I. What are minerals?

A. Under Ohio law, the words “minerals,” “other minerals,” or “valuable minerals” in a deed generally include oil and gas unless language in the granting instrument suggests the parties intended otherwise.

- *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 328, 49 N.E. 399 (1897), syllabus ¶ 1 (recognizing that “[p]etroleum oil is a mineral”).

- *Jividen v. New Pittsburgh Coal Co.*, 45 Ohio App. 294, 15 Ohio L. Abs. 169, 187 N.E. 124 (4th Dist. Meigs County 1933) (explaining that while the authorities at that time were in conflict as to whether the term “minerals” included oil and natural gas, the rule in Ohio was that the term, “taken in its broadest sense . . . includes such oil”).

B. Examples

- *Detlor v. Holland*, 57 Ohio St. 492, 49 N.E. 690 (1898) — The Supreme Court of Ohio held that a conveyance of mining rights covering “all the coal of every variety and all the iron ore, fire clay and other valuable minerals” did not include oil and gas. In reaching its conclusion, the Detlor Court focused on certain easement language incorporated into the deed. Because that language did not include anything necessary for the production of oil and gas (e.g., the use of the words “derricks, pipe lines, tanks, the use of water for drilling, or the removal of machinery”), the Court reasoned that the deed reservation did not contemplate the recovery of oil or gas on the property. As a result, there was “nothing to show that it was the intention of the parties that oil should be included in the word ‘minerals,’ . . . . If it had been, apt words would have been used to express such intention.”

- *Hartman v. Patton*, 4th Dist. Athens No. 1343, 1987 Ohio App. LEXIS 8602 (September 1, 1987) — This appellate court concluded that a deed that conveyed “[a]ll of the surface...” with an exception of “[a]ll the coal of every variety and the iron ore, fire clay, and salt water in and under the surface” did not reserve the oil and the gas. Even though the granting language conveyed only the “surface,” the court reasoned that if the grantors intended to withhold their interest in oil and gas from the conveyance, they would have specifically provided for such an exception. “The record shows that [the grantors] were brokers in and owners of...”
acres in Athens County, Ohio at the time of the conveyance. During the
time of their brokering activities, extensive oil and gas development took
place in York Township. Thus, [the grantors] recognized the value of the
oil and gas in the vicinity and most definitely would have expressly
reserved or excepted such interest, if that was their intention.”

- **Muffley v. M.B. Operating Co., Inc.,** 5th Dist. Stark No. CA-6910, 1986
  Ohio App. LEXIS 8865 (Oct. 27, 1986) — This appellate court held that a
deed that reserved “all minerals, clay, and coal underlying the soil” did not
include oil and gas. The court concluded that the grantors did not intend
to reserve oil and gas rights. “Since oil and gas wells are common in this
area, plaintiff could have expressly included a reservation covering such
rights.” “It is beyond dispute that in [the year the deed was executed] oil
and gas drilling had been conducted in Tuscarawas County for decades.
Thus, the absence of a specific oil and gas reservation must be construed
in favor of [the grantee].”

vs.

- **Coldwell v. Moore,** 2014-Ohio-5323 (7th Dist. 2014). This appellate court
concluded that two deeds transferring “all the coal and other minerals”
included the oil and gas because: (1) both of the “deeds contains
easements allowing for the extraction of ‘other minerals’”; (2) “[n]othing in
the language of these deeds shows that the parties contemplated
something less general than ‘other minerals’”; (3) “nothing in the deeds is
inconsistent with the development of oil and gas and gas rights.”
and (4) subsequent deeds “clearly reflect that [the grantees] were granted surface rights only.”

- **Wiseman v. Cambria Products Co.,** 61 Ohio App.3d 294, 572 N.E.2d 759
(4th Dist. 1989). This appellate court concluded that a deed excepting
and reserving to the grantor “all coal, iron ore and other minerals, in, on
and underlying the above-designated and described lands, together with
full and free rights of ingress, egress, regress and of way, and other
necessary or convenient rights and privileges” included the oil and gas
mineral rights. NOTE: A strong dissenting opinion in *Wiseman* noted
that the term “minerals” means “different things” depending upon whether it is
used in the geographical sense (a broader interpretation) or the economic
sense (a more restrictive interpretation). The dissent concluded that this
ambiguity rendered the case improper for summary judgment.

