DEVELOPING ADVERSE POSSESSION OF SEVERED MINERAL ESTATES IN OHIO

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I. INTRODUCTION

Imagine it is 1814 in rural Noble County, Ohio. While traveling a familiar path, you stumble across a clearing where deer are licking a spot on the ground. Thinking it will lead to much-needed salt to preserve meat through the harsh winter months, you begin to exhaustively mine the patch in hopes of finding the valuable mineral. Once explored, you do indeed find the salt, but it is unusable because it is saturated with oil.

Today, this would not be such an unfortunate discovery. As Jed Clampett learned, oil is nothing more than "black gold," an extremely profitable resource to those with easy access to it.[1] Nonetheless, the real settlers who experienced this situation in Ohio in the early 1800s, Silas Thorla and Robert McKee, were discouraged with their find because oil and gas were not considered worthwhile commodities at that time.[2] Even so, some call their accidental discovery the first "oil well" in North America.[3]

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[1] Jed Clampett is the main protagonist of the television series *The Beverly Hillbillies*, which aired on CBS from 1962 to 1971. *See The Beverly Hillbillies*, IMDB, http://www.imdb.com/title/tt0055662 (last visited Jan. 10, 2016). In the series, Jed had the fortune of stumbling upon an oil reserve, which comically landed him, his family, and their "hillbilly" lifestyle within the ritzy Beverly Hills district of California. *Id.*

[2] *See First Oil Well in North America*, ROADSIDE AMERICA, http://www.roadsideamerica.com/story/11665 (last visited Feb. 17, 2016).

[3] *Id.*; *but see Ohio Crude Oil and Natural Gas Producing Industry*, OHIO OIL & GAS ASS'N 1–2, http://burchfieldcraig.org/FamLib/FamBus/OilGasGeneral/OhioOilandGas IndustryOverview-OOGA.pdf (last visited Feb. 17, 2016) (noting that the first commercial oil well in Ohio went into production in 1860).

Today, oil and gas production has come full circle with a strong return to its roots in Ohio.[4] "The heart of it all"[5] is quickly becoming the heart of Appalachian oil and gas production.[6] As producers continue to fund massive operations in Ohio connected to the Utica and Marcellus Shale formations,[7] shale continues to be "the biggest thing to hit Ohio since the plow."[8]

Although Ohio has a rich history of production,[9] its oil and gas jurisprudence lags behind other traditional, oil-producing states (e.g., Oklahoma, Colorado, and Texas).[10] As Ohio's shale boom continues,[11] the law should catch up with technology as it has in these other states.[12] In particular, old doctrines must be interpreted in light of technological advancements designed to facilitate oil and gas exploration and

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[4] *See id.* at 3.

[5] *See Ohio's State Tourism Slogans*, OHIO HIST. CENT., http://ohiohistorycentral.org/w/Ohio's_State_Tourism_Slogans (last visited Feb. 16, 2016).

[6] *See* OHIO OIL & GAS ASS'N, *supra* note 3, at 8. Ohio recently obtained its one-thousandth well searching for gas, oil, and natural gas liquids, a fact that demonstrates the state's strengthening position as a producing state. *See* Dan Shingler, *Ohio Gets Its 1,000th Shale Well*, CRAIN'S CLEVELAND BUS. (Aug. 8, 2015, 4:30 AM), http://www.crainsclevеland.com/article/20140808/ENERGY/140809841/ohio-gets-its-1000th-shale-well.

[7] *See, e.g.*, Bob Downing, *Production Increases, Profits Decline for Antero Resources in Utica Shale*, OHIO.COM (July 30, 2015, 3:45 PM), http://www.ohio.com/business/utica/production-increases-profits-decline-for-antero-resources-in-utica-shale-1.612142; *see also* Bob Downing, *Gulfport Energy Loses $1.2 Billion in 2015, Production to Grow*, OHIO.COM (Feb. 18, 2016), http://www.ohio.com/blogs/drilling/ohio-utica-shale-1.291290/gulfport-energy-loses-1-2-billion-in-2015-production-to-grow-1.662948.

[8] Joseph Triepke, *Best Thing Since the Plow? Utica Gas Production Finally Ramping*, OILPRO, http://oilpro.com/post/2105/best-thing-since-the-plow--utica-gas-production-finally-ramping (last visited Mar. 8, 2016).

[9] *See Oil and Gas Fields Map of Ohio*, OHIO DEP'T OF NAT. RES., DIV. OF GEO. SURV., http://geosurvey.ohiodnr.gov/portals/geosurvey/PDFs/Misc_State_Maps&Pubs/pg01.pdf (last visited Jan. 10, 2016).

[10] *See* Timothy M. McKeen & Kristen L. Andrews, *The Effect of Missing Production on Ohio's Held By Production Oil and Gas Leases*, 37 OHIO ST. L.J. FURTHERMORE 13, 13 (2012).

[11] *See id.*

[12] *Id.* at 17. *See also* Joe P. Koncelik, *Governor Releases Bill to Regulate Shale Gas Drilling and Wastewater Disposal*, OHIO ENVTL. L. BLOG (Apr. 9, 2012, 3:39 PM), http://www.ohioenvironmentallawblog.com/2012/04/articles/federal-and-state-developments/governor-releases-bill-to-regulate-shale-gas-drilling-and-wastewater-disposal.

development.[13] The purpose of this Comment is to analyze one of those fundamental doctrines, adverse possession, and explore how it provides an avenue to simplify title to oil and gas estates and facilitate Ohio's steady and productive growth and development.[14] Adverse possession will be the crux of this Comment, the scope of which will be limited in one major respect: it will only focus on adverse possession of a severed mineral estate.[15]

Based on existing Ohio jurisprudence and guiding principles from other producing jurisdictions, this Comment makes several conclusions. First, adverse possession of a severed mineral estate is likely feasible under existing Ohio law.[16] Second, a claimant[17] must prove possession through an adjusted adverse possession scheme that is a modified version of the doctrine regarding surface estates.[18] Finally, the minerals transferred and the title the claimant has acquired thereto depends on the depth explored and the minerals produced.[19]

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[13] Although new doctrines, such as the Ohio Dormant Minerals Act, have been developed to simplify title pertaining to minerals by allowing a surface owner to obtain an "abandoned" mineral interest after the record owner of such minerals does not conduct a "savings event" within twenty years, the Act's scope is limited to specific claimants. *See* OHIO REV. CODE ANN. § 5301.56 (West 2014). Adverse possession is another avenue with a broader reach.

[14] This Comment will focus on adverse possession as it pertains to mineral estates in oil and gas. A mineral estate may include other resources as well, including, but not limited to, coal, gypsum, salt, gold, and silver. *See id.* § 5301.56(A)(4). Although the application of the doctrine is similar for any of these minerals, this Comment focuses only on oil and gas because of Ohio's recent shale boom.

[15] Before a severance, jurisdictions universally agree on how to adversely possess minerals. *See* 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 10.5 ¶¶ 1–2 (Matthew Bender rev. ed. 2013). Title to mineral rights, which includes oil and gas rights, may be acquired by adverse possession of the surface where there has been no severance of such mineral rights prior to the time adverse possession began. *See id.*; Bremhorst v. Phillips Coal Co., 211 N.W. 898, 902 (Iowa 1927).

