

## Publications

### *Oil and Gas Alert: How to Successfully Comply with the Abandonment Procedure under the 2006 Ohio Dormant Mineral Act in the Wake of Corban v. Chesapeake Exploration, L.L.C., et al.*

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### Introduction

On September 15, 2016, many oil and gas producers and surface owners of Ohio properties awoke to problematic news: the Supreme Court of Ohio, in *Corban v. Chesapeake Exploration, L.L.C., et al.*, Slip Opinion No. 2016-Ohio-5796, held that the 1989 version of the Ohio Dormant Mineral Act (R.C. § 5301.56) (1989 DMA) was not self-executing (i.e., did not automatically abandon and vest dormant mineral interests in the surface owner of the property by operation of law). Instead, the Court held that the surface owner was required to have obtained a judicial decree that the dormant mineral interest had been abandoned for that interest to have merged with the surface estate. The Court further held that the 2006 version of the DMA (2006 DMA) applies to claims to abandon dormant mineral interests asserted after its effective date (June 30, 2006).

There are several approaches that can be taken to address the issues caused by *Corban*. One option is to cause the surface owner to undertake the abandonment procedure set forth under the 2006 DMA (2006 Abandonment Procedure) and, if successfully completed, obtain a ratification of the surface owner's lease. The remainder of this client alert discusses how to complete the 2006 Abandonment Procedure and the various pitfalls associated therewith.

### 2006 Abandonment Procedure

The 2006 Abandonment Procedure can be broken down into four steps. At the outset, we recommend that surface owners strictly comply with the provisions of the 2006 Abandonment Procedure in order to avoid litigation concerning whether the dormant mineral interest was, in fact, abandoned.

**1. Confirm No Exemptions / Savings Events** -- The surface owner must confirm that the dormant mineral interest is not (a) in coal or a right pertinent to or exercisable with an interest in coal or (b) owned by the United States, the State of Ohio, or a political subdivision, body politic, or agency thereof, both of which are exempted from abandonment under the DMA. The surface owner must also confirm that the dormant mineral interest is in fact "dormant" - - meaning that the mineral interest has not been the subject of a savings event within the past 20 years. There are six events under the DMA, which are described in detail at R.C. § 5301.56(B)(3) (collectively, Savings Events). If any of the six Savings Events occurred within the last 20 years, the surface owner cannot avail himself of the 2006 Abandonment Procedure.

**2. Serve Notice of Abandonment** -- The surface owner must serve a notice of abandonment upon each holder of the dormant mineral interest, or each holder's successor or assigns, by certified mail, return receipt requested, at the last known address of each (Notice). The Notice must state that the surface owner intends to declare the dormant mineral interest abandoned and include the following:

- the name of each holder and the holder's successors or assigns, as applicable;
- a description of the surface of the land that is the subject of the dormant mineral interest. This description must include the volume and page number of the recorded instrument under which the surface owner claims title to the land that is subject to the dormant mineral interest;
- a description of the dormant mineral interest to be abandoned. This description must include the volume and page number of the recorded instrument on which the dormant mineral interest is based;
- a statement attesting that none of the six Savings Events occurred within the 20 years immediately preceding the date on which the Notice is served or published; and
- a statement of the surface owner's intent to record an affidavit of abandonment at least 30 days, but not later than 60 days, after the date on which the Notice is served or published.

If Notice cannot be served upon every holder of the dormant mineral interest by certified mail, return receipt requested, the surface owner can serve the Notice by publishing the Notice at least once in a newspaper of general circulation in each county in which the dormant mineral interest is located. However, before serving the Notice by publication, the surface owner should exercise *reasonable diligence* to locate each of the holders of the dormant mineral interest and serve them by certified mail, return receipt requested. Although the issue has not yet been decided by an Ohio court, it is likely that an Ohio court would find, consistent with case law involving foreclosure actions,<sup>[1]</sup> that the surface owner must exercise this reasonable diligence and serve holders by certified mail, return receipt requested, prior to serving the Notice by publication. Failure to do so could be grounds for invalidating an otherwise successfully completed 2006 Abandonment Procedure. Because litigation may arise in the future, it is recommended that the surface owner save evidence of (a) his due diligence in attempting to locate each holder of the dormant mineral interest and (b) service, whether by certified mail, return receipt requested, or publication.

**3. Record Affidavit of Abandonment** -- The surface owner must record an affidavit of abandonment in the office of the county recorder in each county where the dormant mineral interest is located at least 30 days, but not more than 60 days, after the date on which the Notice was served or published. The affidavit of abandonment must contain the following:

- a statement that the person recording the affidavit is the surface owner of the land subject to the dormant mineral interest;
- the volume and page number of the recorded instrument on which the dormant mineral interest is based;
- a statement that the dormant mineral interest has been abandoned pursuant to the DMA;
- a recitation of the facts constituting the abandonment; and
- a statement that Notice was served on each holder, or each holder's successors or assigns, or published at least once in a newspaper of general circulation.

The holders of the dormant mineral interest have 60 days from the date the Notice was served or published to record either (a) a claim to preserve the dormant mineral interest prepared in accordance with R.C. § 5301.56(C) or (b) an affidavit that identifies a Savings Event that occurred within the 20 years immediately preceding the date on which the Notice was served or published. Either filing will preserve the dormant mineral interest from being abandoned. Note that a claim to preserve does *not* need to identify the occurrence of a Savings Event to be effective. Further, a claim to preserve recorded by one holder is effective as to all holders of the mineral interest. If the holders record either instrument, they are required to notify the applicable surface owner of the filing.

**4. Record Notice of Failure to File** -- If no holder of the dormant mineral interest records a claim to preserve or an affidavit describing a Savings Event within the aforementioned 60 day timeframe, the surface owner must take one additional action to cause the abandonment of the dormant mineral interest. The 2006 DMA requires the surface owner to record in the office of the county recorder in each county where the dormant mineral interest is located a notice of failure to file. The notice of failure to file must contain the following:

- a statement that the person filing the notice of failure to file is the surface owner of the land subject to the dormant mineral interest;
- a description of the surface of the land that is subject to the dormant mineral interest; and
- a statement "This mineral interest abandoned pursuant to affidavit of abandonment recorded in Volume \_\_\_, Page \_\_\_."

Immediately after the notice of failure to file is recorded, the dormant mineral interest shall vest in the surface owner of the land subject to the dormant mineral interest, and the record of the dormant mineral interest shall cease to be notice to the public of the existence of the dormant mineral interest or of any rights under it.

Questions relating to the 2006 Abandonment Procedure or the DMA in general may be addressed to Webb Vorys ([wivorys@vorys.com](mailto:wivorys@vorys.com)), Jay Carr ([jacarr@vorys.com](mailto:jacarr@vorys.com)) or Ilya Batikov ([ibatikov@vorys.com](mailto:ibatikov@vorys.com)).

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<sup>[1]</sup> See, e.g., *Am. Tax Funding, LLC v. Robertson Sandusky Props.*, 2014-Ohio-5831, 23 N.E.3d 1202 (7<sup>th</sup> Dist.).