- **Stocker & Sitler, Inc. v. Metzger,** 19 Ohio App.2d 135, 250 N.E.2d 269
(5th Dist. 1969) (holding that a deed exception covering “all the veins of
c coal and other substances of value” included oil and gas where nothing in
the deed indicated the parties intended to convey less than all substances
of value under the surface).

- **Hardesty v. Harrison,** 6 Ohio Law Abs. 445, 1928 Ohio Misc. LEXIS 1074
(5th Dist. 1928) (holding that a deed exception covering “all the coal, clay
and mineral rights” under a particular piece of property included oil and
gas because a "grant without qualifying or limiting words of the minerals underlying certain real estate will include oil and gas").

II. Ohio's Dormant Minerals Act ("DMA") — Ohio Revised Code (R.C.) § 5301.56

A. The History of the DMA

i. The DMA as enacted in 1989

- The DMA, which is codified in R.C. § 5301.56, provides a surface owner with the opportunity to gain title to previously severed mineral rights if those rights have not been "used" during a specific 20-year time period. Successful use of the DMA vests title to the mineral rights with the surface owner.

- The 1989 version did not identify the process by which a surface owner could accomplish abandonment. As a result, many attorneys and court described it as a "self-executing" statute: if the mineral-interest owners did not "use" their mineral interests during a 20-year time period, they immediately vested in the surface owner without any implementing action being required by the surface owner. See State ex rel. Vickers v. Summit County Council, 97 Ohio St.3d 204, 209, 777 N.E.2d 830 (2002) ("Self-executing means merely that this section is 'effective immediately without the need of any type of implementing action.'" (citing Black’s Law Dictionary (7th Ed. 1999) 1364)); State ex rel. Battin v. Bush, 40 Ohio St.3d 236 (concluding that R.C. 305.03 was self-executing, which meant that, "[u]pon the happening of the enumerated events, the office is then vacant, without resort to any legal proceeding"). "Uses" of the mineral interest are defined in the statute.

- The 1989 ODMA, however, contained ambiguities regarding when the 20-year look back period began and whether it provided for the automatic vesting of abandoned mineral interests in the surface owner.

ii. 2006 Amendment to the DMA -- adopted and became effective on June 30, 2006.

- The 2006 amendments clarified the statute, including providing a more clearly defined "look back" period (the 20 years immediately preceding the date when a notice of intent to abandon is served or published) and setting forth a detailed procedure that surface owners must follow in order to successfully gain title to the mineral rights.

- Requires the recording of instruments providing a title record that the mineral interest has been transferred to the surface owners.

iii. 2014 Amendment to the DMA
Surface owner must file a notice of failure to file a claim to preserve, rather than the abandonment simply being memorialized in the margins of the severance deed by the county recorder in order to complete the abandonment process.

B. What interests does the DMA apply to?

i. The 2006 version of the DMA specifically applies to any mineral interest, which phrase is defined in R.C. § 5301.56(A)(3) as a “fee interest in at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided or undivided.” The 1989 version of the statute did not specifically define the interests subject to abandonment.

   • Blackstone v. Moore, 2017-Ohio-5704, 2017 Ohio App. LEXIS 2739 (Ohio Ct. App., Monroe County June 29, 2017) (holding that a reserved royalty interest is subject to abandonment under the DMA).

   • Devitis v. Draper, 2017-Ohio-1136, 2017 Ohio App. LEXIS 1131 (Ohio Ct. App., Monroe County March 20, 2017) (holding that a reserved royalty interest is subject to abandonment under the 2006 version of the DMA)

ii. The definition of “mineral” in R.C. § 5301.56(A)(4) specifically includes gas, oil, and “other gaseous, liquid, and solid hydrocarbons.” The 1989 version of the statute did not have such a definition.

iii. The statute does not apply to coal interests.

iv. The statute does not apply to any mineral interests owned by the United States, State of Ohio, or any political subdivision (e.g. county, township, municipality or school district).

