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Ohio Supreme Court Confirms Marketable Title Act Extinguishes Oil and Gas Interests

By Brian M. John and Lauren M. Oelrich*

The authors review a landmark decision by the Supreme Court of Ohio and discuss its implications.

The Supreme Court of Ohio recently rendered an opinion on the application of the Marketable Title Act ("MTA") to severed oil and gas interests, in light of more recent enactment of the Dormant Mineral Act ("DMA").

Prior to this decision, the industry did not have one cohesive view and application of the MTA; operators, law firms and landowners held various opinions on the application of the MTA to severed oil and gas interests.

Importantly, the court held that there is no "irreconcilable" conflict between the statutes and, therefore, both statutes can be utilized to "extinguish" or "reunite" severed oil and gas interests.

This landmark decision, while not entirely unexpected, is slightly at odds with the court's prior opinions, and likely will have a significant rippling impact across the state, mirroring the increased litigation that the Seventh District Court of Appeals has seen over the last year or so on quieting title to severed oil and gas interests.

THE CASE

On January 21, 2020, the Supreme Court of Ohio accepted the case of *West v. Bode* for review[1] to consider the question:

> Whether the DMA, as a specific statute controls over the MTA, as a general statute, in determining the abandonment/extinguishment of mineral interests if the statutes are in conflict?

While acknowledging that dual application of both statutes could result in conflicting outcomes (that is, extinguishment under the MTA while an interest was preserved under the DMA) the court definitively held that such a result was not an irreconcilable conflict, and therefore, that both could be applied to severed oil and gas interests.

Importantly, the court specifically noted that once an interest is extinguished under the MTA, it cannot be revived. This note highlights the major impact

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[1] Case No. 2019-1494.

that this decision will have on operators—surface owners in producing units are likely to revisit the issue of ownership of the oil and gas where there is a severance on their property and initiate a quiet title action to confirm that the oil and gas was extinguished under the MTA.

Tucked into the end of the opinion, the court declines to answer whether the MTA extinguishing oil and gas interests violates the Due Process Clause, the mirror argument that was made as to why the 1989 DMA did not automatically reunite severed oil and gas interests. This disappointing response foretells of future litigation on this very topic, and indicates that this is not the last and final word on application of the MTA to oil and gas interests.

IMPLICATIONS FOR OPERATORS AND LANDOWNERS

This decision is likely to instigate a tidal wave of litigation across Ohio regarding severed oil and gas interests, especially in areas where the oil and gas is already in production. Due to the shifts in interpretation of the MTA and DMA since the Shale boom began in Appalachia, operators, surface landowners, and heirs of severed oil and gas interests, have been subject to a multitude of methods of applying these statutes.

Within the last 10 years alone, the industry shifted from thinking that the 1989 DMA may still apply and resulting in automatic abandonment to only the 2006 DMA procedures could properly abandon oil and gas interests, to the current trend in the last year of reutilizing the MTA to apply to severed interests. As a result, there are likely a number of well-settled producing oil and gas units in Ohio in which severed oil and gas owners are being paid royalties that surface owners may now see as ripe for a renewed fight.

Aside from the uncertainty and expense of litigation, the bigger issue for operators is: If the MTA extinguished the oil and gas years ago, what happens to producing units where bonus payments and royalties may have been paid for years to severances owners? Despite the co-tenancy accounting rules, are operators going to be liable to surface owners for past royalties or even trespass if protection leases were not obtained and maintained?

HISTORY OF THE MTA AND DMA

In 1961, Ohio enacted the MTA, with the purpose of "simplify[ing] and facilitate[ing] land title transactions by allowing persons to rely on a record chain of title."[2] The MTA provides a method for extinguishing certain interests in real property in existence prior to the "root of title" of the current owners.

In 1973, the MTA was amended to apply to "mineral" interests.

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[2] O.R.C. § 5301.55.

After 1973, many Ohio courts quieted title to surface owners in oil and gas interests which were extinguished under the MTA.

Subsequently, in 1989, the DMA was enacted within the MTA statute. Unlike the MTA, the DMA provided for notification procedures prior to the oil and gas interest being deemed "abandoned" and "reunited" with the surface. This act was again amended in 2006 to provide for more strict notification procedures.

Through the oil and gas boom in Appalachia, the Ohio courts began to weigh in on the application of the 1989 versus the 2006 DMA statutes, culminating in the Ohio Supreme Court case, *Corban v. Chesapeake*, wherein the court ultimately held that the 2006 DMA was to be utilized for "reuniting" severed oil and gas interests. During this same period, Ohio courts disagreed as to whether the MTA could be applied to severed oil and gas royalty interests, but no traction was made in the courts towards application of the MTA towards fee ownership of the oil and gas, and these arguments started to disappear from appellate cases.

During this time of uncertainty as to dual application of the DMA (1989 versus 2006), many argued that if the 1989 DMA was self-executing, then the provision would have been unconstitutional, as violating the Due Process Clause. The *Corban* court side-stepped this issued by holding that the 1989 DMA was not self-executing, but was rather a "conclusive presumption."

As such, in order to effectuate the re-uniting of severed oil and gas interests, parties utilizing the 1989 DMA needed to institute a quiet title action to confirm vesting in the surface owners.