[16] *See infra* Part III.

[17] In this Comment, "claimant" is used to signify a person who seeks to obtain title through the use of adverse possession, while "record owner" is used to signify a person who has title to real estate, evidenced by a recorded instrument, that is being adversely possessed by a claimant.

[18] *See infra* Part IV.

[19] *See infra* Part V.

II. THE HISTORY OF THE DOCTRINE AND CONSIDERING IT IN THE FUTURE

Adverse possession has had its roots in Ohio for well over one hundred years,[20] as has severing mineral interests.[21] However, these two doctrines have rarely been viewed together.[22] This leaves the area ripe for courts to expand the grasp of each, as the doctrines are woven together into new jurisprudence.

This section will provide an overview of the practicalities of both doctrines and explain how the justifications for adverse possession of surface estates are equally present for severed mineral interests.

A. Requirements of Adverse Possession in Ohio, Generally

Adverse possession was conceived within the common law as an affirmative defense to limit the rights of a record owner who did not timely complain of another infringing upon those rights.[23] The doctrine allows a claimant to obtain title to land from a record owner in which he otherwise has no stake.[24]

As the law developed, a claimant was able to succeed if he satisfied enumerated elements with respect to use of the land before the record owner filed a complaint to eject the claimant. Therefore, if the true owner's complaint was untimely, much like a statute of limitations,[25] the title would vest in the claimant, free and clear of any claims by the record owner.[26]

Successful use of the adverse possession doctrine requires a claimant to establish the existence of the following elements, each of which are

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[20] *See, e.g.*, Gill v. Fletcher, 78 N.E. 433, 435–36 (Ohio 1906). *Gill* is an important Ohio adverse possession case for many reasons. For more discussion on *Gill*, see *infra* Part III.A and *infra* note 114 and accompanying text.

[21] *See, e.g.*, Burgner v. Humphrey, 41 Ohio St. 340, 341, 352 (Ohio 1884).

[22] *See* Michael K. Vennum & Kristin M. McCormish, *Ownership of Abandoned or Dormant Minerals: A Comparison of Pennsylvania and Ohio Law*, 1 OIL, GAS, & MINING 1, 2, 6 (2014), https://www.oilgasandmining.com/volume1/issue2/88-v1n2-vennum.

[23] *See* Edward G. Mascolo, *A Primer on Adverse Possession*, 66 CONN. B.J. 303, 303 (1992).

[24] *See id.* at 304.

[25] *See id.* at 303–04.

[26] This is true even if the record owner showed he had a properly recorded deed to evidence ownership. *See, e.g.*, Crown Credit Co. v. Bushman, 170 Ohio App. 3d 807, 2007-Ohio-1230, 869 N.E.2d 83, at ¶¶ 11, 33 (3d Dist.).

discussed here briefly and explored in detail below.[27] The possession by a claimant must be:

(1) *Actual*, or possessed through a productive use and not mere maintenance;[28]

(2) *Open and notorious*, or possessed in a manner in which the record owner might find after a reasonable inspection or may be told about by others;[29]

(3) *Hostile*, or possessed without permission of the record owner;[30]

(4) *Exclusive*, or possessed while excluding the record owner and third parties;[31] and

(5) *Continuous*, or uninterrupted for the required period.[32]

Only when a claimant is able to prove that each element was present for the required statutory period[33] will a record owner's complaint be untimely and barred by the defense of adverse possession.

B. Severing a Mineral Estate from a Surface Estate

Since the mid-1800s, the Supreme Court of Ohio has allowed a landowner to sever mineral interests from the surface.[34] Once severed, two separate and distinct estates exist with respect to the same area: one for the surface itself (where trees, buildings, and roads are located) and the other from the surface to the center of the earth (where oil, gas, coal, and other minerals lay waiting to be extracted).[35]

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[27] *See infra* Part IV.C.

[28] *See infra* Part IV.C.1.

[29] *See infra* Part IV.C.2. Although subtle differences exist between the two, many Ohio courts view the requirements of openness and notoriousness as a singular element. *See, e.g.*, Cadwallader v. Scovanner, 178 Ohio App. 3d 26, 2008-Ohio-4166, 896 N.E.2d 748, at ¶ 56 (12th Dist.).

[30] *See infra* Part IV.C.3.

[31] *See infra* Part IV.C.4.

[32] *See infra* Part IV.C.5.

[33] Ohio follows a twenty-one year adverse possession period. *See* OHIO REV. CODE ANN. § 2305.04 (West 2014).

[34] *See, e.g.*, Burgner v. Humphrey, 41 Ohio St. 340, 341 (Ohio 1884) (selling rights in "coal, iron ore, limestone, and all the other minerals, together with all the rock or petroleum oils and salines" as early as 1866).

[35] *See* Wray v. Goeglein, No. 97 CA 9, 1998 WL 880582, at *8 (Ohio Ct. App. Dec. 2, 1998).

Each separate estate includes its own ownership, title, and rights thereto.[36] Additionally, where there has been a complete severance, a landowner who has rights in one has no rights in the other.[37]

This severance may occur in various forms. For instance, the landowner may reserve minerals to himself while concurrently granting the surface to another.[38] Or, the landowner may sell the minerals only, while retaining title to the surface.[39] Such a grant or reservation of the minerals could involve: only a fractional amount;[40] only certain types of minerals or shale strata;[41] or be in effect only for a specified period of time.[42]

Through numerous methods, a separate and distinct estate in real property that is not visible to the naked eye may be created and can generate situations in which questions of title exist.[43] This, viewed in light of the justifications of adverse possession of surface estates, makes the doctrine of adverse possession of severed mineral estates in Ohio a prime candidate for extension.

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[36] *See* Gill v. Fletcher, 78 N.E. 433, 435–36 (Ohio 1906) (explaining that if a mine is severed from the surface, the mine is held in fee by one person and the surface is held in fee by another, all while the rights incidental to the ownership of the mine are the same as the rights incidental to the ownership of the surface).

[37] *See Wray*, 1998 WL 880582, at *8. *But see* Chesapeake Expl., L.L.C. v. Buell, 2015-Ohio-4551, slip op. at ¶ 23 (Ohio Nov. 5, 2015) (noting that although the interests may be separately owned, the Supreme Court of Ohio has recognized the "truism" that neither the owner of a surface interest nor the owner of a severed mineral interest has full ownership because each has rights that are dependent on the other).

[38] *See Gill*, 78 N.E. at 435 ("Severance may be accomplished by a conveyance of the mines and minerals . . . .").

[39] *See id.* ("Severance may be accomplished . . . by a conveyance of the land with a reservation or exception as to the mines and minerals.").

[40] *See id.* (allowing a reservation in the fractional amount of one-half).

[41] *See id.* ("The mine itself may, in turn, be divided longitudinally and each stratum become the subject of a grant; the mine thus becoming the property of as many owners as there are different strata.").

[42] *See* Mong v. Kovach Holdings, LLC., 11th Dist. Lake No. 2012-T-0063, 2013-Ohio-882, at ¶ 26 (allowing a life estate in oil and gas royalties).

[43] *See* K.A.D., Annotation, *Severance of Title or Rights to Oil and Gas in Place From Title to Surface*, 146 A.L.R. 880 Art. IV.b (1943) (citing Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96 (Ill. 1943)).

