Unanswered questions following Ohio Supreme Court DMA decision

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The Supreme Court recently decided that the 1989 Dormant Mineral Act was not self-executing. Supporters of Justice Pfeifer's dissent argue that the majority judicially modified the 1989 DMA in an attempt to avoid taking the minerals from the holders. The impact of this decision may take several years before it is fully known, and it appears that the decision created more questions than answers.

The 1989 DMA in pertinent part states: "Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, [if none of the enumerating savings events applied]" The Court held that the above quoted language merely created a presumption to be used as evidence in a quiet title proceeding. However, the 2006 DMA was modified to read as follows: "Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if the requirements established in division (E) of this section are satisfied and [if none of the enumerating savings events applies]" (emphasis added). The underlined portion above is the only change to that portion of the DMA made by the General Assembly when it revised the DMA in 2006. If the Court determined that the 1989 DMA created merely a "conclusive presumption" then an argument most certainly will be that even after the surface owner completes all of division (E)'s requirements of the 2006 DMA, the surface owner will still need a judicial decree to recapture the severed minerals.

The portion of the 2006 DMA [(H)(2)] that states "[i]mmediately after the notice of failure to file a mineral interest is recorded, the mineral interest shall vest in the owner of the surface of the lands formerly subject to the interest, and the record of the mineral interest shall cease to be notice to the public of the existence of the mineral interest or of any rights under it. . ." (emphasis added) should remove any argument about merely creating a conclusive presumption, but no certainty exists following the Court's decision regarding the 1989 DMA.

Here are some other key issues involving the 2006 DMA that have yet to be decided by the Ohio Supreme Court:

- 5301.56 (E)(1) – What level of due diligence is required to locate the holder or holder's successors or assignees to serve notice by certified mail before notice by publication can be utilized?
- Is a severed royalty interest subject to the 2006 DMA? 5301.56 (A)(3) defines mineral interest as a fee interest. Royalty has been held to be personal property in Ohio.
- The MTA has been utilized to extinguish royalty interests. Can surface owners argue that severed mineral interests are extinguished under the MTA or does the DMA trump the MTA?
- Even if surface owner successfully completes the notice of abandonment [5301.56 (E)(1)], affidavit of abandonment [5301.56 (E)(2)] and notice of failure to file [5301.56 (H)(2)] – what is to stop mineral holder from challenging the surface owner with evidence of a savings event or insufficient attempts by the surface owner to serve notice to the mineral holder by certified mail? The 2006 DMA already gives mineral owners a second bite at the apple, is there still this third chance?
- If there is a claim to preserve a mineral interest filed by a fractional owner, does it preserve the interests of all other fractional owners? Even if the fractional owners are unrelated and their interests arose from different sources?
- Can an attorney sign a claim to preserve on behalf of his client or must the holder sign?
- Will oil and gas leases taken out by surface owners believing they rightfully owned the minerals or surface owners who owned a fractional interest in the minerals or who owned subject to a non-participating royalty interest be counted as savings events under (B)(3)(a) thereby effectively halting the surface owner from completing the requirements of the 2006 DMA?
- Is the 60-day deadline to respond to a notice of abandonment [5301.56 (H)(1)] a hard deadline? What if day 60 falls on a Sunday or a day the Office of the Recorder is closed?
- What happens if the notice of failure to file [5301.56 (H)(2)] is not filed and the mineral holder initiates a savings event without ever filing a timely claim to preserve?
- Prior to January 30, 2014, 5301.56 (H)(2) required the surface owner to cause the county recorder to make a marginal notation on the record of which the severed mineral interest is based. What happened if the country recorder refused to do so? Must the entire process be restarted or can the surface owner file a notice of failure to file under the revised 5301.56 (H)(2)?

All that is certain for now is that there are a lot of unanswered questions that remain following the Court's decisions. While the Ohio Supreme Court succeeded in preserving severed interests in their holder, additional issues will flood its docket for the foreseeable future.