C. The 2006 version of the DMA — The statute was substantially rewritten in 2006. Under the current version of the DMA, effective June 30, 2006, the surface owner must adhere to the following multi-step process to accomplish the merging of the surface and mineral interests:

i. The surface owner must confirm that the oil and gas mineral interests have not been used within the previous 20 years. The 2006 version of the DMA retains the savings events listed in the 1989 version of the statute. The six savings events are set forth below:

   1. The mineral interest has been the subject of a title transaction . . . recorded in the office of the county recorder of the county in which the lands are located.

   2. There has been actual production or withdrawal of minerals by the holder. . . or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating,
provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded.

3. The mineral interest has been used in underground gas storage.

4. A drilling or mining permit has been issued to the holder.

5. A claim to preserve the mineral interest has been filed under R.C. § 5301.56(C).

6. In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

ii. “Serve notice by certified mail, return receipt requested, to each holder or each holder’s successors or assignees, at the last known address of each, of the owner’s intent to declare the mineral interest abandoned.” See R.C. § 5301.56(E)(1). The notice must contain: (i) the name of each mineral interest holder and any successors and assignees; (ii) a description of the surface, including references to recorded documents; (iii) a description of the mineral interest to be abandoned; (iv) a statement that none of the “uses” described above occurred within the 20 years preceding the date the notice was served or published; and (v) a statement that the surface owner intends to record an affidavit of abandonment at least 30, but not later than 60, days after the date on which notice was served or published.


• See Paul v. Hannon, 2017-Ohio-1261, 2017 Ohio App. LEXIS 1262 (Ohio Ct. App., Carroll County Mar. 31, 2017) (focusing on the application of the 2006 version of the DMA, the court required only substantial, not strict, compliance with the notice and preservation affidavit requirements in the 2006 version of the DMA).

iii. If certified mail notice is not possible, the surface owner must publish notice at least once in a newspaper of general circulation in each county in which the land is located. See R.C. § 5301.56(E)(1).

• See Dodd v. Croskey, 7th Dist. Harrison No. 12 HA 6 (Sept. 23, 2013) (recognizing that “the language of the statute allowing for published notice if certified mail could not be completed indicates that there must be an attempt to notify by certified mail”).
• See Haas v. Chesapeake Exploration, L.L.C., 2017-Ohio-5702, 2017 Ohio App. LEXIS 2736 (Ohio Ct. App., Carroll County June 29, 2017) (concluding that a surface owner fails to comply with the 2006 version of the DMA if certified mail notice is not served).

• See Harmon v. Capstone Holding Co., 2017-Ohio-4155, 2017 Ohio App. LEXIS 2202 (Ohio Ct. App., Noble County June 5, 2017) (concluded that surface owner failed to properly use 2006 version of the DMA by failing to attempt to serve severed mineral interest owner with notice under the 2006 version of the DMA)

iv. Confirm that one of the mineral interest holders has not recorded one of the following documents within 60 days of service or publication of the notice: (i) a claim to preserve the mineral interest pursuant to R.C. § 5301.56(C); or (ii) an affidavit that identifies an event described in R.C. § 5301.56(B) [e.g. a savings event] that has occurred within the 20 years preceding the date of service or publication.

NOTE: A successful claim preserving mineral interests preserves the rights of all holders of a mineral interest in the same lands, not just the person(s) recording the affidavit. R.C. § 5301.56(C).

v. File in the county recorder’s office an affidavit of abandonment at least 30, but not later than 60, days after the date on which the notice was served or published by the surface owner. See R.C. § 5301.56(E)(2). The affidavit must contain: (i) a statement that the person filing the affidavit is the surface owner; (ii) the volume and page number of the recorded instrument where the mineral interest was severed; (iii) a statement that the mineral interest has been abandoned; (iv) the facts constituting the abandonment; and (v) a statement that notice was served on each mineral interest holder or their successors or assignees. R.C. § 5301.56(G). See Paul v. Hannon, 2017-Ohio-1261, 2017 Ohio App. LEXIS 1262 (Ohio Ct. App., Carroll County Mar. 31, 2017) (focusing on the application of the 2006 version of the DMA, the court required only substantial, not strict, compliance with the notice and preservation affidavit requirements in the 2006 version of the DMA).