C. Justifications for Adverse Possession of Severed Mineral Estates

Adverse possession, before understanding the justifications, may sound like nothing more than legalized theft.[44] The historical doctrine has been criticized and compared to "a primitive method of acquiring land without paying for it."[45] At first blush, this accusation seems justifiable when considering title is transferred without compensation for the record owner due to no fault of his own, other than neglect.[46] Those who criticize its application, however, have lost sight of the justifications underlying the doctrine's implementation.[47] These same justifications, listed here, will be used in the near future when courts are faced with the issue of extending or curtailing adverse possession's reach in the context of severed mineral estates.

1. Curing Defects in Title

First, by allowing adverse possession of severed mineral estates, landowners are able to cure potential or actual defects in real estate title.[48] Without the doctrine, long-lost heirs of any former owner, possessor, or lien holder of an interest that has not been used, potentially for well over a century, could come forward with a legal claim and eject another who has been productively using the land.

It may be impossible to determine which of the parties exist, especially because some grants or reservations have produced fractional interests of negligible amounts of the whole.[49] Even if found, these fractional interests become increasingly difficult to track as they are further and further sub-divided.[50] One commentator has stated that oil and gas interests may be split

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[44] *See* Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918).

[45] *Id.*

[46] *See id.*

[47] *See* Jeffrey E. Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2420 (2001).

[48] *See* Ballantine, *supra* note 44, ¶ 140–41 ("The only cloud on the possessor's title is the [record] owner's right to recover possession by entry or ejectment, or by some other remedy, and when these remedies are all taken away by the statute or by analogy thereto, the defect in the possessory title becomes cured.").

[49] *See* Nat'l Ass'n of Royalty Owners & Nat'l Ass'n of Division Order Analysts, *Solving the "Fractionalization" Problem*, MANAGING MIN. INTS., http://www.nadoa.org/forms/fractionalization.pdf (last visited Feb. 17, 2016).

[50] *Id.*

into "more fragments than the atom or the rainbow."[51] By allowing one party to adversely possess the entire interest, these questions of title are cleared by vesting complete ownership in one claimant, thereby eliminating the so-called "fractionalization" problem.[52]

2. Beneficial or Productive Use of Land

Second, because many grants or reservations of mineral interests were created in the mid-1800s,[53] landowners or their heirs are often unaware they possess a mineral interest or are uninterested in developing.[54] Adverse possession allows the most productive use of land,[55] rewarding those who improve the quality of it and refusing claims by landowners who "sleep on their rights,"[56] or were unaware they had rights in the first place.[57] Without a doctrine such as adverse possession, these mineral interests may never be developed. This is equally true with severed mineral estates. Without the doctrine of adverse possession, oil and gas that may otherwise lay dormant may become extracted and refined instead.

3. Mitigating the Harshness of Mistakes of Ownership

Third, in practice, there are bound to be title mistakes during development of land interests, as clearly evidenced by the sheer number of quiet title actions in Ohio in recent years.[58] In these situations, a record

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[51] Jones v. Salem Nat'l Bank (*In re* Fullop), 6 F.3d 422, 424 (7th Cir. 1993) (quoting B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UCC ¶ 13.01 at 13-2 (2d ed. 1988)).

[52] Gregory D. Russell & Lauren N. Fromme, *Dormant Mineral Acts: Addressing Severed Mineral Interests in a Fractional World*, 33 ENERGY & MIN. L. INST. 288, 291–92 (2012).

[53] *See, e.g.*, Burgner v. Humphrey, 41 Ohio St. 340, 341 (Ohio 1884). *See also* Tom Knox, *Millions of Dollars at Stake for Landowners, Drillers in Supreme Court Mineral Rights Case*, COLUMBUS BUS. FIRST (Aug. 15, 2014), http://www.bizjournals.com/columbus/news/2014/08/15/millions-of-dollars-at-stake-for-landowners.html.

[54] *See id.* (noting that heirs are often "oblivious to a long-deceased relative's ownership").

[55] *Real Estate & Property Law*, JUSTIA, https://www.justia.com/real-estate/ docs/adverse-possession.html (last visited Feb. 9, 2016).

[56] This phrase comes from the maxim of equity, *vigilantibus non dormientibus aequitas subvenit*, or "equity aids the valiant, not those that sleep on their rights." JOHN HOUSTON MERRILL, THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 710–11 (1888).

[57] *Id*.

[58] *See* QUIET TITLE ACTIONS IN OHIO, AM. PLAN. ASS'N (Mar. 10, 2015), http://conference.planning.org/events/event/3028146.

owner may ordinarily have a right to sue for trespass.[59] When these mistakes go unnoticed for twenty-one years, however, it seems justifiable that the record owner be estopped from asserting a claim for ejectment. The record owner had his opportunity and slept on his rights.[60]

Because of innocent mistakes, such as the minor, unintentional intrusion of an encroaching fence, adverse possession has often been used as a defense releasing the claimant from liability.[61] Very early, the Supreme Court of Ohio established that adverse possession is "not regarded as a source of title, but as a means of defense against the assertion of an originally superior title—one that would have prevailed but for the consideration given to long-time possession."[62] Courts will generally be reluctant to eject claimants, leaving them with nothing, when they have been actively using the land that they possessed.[63]

Similarly, refusing to grant title to a claimant who improved and enjoyed the land would reach the inequitable result of allowing a record owner to recover property, improved without effort of his own, by happenstance of having received title years ago.[64]

4. An Emerging Justification for Severed Mineral Estates: Production

A final, fourth justification arises in the context of severed mineral interests that does not ordinarily arise in general adverse possession law: courts generally favor the production of minerals.[65] Courts will often relax standards or create new ones to benefit oil and gas producers by allowing them to explore for minerals.[66]

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[59] *See, e.g.*, Abraham v. BP Expl. & Oil, Inc., 149 Ohio App. 3d 471, 2002-Ohio-4392, 778 N.E.2d 48, at ¶ 14 (10th Dist.) ("A trespass is an interference or invasion of a possessory interest in property.").

[60] *See supra* Part II.C.2.

[61] *See, e.g.*, Applebey v. Lenschow, 494 N.E.2d 529, 535 (Ill. App. Ct. 1986) ("The conclusion that there has been no trespass was implicit in the jury's finding in favor of the defendant on the issue of adverse possession.").

[62] Pavey v. Vance, 46 N.E. 898, 900 (Ohio 1897).

[63] *See* Mascolo, *supra* note 23, at 303.

[64] *See id.* at 303–04.

[65] *See* Paula Dittrick, *Ohio Supreme Court Rules Against Municipality in Oil and Gas Case*, OIL & GAS J. (Feb. 23, 2015), http://www.ogj.com/articles/2015/02/ohio-supreme-court-rules-against-municipality-in-oil-and-gas-case.html.

[66] *See* Donald D. Jackson, *Texas Supreme Court Continues to Rule in Favor of Lessees*, LAW360 (July 1, 2014, 12:35 PM), http://www.law360.com/articles/552844/texas-supreme-court-continues-to-rule-in-favor-of-lessees.

Some states, such as Texas, even go as far as implying new rules and terms—such as easements—into oil and gas leases to allow for such production.[67] Without implying such terms, production may be stifled.

