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MARYLAND



By: *Davin L. Seamon*

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I. INTRODUCTION

While the State of Maryland is far from a traditional epicenter of conventional oil and gas development, the ubiquitous Marcellus Shale runs strong through two of Maryland’s western panhandle counties, Garrett and Allegheny, and the play for these reserves has many of the industry’s eyes squarely trained on this somewhat economically depressed area of Maryland. Several operators have begun preliminary work in the area, and a few large, mid-continental operators have charged headlong into western Maryland performing title examinations, securing leases, and obtaining title opinions in the hopes of pioneering a new geographic market and injecting a much needed boost of economic development into the sleepy, rural area. A few operators have applied for permits to drill and operate horizontal wells in Garrett and Allegheny Counties; however, this is where the fervor, activity, and excitement stops, and the development train leaps from its

tracks. To date, the State of Maryland has yet to issue its first horizontal drilling and hydraulic fracturing permit.¹

II. MARYLAND DORMANT MINERAL INTERESTS ACT

A. *Introduction*

In an effort to resolve the problems created by missing or unknown owners of severed mineral interests, the National Conference of Commissioners on Uniform State Laws created a model statutory scheme, the Uniform Dormant Mineral Interests Act, to permit the termination of dormant mineral interests and to vest those interests in the owners of the surface overlying the same. The model act attempts to protect the interests of mineral owners while serving public policy by encouraging the efficient development and use of land.

On April 7, 2010, the Maryland legislature passed its version of the Uniform Dormant Mineral Interests Act (the “Act”), which the Governor signed into law on May 4, 2010. Beginning on October 1, 2011, the Act provided Maryland surface owners subject to a severed mineral interest a cause of action to terminate dormant mineral interests.²

B. *Dormant Mineral Interests*

The Act provides that a surface owner of real property subject to a severed mineral interest may maintain an action, similar to a quiet title action, to terminate or extinguish the severed mineral interest, if the subject mineral interest is dormant as defined in the Act.³ A mineral interest is defined as “dormant” if it is not “used” and if no “notice of [intent to preserve]⁴ the mineral interest” is filed for a period of twenty (20) or more years preceding the commencement of the termination action.⁵

The Act provides that “use” of a severed mineral interest includes conducting active mineral operations (including operations on tracts pooled or unitized with the subject property); paying taxes on a separate assessment of the severed mineral interest or other associated taxes; recording “an instrument that creates, reserves, or otherwise evidences a claim to, or the continued existence of, the severed mineral interest, including an instrument that transfers, leases, or divides the interest”; and recording of a judgment or decree that makes a specific reference to the severed mineral interest.⁶ Note, however, that the

1. 38-14 Md. Reg. 782 (July 1, 2011).

2. MD. CODE ANN., ENVIR. § 15-1203(a)(1) (LexisNexis Supp. 2011).

3. *Id.*

4. Section 15-1203(a)(2) of the Act actually refers only to “notice of the mineral interest”; however, the remainder of the Act refers to “notice of intent to preserve interest.”

5. MD. CODE ANN., ENVIR. § 15-1203(a)(2).

6. *Id.* § 15-1203(c)(1).

Act specifically provides that the injection of substances for the purpose of disposal or *storage* does not constitute use thereunder.⁷

Under the Act, an owner, co-owner, or someone *legally authorized* to act on their behalf may record, at any time, a notice of intent to preserve the severed mineral interest.⁸ This notice must include the name of the owner, or co-owners, of the severed mineral interest, if known, or an indication that the owner or co-owners cannot be determined.⁹ The notice must also identify the severed mineral interest by referring to: (i) the recording information for the instrument creating the interest; (ii) a judgment or decree confirming the existence of the mineral interest; (iii) a legal description of the mineral interest, if accompanied by a reference to the owner of record by which the owner filing the notice claims an interest; or (iv) a general reference to any or all mineral interests of the owner in any real property situated in the county, if it was created by a document of record or confirmed by a judgment or decree.¹⁰

Section 15-1204 of the Maryland Environment Code contains the only real variance between Maryland's version of the Act and the model version thereof. In reference to who may record a notice of intent to preserve a severed mineral interest, the model act provides that anyone acting on behalf of an owner may file a notice; however, the Act expressly includes the additional requirement that that filing person be "legally authorized" to act on behalf of the owner or co-owners.¹¹

The Act also provides that an owner of a severed mineral interest may file a notice to preserve the interest subsequent to the initial filing of an action to terminate a dormant mineral interest.¹² The notice may serve as a condition of dismissing the action if the severed mineral owner pays the legal expenses incurred by the filing party or parties and, provided that the mineral interest has not been unused for a period of forty years or more.¹³ The Act does not establish a time limit for the filing of a notice after an action is instituted; however, based upon the Act's use of the language "as a condition of dismissal of the action," it can be inferred that the filing of this late notice can only be used as a defense up to the deadline for filing dispositive motions, which is usually established in each case by schedule order.

