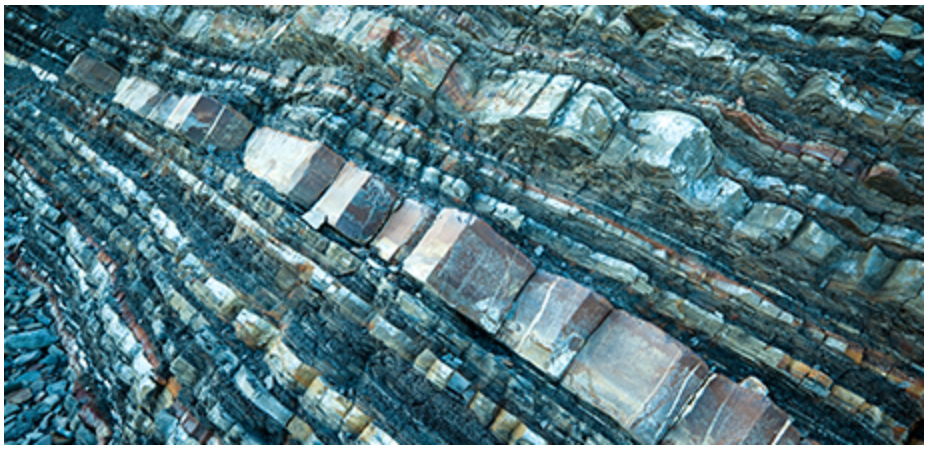

Ohio Supreme Court holds 1989 version of Ohio Dormant Minerals Act is NOT self-executing

September 15, 2016

On September 15, 2016, the Ohio Supreme Court issued a series of landmark rulings confirming that the 1989 version of the Ohio Dormant Minerals Act (DMA) was not self-executing. In the lead case, Corban v. Chesapeake Exploration L.L.C., 2016-Ohio-5796, the Court, in a 5-2 decision, concluded that the "1989 law was not self-executing and did not automatically transfer ownership of dormant mineral rights by operation of law." Instead, surface owners were "required to bring a quiet title action" prior to 2006 in order to establish abandonment. After June 30, 2006 (the effective date of the 2006 version of the DMA), a surface owner is "required to follow the statutory notice and recording procedures enacted in 2006."

The Corban decision and the other 13 pending DMA cases are summarized below.

Corban v. Chesapeake Exploration L.L.C.

1. Federal district court proceeding

Like most DMA cases, Corban involved a dispute over the ownership of the subsurface oil, gas and other minerals underlying approximately 164.48 acres of real property located in Harrison County, Ohio (the Property). On July 2, 1959, The North

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American Coal Corporation (North American) conveyed the Property by deed to Orelen H. Corban and Hans D. Corban but reserved to itself, and its successors and assigns, the rights to the oil, gas and other minerals underlying the Property (the Severance Deed). Between the date of the mineral severance and 2013, North American entered into several oil and gas leases, the most recent of which was signed in 2009. There is currently one well in production under the most recent oil and gas lease.

In 2013, the surface owner filed a lawsuit in Harrison County Common Pleas Court against North American and a number of other entities attempting to quiet title to the oil and gas mineral rights under the Property. At no time prior to the filing of the lawsuit did the surface owner of the Property attempt to comply with the notice process in the 2006 version of the DMA. The defendants subsequently removed the case to federal court and counterclaimed. Dueling motions for summary judgment were filed. The federal district court, however, certified two questions of Ohio law to the Ohio Supreme Court: (i) "whether the 1989 or the 2006 version of R.C. 5301.56… should be applied to a quiet title action filed after 2006 that asserts that the right to the minerals vested in the surface owner as a result of abandonment prior to 2006;" and (ii) "whether the payment of delay rental during the term of an oil and gas lease constituted a title transaction."

2. The Ohio Supreme Court's decision

A. The 1989 version of the DMA was not self-executing.

i. Justice O'Donnell's majority opinion

The focal point of the Court's decision involved the first certified question — namely whether the 1989 version of the DMA was self-executing. In a 5-2 decision authored by Justice O'Donnell, the Court focused on the word "deemed" in the statute and concluded that the 1989 version of the DMA created a "conclusive presumption that the mineral interest had been abandoned in favor of the surface owner." Yet, this presumption was simply an "evidentiary device that applied to litigation seeking to quiet title to a dormant mineral act." Corban, 2016-Ohio-5796 at ¶¶ 25-26. As a result the Court held that the "1989 Dormant Mineral Act was not self-executing and did not automatically transfer ownership of dormant mineral rights by operation of law" (emphasis added). Id. at ¶ 40.

Instead, a surface owner "was required to bring a quiet title action seeking a decree that the mineral rights had been abandoned" under the 1989 version of the DMA. Corban at ¶ 28. Most importantly, if the surface did not file such a quiet title action prior to June 30, 2006 (the effective date of the 2006 version of the DMA), no such claims could be filed. Stated another way, "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." Corban at ¶ 31. Justice O'Donnell's decision was joined by Chief Justice O'Connor and

Justice French.

ii. Justice Kennedy's concurring opinion

Although both Justice Kennedy and Justice Lanzinger concurred in the judgment (resulting in the five justice majority), Justice Kennedy wrote a well-reasoned concurring opinion agreeing with Justice O'Donnell that the 1989 version of the DMA "was not self-executing and that a severed mineral interest cannot revert to the surface owner absent judicial action." The difference in their opinions, however, was Justice Kennedy's analysis in reaching that conclusion.

