Oil and Gas-Mineral Rights Property Disputes

By: James Havens
Adam Schwartz

Our firm has recently been retained to resolve claims involving severed mineral rights and resulting oil/gas lease disputes. Current estimates value Ohio's exploitable oil and gas deposits at $600 billion. These types of cases are unique from other real property claims. Abandonment of mineral rights are treated separately under the Ohio Revised Code. Oil and gas property interests utilizing new and expanding technology present valuation challenges.

Ohio's Utica shale formation is ripe for the picking, and the legislature is looking to open up the floodgates by allowing a controversial method of extraction—horizontal hydraulic fracturing, "fracking" for short.

This is a hot button issue. Ohio Democrats recently tried to ban fracking, but the Republican majority snuffed it out. The concerns are largely environmental, fearing the chemicals used will end up in surface and underground water supplies. A larger EPA study of the issue won't come in time; its findings are expected in 2014. For this reason, the Democrats are back, trying instead to impose a moratorium until those findings are reported. This latest battle is ongoing and unresolved.

Just about everyone knows fracking is a game changer. Mining permits are up exponentially: 42 so far this year compared with 2 all of last year and 1 the year before that. The current focus is on Carroll, Licking, Knox, Cuyahoga, and Noble counties.

We expect property owners and leaseholders to dust off their records to see what property interest, if any can be explored for oil and gas. And this will likely lead to an increase of newly-found title disputes that will soon reach the doorsteps of insurers over the next year.

Going forward, the challenge for insurers is to figure out how to value these mineral interests, and resolve claims in a cost-effective manner when the only choice is to settle up with the insured or the rights holder. No doubt both sides will be asking for the stars when speculating about the market value. The key will be to have a process in place to efficiently handle these unusual claims, including a network of appraisers and local experts with geological knowledge. Leveraging these costs and results across claims will be crucial.

All is not lost on the merits, however. It is likely that Ohio's Marketable Title Act will play a prominent role in analyzing these types of claims.

The Marketable Title Act (R.C. §§ 5301.47-.56) was created on September 29, 1961, in order to simplify transactions by eliminating stale interests. See Semachko v. Hoppo (1973), 35 Ohio App.2d 205. Its goal, as the title suggests, is to create a "marketable" title. See R.C. § 5301.47(A) (defining "marketable record title").

In short, a 40-year unbroken chain of title can't be attacked by a prior (regardless of the

merits) unless certain statutory exceptions apply. See R.C. §§ 5301.48 and .50.

But mineral rights are treated differently than other interests under the Act. Section 5301.56 has dealt with them specifically since March 22, 1989; before that, the general provisions of the Act applied.

In short, mineral rights are abandoned back to the surface owner if certain things don't appear in the chain of title over a 20-year period. It effectively cuts the time period from 40 years to 20 years. This is a plus for title insurers.

So looking at that 20-year stretch, in general, if a title transaction or preservation notice involving that mineral right appears in the chain, that is enough to keep it alive. Otherwise, it is legally property of the surface owner.

It is not enough to presently sit back. Affirmative action is required. There are specific notice provisions that are described in §5301.56(E) and (F) that must be followed before that 20-year period can be established. The requirements are very detailed, as is the process to clear the title on the record. An additional hurdle is that the notice needs to be given by the surface owner, which means some level of cooperation and coordination with the insured is necessary.

As a final matter, there are apparently two open issues that may impact efforts to clear title. One is whether §5301.56(B)(1) protects all interests in coal, *even if* the notice/abandonment provisions are otherwise met. Because most mineral rights will likely include coal, it is unclear if a complete resolution can be achieved when coal rights are involved.

The second question is whether the general 40-year provisions of the Act also apply to mineral rights or if §5301.56 is the *exclusive* means. In other words, if abandonment won't work under §5301.56, can insurers fall back on other parts of the Act?