NOTE: Successful use of the abandonment process is only effective as to the property of the surface owner that filed the affidavit of abandonment, not other property subject to the same reservation and owned by a different surface owner.

vi. If the mineral interest holder(s) failed to file a claim to preserve the mineral interest or filed the claim more than 60 days after the date on which the notice was served or published under R.C. § 5301.56(E), the surface owner must file a notice of failure to file in the county recorder’s office. The notice must contain: (i) a statement that the person filing the notice is the owner of the surface of the land subject to the mineral interest; (ii) a description of the surface of the land that
is subject to the mineral interest; (iii) the statement “This mineral interest abandoned pursuant to affidavit of abandonment recorded in volume…..,page…..” R.C. § 5301.56(H)(2)(c). **NOTE:** This notice process took effect on January 31, 2014. Prior to that date, the final step in the process involved the surface owner requesting that the county recorder note on the severance deed the following: “This mineral interest abandoned pursuant to affidavit of abandonment recorded in volume…..,page…..”

vii. Immediately after the notice of failure to file a mineral interest is recorded, the mineral interest shall vest in the surface owner. Further, the record of the mineral interest shall cease to be a notice to the public of the existence of the mineral interest or of any rights under it. Additionally, the record shall not be received as evidence in any court in the state on behalf of the former holder of the mineral interest, or his successors or assignees against the surface owner. R.C. § 5301.56(H)(2)(c).

III. DMA Litigation History

A. Pre-**Corban:** Which version of the statute applies? Was the 1989 version of the DMA self-executing?

- Series of cases before the Seventh District Court of Appeals deemed the 1989 version of the DMA to remain applicable and to be “self-executing.”
  - But, the concurring opinions of Judge DeGenaro in **Eisenbarth v. Reusser,** **Farnsworth v. Burkhart,** and **Tribett v. Shepherd** highlighted the divisive nature of this issue as she contended the 1989 version of the DMA is not “self-executing”
  - The Fifth and Eleventh District Courts of Appeal adopted the conclusion of the Seventh District Court of Appeals and determined the 1989 version of the DMA to remain applicable and to be “self-executing”
    - **Wendt v. Dickerson,** 5th Dist., Case No. 2014 AP 01 0003, 2014-Ohio-4615 (October 16, 2014) (indicating that the court was “inclined to follow the persuasive authority of our colleagues in the
Seventh District Court of Appeals to find the trial court correctly determined the 1989 DMA applied and under the language of the 1989 DMA, the mineral rights automatically vested with the surface owners on March 22, 1992”). See also Riddel v. Layman, 5th Dist. Licking No. 94-VA-114, 1995 Ohio App. LEXIS 6121 (July 10, 1995).


- Majority of trial court decisions also interpreted the 1989 version of the DMA as “self-executing.”

- But see Dahlgren v. Brown Farm Properties, LLC, Carroll C.P. No. 13-CVH-27445 (Nov. 5, 2013) (visiting Judge Richard Markus concluded that the “1989 version impliedly required implementation before it finally settled the parties' rights, at least by a recorded abandonment claim that permitted the adverse party to challenge its validity, if not by an appropriate court proceeding to confirm that abandonment. . . . Absent any implementation or enforcement of claimed abandonment rights before the 2006 amendment, the landowner defendants must comply with the procedures which the 2006 amendment requires”); M&H Partnership v. Hines, Harrison C.P. No. CVH-2012-0059 (Jan. 14, 2014).

B. Corban and Its Progeny

i. Corban v. Chesapeake Exploration L.L.C 2016-Ohio-5796, 149 Ohio St. 3d 512: The 1989 version of the DMA was not self-executing

- In a 5-2 decision authored by Justice O'Donnell, 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. 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. 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.

- 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.

- Justice Kennedy and Justice Lanzinger concurred in the judgment (resulting in the five justice majority). Justice Kennedy wrote a 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.” 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.

- Justice Pfeifer dissented in the case, concluding 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.
ii. The Ohio Supreme Court issued a series of additional decisions which followed the holdings in *Corban*:

- **Eisenbarth v. Reusser**, 2016-Ohio-5819, 2016 Ohio LEXIS 2382 (7th District Court of Appeals’ decision affirmed based on *Corban*).

- **Tribett v. Shepherd**, 2016-Ohio-5821, 2016 Ohio LEXIS 2380 (7th District Court of Appeals’ decision reversed based on *Corban*).

