



Ohio Supreme Court Decision Clarifies Mineral Rights in Utica and Marcellus Shale Plays

Law Does Not Provide for Automatic Vesting of Unused Mineral Interest Without Notice

Many states have “dormant mineral” legislation providing for the transfer of severed mineral interests to the surface owner if the mineral owner does not develop the minerals or take other action manifesting an intent to preserve his interest over an extended period of time, typically 20 years. The basic purpose of such legislation is to promote the development of mineral resources by clearing title of unwanted mineral interests and eliminating the uncertainty about mineral ownership that can arise when many years of devise, descent, and conveyance leave oil and gas rights fragmented and disconnected from surface ownership.

Some of these statutes are expressly self-executing and provide for the automatic vesting of an unused mineral interest in the surface owner, without advance notice to the mineral owner. In 1982, the United States

Supreme Court upheld Indiana’s self-executing statute against a variety of constitutional challenges. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Other statutes, including the Uniform Dormant Mineral Interests Act (1987), require the surface owner to take some action to reunite the mineral and surface estates.

The Background

Ohio adopted its Dormant Mineral Act (“DMA”) in 1989 and amended it in 2006. Ohio Rev. Code § 5301.56.¹ The 1989 Act provided that a mineral interest “shall be deemed abandoned and vested in the owner of the surface” unless a savings event occurred within the preceding 20 years. Savings events include a recorded title transaction of which the mineral interest was the subject, actual production of minerals by

¹ Other states in the Appalachian Basin also have “dormant mineral” legislation, with substantially different provisions, to promote the development of mineral resources. For example, 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. West Virginia’s legislature has in place a method whereby the courts can facilitate development of mineral estates that 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.” W. Va. Code § 55-12A-1 et seq. For more information, see [Dormant Minerals Acts and the Marcellus and Utica Shale Plays](#).

the holder, the issuance of a drilling or mining permit to the holder, or a filed claim to preserve the holder's interest. The 2006 amendments imposed new requirements on the surface owner: First, he must give advance notice to the mineral rights holder of his intent to claim abandonment; second, he must, within 30 to 60 days, file an "affidavit of abandonment" reciting the absence of a savings event; and third, if the mineral rights owner files neither a claim to preserve his interest nor an affidavit proving that a savings event occurred, he must record a "notice of failure to file." Only then "the mineral interest shall vest in the owner of the surface of the lands formerly subject to the interest." Ohio Rev. Code § 5301.56(H)(2).

For about a quarter century, there was virtually no litigation under the DMA and only one reported decision. With the advent of horizontal drilling and fracking in the Utica and Marcellus shale, there was an explosion in DMA-related cases. Landowners filed dozens of lawsuits alleging that: mineral interests automatically vested in them under the 1989 Act before 2006; the 2006 amendments therefore did not apply to them; and they, rather than the mineral owners of record, were entitled to lease those interests and collect any royalties from their development. Although there was some division in the trial courts, all three appellate districts (the Fifth, Seventh, and Eleventh) that addressed these issues agreed with the landowners, concluding that the 1989 Act was self-executing and provided for automatic vesting.

These lawsuits created significant uncertainty about mineral ownership in the Utica and Marcellus shale. The Ohio Supreme Court resolved that uncertainty in a decision on a certified question that it handed down on September 15, 2016. *Corban v. Chesapeake Exploration, LLC, et al.*, No. 2014-0804, Slip Op. No. 2016-Ohio-5796.

The Case

The mineral interest in *Corban* was severed in 1959. The plaintiff/petitioner acquired the surface rights to the property in 1999. Oil and gas production commenced on the property in 2011. The plaintiff brought suit under the DMA in 2013. He argued that the 1989 DMA was self-executing and, in the absence of any savings event for a 20-year period, automatically gave him a "vested right" to the minerals when he acquired the property, which the Ohio Legislature could not retroactively destroy in 2006.