Ohio is no exception. Adopting the "rule of capture"[68] as early as 1897, Ohio's jurisprudence is designed to facilitate development.[69] This history has continued and is in effect today, as evidenced by recent Supreme Court of Ohio decisions reiterating that Ohio statutory law "encourage[s] the use of Ohio's natural resources."[70]

Allowing adverse possession of severed mineral estates furthers the justification of favored production; more wells may be drilled, in turn producing more hydrocarbons.[71]

III. IS ADVERSE POSSESSION OF MINERALS FEASIBLE UNDER EXISTING OHIO LAW?

Before discussing the requirements to adversely possess mineral interests in Ohio, it must first be determined whether the doctrine is currently applicable. Although there has been no recent, definitive answer, case law strongly supports the argument that it is.

A. The Importance and Implications of Gill v. Fletcher

Various jurisdictions throughout the United States have tackled the issue of whether a severed mineral estate may be adversely possessed against a record owner.[72] One commentator suggests all jurisdictions except Louisiana—including the more traditional oil-producing states of

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[67] *See id.*

[68] *See* Phillip Wm. Lear et al., *Modern Oil and Gas Conservation Practice: And You Thought the Law of Capture Was Dead?*, 41 ROCKY MT. MIN. L. INST. 17-1 § 17.02[5] (1995) (describing the law of capture as a vested right in which a "landowner [i]s entitled to drill an infinite number of wells on his land and could produce oil or gas without restriction even though a portion of the oil or gas may have migrated from the property of another").

[69] *See* Kelley v. Ohio Oil Co., 49 N.E. 399, 401 (Ohio 1897) (barring a claim of trespass when wells, validly placed on a tract of land, extracted oil that had percolated onto it from a neighboring tract).

[70] Chesapeake Expl., L.L.C. v. Buell, 2015-Ohio-4551, slip op. at ¶ 90 (Ohio Nov. 5, 2015).

[71] *See id.*

[72] *See* KUNTZ, *supra* note 15, § 10.5.

Oklahoma, Colorado, and Texas—have concluded that severed mineral estates may be adversely possessed.[73]

The Supreme Court of Ohio addressed this issue well over a century ago in the case of *Gill v. Fletcher*.[74] Unequivocally, this early decision proclaimed, "It is not disputed that title to a mine which has been severed from the title to the surface may be acquired by adverse possession."[75] With this one line, the court opened a new area of the law by allowing a claimant to adversely possess a severed mineral estate.[76] Nonetheless, the implications of the case have been lost over time but should be again brought to light.

B. Who May Be Deemed a Claimant

Based on the Supreme Court of Ohio's holding in *Gill*,[77] it is logical to conclude that adverse possession of severed mineral interests remains a viable claim. With this in mind, it becomes relevant to discuss *who* may adversely possess minerals. There are three possible options, explored below: (1) lessors; (2) surface owners; and (3) lessees.

1. Lessors

When an individual who is not the record owner of a severed mineral estate leases those minerals to another, who is the claimant?[78] Generally, sufficient possession to establish adverse possession need not be solely held by the claimant.[79] Instead, possession may be established using an agent or

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[73] *See id.*; Deruy v. Noah, 185 P.2d 189, 191 (Okla. 1947); Kriss v. Mineral Rights, Inc., 911 P.2d 711, 714 (Colo. App. 1996); Nat. Gas Pipeline Co. v. Pool, 124 S.W.3d 188, 193 (Tex. 2003).

[74] *See* Gill v. Fletcher, 78 N.E. 433, 435 (Ohio 1906).

[75] *Id.*

[76] *See, e.g.*, Schafer v. Sharon Silica Co., No. 1878, 1989 WL 62711, at *1 (Ohio Ct. App. May 18, 1989) (referring to the lower court record, where appellee pleaded the doctrine and appellant could not supply any case to the contrary); Yoss v. Markley, 68 N.E.2d 399, 402 (Ohio Ct. C.P. 1946) ("Minerals which have been severed from the title to the surface may be acquired by adverse possession . . . .").

[77] *See Gill*, 78 N.E. at 435.

[78] This situation may arise as an innocent mistake of ownership because of a historical grant or reservation of oil and gas. *See supra* Part II.C.3.

[79] *See, e.g.*, Omaha & Florence Land & Tr. Co. v. Parker, 51 N.W. 139, 140 (Neb. 1892).

servant.[80] In these situations, the claimant is holding possession *through* another.[81]

Ohio also follows this principle.[82] In Ohio, the possession of the lessee has been legally deemed to be possession of the lessor.[83] This may seem counter-intuitive, however, because the actual conduct sufficient to establish adverse possession would be made by the lessee.[84] For example, it would be the lessee, not the lessor, who would be occupying the property and putting it to a beneficial use.[85] Yet, where the lessee is engaged in a contract for this use, he is acting under the permission of the lessor.[86] Thus, when one individual leases to another to produce minerals, neither of which is the record owner of the severed mineral estate, it seems the lessor will be deemed the claimant because he is the principal of an agency relationship to drill.

2. Surface Owners

Within the broad sphere of lessors as claimant, one subset may pose a different result: surface owners. At least one jurisdiction seemingly forecloses the ability of surface owners to become claimants with respect to a severed mineral estate. In 1943, the Illinois Supreme Court held, "[T]he law is well settled there can be no adverse possession of the mineral estate by the owner of the surface estate."[87] The court then abruptly ended its discussion without explaining whether this becomes a de facto rule in that state.[88] If that is the case, a surface owner is prevented from being a claimant solely because he is the surface owner. However, in light of the other jurisdictions cited by the Illinois court,[89] it is likely that the decision only

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[80] *Id.*

[81] *Id.*

[82] *See, e.g.*, Powers v. Malavazos, 158 N.E. 654, 655 (Ohio Ct. App. 1927) (holding that a tenant's possession, as lessee, is deemed to be possession of the landlord, as lessor).

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96, 102 (Ill. 1943).

[88] *See id.*

[89] *Id.*

forecloses a surface owner from adversely possessing a severed mineral estate through possession of the surface.[90]

Unsurprisingly, the Illinois court analyzed Ohio's decision in *Gill*.[91] That decision states, "[N]either the owner of the surface nor the owner of the mine can claim the other estate *merely* by force of the *possession* of his own estate."[92] By mere possession of the surface, it becomes impossible to determine whether the claimant is putting use to the severed mineral estate or only the surface.[93] In light of this, it seems unlikely that Ohio will follow the apparent de facto rule of Illinois. Rather, Ohio may allow a surface owner to act as claimant with respect to a severed mineral estate, provided he can satisfy the appropriate requirements discussed below.[94]

3. Lessees

Lessors generally are deemed claimants,[95] but some jurisdictions have hinted that the roles of lessor and lessee may switch regarding this presumption.[96] In this situation the lessee, opposed to the lessor, may be regarded as a claimant who must satisfy the requirements of adverse possession. This occurs where a lessee continues to possess the severed mineral estate when a lease, through another claimant, has expired.[97] At this point, the lessee's possession is no longer under the guise of permission from the lessor-claimant through an agency relationship.[98] Thus, the possessory act of the lessee now becomes basis for the adverse possession defense.