- **Swartz v. Householder**, 2016-Ohio-5817, 2016 Ohio LEXIS 2378 (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, 2016 Ohio LEXIS 2376 (7th District Court of Appeals’ decision reversed based on *Corban* and *Walker*).

- **Farnsworth v. Burkhart**, 2016-Ohio-5816, 2016 Ohio LEXIS 2381 (7th District Court of Appeals’ decision affirmed based on *Corban* and *Dodd v. Croskey*).

- **Carney v. Shockley**, 2016-Ohio-5824, 2016 Ohio LEXIS 2393 (7th District Court of Appeals’ decision affirmed based on *Corban* and *Walker*).

- **Taylor v. Crosby**, 2016-Ohio-5820, 2016 Ohio LEXIS 2383 (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**, 147 Ohio St. 3d 284, 2016-Ohio-5822 (5th District Court of Appeals’ decision reversed on authority of *Corban* and *Walker*).

- **Thompson v. Custer**, 2016-Ohio-5823, 2016 Ohio LEXIS 2392 (11th District Court of Appeals’ decision reversed on authority of *Corban* and *Walker*).

- **Albanese v. Batman**, 148 Ohio St. 3d 85, 2016-Ohio-5814

- **Walker v. Shondrick-Nau**, 149 Ohio St. 3d 282, 2016-Ohio-5793

  o This decision 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.” In response the Walker decision, John Walker, Jr., petitioned the
United States Supreme Court to review the case as a violation of the due process clause and the contracts clause of the United States Constitution. That petition was denied by the United States Supreme Court. Walker, John v. Shondrick-Nau, 580 U.S. 16-776.

iii. Lower appellate courts have also issued a series of decisions which followed the holdings in Corban:

iv. Some impacts of the *Corban* decision

- **Emphasized the Need to Run Good Mineral Title** – In order to properly evaluate an abandonment claim post-*Corban*, it is essential that good mineral title be run on both the surface and mineral estate in order to: (1) determine whether a savings event has occurred in the prior 20 years; and (2) identify whether a surface owner recorded an affidavit of abandonment under either the 1989 version and/or 2006 version of the DMA; and (3) evaluate whether a recorded affidavit of abandonment is proper (e.g., followed the statutory requirements, including at least an attempt at notice by certified mail).

- **Filing of Preservation Claims** – Regardless of whether there has been a savings event in the past 20 years, most severed mineral owners are choosing to record a preservation affidavit to confirm record ownership of the severed mineral estate. Such a preservation claim should strictly (or at least substantially) comply with the statutory requirements in R.C. 5301.56(c) and R.C. 5301.52.

- **Getting Paid Under and Oil and Gas Lease** – Post-*Corban*, the primary focus of many severed mineral interest owners is getting paid the per acre lease bonus payment and/or suspended landowner royalties due and owing under an oil and gas lease. Getting paid, however, is not as simple and straightforward as sending a copy of the *Corban* decision to the lessee and demanding payment. It is important to not only review the terms of an existing oil and gas lease’s conditions for payment, but to work closely with the lessee to understand what is required prior to the release of payment(s). For example, many lessees are requiring various levels of title curative work to establish record ownership of the severed mineral rights. Often, this includes the completion of additional probate work in order to obtain certificates of transfer for the severed mineral estate into the name of the current holder(s). Other companies may only require an affidavit of heirship.

- **Evaluate Prior Use of the 2006 Version of the DMA** – It is important that surface owners evaluate any prior use of the 2006 version of the DMA to ensure the process was completed in compliance with R.C. 5301.56. It is expected that a primary focus in future DMA litigation will involve compliance with the notice and timing elements in the statute. For example, did the surface owner attempt notice by certified mail or just go straight to newspaper publication notice? Although the issue has not been directly decided by Ohio courts, the Seventh District Court of Appeals did note in *Dodd v. Croskey*, 7th Dist. Harrison No. 12 HA 6 (Sept. 23, 2013) that “the language of the statute allowing for published notice if certified mail could not be completed indicates that there must be an attempt to notify by certified mail.” This holding suggests that attempts to use the 2006 version of the DMA without having tried certified mail notice will be invalid.
• **Analyze the Validity of Pre-Corban Leases** – The validity of oil and gas leases entered into with surface and severed mineral owners prior to the *Corban* decision must be evaluated. If such a lease is not valid, a surface owner must review the terms in the oil and gas lease to analyze whether there are any potential claims against them for the recoupment of previously issued payments under the lease (e.g., the per acre lease bonus payment or royalties).