The mineral owner and its lessee argued that the 1989 Act was not self-executing and did not provide for "automatic" vesting because such vesting would occur outside the chain of title, violating the declared statutory purpose of "simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title." Ohio Rev. Code § 5301.55. They also argued that the 2006 Act was not unconstitutionally retroactive because it only established a procedure that must be followed for any allowable vesting can occur, without changing any of the substantive elements of a deemed abandonment.

The Ohio Supreme Court Decision

Disagreeing with every court of appeals, the Ohio Supreme Court held that the 1989 DMA was not self-executing; in providing that dormant mineral interests shall merely be "*deemed* abandoned and vested" (emphasis added), rather than "extinguished" or "null and void" (terms used elsewhere in the Marketable Title Act, of which the DMA is a part), the legislature established only a "conclusive presumption." "[B]ecause the conclusive presumption of abandonment was only an evidentiary device that applied to litigation seeking to quiet title to a dormant mineral interest, the Dormant Mineral Act did not automatically transfer the interest from the mineral rights owner to the surface owner by operation of law." Rather, a surface owner claiming subsurface minerals under the 1989 DMA "was required to commence a quiet title action seeking a decree that the dormant mineral interest was deemed abandoned." The court found it "apparent" from the legislative history that the General Assembly "did not intend title to dormant mineral interests to pass automatically and outside the record chain of title."

Since a dormant mineral interest did not automatically pass to the surface owner under the 1989 Act, the court also held, "as of June 30, 2006, any surface holder seeking to claim dormant mineral rights and merge them with the surface estate is required to follow the statutory notice and recording procedures enacted in 2006." This does not violate the Retroactivity Clause of the Ohio Constitution because "the General Assembly has not divested the surface holder of a right to abandon mineral interests that accrued prior to the effective date of [the 2006 amendments], but rather, it modified only the method and procedure by which the right is recognized and protected."

The Decision's Impact

This decision will likely be dispositive in most DMA cases, because few surface owner plaintiffs have even attempted to comply with the requirements of the 2006 DMA. See, e.g., *Albanese v. Batman*, No. 2015-0120, Slip Op. No. 2016-Ohio-5814 (Ohio Supreme Court, Sept. 15, 2016). Those who do attempt to comply, by giving notice to the mineral holder, will have no claim if the holder then within 60 days files a claim to preserve its interest—as occurred in a case decided on the same day as *Corban*—*Walker v. Shondrick-Nau*, No. 2014-0803, Slip. Op. No. 2016-Ohio-5793 (Ohio Supreme Court, Sept. 15, 2016). The Ohio Supreme Court decided 12 other DMA cases together with *Corban*, and in 10 of its orders, it simply cited *Corban*, or *Corban* and *Walker*, as the authority for reversing or affirming the decision below.

The Ohio Supreme Court's *Corban* decision will eliminate the uncertainty created by dozens of DMA lawsuits about the ownership of rights in the Utica and Marcellus shale, stabilize those rights, and remove a legal obstacle to the further development of this valuable resource. Mineral owners who value their rights should no longer be faced with claims that through inaction, they lost or relinquished those rights, or that those rights have been transferred to others automatically and without notice to them or any legal process. If surface owners give notice as required under the 2006 Act of their intent to claim that minerals have been abandoned, it is a fairly simple matter for mineral holders to then file a claim or affidavit within 60 days, under Ohio Rev. Code § 5301.56(H) (1)(a), that "is sufficient to preclude the mineral interests from being deemed abandoned" under the Ohio Supreme Court's decision in *Dodd v. Croskey*, 143 Ohio St. 3d 293 (2015).

Jones Day represents one of the parties in Corban and argued the matter in the Ohio Supreme Court.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Jeffery D. Ubersax

Cleveland
+1.216.586.7112
jdubersax@jonesday.com

Roy A. Powell

Pittsburgh
+1.412.394.7922
rapowell@jonesday.com

Jeffrey A. Schlegel

Houston
+1.832.239.3728
jaschlegel@jonesday.com

Kevin C. Meacham

Pittsburgh
+1.412.394.7265
kcmeacham@jonesday.com

John P. Miller

Pittsburgh
+1.412.394.7912
jpmiller@jonesday.com