



DORMANT MINERALS ACTS AND THE MARCELLUS AND UTICA SHALE PLAYS

Ohio, Pennsylvania, and West Virginia are currently home to one of the most impressive natural resource developments in our history: the unconventional hydrocarbon resources from the Marcellus and Utica shale plays. For years, the immense value contained in these formations eluded capture due to inadequate technology, but with the combination of horizontal drilling and hydraulic fracturing, production is now occurring where never possible before. One challenge to development and production, however, stems from property law. The long-standing practice of partially or completely severing surface and mineral estates, combined with years of devise, descent, and conveyance, has left many oil and gas rights highly fragmented with little or no connection to surface estate ownership. As a result, the owners of these minerals are oftentimes unaware of their rights, too remote to care, or perhaps too many in number to work out an acceptable development arrangement.

These realities—first considered in the context of traditional mineral resources, but equally applicable to unconventional shale plays—have led many states to adopt dormant minerals acts, also known as dormant oil and gas acts or mineral lapse statutes. Dormant minerals acts are statutory mechanisms designed to facilitate the development of mineral resources generally in one of two ways: (i) by identifying unknown or unlocated mineral owners so that they might receive the benefits of mineral development, or (ii) by declaring mineral interests abandoned after a requisite period of time and reuniting the surface and mineral estates. The former approach, exemplified by Pennsylvania’s dormant minerals act, works to protect the interests of the owners of mineral rights while allowing a known interest owner to develop the estate. The latter approach, exemplified by Ohio’s dormant minerals act, embodies a use-it-or-lose-it mentality requiring owners to act lest their rights transfer to

another party, usually the owner of the surface estate. West Virginia's statute takes a hybrid approach, working initially to protect unknown or unrepresented mineral owners and later working a reunification of the estates to the extent the rightful mineral owners have not been found.

Dormant minerals acts, no matter their style, have the power to significantly affect property rights and mineral development. Landowners believing their property sits atop unconventional resources must be sure to confirm not only that they own the mineral rights, but also that their rights have not been lost pursuant to a dormant minerals act. Similarly, oil and gas developers must be aware of potential title defects caused or cured by dormant minerals acts that may affect leasing rights. This *Commentary* will briefly examine the legal history of dormant minerals acts before examining more closely the laws in Ohio, Pennsylvania, and West Virginia. This *Commentary* will then discuss two bills introduced in Pennsylvania that propose to restructure the Commonwealth's law in a manner that more closely resembles Ohio's dormant minerals act.

THE CONSTITUTIONALITY OF DORMANT MINERALS ACTS

Dormant minerals acts have frequently been subject to judicial scrutiny, particularly in the late 1970s and early 1980s. A common theme in challenges to these acts was the theory that they resulted in an unconstitutional taking of private property without notice and compensation. In the past, courts have been receptive to these arguments. See, e.g., *Chi. & N. W. Transp. Co. v. Pedersen*, 259 N.W.2d 316, 320 (Wis. 1977) (finding statute working reversion of mineral rights to owner of surface estate without a hearing or compensation "entirely lacking in substantive and procedural due process"); *Wilson v. Bishop*, 412 N.E.2d 522, 525 (Ill. 1980) (affirming judgment that dormant mineral interest act unconstitutionally violated due process guarantees by depriving owners of their property without adequate notice and an opportunity to be heard).

The Supreme Court of the United States, however, rejected a similar challenge in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). In *Texaco*, the Court upheld Indiana's Dormant Mineral Interests Act, a relatively strong statute working an

abandonment of mineral interests after a period of 20 years without the occurrence of an event to preserve those interests. Indiana's statute (Ind. Code § 32-23-10-1 et seq.) did not require any notice to be given to the owner of the mineral interests prior to those interests being extinguished. Justice Stevens, writing for the five-vote majority, accepted Indiana's law as rationally related to legitimate state interests in generating tax revenue, encouraging mineral development, and identifying the owners of mineral estates so that interested parties might be able to lease their rights. Furthermore, any abandonment occurred due to the owner's own inaction and not due to an action of the government. Therefore, the state could not be said to be taking mineral interests without providing compensation.

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Ohio's Dormant Minerals Act. Ohio's Dormant Minerals Act (Ohio Rev. Code Ann. § 5301.56) deems severed mineral interests abandoned and rejoined with the surface estate if the mineral interests have not been subjected to a savings event for a period of 20 years. "Savings events" include title transactions with respect to the mineral interests, actual production from the mineral interests or lands pooled or unitized with those interests, the usage of the mineral interests for underground storage, the issuance of a drilling permit to the holder of the mineral interests, the creation of a separate tax listing for the mineral interests, and the filing of a claim by the holder of the mineral interests to preserve those interests.

The Ohio Dormant Minerals Act was enacted in 1989 and significantly amended in 2006. The original statute included no requirement that a mineral owner be notified of a claim of abandonment or that a surface owner do anything to perfect the abandonment. The amended statute added new requirements that the surface owner serve on the mineral rights owner by certified mail a notice of his intent to declare the mineral interest abandoned, or publish a notice if service cannot be completed, and then file an affidavit within 60 days reciting "the facts constituting the abandonment." The amendment also added a whole new procedure for the mineral owner to contest abandonment by filing, after the surface owner's notice, either a claim to preserve his interest

or an affidavit identifying a savings event in the 20 years before the surface owner's notice. If the mineral owner fails to do either of these things, the surface owner must then cause the county recorder to memorialize the record with a statement that the mineral interest has been abandoned.