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[90] Although outside the scope of this comment, if Ohio followed a per se rule, there are other avenues for a surface owner to reclaim minerals. *See supra* note 13 and accompanying text; OHIO REV. CODE ANN. § 5301.56 (West 2014).

[91] *Cf.* Gill v. Fletcher, 78 N.E. 433, 433 (Ohio 1906).

[92] *Id.* at 435 (emphasis added).

[93] *See infra* Part IV.C.

[94] *See infra* Part IV.C.

[95] *See supra* Part III.B.1.

[96] This is a "permissive use" and, along with the implied switch of roles, is explored more below in the context of hostile possession. *See infra* Part IV.C.3.

[97] *See, e.g.*, Nat. Gas Pipeline Co. v. Pool, 124 S.W.3d 188, 194 (Tex. 2003).

[98] *See id.* However, it could be argued that once a lease has expired, the lessee still retains possession as a "tenant by sufferance," which implies permission and an agency relationship. *See id.* at 195. *See generally* 49 AM. JUR. 2D *Landlord and Tenant* § 124 (2015). However, this argument goes beyond the scope of this Comment, and this section highlights a potential emerging argument.

IV. HOW TO ADVERSELY POSSESS MINERALS IN OHIO

Because a claimant may acquire title to a severed mineral estate by adverse possession,[99] the next issue is what is required for the title to be conveyed to the claimant. Although the requirements of adverse possession for surface rights vary by state, a claimant in Ohio must demonstrate by clear and convincing evidence that for a twenty-one year period his possession of the land was actual, open, notorious, hostile, exclusive, and continuous.[100] Once established, any action by the record owner to recover title to, or possession of, the real property is subsequently barred by the statute of limitations in Ohio Revised Code section 2305.04.[101]

Surface lands may be a proper analogue for adverse possession of a severed mineral estate, but the requirements do not perfectly correlate. Thus, this section provides guidance on which requirements apply, how the relevant requirements apply, and which new principles arise in the unique context of adversely possessing a severed mineral estate.

A. Burden of Proof

For many years, the burden of proof to establish general adverse possession claims troubled Ohio courts. Prior to 1998, the Supreme Court of Ohio had not definitively ruled on the required burden of proof needed, other than in the context of cotenants.[102] Many appellate courts believed that this silence meant a preponderance standard was sufficient.[103] As case law evolved, the only circumstances under which adverse possession was established by a clear and convincing evidence standard—rather than by a preponderance standard—was between cotenants or where a familial

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[99] *See* Gill v. Fletcher, 78 N.E. 433, 435 (Ohio 1906).

[100] *See, e.g.*, Roll v. Bacon, 167 Ohio Misc. 2d 23, 2011-Ohio-6972, 962 N.E.2d 881, at ¶ 30 (C.P).

[101] OHIO REV. CODE ANN. § 2305.04 (West 2014).

[102] *See* Grace v. Koch, 692 N.E.2d 1009, 1011 (Ohio 1998). *See also Gill*, 78 N.E. at 436 ("[A] tenant in common cannot assert title by adverse possession against his co-tenant, unless he shows a definite and continuous assertion of adverse right by overt acts of unequivocal character clearly indicating an assertion of ownership of the premises to the exclusion of the right of the co-tenant.").

[103] *See, e.g.*, Demmitt v. McMillan, 474 N.E.2d 1212, 1215–16 (Ohio Ct. App. 1984); Walls v. Billingsley, No. 1-92-100, 1993 WL 135808, at *1 (Ohio Ct. App. Apr. 28, 1993); Rolling Hills Landmark, Inc. v. Townsend, No. 95-CA-07, 1996 WL 363579, at *2 (Ohio Ct. App. May 24, 1996); Rosenblub v. Wilkes, 6 Ohio Law Abs. 323, 323 (Ohio Ct. App. 1928).

relationship between the parties existed.[104] Less than two decades ago, however, the Supreme Court of Ohio conclusively answered the question.[105]

Because a "successful adverse possession action results in a [record owner] forfeiting ownership to [a claimant] without compensation," adverse possession is generally disfavored and is met with a rigorous burden of establishing each requirement.[106] As such, the Supreme Court of Ohio held that to acquire title by adverse possession, a party must prove each requirement by clear and convincing evidence.[107] This was influenced by the Court's desire to reduce the frequency of the inequitable application of the doctrine.[108]

Holding claimants to a clear and convincing standard is not unique to Ohio. While fourteen states require only a preponderance of the evidence,[109] at least thirty-three states and the District of Columbia require the heightened standard.[110]

Although adverse possession of surface estates requires clear and convincing evidence,[111] Ohio courts have not spoken directly to the burden in the context of severed mineral interests.[112] However, other jurisdictions such as North Dakota have addressed the question and held specifically that "adverse possession [of a severed mineral estate] must be shown by clear and convincing evidence."[113] Ohio likely will require the same when given the opportunity to do so, thereby keeping consistency between the claims.[114]

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[104] *See Rolling Hills*, 1996 WL 363579, at *2. *See also Demmitt*, 474 N.E.2d at 1215.

[105] *See Grace*, 692 N.E.2d at 1012.

[106] *Id.*

[107] *See id.*

[108] *See id*.

[109] *Id.* at 1012 n.2.

[110] *Id.*

[111] *See id.* at 1012.

[112] *See* Fenner L. Stewart, *When the Shale Gale Hit Ohio: The Failures of the Dormant Mineral Act, Its Heroic Interpretations, and Grave Choices Facing the Supreme Court*, 43 CAP. U. L. REV. 435, 461–462 (2015).

[113] *See, e.g.*, Burlington N., Inc. v. Hall, 322 N.W.2d 233, 241 & n.3 (N.D. 1982); *Cf.* Kriss v. Mineral Rights, Inc., 911 P.2d 711, 714 (Colo. App. 1996) (Colorado, a state which holds the burden as a preponderance for a surface estate, holds such a requirement equal to that of a severed mineral estate.).

[114] Though often overlooked, the Supreme Court of Ohio also dealt with the adverse possession of a severed mineral estate. *See supra* Part III.A. *See also* Gill v. Fletcher, 78 N.E. 433, 435 (Ohio 1906). Appellate courts first heavily relied on this case when determining the standard of proof for general adverse possession. *See supra* note 104 and accompanying text. By choosing the burden of clear and convincing evidence when dealing

B. Duration

Although adverse possession is a product of the common law,[115] the duration of the adverse period has been statutorily defined.[116] Under Ohio's ejectment statute, "An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause of action accrued."[117] Because a claimant uses adverse possession as a defense against a record owner's suit for recovery of real estate, this statute forms the basis for the duration of the possession required.[118]

The doctrine of adverse possession has evolved alongside, and as a corollary to, this ejectment statute to allow a claimant to obtain title to real property in fee from a record owner.[119] A claimant must remain in possession for more than twenty-one years to ensure a record owner may not assert ownership of the property, by virtue of the limit on the record owner's ability to complain.[120] Once the twenty-one years have passed, the record owner's title is vested in the claimant because the record owner slept on his rights.[121]

This twenty-one year period begins to run when a claim by the record owner "accrues."[122] "[A]n action accrues upon the date the injury to the property is either actually discovered or should have been discovered by a reasonably prudent [record] owner."[123] Adverse possession allows a record owner to discover the possession by requiring elements that are specifically designed to provide notice to him.[124] Notice to a record owner of an adverse claim must be shown by some act that is actual, open, notorious, and hostile to the rights of the record owner.[125] Thus, a claim accrues under the statute

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with adverse possession of gypsum (though dicta when viewed in the light of cotenants), Ohio courts have a proper precedential basis for the future. *See Gill*, 78 N.E. at 434.

