redemption periods.

The 1999 amendments eliminated the sale of delinquent tax liens. Rather, delinquent tax liens are forfeited to the county treasurer in March of the second year of the tax delinquency, and the property is foreclosed at a circuit court hearing held at the end of the second year of delinquency. Title to the property vests absolutely in the foreclosing governmental unit, without further rights of redemption, if all forfeited delinquent taxes, interest, penalties, and fees are not paid within 21 days after entry of the judgment.

For transitional purposes, the former system remains in effect through December 2006 for property taxes levied before January 1, 1999.

Comben v *State of Michigan*

In April 2001, Sherry Comben, Antrim County Treasurer, filed an action for foreclosure upon parcels of property that had been forfeited and for which the taxes remained unpaid for tax years 1997 and 1999. Antrim County became the foreclosing governmental unit. In March 2002, the Antrim County Circuit Court entered an order of foreclosure regarding 134 parcels for which taxes had remained unpaid. In June 2002, due to concern about the effect that the amended GPTA would have on severed oil and gas rights in the parcels, Treasurer Comben brought a declaratory judgment action against the State of Michigan, which 57 counties elected to handle foreclosures; the Department of Treasury, as the State agency responsible for foreclosure action on behalf of those counties; and various individuals and companies having interests in oil and gas underlying tax-foreclosed parcels in Antrim County.

According to the circuit court, the critical issue in the case was whether the GPTA, as amended in 1999, "…if properly followed, extinguishes severed oil and gas interests if the property is not redeemed within 21 days after the entry of the order of foreclosure". Based on constitutional language concerning property taxation, the court stated that subsurface oil and gas interests would be subject to ad valorem property taxation unless expressly exempted. The Court concluded that the Severance Tax Act--which imposes a specific tax on the value of the gross amount of production of gas and oil as computed immediately after its removal, or severance, from the land--exempts subsurface oil and gas interests from ad valorem property taxation. Under Section 15 of that Act, "The severance tax…shall be in lieu of all other taxes, state or local, upon the oil or gas, the property rights attached thereto or inherent therein, or the values created thereby; [and] upon all leases or the rights to develop and operate any lands of this state for oil or gas…" (MCL 205.315). The circuit court also pointed out that the GPTA makes no reference to subsurface oil and gas interests, although it does address "hard" minerals, as well as oil and gas wells and equipment.

The court examined the character of the title vesting in the foreclosing governmental unit under the pre-1999 GPTA, and discussed a 1976 Court of Appeals decision holding that the title obtained by the State did not include the subsurface estate, if it had been severed from the surface estate (*Hammond* v *Auditor General*, 70 Mich App 149). The circuit court noted that the current GPTA does not expressly address the effect of the forfeiture and foreclosure procedure on severed oil and gas interests although it does provide that "all existing recorded and unrecorded interests in the property are extinguished" (MCL 211.78k(5)(e)). "However, if severed oil and gas interests were exempt from ad valorem taxation and were exempt from the lien for unpaid taxes under the GPTA before it was amended and the Legislature did not expressly provide that severed oil and gas interests would be extinguished by the new forfeiture and foreclosure procedure, the Court concludes that the Legislature never intended for severed oil and gas interests to be extinguished under MCL 211.78k(5)(e). Title to severed oil and gas interests simply does not pass through the property tax reversion process."

Based on rules of statutory construction, the circuit court held that an interpretation of the GPTA as extinguishing severed oil and gas interests would conflict with common law and with other statutory provisions concerning oil and gas interests, including the Severance Tax Act and the Dormant Minerals Act (described above). According to the court, that Act is designed to increase the marketability and development of severed mineral interests. "If the GPTA, as amended, is interpreted to extinguish severed oil and gas rights, it would conflict with the Dormant Minerals Act because the owner of the severed oil and gas interest, who fully complied with the requirements of the Dormant Minerals Act, could nonetheless lose his interest if the surface owner failed to pay taxes."

Further, the circuit court stated, "…it is impossible under the GPTA, as amended, to satisfy the due process protections that severed oil and gas interest holders would be entitled to under the state and federal constitutions", and "…extinguishing the severed oil and gas interests would violate the takings clauses of both…constitutions". The court also found that the different tax treatment of oil and gas does not violate the equal protection clauses of the U.S. and Michigan Constitutions or the uniform taxation clause of the State Constitution.

In its April 10, 2003, decision, the circuit court granted the summary disposition motions of defendants Pure Resources, L.P., Dominion Reserves, Inc., and Wolverine Gas & Oil Company, Inc.

On appeal to the Court of Appeals, the appellants argued that, for many years, the State routinely reserved unified mineral rights when taking possession of parcels for nonpayment of taxes, a practice documented in a long legal history. The Court of Appeals, however, pointed out that the question at hand dealt with *severed* mineral rights. The Court agreed with the trial court that the severance tax imposed upon oil and gas rights exempts those rights from the ad valorem property tax, and so severed oil and gas rights are shielded from forfeiture of the surface rights for delinquent taxes.

The appellants argued that Section 15 of the Severance Tax Act applied only to oil and gas severed from the ground, not severed interests in undeveloped oil and gas. According to the Court, however, "Section 15…singles out oil and gas from other valuable underground natural resources in obvious recognition of the uncertainties inherent in assessing how much oil or gas may exist under a given parcel and because quantities pass under a given parcel only transiently… The broad and unambiguous language in MCL 205.315 compels the conclusion that the Legislature imposed a tax on oil and gas, as they are extracted and, thus, transformed from speculative interests into marketable chattels, as the exclusive vehicle through which the state may tax those natural resources."