Pennsylvania's Dormant Oil and Gas Act. Pennsylvania's Dormant Oil and Gas Act (58 Pa. Stat. Ann. § 701.1 *et seq.*) is designed "to facilitate the development of subsurface properties by reducing the problems caused by fragmented and unknown or unlocatable ownership of oil and gas interests..." 58 Pa. Stat. Ann. § 701.2. Unlike Ohio's Dormant Minerals Act, the Pennsylvania Dormant Oil and Gas Act does not "vest the surface owner with title to oil and gas interests." Instead, the statute "protect[s] the interests of unknown or unlocatable owners of oil and gas." *Id.*

Pursuant to the Pennsylvania Dormant Oil and Gas Act, any party with an interest in oil and gas may petition the court to create a trust with all the unknown interest owners as beneficiaries. "Unknown owners" are those persons whose identity, residence, or address is unknown and undeterminable through diligent efforts. The petitioning party's interest may be in fee, by lease, a royalty, or correlative rights to that oil and gas reservoir. Pennsylvania courts will grant constructive trusts on behalf of the unknown or unlocatable interest owners only after diligent efforts have been made to find those persons and the petitioner demonstrates that the appointment of a trustee to act on their behalf is in the unknown persons' best interest.

Trusts created pursuant to the Pennsylvania Dormant Oil and Gas Act remain in force until the unknown persons are identified to the trustee's satisfaction and those persons have received their share of funds from the trust. Unclaimed funds held in trust may be deemed abandoned pursuant to Pennsylvania's Fiscal Code.

West Virginia's Abandonment Statute. West Virginia currently does not have a traditional dormant minerals act. The legislature has in place a method whereby the courts can facilitate development of mineral estates. The legislation applies to "coal, oil, gas, and other minerals" and is designed to remove "certain barriers to ... development caused by interests in minerals owned by unknown or

missing owners or by abandoning owners." See W. Va. Code § 55-12A-1 *et seq.* If the development of the minerals would be advantageous to a prudent owner and such development would further public policy, the court may appoint a special commissioner to "sell, execute and deliver a valid lease of the mineral interest on terms and conditions customary in the area." W. Va. Code § 55-12A-4(a).

West Virginia's abandonment process starts with the filing of a petition by any party vested with a fee interest in either the subject mineral estate or the overlying surface estate, or by a lessee of the mineral interests or its assignee whose lessor would be entitled to file a petition as the partial owner of the subject mineral estate. The petitioning party must publish notice of its petition and render personal service to the extent possible. The court may authorize the special commissioner to lease the mineral interests six months after the petition has been filed. The proceeds from the lease are to be held by a special receiver of the court, and within seven years after the date of the lease, any unknown, missing, or abandoning owner may petition the court to document his or her title and receive his or her share of the proceeds. Once seven years have passed, however, the owners of the surface estate receive both title to the mineral estate from the special commissioner and the funds possessed by the court's receiver.

PROPOSED PENNSYLVANIA LEGISLATION

HB 97, introduced in the Pennsylvania House of Representatives on January 14, 2013, proposes to amend the Pennsylvania Dormant Oil and Gas Act into a statute more in line with Ohio's Dormant Minerals Act. If passed, the bill would work abandonment of oil and gas interests in favor of the owner of the surface estate if, within the previous 20-year period, no savings events occurred. Savings events include: (i) the selling, leasing, mortgaging, or transferring of the oil and gas interests; (ii) the issuance of a drilling permit for those interests; (iii) actual production or withdrawals of oil or gas from the lands concerned or those that are pooled or unitized therewith; (iv) the use of the subsurface estate for gas storage; or (v) the filing of a claim of interest with the recorder of deeds maintaining the oil and gas ownership rights. As long as any of these savings events occurs every

20 years, the mineral estate remains separate from the surface estate. Upon the expiration of any 20-year period without such an event, however, the bill calls for a declaration of abandonment and a rejoining of the surface and mineral estates. Similar to Ohio's original Dormant Minerals Act, the bill requires no notice to the owner of the oil and gas rights.

SB 258, introduced in the Pennsylvania Senate on January 17, 2013, is a more restrained approach to dealing with severed mineral interests. Technically, the bill is not a proposed amendment to the Pennsylvania Dormant Oil and Gas Act but, rather, a separate enactment, and the bill also applies to coal, whereas the Pennsylvania Dormant Oil and Gas Act does not. The bill proposes to create a rebuttable presumption that the owner of subsurface rights who has failed to exercise those rights for a period of greater than 50 years has abandoned those rights in favor of the owner of the surface estate. If passed, the bill would not apply to affirmative grants or long-term leases. The bill would apply only to mineral interests that were severed from the surface estate by reservation.

DORMANT MINERALS ACTS AND THE FUTURE DEVELOPMENT OF THE MARCELLUS AND UTICA SHALE PLAYS

The ability to sever mineral interests from the surface estate and to subdivide those interests are well-established rights of ownership. Deeds, wills, and intestacy diluted mineral ownership in Ohio, Pennsylvania, and West Virginia, often to the point of nonrecognition. These conditions brought dormant minerals acts into existence. The proposed legislation in Pennsylvania, if passed, will likely increase the number of quiet title actions brought by landowners attempting to reclaim interests severed from the surface many years ago. Producers and developers negotiating leases with landowners who have been awarded ownership of mineral interests in quiet title actions will want to be certain that those mineral interests will not be lost

should the original owner become known at a later date. As with all matters relating to the leasing of oil and gas interests, stakeholders should consult experienced oil and gas attorneys to answer any questions that they may have with regard to dormant minerals acts.

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