• **Unitization** – Ohio’s unitization statute (R.C. 1509.28) can be used to force uncommitted working interest and mineral owners, which includes severed mineral interest owners, into a drilling unit when the provisions of the statute are satisfied. In order to utilize this statute, the applicant must: (i) control sixty-five percent of the mineral interests “in the land area overlying the pool” in fee or through leaseholds (although approved applicants have had ownership percentages that are much higher); (ii) submit to ODNR an application establishing that unitization is “reasonably necessary to increase substantially the ultimate recovery of oil and gas,” and “the value of the estimated additional recovery ... exceeds the estimated additional cost incident to conducting the operation”; and (iii) submit to ODNR a non-refundable fee of $10,000.

• **Partition** – R.C. 5307.01 to 5307.25
  - “Tenants in common, survivorship tenants, and coparceners, of *any estate in lands*, tenements, or hereditaments within the state, may be compelled to make or suffer partition thereof as provided in sections 5307.01 to 5307.25 of the Revised Code.” (Emphasis added). R.C. 5307.01.
  - See also *Black v. Sylvania Producing Co.* (1922), 105 Ohio St. 346, syllabus paragraph 2 (holding that a “leasehold interest for oil and gas, with the usual rights and appurtenances necessary to development of the lands and the production of such oil and gas, is partitionable, either under the statute or, as in this case, in equity”)

C. **What is the definition of a “title transaction” for purposes of the DMA?**

The phrase “title transaction” is not defined in the prior or current version of the DMA. It should be noted, however, that the phrase is defined in Ohio’s Marketable Title Act. See R.C. § 5301.47(F).

When the definitions of “mineral interest” in R.C. § 5301.56(A)(3) and “title transaction” in R.C. § 5301.47(F) are merged together, it becomes clear that the savings event occurs when the “mineral interest” [defined as including the fee interest in oil and/or gas] has been the subject of a title transaction [defined as a “transaction affecting title to any interest in land, including title by will or descent,” as well as warranty deed, quit claim deed, or mortgage]
that has been filed or recorded in the office of the county recorder of the county in which the lands are located.”

i. Broad nature of the “title transaction” savings event

- A “title transaction means any transaction affecting title to any interest in land. It is difficult for the Court to conceive of a broader definition than the one chosen by Ohio law. By its plain language, the statute does not require a conveyance or transfer of real property in order to constitute a title transaction.” McLaughlin v. CNX Gas Co., N.D. Ohio No. 5:13-CV-1502, 2013 U.S. Dist. LEXIS 174698 (Dec. 13, 2013).

ii. Ohio Marketable Title Act case law interpretation

a. A title transaction not only includes instruments in the chain of title for the party seeking to establish marketable title under the Act, but also instruments that are part of an independent chain of title. Heifner v. Bradford, 4 Ohio St.3d 49, 446 N.E.2d 440 (1983). But see Morgenstern v. National City Bank of Cleveland, 4th Dist. Washington No. 85-CA-33, 1987 Ohio App. LEXIS 5677 * 8 (Jan. 27, 1987) at *21-*22 (stating that R.C. § 5301.48 requires that the claimant’s chain of title be examined to determine if such chain is unbroken and rejecting the surface owners’ argument that instruments in their independent chain of title divest claimant’s interest).

b. A title transaction includes the conveyance of interests passing under the terms of a will. Heifner v. Bradford, supra. See also Blakely v. Capitan, 34 Ohio App.3d 46, 516 N.E.2d 248 (11th Dist. 1986) (a certificate of transfer preserved restrictions); Morgenstern, supra at *17-*18 (a certificate of transfer qualified as a title transaction and served as a preservation notice).

c. A court decree which affects title to an interest in land is a title transaction. Blakely v. Capitan, 34 Ohio App.3d at 48.


iii. DMA Case Law interpretation
• Does an oil and gas lease qualify as a “title transaction”?
  o YES: *Chesapeake v. Buell*, Case No. 2014-0067 (on November 5, 2015, the Supreme Court of Ohio decided that: (i) a recorded oil and gas lease is a title transaction under R.C. 5301.56(B)(3)(a); and (ii) the “unrecorded expiration of a recorded oil and gas lease and the accompanying reversion to the lessor of rights granted by the lease is not a title transaction that restarts the 20-year clock under the Dormant Mineral Act, R.C. 5301.56.”

