

OHIO COURT RULINGS CONTINUE IN LEGAL BATTLES OVER SEVERED MINERAL RIGHTS



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Hundreds of lawsuits between surface owners and mineral owners over ownership of valuable oil and gas rights are pending in Ohio, and important legal issues are still being sorted out by the Ohio courts. This is even more than two years after the Ohio Supreme of Ohio issued its landmark decision on September 15, 2016 in *Corban v. Chesapeake Exploration, LLC*, 2016-Ohio-5796. Recall that *Corban* held that the 1989 version of the Ohio Dor-

mant Minerals Act (“1989 DMA”) could only be relied upon by surface owners in cases brought before June 30, 2006. The Court also held that the 1989 DMA was nothing more than an evidentiary mechanism that assisted in proving a claim for abandonment of minerals and did not automatically abandon and vest ownership of severed mineral rights in the surface owners at that time. As a result, surface owners must first follow the mandatory statutory notice procedure set forth in the 2006 version of the

Ohio Dormant Minerals Act (“2006 DMA”) before an abandonment case can be filed.

A recent decision issued by the Ohio Court of Appeals for the Eleventh District illustrates the importance of understanding the individual components that constitute “mineral rights” and how these components can be severed and separately conveyed. The recent case of *Thompson v. Custer*, 2018-Ohio-4476, involved a dispute between the surface owner (Custer)

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and a mineral owner who claimed to own one-half of the minerals (Thompson). The producer, BP, signed an oil and gas lease with the surface owner (Custer) and initially paid a \$3,900 per acre bonus for Custer's one-half mineral interest. BP later reconsidered the title to the property and paid the rest of the bonus to Custer for the remaining half of the mineral, despite Thompson's claim to this interest.

In an earlier appeal in the same case, the Court of Appeals reversed the matter under the authority of *Corbin*, holding that the 1989 DMA did not apply and that the 2006 DMA contained the controlling procedure by which mineral rights could be abandoned or preserved.

On remand before the trial court, Thompson brought additional claims for slander of title, conversion and unjust enrichment, essentially seeking to recover the lease bonus that BP paid to Custer for the mineral interest claimed by Thompson. Eventually, the trial court quieted title to the reserved minerals in favor of Thompson under the 2006 DMA, but dismissed Thompson's claims seeking to recover the bonus paid by BP.

On appeal, Court of Appeals cited to the important Ohio case of *Eisenbarth v. Reusser*, 2014-Ohio-3792. *Eisenbarth* is oft-cited as the first case in Ohio that describes the "bundle of sticks" that make up a severed mineral interest as follows: "five individual attributes of a severed mineral estate: right to develop (with ingress and egress), right to receive bonus payments, right to receive delay rentals, right to receive royalty payments and right to lease (known as the executive right)." *Eisenbarth* went on to hold that these attributes are separate and any one "stick" in the bundle of sticks can be severed and separately conveyed.

Applying *Eisenbarth* to the facts of the case, the Court of Appeals found that Thompson had reserved both the right to lease and the right to a lease bonus when it reserved its one-half interest in the minerals. Thus, Custer did not own the right to lease Thompson's half interest or the right to the bonus for this interest. However, the Court of Appeals went on to rule that Thompson had no right to the mistaken overpayment that BP paid to Custer under Custer's lease with BP. BP never entered into a lease with Thompson, and any benefit to Custer came from BP. By the time this case was decided, Shale producers such as BP were no longer developing in this area. Therefore, Thompson's leasing opportunity was gone.

The result of this case certainly would have been different had BP developed this area and drilled horizontal Shale wells. Had this occurred, Thompson would have been able to assert trespass and conversion claims against BP for the withdrawal of Thomp-

son's minerals without a lease, putting Thompson in an excellent position to demand a new lease and a bonus from BP.

The *Thompson v. Custer* opinion, and its citation and analysis of *Eisenbarth v. Reusser*, illustrate something that most mineral owners do not always realize: that not only can a mineral interest be severed from the surface, but the five separate rights in the "bundle of sticks" that constitute a mineral interest can be separately conveyed or reserved. Thus, a careful review of the mineral title should be undertaken to ensure that these individual rights have not be severed or separately transferred. Some mineral owners have been surprised to discover that they own greater or fewer rights than were previously realized. This case also highlights the importance of retaining experienced oil and gas counsel to advise clients as to title and ownership of severed royalty and mineral interests.

David J. Wigham is a second-generation Ohio oil and gas attorney with more than 26 years of experience in the industry. He is a shareholder at the law firm of Roetzel & Andress and maintains offices in Akron and Wooster, Ohio. He can be reached at 330-762-7969, or dwigham@ralaw.com.

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