Rather than focus on the word "deemed," Justice Kennedy's analysis centered on the inherent ambiguity in the 1989 version of the DMA — namely, the ambiguity in the meaning of the word "abandoned." Drawing a distinction between the words "abandoned" (as used in the DMA) and "extinguished" (as used in the Ohio Marketable Title Act), Justice Kennedy concluded that "unlike the term 'abandon,' which requires an intent to relinquish property, the term 'extinguish' operates regardless of intention." Id. at ¶ 80. Harkening back to the common law, Justice Kennedy emphasized that abandonment (under Ohio law) requires more than mere non-use. It requires "an action and intent to relinquish." Id. at ¶ 87. Because the abandonment determination presents a question of fact regarding intent, "a judicial action is required to make the determination." Thus, "a surface owner seeking to reacquire a severed mineral interest must not only satisfy the statutory elements of the DMA, but must also provide evidence that the holder intended to abandon the severed mineral estate. There is no opportunity for those determinations to be made if the DMA is self-executing" (emphasis added). Id. at ¶ 88. And, such a judicial determination "serves to facilitate both the paramount purpose of the MTA and DMA because a recorded judgment indicating that a severed mineral interest has reverted to the surface owner provides notice within the record chain of title, which in turn promotes the use of mineral estates." Id. at ¶ 92.

iii. Justice Pfeifer's dissent

Simply stated, Justice Pfeifer concluded that the 1989 version of the DMA was self-executing, did not require judicial implementation and continued to apply after the 2006 amendment to the DMA. Among other things, Justice Pfeifer noted that the DMA "is absolutely silent as to any action required by the surface owner to effectuate the vesting of the mineral rights" and that the General Assembly "stood on solid constitutional ground in not requiring notice or filing of suit by the surface owner prior to the mineral interest being deemed abandoned and vested in the surface owner." Id. at ¶¶ 113 and 115. Focusing on what he believed to be the clear meaning of the statute, Justice Pfeifer also criticized the Court for allegedly rewriting the 1989 version of the DMA and ignoring what he believed to be the proper definition of the word "deemed." But, as Justice Pfeiffer noted in Walker, his dissent is a "vain act" as the Court has concluded that the 1989 version of the DMA

was not self-executing.

> B. The payment of delay rentals under an oil and gas lease is not a savings event under the DMA.

The answer to the second certified question proved much easier for the Court to answer. In a unanimous judgment, the Court concluded that the payment of delay rentals under an oil and gas lease did not constitute a savings event under the DMA. Not only is the payment of a delay rental not recorded (a requirement under the DMA), but there is "no basis to support a conclusion that a delay rental payment alone affects title separate and apart from the oil and gas lease." Id. at 38.

Walker, Batman and the other DMA decisions

Based on its holding in Corban, the Court decided 11 other cases (two of which were companion cases decided in the same case) by the same 5-2 vote in favor of the severed mineral interest owners. Information about each of these cases is below.

- Walker v. Shondrick-Nau, 2016-Ohio-5793 (7th District Court of Appeals' decision reversed based on Corban and Dodd v. Croskey). A short decision by Justice Kennedy built on the seminal holding in Corban, concluding that: (i) there was no evidence of any legal action being taken by the surface owners prior to the effective date of the 2006 version of the DMA; and (ii) the severed mineral interest owner's "claim to preserve his mineral rights was sufficient under the 2006 version of the act to prevent the mineral rights from being 'deemed abandoned and vested' in the owner of the surface estate."
- Eisenbarth v. Reusser, 2016-Ohio-5819 (7th District Court of Appeals' decision affirmed based on Corban).
- Tribett v. Shepherd, 2016-Ohio-5821 (7th District Court of Appeals' decision reversed based on Corban).
- Swartz v. Householder, 2016-Ohio-5817 (7th District Court of Appeals' decision reversed in two companion cases based on Corban and Walker).
- Dahlgren v. Brown Farm Properties, L.L.C., 2016-Ohio-5818 (7th District Court of Appeals' decision reversed based on Corban and Walker).
- Farnsworth v. Burkhart, 2016-Ohio-5816 (7th District Court of Appeals' decision affirmed based on Corban and Dodd v. Croskey).
- Carney v. Shockley, 2016-Ohio-5824 (7th District Court of Appeals' decision affirmed based on Corban and Walker).
- Taylor v. Crosby, 2016-Ohio-5820 (7th District Court of Appeals' decision affirmed based on Corban and Walker and remanded to trial court regarding whether there was compliance with the 2006 version of the DMA).
- Wendt v. Dickerson, 2016-Ohio-5822 (5th District Court of Appeals' decision reversed on authority of Corban and Walker).
- Thompson v. Custer, 2016-Ohio-5823 (11th District Court of Appeals' decision reversed on authority of Corban and Walker).

In addition, the Court collectively decided two cases in a single, unanimous decision, Albanese v. Batman, 2016-Ohio-5814. Interestingly, the Court's decision in Batman relied on Corban and then focused on the surface owner's failure to even start the notice process under the 2006 version of the DMA. As a result, the Court affirmed the judgment of the 7th District Court of Appeals, concluding that "because neither [of the surface owners] complied with the statutory notice and affidavit provisions found in R.C. 5301.56(E), the severed mineral rights never vested in them, but remain with the [severed mineral interest owners]." Interestingly, Justice Pfeifer (in a concurring opinion joined by Justice O'Neill) concurred in the judgment based on two savings events (a recorded preservation claim and a recorded will), which resulted in no 20-year period of dormancy under the DMA. The humorous last paragraph of Justice Pfeiffer's concurring opinion is worth a read.