7. *Id.* § 15-1203(c)(2).

8. *Id.* § 15-1204.

9. *Id.*

10. *Id.*

11. *Id.* at § 15-1204(b)(1)(ii).

12. *Id.* at § 15-1205.

13. *Id.*

C. *Unknown or Missing Owners*

Section 15-1206 of Maryland's version of the Act, which is not included in the Model Act, provides a procedure for placing severed mineral interests in trust and appointing a trustee to manage the severed mineral interests if the owner or owners of the severed mineral interests are unknown or missing. The surface owner, or co-owners, may file a petition to create this trust, and if the unknown or missing owners do not contest the creation of this trust for a period of five (5) years after the creation thereof, then on petition of the trustee, the trust is terminated and title to the mineral interests therein vests in the surface owner, or co-owners.¹⁴ During the pendency of the trust, the circuit court may authorize the trustee to lease the severed mineral interest unto the surface owner, or owners.¹⁵

D. *Recommendations and Best Practices*

Any Maryland oil and gas operators relying upon severed mineral interests should record notice of their intent to preserve the subject mineral interests as soon after October 1, 2011, as possible, and every twenty (20) years or less thereafter. While it is true that mere "use" of a severed mineral interest would protect it from termination, simply recording a notice to preserve such an interest is more effective to avoid unnecessary litigation. The recordation of notice in proper form is a complete defense to termination; however, if one were to rely upon use as a defense thereto, said party must present sufficient evidence, most likely during a full evidentiary hearing, to defend against forfeiture of the severed mineral interest to the surface owner, which would result in a significant increase in legal fees.

In order to record such a notice, an oil and gas lessee must be legally authorized to do so by the owner of the severed mineral interest. Inclusion of the following language in an operator's form oil and gas lease would create such legal authorization:

The Lessor expressly authorizes the Lessee, or its successors, designees, and/or assigns, to prepare, execute, and record on Lessor's behalf, such notice or notices of Lessor's intent to preserve Lessor's mineral interest or interests, as the Lessee, in its sole and absolute discretion, shall deem applicable, necessary, and appropriate.

As mentioned hereinabove, the unknown or missing owner section of the Act provides a means for the establishment of a trust in order to acquire a lease of the minerals owned by unknown or missing owners; however, according to the Act, the petition to establish this trust must be filed by the owner of the surface estate in fee simple.¹⁶ The issue here, of course, is that the surface owner, or owners, may not be

14. *Id.* at § 15-1206(c).

15. *Id.* at § 15-1206(a).

16. *Id.* §§ 15-1205 to -1206.

inclined or in a position to pursue this action on their own behalf. Accordingly, operators should obtain a limited power of attorney, when possible and/or necessary, from the owners of the surface estate of any tracts of land which overlie oil and gas estates owned by missing or unknown parties, in order to file a petition on the behalf of said surface owners. In the event that a known owner of a fractional interest in and to the oil and gas is also the owner of the surface overlying said reserves, then the operator should insert limited power of attorney language into the lease with said known owner to authorize the operator to file the petition on the known owner's behalf.

III. THE MARYLAND MARCELLUS SHALE SAFE DRILLING INITIATIVE

On June 6, 2011, Maryland Governor Martin O'Malley signed Executive Order 01.01.2011.11, establishing the Maryland Marcellus Shale Safe Drilling Initiative (the "MSSDI"), to be jointly administered by the Maryland Departments of the Environment and Natural Resources (the "Departments").¹⁷ The stated purpose of the MSSDI is to "assist policymakers and regulators in determining whether and how gas production from the Marcellus Shale in Maryland can be accomplished without unacceptable risks of adverse impact to public health, safety, the environment and natural resources."¹⁸

Said Executive Order also creates an Advisory Committee to the MSSDI to be comprised of individuals chosen by the Secretaries of the Departments.¹⁹ Only one of the fourteen (14) members of said committee is permitted to be "a representative of a company in the gas industry,"²⁰ while the remainder of the committee members include geologists, environmentalists, and western Maryland-based representatives of local government, business leaders, and private

17. 38-14 Md. Reg. 782 (July 1, 2011).