• Does a recorded release of an oil and gas lease qualify as a “title transaction”?

• Does a transfer of the surface that specifically references the severed mineral interest qualify as a “title transaction”?
  o YES: *Dodd v. Croskey*, Harrison C.P. No. CVH-2011-0019 (Oct. 29, 2012) (holding that a 2009 conveyance of the surface rights that specifically referenced the mineral severance “was the subject of the title transaction” even though the mineral interest itself was not conveyed), overturned on appeal as discussed below.

  ▪ In an odd procedural twist, the Ohio Supreme Court accepted this issue *sua sponte* for review after oral argument was held, but ultimately did not decide the issue in *Dodd v. Croskey*, 2015-Ohio-2362 (June 18, 2015).

  o NO:

    ▪ *Dodd v. Croskey*, 7th Dist. Harrison No. 12 HA 6 (Sept. 23, 2013) (holding, that a deed conveying the surface that specifically references severed mineral interest is not the “subject of” a title transaction because the phrase “subject of” “establishes that something less than the conveyance of the mineral interest must be [a Savings Event]”).

• Does a recorded will that transfers the mineral estate qualify as a “title transaction”?
  
  o YES: *Albanese v. Batman*, 148 Ohio St. 3d 85, 2016-Ohio-5814

D. Does a preservation affidavit timely filed under R.C. § 5301.56(H) trump an affidavit of abandonment filed under R.C. § 5301.56(E)?

• YES: *Dodd v. Croskey*, 2015-Ohio-2362 (June 18, 2015) (affirming the lower court’s decision and holding that “a mineral-interest holder’s claim to preserve filed pursuant to R.C. 5301.56(H)(1)(a) is sufficient to preclude the mineral interests from being deemed abandoned if filed within 60 days after notice of the surface owner's intent to declare those interests abandoned”).


IV. Ohio’s Marketable Title Act (MTA) – R.C. 5301.49 through R.C. 5301.56

A. Overview
The MTA was first enacted in 1961 to “simplify land title transactions by making it possible to determine marketability through limited title searches over some reasonable period of time avoiding the necessity of examining the record back to patent for each new transaction.”

B. How does the Marketable Title Act work?

1. Ensure you have accurate title work.

   • Although the DMA is restricted to instruments filed in the county recorder’s office, the MTA applies to all documents filed in the county (e.g., probate court).

2. Verify that the claimant (i.e., the person claiming “marketable record title” under the MTA) has the legal capacity to own land in Ohio.

3. Determine what interest in land is being claimed (e.g., surface estate vs. mineral estate; royalty interest)

---

2 Portions of this section on the Ohio Marketable Title Act are based upon (with permission) a paper submitted to the EMLF which is dated December 12, 2016, written by James A. (“Jay”) Carr II (Vorys, Sater, Seymour and Pease) and Craig Sweeney (Bricker & Eckler, LLP) and entitled “Ohio’s Marketable Title Act and the ODMA: Siblings or Distant Cousins?”

4. Select the date when marketability is being determined.

- Important because it ultimately affects which instruments can qualify as the claimant’s “root of title.”

- Additional discussion below regarding when marketability should be determined.

5. Identify the claimant’s “root of title.”

- The “root of title” is “that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined.”

- See above for discussion about the definition of “title transaction”

6. Confirm that none of the statutory exceptions in R.C. 5301.49 apply, some of which are described below

- **Exception 1:** “All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest . . .”


- **Exception 2:** “All interests preserved by the filing of proper notice [preservation affidavit] . . . in accordance with section 5301.51 of the Revised Code.”

  - See above for additional discussion

- **Exception 3:** “Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title or record is started; provided that
such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by operation of section 5301.50 of the Revised Code.”

- See title transaction discussion above.

7. Confirm that none of the statutory exceptions in R.C. 5301.53 apply (listing certain interests that cannot be extinguished under the MTA).

