Legal Battles Continue in Ohio Over Oil & Gas Rights

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Many Ohio lawsuits between surface owners and mineral owners over ownership of valuable oil and gas rights are being filed, and many others remain active, even after the Supreme Court of Ohio issued its sweeping decision on September 15, 2016 in Corban v. Chesapeake Exploration, LLC, 2016-Ohio-5796. Corban held that the 1989 version of the Ohio Dormant 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.

In a prior ruling regarding the 2006 DMA, Dodd v. Croskey, 2015-Ohio-2362, the Ohio Supreme Court held that even if there is no savings event in the chain of title, a mineral owner's claim to preserve a mineral interest filed in compliance with R.C. 5301.56(H) is sufficient to prevent the mineral interest from being deemed abandoned to the surface owner. Now, if a surface owner follows the notice provisions of the 2006 DMA and any mineral owner files a Notice of Preservation, that Notice "preserves the rights of all holders of a mineral interest" from being deemed abandoned.

The Corban ruling (coupled with prior the Dodd decision) dealt a fatal blow to many surface owners attempting to reclaim ownership of mineral rights and royalty interests severed from their property, many occurring more than 100 years ago. However, the legal issues in Ohio courts over valuable mineral rights are far from over.

Surface owners still have an array of potential quiet title and declaratory judgment claims to assert when seeking to reclaim ownership of oil and gas rights. In case of severed royalty interests, surface owners first must carefully review the deed language. If the royalty interest was severed prior to 1925 and does not contain words of inheritance, then the surface owner may assert a "lack of words of inheritance" claim. Prior to the enactment of G.C. 8510-1 in 1925 (now R.C. 5301.02), Ohio law required the use of words of inheritance to create a fee simple estate in the reserving party. The words of inheritance or perpetuity were required to show that an owner's interest was not limited to his life alone, but passed to his heirs or beneficiaries. If the royalty reservation did not contain words of inheritance (such as "heirs and assigns" language), it could be held that the royalty interest was owned as a life estate, thereby allowing the surface owner to bring a claim that the reserved royalty interest expired upon the death of the reserving party. [Note that this very issue is pending before the Seventh District Court of Appeals in a case known as Headley v. Ackerman, Case No. 2016-MO-0010, which has been fully briefed and is awaiting oral argument.]

Also, if reserved mineral interest was in the nature of a royalty interest – as opposed to an oil and gas interest – surface owners also have possible 2006 DMA claims and may follow the abandonment procedures in the 2006 DMA. This based on a recent decision from the Seventh Appellate District known as Devitis v. Draper, 2017-Ohio-1136. In Devitis, an Ohio Court of Appeals held for the first time that a royalty interest in an oil and gas estate is subject to the provisions of R.C. 5301.56 (the 2006 DMA). This holding makes clarifies that royalty interests can be abandoned – and can be preserved -- under the 2006 DMA. The ruling is potentially a double-edged sword for surface owners, because royalty owners would be able to preserve their interests under the 2006 DMA as well. In the case of a severed royalty interest, the surface owner would still own the executive rights to their property, meaning that they still have the right to sign an oil and gas lease and receive a signing bonus.

Moreover, surface owners are still able to assert claims under the 2006 DMA, the Marketable Title Act and for common law abandonment. In the case of older oil and gas reservations, there is a much greater the likelihood that the heirs are numerous, many do not know or possible like each other or are not in contact, many are living out of state, many are dead, and many own too small of an interest to justify the legal expense, many are unable to document heirship, and many are simply not interested in getting involved. These factors could open the door for surface owners to bring claims against the heirs of the original reservists seeking to abandon the mineral interests held by distant heirs. Even if a few heirs appear, chances are that many will not, meaning that the surface owner should be able to regain at least a portion of the oil and gas rights.

Another consequence of the Corban ruling is beginning to impact surface owners who are already leased, drilled and

receiving royalties. Utica producers are now beginning to suspend royalty payments to certain surface owners who have mineral severances covering their property that were assumed to be abandoned. Producers are understandably reluctant to pay royalties based on mineral interests that may be subject to a dispute and then run the risk of paying royalties twice. Some producers are requiring a court order entered in a declaratory judgment lawsuit to quiet title to disputed mineral rights before payment for royalties can commence or resume. This situation has resulted in significant confusion and frustration for surface owners and mineral owners alike.

Many producers are also reviewing surface owners' compliance with the mandatory 2006 DMA abandonment procedure with heightened scrutiny. The 2006 DMA abandonment procedure is often difficult for surface owners to accomplish and is easier for mineral interest holders to defeat. Under the 2006 DMA, a surface owner must locate the current "holders" or owners of a severed mineral interest and attempt to notify those holders by certified mail, return receipt requested, at their last known address. Once service of the abandonment notice cannot be completed by certified mail, the surface owners may then publish the abandonment notice in a newspaper of general circulation in which the property is located. If even one mineral interest owner comes forward and files an Affidavit of Preservation, the surface owner's abandonment fails as to all mineral interest owners.

Prior to Corban, many surface owners were skipping the mandatory step in the 2006 DMA abandonment procedure that requires attempted certified mail service upon mineral holders or their "successors and assignees," and were proceeding directly to publication. One of the legal issues likely to arise in the next wave of DMA litigation (now that the 1989 DMA is no longer available) will be: whether a surface owner's failure to attempt certified mail service prior to publishing an abandonment notice will render the surface owner's 2006 DMA abandonment procedure invalid as to the mineral interest at issue.

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In short, even after Corban, surface owners and mineral interest owners in Ohio continue to face significant legal hurdles over the ownership of valuable oil and gas rights and royalties. The additional hurdles brought about by Corban are not insurmountable and in many instances, surface owners may be able to gain ownership of at least of portion of oil and gas rights beneath their property. In other cases, the mineral owner will be able to avoid abandonment and retain ownership. This conflict highlights the importance of retaining experienced oil and gas counsel to advise clients as to title to severed royalty and oil and gas interests. Until and unless these title issues are resolved by Court order, many surface owners and mineral interest owners are finding that, after Corban, producers are unwilling to recognize disputed mineral interests and release bonus and royalty payments.

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