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Case Law Update: Ohio is One Step Closer to Learning Whether the DMA and MTA Both Apply to Mineral Rights

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Merit briefs have been filed in a landmark oil and gas case currently pending before Supreme Court of Ohio: *West v. Bode*, Case No. 2019-1494. And the stakes could not be higher for both surface and mineral owners, because the Supreme Court is being asking to decide a single question that carries with it sweeping consequences: whether a surface owner may utilize the Marketable Title Act ("MTA") to quiet title to severed mineral interests, or whether the Dormant Mineral Act ("DMA") provides the exclusive remedy to quiet title to severed mineral interests. Under Ohio law, when two statutes are in conflict and if the conflict is irreconcilable, the more specific statute controls over the general statute. The primary issue before the Court in *West v. Bode* is whether the MTA irreconcilably conflicts with the DMA.

If the Court rules that the MTA irreconcilably conflicts with the DMA -- and therefore cannot be used to extinguish severed mineral interests -- surface owners will be left with few remedies to terminate severed mineral interests, primarily because the DMA allows mineral owners to perpetually preserve their interests and to easily defeat surface owner abandonment attempts.

For this reason, the Court's ruling in this case will have major implications in Ohio's shale play. First, depending on how the Court rules, there could be a major wealth transfer as the ownership of valuable mineral rights will shift between surface owners and mineral owners. Second, there will be oil and gas development implications. The increased uncertainty and risk caused by recent inconsistent MTA rulings from lower courts clouds title to minerals and hinders development and increases costs. In many cases, producers are forced to seek protection leases from, or force unitize, both surface owners and mineral owners before receiving permits to drill Shale unit wells, and then must hold bonus and royalty payments in suspense accounts until title to the minerals is cleared through costly litigation. For these reasons and others, *West v. Bode* is being closely watched by all stake holders in Ohio's shale play.

As of April 20, 2020, merit briefs were filed by both parties to the appeal. In addition, several Amicus briefs were filed, including one on behalf of Ascent Resources and Gulfport Energy urging the Court to hold that the MTA is in direct conflict with the DMA and therefore cannot be used to extinguish mineral interests. Several surface owners and one local producer who will be impacted by the Court's decision also submitted Amicus briefs, arguing that the MTA should remain a remedy to extinguish severed mineral interests. (Amicus briefs are filed by non-litigants who have a strong interest in the outcome of the case and advise the court of additional arguments for the court to consider). The Appellants still have time to file a reply brief, and then the Court will set the matter for oral argument. At the earliest, we expect the Court to render a decision by the end of the year.

MINERAL OWNER ARGUMENTS

In their merit brief, the Appellants (the mineral owners) correctly observe that when the original MTA was enacted in 1961, it did not apply to minerals, but was later amended in 1973 to include mineral rights. However, in 1983, the Ohio Supreme Court issued its decision in *Heifner v. Bradford*, 4 Ohio St. 3d 49, holding that when a severed mineral interest is subject to a separate chain of title, independent from the

chain of title to the surface, and if title transactions are recorded within the 40-year period of marketability within this separate, mineral chain of title, those title transactions break the surface owner's chain, preventing the extinguishment of the severed mineral interest.

Suddenly, the MTA's stated purpose of "simplifying and facilitating land title transactions" was defeated. The separate chain of title to a severed mineral interest that predates the root title deed can split into hundreds of smaller chains over time, as the severed interest is fractionalized by transfer and inheritance. Each chain can potentially contain a savings event that prevents extinguishment. Complicating matters further, there are instances where severed mineral owners have conveyed royalty interests out of the separate mineral estate, thereby creating two additional layers of chains of title that could be subject to the MTA (mineral fee and royalty chains). And all of this is occurring outside of the surface owner's record chain of title.

It was for this reason, the Appellants argue, that the Ohio legislature enacted the DMA, an amendment to the MTA, to create a separate (and sole) remedy for terminating severed mineral interests. According to the Appellants, when construed together, both statutes contain mechanisms for terminating severed mineral interests, but the DMA is the more specific remedy, in that it applies only to mineral rights. The MTA, by contrast, can be applied to any interest in land, including for example, old, unreleased mortgages, easements and rights-of-way, or even deed or use restrictions.

The Appellants then point out that the conflict between the MTA and DMA is irreconcilable by citing several examples when the two statutes could operate differently to the same severed mineral interest, such that a mineral owner could take steps under the DMA to preserve its interest and actually place the interest in production, and at the same time could lose the same interest under the MTA because there was no title transfer in the surface owner's chain of title within the 40-year period, even though the interest was in production and preserved under the DMA. In other words, the mineral interest could be simultaneously preserved under the DMA and extinguished under the MTA; the mineral owner is the owner of the mineral interest under the DMA and the surface owner is the owner of the mineral interest under the MTA. Thus, Appellants argue, the MTA and DMA irreconcilably conflict with each other.

SURFACE OWNER ARGUMENTS

Conversely, the Appellees (the surface owners) argue there is no irreconcilable conflict between the MTA and the DMA. Reviewing the history of the enactment of the MTA in 1961, its amendment to include mineral interests in 1973, the enactment of the DMA in 1989, and the amendment of the DMA in 2006, Appellees observe that the extinguishment of a mineral interest under the MTA is separate and distinct process from a DMA abandonment and just because the two statutes operate differently does not necessarily mean that they are in conflict with each other.

On one hand, the MTA operates to extinguish prior mineral interests when a person holds "marketable record title" to their property, meaning that there is an "unbroken chain of title … for forty years or more." On the other hand, the DMA is merely an "evidentiary device" that creates a "conclusively presumption" of abandonment after 20 years of non-use and the failure by the mineral owner to preserve its interest. From this, Appellees conclude that that there is no conflict between the two statutes, but even if there is, the conflict is not irreconcilable.

The Appellees also cite to Supreme Court's decision in *Corban v. Chesapeake Exploration, LLC*, 2016-Ohio-5796, in which a plurality of the Court distinguished between the DMA's use of the term "deemed

abandoned" from the "extinguished" interest under the MTA. For this reason, the Appellees argue that the fact that the MTA and DMA create different results does not mean they are in irreconcilable conflict. According to Appellees, if the MTA has already operated to extinguish a mineral interest, that interest cannot be revived under the preservation mechanism of the DMA.

In summary, one thing is clear: the Supreme Court of Ohio is going to render a decision on this issue and the ability of surfaces owners to extinguish mineral rights under the MTA is at risk. A ruling by the Supreme Court of Ohio that the MTA does not apply to minerals would deal a significant blow to surface owners seeking to extinguish severed mineral interests in their property and grant a huge victory to mineral owners seeking to preserve their ownership of these interests. The combined impact of continued uncertainties in the law and the need for litigation to clear title to minerals highlights the importance of retaining an experienced oil and gas attorney who can advise clients with respect to the rights of surface owners and mineral owners as to severed mineral interests.

If you would like more information on this or other issues relating to oil and gas litigation please contact any of the listed attorneys.

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