[115] *See, e.g.*, Pottmeyer v. Douglas, 4th Dist. Washington No. 10CA7, 2010-Ohio-5293, at ¶ 22.

[116] OHIO REV. CODE ANN. § 2305.04 (West 2014).

[117] *See id.*

[118] *See Pottmeyer*, 2010-Ohio-5293, at ¶¶ 22–24.

[119] *See* Mascolo, *supra* note 23, at 319.

[120] *See* Montieth v. Twin Falls United Methodist Church, Inc., 428 N.E.2d 870, 872–73 (Ohio Ct. App. 1980).

[121] *See* Mascolo, *supra* note 23, at 317; *See also supra* Part II.C.2.

[122] OHIO REV. CODE ANN. § 2305.04 (West 2014).

[123] Hatfield v. Wray, 748 N.E.2d 612, 618 (Ohio Ct. App. 2000) (alteration in original).

[124] *See* Vanasdal v. Brinker, 500 N.E.2d 876, 878 (Ohio Ct. App. 1985); *Montieth*, 428 N.E.2d at 875.

[125] *See, e.g.*, *Vanasdal*, 500 N.E.2d at 878; *Montieth*, 428 N.E.2d at 875.

of limitations when a claimant takes some act that satisfies the elements of actual, open, notorious, and hostile,[126] which are discussed individually below, alongside the other elements.[127]

C. Elements

Once the burden of proof has been established for an adverse possession claim and the statute of limitations period has accrued, the defendant must affirmatively prove each remaining element of the defense.[128] The following sections explain how Ohio courts have initially treated adverse possession for a surface owner and how those elements differ when applied to a severed mineral estate. Because actual, open, notorious, and hostile are required for the statute of limitations to accrue,[129] these elements will be examined first.

1. Actual

Actual possession is one of the elements designed to place a record owner on notice that a claimant possesses his real property.[130] It is used to determine if a claimant uses, or is physically present on, the property.[131] This establishes notice by requiring that such use or possession is similar to that of the record owner.[132] If the act by a claimant is that which a record

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[126] In forcing a claimant to satisfy the elements of actual, open, notorious, and hostile before a claimant may raise the defense, the doctrine of adverse possession has been consistent with the Ohio legislature's recent development of oil and gas law. *See* OHIO REV. CODE ANN. § 5301.56 (West 2014). These elements are in place to provide notice to the record owner that a claimant is possessing his real property. *See Montieth*, 428 N.E.2d at 875. The 1989 version of the statute did not include a notice or filing requirement before a severed mineral interest was deemed abandoned in favor of a surface owner. *Cf.* OHIO REV. CODE ANN. § 5301.56 (West 1989). The more recently enacted 2006 version, however, requires a surface owner to give notice to the record owner of a dormant mineral interest before the severed mineral estate is reunited with the surface estate. OHIO REV. CODE ANN. § 5301.56 (West 2006). By comparing a similar, albeit different, property right created by statute to a newly-developing area in Ohio oil and gas law, the application seems to coincide neatly.

[127] *See infra* Parts IV.C.1–IV.C.3.

[128] *See generally* Wagoner v. Obert, 180 Ohio App.3d 387, 2008-Ohio-7041, 905 N.E.2d 694 (5th Dist.).

[129] *See* Hatfield v. Wray, 748 N.E.2d 612, 618 (Ohio Ct. App. 2000).

[130] *See supra* note 126 and accompanying text.

[131] *See, e.g.*, Vanasdal v. Brinker, 500 N.E.2d 876, 878 (Ohio Ct. App. 1985); *Monteith*, 428 N.E.2d at 873.

[132] *Vandasal*, 500 N.E.2d at 878.

owner might do himself, it is reasonable to believe that the record owner would be aware of the possessory act.[133]

However, various owners have different uses for their property. Thus, acts that may be accomplished by a record owner, while probative, are not wholly indicative of actual possession.[134] The amount of possession, or sufficient use, may be viewed as a sliding scale, which necessarily must be viewed on a case-by-case basis.[135]

For instance, a claimant residing on the property is the epitome of actual use because a record owner, essentially, can do no more.[136] Yet, Ohio law has never required such a full use.[137] To hold a claimant to such a high standard would, presumably, result in the doctrine never being used successfully. On the other end of the scale, paying taxes on the land is insufficient for actual possession.[138] Paying taxes is an ancillary obligation incident to property ownership,[139] not "possession" or "use" of the land itself. Thus, it is inadequate to provide the type of notice that the doctrine attempts to effectuate. Between these two extremes is where disputes arise.

To satisfy the Ohio requirement for actual possession, a claimant must conduct activities indicative of ownership.[140] Although there is no bright line rule, courts divide possession into productive uses (worthy of an adverse possession claim) and mere maintenance (insufficient to satisfy an adverse possession claim).[141]

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[133] *See, e.g.*, *id.*; Smith v. Krites, 102 N.E.2d 903 (Ohio Ct. App. 1950).

[134] *See* Thompson v. Hayslip, 600 N.E.2d 756, 759 (Ohio Ct. App. 1991).

[135] *Id.* ("Our examination of these cases convinces us that *each claim must be decided upon its peculiar facts*.") (citing Oeltjen v. Akron Associated Inv. Co., 153 N.E.2d 715, 717 (Ohio Ct. App. 1958)).

[136] *See, e.g.*, Ewing v. Burnet, 8 F. Cas. 931, 932 (C.C.D. Ohio 1835), *aff'd sub nom.* Ewing's Lessee v. Burnet, 36 U.S. 41 (1837).

[137] *See id.* ("[T]o constitute an adverse possession it is not essential that the property . . . have a dwelling house upon it.").

[138] *See* Roll v. Bacon, 160 Ohio Misc. 2d 23, 2010-Ohio-5540, 938 N.E.2d 85, at ¶ 39 (C.P.) ("[I]n Ohio, the payment of taxes alone is insufficient to prove title by adverse possession."); *Ewing*, 8 F. Cas. at 932 ("[P]aying the taxes . . . [is] not sufficient to constitute an adverse possession.").

[139] *See* OHIO CONST. art. XII, § 2a(A) (providing procedures for and the authority to tax real estate).

[140] Vanasdal v. Brinker, 500 N.E.2d 876, 878 (Ohio Ct. App. 1985)

[141] *See, e.g.*, Hardert v. Neumann, 4th Dist. Adams No. 13CA-977, 2014-Ohio-1770, at ¶ 14 ("[E]ach claim of adverse possession must be decided upon its particular facts" and "there is no 'bright line' rule regarding such activities as cutting hay and mowing grass." (quoting Thompson v. Hayslip, 600 N.E.2d 756, 756 (Ohio Ct. App. 1991))).

