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West v. Bode: Ohio Supreme Court Embraces a “Choose-Your-Own-Adventure” Regime of Mineral Abandonment/Extinguishment

The first shoe in the world of Ohio oil and gas jurisprudence has dropped, with the Ohio Supreme Court ruling in *West v. Bode*, 2020 — N.E.3d — 2020 WL 7049820 2020 -Ohio- 5473, that **both** the MTA and DMA¹ apply to severed mineral interests. A full copy of the slip opinion can be found [here](#). Regardless of whether you agree with *West*, there is little doubt that in its wake Ohio mineral title law is a lot murkier. One sage counsel even described mineral abandonment/extinguishment in Ohio now as a “choose-your-own-adventure” game for surface owners.

The central issue on appeal before the Ohio Supreme Court in *West* was seemingly simple: does the MTA still apply to potentially extinguish severed mineral interests when the DMA, which was enacted for the express purpose of saying when a severed mineral interest is abandoned, also applies?

The question of whether a specific statute or provision is determined to supersede a more general one is really a question of how much they conflict. If there is some conflict, but it is possible to interpret them so both can still simultaneously apply, this interpretation should be utilized. It is only when the conflict between the two is irreconcilable (they cannot both be applied simultaneously) that we say the specific provision supersedes the general one. The question in *West*, then, was not simply whether the MTA and DMA conflicted, but whether they **irreconcilably** conflicted. Acknowledging the havoc its decision would likely ensue, a 4 to 3 majority of the Ohio Supreme Court nevertheless held that there is no irreconcilable conflict between the two.

The basis for the majority’s conclusion lies in the fundamental differences between the MTA and DMA. Although they may reach the same result, they were created for different purposes and

operate differently. The MTA was originally enacted in 1961 to simplify title by automatically extinguishing claims and interests older than the root of title unless some savings event occurred to prevent it. The MTA originally did not apply to minerals but was amended in 1973 to include them. *West* at ¶ 17. The MTA applies by operation of law (automatically) to extinguish old claims and interests. No intent or action is involved—it just happens. With regard to independent severed mineral interests, however, the 1983 case *Heifner v. Bradford*, 4 Ohio St.3d 49, 446 N.E.2d 440 (1983) demonstrated that the MTA was not written to reunite a severed mineral interest back with the surface owner where that severed mineral interest had its own chain of title separate from the surface estate. *West* at ¶¶ 18–20.

Six years later, in 1989, the DMA was enacted with the express purpose of providing a means by which severed mineral interests could be abandoned and reunited with the surface estate. *Id.* at ¶ 21. Many argue it was the legislature's answer to *Heifner*. In 2006, the DMA was amended to include notice and recording requirements that a surface owner must follow to effectuate an abandonment of a severed mineral estate. *Id.* at ¶¶ 23–24. Unlike the MTA, the DMA does not operate automatically—it always requires a surface owner's action to implement it and abandon the severed mineral interest. *Id.* at ¶ 26.

As support for its conclusion, the majority points to all the differences between the DMA and MTA. See *West* at ¶¶ 27–31. The two utilize different time periods and different savings events. *West* at ¶¶ 28, 30. Under the MTA, an interest cannot be preserved or revived once extinguished, but under the DMA a severed mineral interest can be saved by a timely filed notice of preservation even if no other savings event applies. *Id.* at ¶ 31. According to the majority, it makes sense that these two statutes would yield different, sometimes unexpected or confusing results—they are different statutes for different purposes. *Id.* at ¶ 32. And because of these base differences, they can be simultaneously applied—i.e. there is no irreconcilable conflict.

As an example of where an irreconcilable conflict did exist, the majority discusses *In re Petition to Annex 320 Acres to S. Lebanon*,

64 Ohio St.3d 585, 597 N.E.2d 463 (1992), which was actually cited by amici curiae in support of finding an irreconcilable conflict. *West* at ¶ 33. That case involved the question of whether two statutes that provided recourse for parties aggrieved by a property annexation were irreconcilably in conflict. R.C. 2506.01 provides for a direct appeal to the court of common pleas of “every final order, adjudication, or decision” of a political subdivision, and prescribed a standard of review that essentially allowed the court of common pleas to review the decision anew—a non-deferential standard. *West* at ¶ 34. Former R.C. 709.07, however, provided the ability to seek an injunction from the court of common pleas to restrain the annexation, but required a great showing that the decision was wrong: clear and convincing evidence that the decision was unreasonable or unlawful, or that there was some error. *Id.* And it was this differing standard of review that the majority viewed as the irreconcilable conflict. *Id.* at ¶ 35. Compared to the DMA and MTA, the majority saw a clear difference: “[the DMA and the MTA] do not provide different and conflicting mechanisms to evaluate the same action, even though they may both ultimately affect the continued viability of a severed mineral interest. The acts ask different questions and provide for different results.” *Id.* at ¶ 36.²

For the dissent, however, differences between the DMA and MTA and the timing of the DMA as a later amendment to the MTA serve as proof of their irreconcilable conflict. To the dissent, *Heifner* exposed the deficiencies of the MTA in dealing with severed mineral interests and the DMA was intended to fix this and as the exclusive means of dealing with severed mineral interests. *West* at ¶¶ 49–50. The DMA’s use of different terms (abandon and not extinguish), creation of distinct savings events, differing mechanism (manual vs. automatic), focus on the intent of the mineral holder, due process protections, and timing as a later amendment are all evidence that the intention was to have the DMA constitute the exclusive means by which severed mineral interests were dealt with under the MTA. *Id.* at ¶¶ 61–64. “The General Assembly created a specific statutory mechanism to terminate dormant mineral interests that conflicts with and therefore must supersede the [MTA].” *Id.* at ¶ 61. The inherent confusion and illogical results that are possible under dual application of the MTA and DMA are further

support of this conclusion: “a mineral interest could survive under the [MTA] because it was mentioned in the muniments of title subsequent to the root of title but nonetheless be deemed abandoned due to the lack of a saving event during a subsequent 20-year period.” *Id.* ¶ 63. Because of this, says the dissent, the DMA and MTA cannot “reasonably be put into simultaneous operation” meaning they are irreconcilably in conflict. *Id.* at ¶ 65.

While the majority opinion is not overtly incorrect, the end-result is undoubtedly the opposite of the stated purpose of the MTA and DMA: *to simplify title*. Under this dual regime, determinations of mineral title become more complex, more expensive, and less certain. And while some surface owners will benefit from this, the overall result is a net negative. Whether the General Assembly revises the MTA to clarify its intention is yet to be seen, but this author believes it is warranted.

For more information please contact [Christopher Rogers](#) or any attorney in Frost Brown Todd’s [Oil & Gas](#) Industry Team.

[1] The MTA is the Ohio Marketable Title Act, R.C. 5301.49 *et seq.* and the DMA is the Ohio Dormant Mineral Act, R.C. 5301.56. The DMA is part of the MTA, though they are often discussed as though they are completely separate.

[2] While futile at this juncture, one could reconcile the two statutes involved in *In re Petition to Annex* on the basis of the remedy sought. That is, it makes sense that an injunction, considered extraordinary relief, would require a heightened burden of proof and be more deferential to the political subdivision, whereas a general appeal challenging the decision, but not seeking an injunction, would not have the same requirements. But this author digresses.

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