Conversely, the *Corban* court held that the 2006 DMA, with its additional vesting language, "operates to establish the surface owner's marketable record title in the mineral estate." With that landmark holding, many thought that there was a final, definitive, and most importantly, singular, clear method for determining whether a severed oil and gas interest was vested with the surface owner of the property.

That was until *Blackstone v. Moore*, just two years later.

THE COURT OPENS THE DOOR TO MTA APPLICATION

The debate on the application of the MTA was rekindled on December 13, 2018, by the Ohio Supreme Court in the case *Blackstone v. Moore*.[3] In this case, the court applied the MTA to a severed royalty interest, and developed a three-part test for determining whether such interest was extinguished under the MTA (the "*Blackstone* test"). The *Blackstone* test asks:

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[3] 2018-Ohio-4959.

1. Is there an interest described within the chain of title?
2. If so, is the reference to that interest a "general reference"?
3. If the answers to the first two questions are yes, does the general reference contain a specific identification of a recorded title transaction?

In *Blackstone*, the court held that the reference to the mineral severance in the Root of Title deed was "specific" as it noted the "type of interest," and "by whom the interest was originally reserved." As such, the royalty interest was not extinguished under the MTA.

However, Justice Degenaro wrote a concurring opinion cautioning application of the MTA to severed mineral interests, specifically calling for the DMA to be considered a more specific statute than the general MTA and noting that the "continued applicability of the Marketable Title Act in light of the more specific Dormant Mineral Act was not raised as a proposition of law in this appeal, and our review is generally constrained by the arguments of the parties."

THE AFTERMATH OF *BLACKSTONE*—A SECOND WAVE OF OIL AND GAS LITIGATION

Evidencing the expected surge of litigation on the heels of *West v. Bode* since *Blackstone*, the Ohio courts in the Seventh Appellate District and Fifth Appellate District have heard and applied the MTA to numerous severed mineral interests, explicitly rejecting the specificity argument in the *Blackstone* concurrence by Justice Degenaro.

1. *Soucik v. Gulfport Energy Corp.*[4]—The court ignores the *Blackstone* test and simply holds that the root of title deeds failed because there is a reservation in the deed and therefore "it is not the interest claimed by appellees, namely, an interest free of any reservations."
2. *Stalder v. Butcher*[5]—The court held that oil and gas interests were subject to both the 2006 ODMA and the MTA, where the "oil and gas interest at issue was recorded before the enactment of the 2006 DMA and before the appellants became the surface owners of the property at issue. The court further applies the *Blackstone* test, and found that there was a specific reference where the deed contained both a recitation of the reservation and a clause stating "being the same premises that were conveyed to . . . " and recited the book and page of the reservation. As such, the court held that the interest was not

[4] 2019-Ohio-491 (decided February 7, 2019).

[5] 2019-Ohio-936, appeal denied 2019-Ohio-2780 (July 20, 2019).

extinguished under the MTA.

3. *Datkuliak v. Wheeler*[6]—The court simply held that oil and gas were subject to both the ODMA and the MTA and remanded the case for MTA application.
4. *Miller v. Merlot*[7]—The court applied the MTA, but held that the severance was not extinguished because of a pre-root gap in the chain of title, and therefore, the court could not confirm whether the root of title deed contained a recitation or a new severance of the oil and gas.
5. *Senterra Ltd. v. Winland*[8]—The court reaffirms *Stalder*, and, in applying the MTA, further describes the "root of title" deed as having both a temporal and a substantive element. The temporal element is described as being the title transaction over 40 year old and the substantive requiring that title transaction to "create the interest claimed by such person, upon which he relies as a basis for the marketability of his title." This case appears to be the first by the Seventh Appellate District directly upholding a trial court decision to extinguish the minerals under the MTA.
6. *Richmond Mills, Inc. v. Ferraro*[9]—The court reiterated the history of its application of Blackstone and held that it was not error for the trial court to extinguish the mineral interest under the MTA.
7. *Erickson v. Morrison*[10]—The court utilized the same rationale as the Seventh Appellate District—since the recitation did not specifically reference the severing party, or identify the severance deed, it was not "specific" under the *Blackstone* test, and therefore, the minerals were extinguished under the MTA.
8. *McClellan v. McGary*[11]—Relies on *Blackstone* and applies the analysis of *Senterra* in applying the MTA to a severed oil and gas interest.

UNCERTAIN FUTURE OF THE MTA: DUE PROCESS CHALLENGES LIKELY IN WAKE OF *WEST v. BODE*

Despite passionate due process arguments, the court held that such argument was waived, as no "specific argument" was developed by appellants, the trial

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[6] 2019-Ohio-4091 (decided September 23, 2019).

[7] 2019-Ohio-4084 (decided September 30, 2019).

[8] 2019-Ohio-4387 (decided October 11, 2019).

[9] 2019-Ohio-5249 (decided December 9, 2019).

[10] 2019-Ohio-5430 (decided December 30, 2019).

[11] 2020-Ohio-1109 (decided March 23, 2020).

court, or the court of appeals. The court continued to note that even if the issue was not waived, it was not the proposition that was accepted for review and, therefore, the court "decline[d] to consider it."

Such decline is curious, as the court could have easily extinguished any argument regarding application of the MTA by holding that the statute was constitutional.

By declining to consider or render an opinion of the constitutional applications of extinguishing oil and gas interests, the court leaves the door cracked to future arguments and litigation on application of the MTA, but this time, under the posture of a constitutional claim.