A productive use is one "such as building on the premises or fencing them to define the limits of the claim and to warn the record owner of the necessity for him to take protective measures."[142] Much like residing on the property, a permanent improvement is one that a productive record owner often conducts on his own.[143]

Conversely, Ohio courts have stated, "Mere maintenance of land, such as mowing grass, cutting weeds, planting a few seedlings, and minor landscaping, is generally not sufficient to constitute adverse possession."[144] Minor improvements to the land are deemed too insubstantial to be considered a productive improvement.[145]

This productive use requirement has prevailed in the context of actual possession of severed mineral interests as well. Because underlying minerals are not subject to maintenance, Ohio has held that a productive use is any which takes the mineral out of the record owner's possession.[146] In essence, actual possession requires actual development of the oil and gas mineral rights.[147] West Virginia, a jurisdiction that follows the same rule, has explained this requirement as necessary to distinguish a claimant's possession of the severed mineral from his possession of the overlying surface.[148] Other oil and gas producing states also support this conclusion. For instance, Texas has found that in the context of oil and gas, if there has been no drilling, there can be no actual possession.[149]

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[142] Briegel v. Knowlton, No. 1-87-45, 1989 WL 71130, at *3 (Ohio Ct. App. June 20, 1989).

[143] *See id.*

[144] *See* Robinson v. Armstrong, 5th Dist. Guernsey No. 03CA-12, 2004-Ohio-1463, at ¶ 25.

[145] Ohio courts have expanded the distinction so far as to hold the replenishing and grading of gravel in a driveway to be a productive use, provided the record owner would do the same. *See* Vaughn v. Johnston, 12th Dist. Brown No. CA2004-06-009, 2005-Ohio-942, at ¶ 13. Essentially, by adding gravel and working it within the area, it is more than merely maintaining the path; it is an improvement that will remain for a length of time. *Cf.* Vanasdal v. Brinker, 500 N.E.2d 876, 878 (Ohio Ct. App. 1985) (finding that "maintain[ing] the tract as a whole . . . and keeping it generally attractive . . . is such use as would be made of that land by the owner.").

[146] *See* Gill v. Fletcher, 78 N.E. 433, 435–36 (Ohio 1906) (refusing to allow a co-tenant to adversely possess a one-half mineral interest in gypsum without actual mining of the mineral).

[147] *See id.* at 436.

[148] *See* Plant v. Humphries, 66 S.E. 94, 98 (W. Va. 1909).

[149] *See* Cohen v. Texas Land & Mortgage Co., 137 S.W.2d 806, 813 (Tex. 1940) *rev'd on other grounds by* 159 S.W.2d 859 (Tex. Ct. App. 1942).

Even if there is drilling, however, it still may not be enough to extinguish the record owner's claim. It is not enough to adversely possess a severed mineral estate by drilling a mine, searching for water or oil, and finding neither.[150] Thus, both actual drilling *and* actual production are necessary to take possession from a record owner.[151] There must be an actual, unequivocal possession of the minerals, taken through drilling from beneath the surface.[152]

2. Open and Notorious

Open and notorious possession are two elements designed to place a record owner on notice that a claimant possesses his real property.[153] Although actual possession is capable of providing notice to a record owner by establishing that a claimant has possession or use of the property, the open and notorious elements facilitate that notice by refusing to allow the claimant to hide his activities. "Open and notorious [possession] is often treated as a substitute for the [record] holder's actual knowledge."[154] Despite most Ohio courts construing these as one singular requirement, there are subtle differences between the two.[155]

a. Open

To be open, a claimant's possession must be in a manner that the record owner of the property may be likely to discover it in the ordinary course of events while inspecting his land.[156] The purpose of this requirement is to give an opportunity to a record owner to protect his interest in real property.[157] If possession could be hidden, a record owner would have no ability to know that he must file a claim of ejectment against a claimant to

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[150] *See, e.g.*, Lyles v. Dodge, 228 S.W. 316, 317 (Tex. Civ. App. 1921).

[151] *See, e.g.*, *id.* at 318; Nat. Gas Pipeline Co. v. Pool, 124 S.W.3d 188, 193 (Tex. 2003); Hunt Oil Co. v. Moore, 656 S.W. 634, 641 (Tex. Ct. App. 1983).

[152] *See Pool*, 124 S.W.3d at 193 ("[I]n order to mature title by limitations to a mineral estate, actual possession of the minerals must occur. In the case of oil and gas, that means drilling and production of oil or gas.").

[153] *See supra* note 126 and accompanying text.

[154] Hindall v. Martinez, 591 N.E.2d 308, 310 (Ohio Ct. App. 1990).

[155] *See, e.g.*, Cadwallader v. Scovanner, 178 Ohio App. 3d 26, 2008-Ohio-4166, 896 N.E.2d 748, at ¶ 56 (12th Dist.) ("Though they are two separate elements, the open and notorious elements are related and are interpreted jointly.").

[156] *See* Franklin v. Massillon Homes II, L.L.C., 2009-Ohio-5487, 921 N.E.2d 314, at ¶ 25 (5th Dist.).

[157] *See* Foot v. Bauman, 129 N.E.2d 916, 919 (Mass. 1955).

retain his property rights. Thus, a claimant openly possesses property so long as it is done without concealment.[158]

Although actual possession and open possession are distinct elements, in practice their application is often the same.[159] Both look toward the same distinction of productive use versus mere maintenance.[160] For instance, filling the potholes in a driveway, trimming bushes, and placing gravel on a path are sufficiently open.[161] A record owner would be able to see, after reasonable inspection, his neighbor working on his driveway. Conversely, Ohio courts have agreed that, by themselves, incidental "activities conducted merely to maintain the land, such as mowing, are generally not sufficient to establish [open] adverse possession."[162] Thus, if that same claimant had shoveled snow off that same driveway, that act is insufficiently open and actual.[163]

Where open possession differs from actual possession, however, is where the visible nature of the use is not apparent.[164] A productive use may not be open. For instance, sewer pipes laid just below the surface (more than mere maintenance), may not be deemed open possession because they are hidden from a record owner.[165] Being almost exclusively a below-surface activity, horizontal oil and gas development will inevitably be affected by this rule.[166]

By its very nature, horizontal drilling is invisible from the surface of the land.[167] To illustrate the open requirement in terms of mineral estates, consider oil field service company Halliburton, which drilled a well in 2011 extending laterally over 9,000 feet in the Denver-Julesburg Basin in

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[158] *See, e.g.*, *Franklin*, 2009-Ohio-5487, at ¶ 25; Hardert v. Neumann, 4th Dist. Adams No. 13CA-977, 2014-Ohio-1770, at ¶ 12 ("Possession is open if the use is without concealment.").

[159] *See supra* note 155 and accompanying text.

[160] *See supra* Part IV.C.1.

[161] *See* Roll v. Bacon, 160 Ohio Misc. 2d 23, 2010-Ohio-5540, 938 N.E.2d 85, at ¶¶ 33–34 (C.P.).

[162] Hardert v. Neumann, 4th Dist. Adams No. 13CA-977, 2014-Ohio-1770, at ¶ 14.

[163] *See Bacon*, 2010-Ohio-5540, at ¶¶ 33–34.

[164] *See* Elster v. City of Springfield, 30 N.E. 274, 276 (Ohio 1892).

[165] *See id.* (finding that the use, while "known to the municipality because of the giving of the license, . . . was not apparent, and could not, in its nature, be notorious, as regards the public").