18. *Id.*

19. *Id.* at 783. The members of the Advisory Committee to the MSSDI are as follows: Senator George Edwards; Delegate Heather Mizeur; Garrett County Commissioner James Raley; Allegeny County Commissioner William Valentine; Oakland Mayor Peggy Jamison; Shawn Bender, Division Manager at the Beitzel Corporation and President of the Garrett County Farm Bureau; Steven M. Bunker, Director of Conservation Programs, Maryland Office of the Nature Conservancy; John Fritts, President of the Savage River Watershed Association and Director of Development for the Federation of American Scientists; Jeffrey Kupfer, Senior Advisor, Chevron Government Affairs; Dominick E. Murray, Deputy Secretary of the Maryland Department of Business and Economic Development; Paul Roberts, a Garrett County resident and co-owner of Deep Creek Cellars winery; Nick Weber, Chair of the Mid-Atlantic Council of Trout Unlimited; and Harry Weiss, Esquire, partner at Ballard Spahr. David Vanko, Ph.D., a geologist and current Dean of The Jess and Mildred Fisher College of Science and Mathematics at Towson University, is the Chair of said Committee. Maryland Department of the Environment, *Facts about the Marcellus Shale Safe Drilling Initiative*, [http://www.mde.state.md.us/programs/Land/mining/Non%20Coal%20Mining/Documents/Shale_EO_factsheet_061011\[1\].pdf](http://www.mde.state.md.us/programs/Land/mining/Non%20Coal%20Mining/Documents/Shale_EO_factsheet_061011[1].pdf).

20. 38-14 Md. Reg. at 783.

citizens, together with other individuals the aforesaid Secretaries have “jointly determine[d] to be necessary.”²¹

The Executive Order tasks the MSSDI with “initially investigat[ing] the desirability of enacting State legislation to establish: (a) one or more sources of revenue, such as a State-level severance tax or other assessment, to fund State activities relating to hydraulic fracturing, including impact assessments, research, broad-area monitoring, remediation where no liable entity can be identified, and other State purposes; and (b) standards of liability for damages caused by gas exploration and production.”²² This segment of the Committee’s duties must be completed by December 31, 2011, and at that time, the Committee shall present its findings to the Governor, the Speaker of the House, and the President of the Senate.²³

The Executive Order also commissions a study “of the extraction of natural gas from shale formations in the State, including the Marcellus Shale formation,” to be conducted by the Departments and the Advisory Committee through consultation, “as appropriate,” with “other State agencies, other states in the region, and federal agencies.”²⁴ Said study “shall include a review of the results, to the extent they are available, of [the Office of Research and Development at the United States Environmental Protection Agency study on the relationship between hydraulic fracturing and drinking water], environmental impact statements of the [S]tate of New York, the Delaware River Basin Commission, and other studies of potential impacts to the public health, safety, the environment, or natural resources.”²⁵ Further, the study shall “address the short-term, long-term, and cumulative effects of natural gas exploration in the Marcellus Shale, best practices, and appropriate changes, if any, to the laws or regulations concerning oil and gas,” spanning numerous sub-topics, including contamination of groundwater and surface water, the required and available water resources to support hydraulic fracturing, well spacing, greenhouse gas emissions, economic development, insurance and bonding, and the scope of environmental assessment to be required prior to the issuance of drilling permits.²⁶

The MSSDI shall “prepare draft reports, solicit public comment, and issue” a final report “addressing . . . best practices for all aspects of gas exploration and production in the Marcellus Shale in Maryland . . . [n]o later than August 1, 2012,”²⁷ and an additional report “ad-

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

... [n]o later than August 1, 2014[.]”²⁸

At the MSSDI’s first meeting on August 3, 2011, energy industry representatives offered to fund an environmental baseline study in exchange for a more accelerated timeline than that outlined in the Executive Order,²⁹ while one state legislator proposed an extraction tax of up to 10%.³⁰

28. *Id.*

29. Maryland Marcellus Shale Advisory Commission Holds First Meeting – Sparks Fly, Marcellus Drilling News, <http://marcellusdrilling.com/2011/08/maryland-marcellus-shale-advisory-commission-holds-first-meeting-sparks-fly/> (last visited Nov. 28, 2011).

30. *Id.*