Additionally, the Court of Appeals cited the trial court's consideration of the Dormant Minerals Act, and agreed that if the GPTA were interpreted to extinguish severed oil and gas rights, it would conflict with the Dormant Minerals Act. Additionally, the Court pointed out that, where a specific statutory provision (i.e., the avenues for preserving severed oil and gas interests set forth in the Dormant Minerals Act) differs from a related general one (i.e., the GPTA's provision for extinguishing "all existing recorded and unrecorded interests in that property"), the specific one controls.

The Court of Appeals affirmed the lower court's decision. The Michigan Supreme Court, however, vacated the decision in July 2006, on the basis that "the court lacked jurisdiction where the appellants were not aggrieved by the trial court's decision, which fully protected appellants' ownership interests in the subject properties at issue."

Black Stone Minerals v *State of Michigan*

Another case being litigated in the Antrim County Circuit Court involves some of the parties to the *Comben* action. The lead plaintiff is Black Stone Minerals, formerly Pure Resources, L.P., and the defendant is the State of Michigan. The case is a consolidation of a separate action filed by Pure Resources (originally filed in November 2002 as a cross-claim in *Comben,* but subsequently severed) and a class action filed in the Court of Claims by Pure Resources on April 16, 2003. In May 2005, Black Stone filed an amended complaint identifying class members and giving specific descriptions of the severed oil and gas interests at issue, involving approximately 47,000 acres of land. The plaintiffs seek to quiet title to severed oil and gas rights and to recover revenue received by the State under various oil and gas leases.

The State contended that the plaintiffs' causes of action were time-barred either by an applicable statute of limitations or by the equitable doctrine of laches (which applies when the passage of time combined with a change in condition would make it inequitable to enforce the claim against the defendant). Alternatively, the State claimed that it had adversely possessed the oil and gas.

On November 1, 2005, the Antrim County Circuit Court issued a decision granting in part and denying in part the defendant's motion for partial summary disposition. The court held that the State did not acquire an interest in the already-severed oil and gas estate when it foreclosed upon the land for the nonpayment of taxes (as decided in *Comben*); the State was equitably estopped from claiming laches; there were factual issues that precluded the court from granting summary disposition for the State; and the State could not assert laches or a limitations period with respect to plaintiffs' efforts to recover their severed oil and gas interests. The court further held that claims for money damages were within the exclusive jurisdiction of the Court of Claims and subject to a three-year limitations period, and there remained questions of fact as to when those claims accrued.

At present, the parties are finishing the process of identifying the property in conflict, to which the plaintiffs claim rights.

The next phase in the case will determine the amount of damages the State owes the plaintiffs.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bills would eliminate ambiguity in the existing statutes regarding whether severed mineral rights are subject to foreclosure. In the past, severed interests in gas and oil have not always been recorded every 20 years. Although the bills would not address past foreclosures that included severed mineral rights, they would clarify the process going forward by specifying that these rights would be subject to foreclosure unless the owner took specific actions to protect them. The process used by many county treasurers already includes the requirement to record oil and gas interests every 20 years, so the bills should not present an undue burden for the owners of severed oil and gas interests or local governments.

Legislative Analyst: Julie Cassidy
Suzanne Lowe

FISCAL IMPACT

The bills would reduce possible future State expenditures and prevent a possible reduction in future State revenue by an unknown amount. The bills would reduce, although not eliminate, a number of claims that could be made against the State with regard to oil and gas interests related to property where a tax foreclosure has occurred. Although the ruling applies in one circuit only, the Antrim County Circuit Court has held that severed oil and gas interests are not terminated when the government forecloses on the surface property. The bills would eliminate claims where the interests were not recorded during the 20 years prior to the foreclosure. It is unclear how the bills would address issues where the foreclosure had occurred in the past but interests were not recorded—whether the changes would be only prospective and/or whether the courts would allow claims to be made against foreclosures in the past.

Despite the bills, claims that could result in potentially significant judgments still would be likely. Historically, the State has argued that oil and gas interests are extinguished when a foreclosure occurs—even if recorded separately. However, because the bills still would allow claims where the interest had been recorded (for instance, if an interest had been recorded in 1915 and the property was foreclosed in 1930), potentially significant claims still could be made.

Any claims successfully made against the State would likely cause the State to compensate individuals or entities for revenue lost as a result of the State's assumption of the oil and gas interests. Similarly, the loss of those interests would reduce future revenue. By limiting the claims, the bills would reduce both the expenses and the loss of revenue.

The State will likely realize some increase in severance tax revenue as a result of successful claims under the recent court decision. However, the State also will lose royalty income from the oil and gas interests. Because the royalty income would exceed any potential severance tax liability, the net change would be a loss of revenue to the State. As a result, while the bills would cause the State to forego the additional severance tax revenue, the net impact would be that the State would lose less total revenue under the bills than under the current state of the law.

Generally, the bills would have no effect on local units, although local units that have foreclosed on property and retained it would be subject to the same types of fiscal impacts (excluding those related to the severance tax) as the State.

Fiscal Analyst: David Zin