C. Does Ohio’s Marketable Title Act apply to severed mineral interests? Severed royalty interests?

i. The History of the MTA and Mineral Rights

- The DMA remains part of Ohio’s Marketable Title Act. See R.C. § 5301.55 (expressly stating that “Sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall be…” and Heifner v. Bradford, 4 Ohio St.3d 49, 50, 446 N.E.2d 440 (1983) (explaining that “R.C. § 5301.47 through R.C. § 5301.56” is “otherwise known as the Ohio Marketable Title Act.”

- As originally enacted (1961), the Ohio Marketable Title Act did not apply to any minerals, including oil and gas. A subsequent amendment narrowed the exclusion solely to coal—a change that one Ohio appellate court explained as follows: “Section (E) was repealed in 1971 by an act amending R.C. §§ 5301.53 and 5301.56 in 135 Ohio Lands Part I 942. The following year the present R.C. § 5301.53(E) was enacted. …. See 135 Ohio Laws Part II 1211 (1974). It logically follows that in enacting R.C. § 5301.53(E) if the legislature had intended to treat oil and gas interests in the same manner as coal interests it would have so provided. By not specifically including oil and gas, the General Assembly has decided as a matter of public policy that such interests are not within the exceptions enumerated in R.C. § 5301.53 and that the Ohio Marketable Title Act does apply to extinguish oil and gas interests.” Morgenstern v. National City Bank of Cleveland, 4th Dist. Washington No. 85-CA-33, 1987 Ohio App. LEXIS 5677 * 8 (Jan. 27, 1987).


ii. Are severed mineral interests subject to the MTA?

- Certain Ohio courts have held that there is no irreconcilable conflict between the MTA and ODMA because the two statutes offer alternative remedies to cure mineral defects. See Pletcher v. Brown, Monroe C.P. No. 2012-069 (Feb. 7, 2013).
The MTA and ODMA conflict with one another and, as such, the ODMA should exclusively apply to severed mineral interests because it is the more specific statute.

R.C. 1.51 provides that “[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If a conflict between provisions is irreconcilable, the special or local provision controls as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.”

There is an irreconcilable conflict between the ODMA and MTA because, in certain circumstances, the holder of a severed mineral interest can have marketable record title to his mineral interest, but such interest can also be abandoned under the ODMA. As such, and pursuant to R.C. 1.51, the ODMA applies exclusively to severed mineral interests because the ODMA was enacted after the MTA and is the more specific statute. See Swartz v. Householder, 7th Dist. Jefferson Nos. 13 JE 24 and 13 JE 25, 2014-Ohio-2359.

iii. Does the MTA apply to severed royalty interests?

• **YES:** Pollock v. Mooney, 7th Dist. Monroe No. 13 MO 9, 2014-Ohio-4435, ¶ 21. (“The MTA does not differentiate between different types of interests. It applies to all interests.”).

iv. Is the MTA self-executing?


  o **NOTE:** dicta in Corban v. Chesapeake Exploration, L.L.C., et al., 2016-Ohio-5796 suggests that the MTA is self-executing. The Court noted that the MTA uses the word “extinguished” and the phrase “null and void” to describe what happens to ancient interests and defects under the MTA.

• **NO:**

  o The Court in Corban appears to be concerned with interests passing outside the chain of record title. If the MTA is self-executing, there would be no document appearing of record indicating that certain interests and defects were extinguished.

  o There may be constitutional concerns similar to those raised in the context of the arguments against the 1989 version of the DMA being self-executing.
- Ohio Const. Art. II, § 28 ("The general assembly shall have no power to pass retroactive laws").

- Ohio Const. Art. 1, § 6 and § 19 (due process)

- **NOTE:** R.C. 2721.12 ("when declaratory relief is sought under this chapter in an action or proceeding... and, if any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard")

v. What is the date “marketability is being determined”?

- The MTA does not state when marketability is to be determined. As such, Ohio case law has been inconsistent in this regard. For example, certain Ohio courts have found the date “marketability is being determined” to be the date the plaintiff’s complaint was filed, the date process was served upon the defendant, the date of trial, *etc.*

- The date “marketability is being determined” can have material consequences to the person claiming marketable record title.