[166] *See* Christy M. Schweikhardt, *Horizontal Perspective: Texas Oil & Gas Law in Light of Horizontal Drilling Technology*, 34 S. TEX. L. REV. 329, 332–333 (1993).

[167] *See id*.

Colorado and Wyoming.[168] Although this was one extreme case, lateral sections extend over 4,000 feet on average.[169] Because land ownership is generally measured in acres rather than square miles, these sections are bound to be under multiple landowners' property at once. With respect to these owners, whether the horizontal well will establish open possession while the invisible bore extends below their property is an issue for the courts.

The Oklahoma Supreme Court has squarely addressed this issue. It held that for a claimant to adversely possess a severed mineral estate, he must place a pad and drill a well on real property and produce from that tract itself.[170] Thus, a claimant "cannot acquire . . . title to minerals drained from *any tract other than that upon which his well is located*."[171] Arkansas has reached this conclusion as well.[172] Production from a unit, but not from a unitized tract claimed by adverse possession, does not constitute adverse possession of such tract.[173]

Ohio, however, has not decided the issue of whether a severed mineral estate may be adversely possessed by drilling a horizontal bore that extends to a neighboring tract of land. In this particular issue, it is difficult to determine where Ohio will land.

One line of reasoning is that because Ohio has already found that sewer pipes, only feet below the surface, are not open,[174] Ohio likely will continue to follow the trend of Oklahoma and Arkansas.[175] The horizontal well bores are solely beneath the surface and do not provide the surface owner with the notice that he must take action. Thus, presumably, the surface owner's claim has not accrued for statute of limitations purposes.[176]

Another argument focuses on the practicality and justification of the doctrine's implementation. It seems bizarre to hold one claimant as adversely possessing a severed mineral estate from one record owner, while holding him liable for trespass to a neighbor, when the conduct is the same

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[168] *A Case Study: Extended-Reach Laterals in the Denver-Julesburg Basin, Halliburton Drilled the Longest Horizontal Well in the DJ Basin in Record Time*, HALLIBURTON (2011), http://www.halliburton.com/public/common/Case_Histories/H08482.pdf.

[169] *Id.*

[170] *See* Atl. Richfield Co. v. Tomlinson, 859 P.2d 1088, 1094 (Okla. 1993).

[171] *Id.* at 1095.

[172] *See* Brizzolara v. Powell, 218 S.W.2d 728, 729 (Ark. 1949).

[173] *See id.*

[174] *See* Elster v. City of Springfield, 30 N.E. 274, 276 (Ohio 1892).

[175] *See Atl. Richfield Co.*, 859 P.2d at 1094; *Brizzolara*, 218 S.W.2d at 729.

[176] *See supra* note 126 and accompanying text.

for both concerning their respective tracts. By allowing the possession to be open toward both, courts will further extend their favor toward the production of oil and gas.[177]

b. Notorious

Openness focuses on whether the use is visible to the true owner; notoriousness looks to the community at large.[178] To be notorious, a use must be known to others who might be expected to communicate their knowledge to the record owner, or be so patent that the record owner could not be deceived as to the property's use.[179] Generally, courts will look to the nature of the act, such as the removal of tree lines, filling holes with top soil, and combining fields, to determine whether this would be a small project that would go unnoticed by passersby.[180] If it is not, the possession will be deemed notorious.

In practice, the distinction between open and notorious has become blurred by Ohio courts such that it is almost non-existent; the two elements have essentially been fused into one.[181] If a claimant can establish the open character of his possession, he may use it as evidence that others would notice the use. Similarly, if a claimant can show that others are actually aware of the use, through testimony or other evidence,[182] it is probative of visibility to the record owner. Thus, in the context of a severed mineral estate, it is sufficient to construct a well pad on the surface of the severed mineral estate that a claimant seeks to adversely possess. [183]

3. Hostile

Hostile possession is the last of those elements designed to place a record owner on notice that a claimant possesses his real property.[184] Although hostility gives a record owner notice of a claim affecting his rights in property, "hostile" does not imply force or threat, as the general word is

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[177] *See supra* Part II.C.4.

[178] *See* Hindall v. Martinez, 591 N.E.2d 308, 310–11 (Ohio Ct. App. 1990).

[179] *See* Franklin v. Massillon Homes II, L.L.C., 2009-Ohio-5487, 921 N.E.2d 314, at ¶ 25 (5th Dist.).

[180] *See, e.g.*, Hardert v. Neumann, 4th Dist. Adams No. 13CA-977, 2014-Ohio-1770, at ¶ 12.

[181] *See supra* note 155 and accompanying text.

[182] *See, e.g.*, Roll v. Bacon, 160 Ohio Misc. 2d 23, 2010-Ohio-5540, 938 N.E.2d 85, at ¶¶ 33–34 (C.P.).

[183] *See supra* Part IV.C.2.a.

[184] *See supra* note 126 and accompanying text.

understood.[185] Rather, hostility requires no interaction at all between a claimant and record owner, but instead looks to the intent of the claimant.[186]

A minority of jurisdictions in the United States require a good faith intention by a claimant to adversely possess real property. For instance, New Mexico statutorily requires a claimant to hold "in good faith under color of title."[187] The courts in New Mexico have held this to mean "freedom from a design to defraud the person having the better title."[188] Thus, to be successful in obtaining title by adverse possession, the claimant must have the intention to claim the property as his own while subjectively believing it is his because of a deed or other writing, even if that writing is void.[189]

Other states such as South Carolina, however, conclude that if a claimant possesses property under a good faith intention, that act does not rise to the level of hostility.[190] Under these minority jurisdictions, a claimant must be in possession as an owner, with the intention to claim the land as his own.[191] Furthermore, he must be aware that he is trespassing with the intention to possess the land even though he knows he does not have title.[192]

A third group of states, which includes Ohio, follows the majority rule: the intent of the claimant is irrelevant.[193] The Supreme Court of Ohio has held that "any use of the land inconsistent with the rights of the [record owner] is adverse or hostile."[194] Essentially, this means a claimant must possess in a non-permissive manner.[195] It does not matter whether a claimant intentionally trespasses in bad faith to claim ownership to land he knows that he does not own, or under a mistake of ownership where he

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[185] Richard Norejko, *Adverse Possession*, FAIR & EQUITABLE, May 2006, at 3, http://www.teamconsulting.cc/images/Norejko_Article_IAAO.pdf.

[186] *See id.*

[187] *See* N.M. STAT. ANN. § 37-1-22 (LexisNexis 2004).

[188] *See, e.g.*, *In re* Estate of Duran, 2003-NMCC-008, ¶ 21, 133 N.M. 553, 66 P.3d 326, 334.

[189] *See id*.

[190] *See* Ouzts v. McKnight, 103 S.E. 561, 562 (S.C. 1920).

[191] *Id.*

[192] *See id.*

[193] *See* Evanich v. Bridge, 119 Ohio St. 3d 260, 2008-Ohio-3820, 893 N.E.2d 481, at ¶ 9.

[194] *See* Franklin v. Massillon Homes II, L.L.C., 2009-Ohio-5487, 921 N.E.2d 314, at ¶ 26 (5th Dist.) (quoting Kimball v. Anderson, 181 N.E. 17 (Ohio 1932).

[195] *See* Coleman v. Penndel Co., 703 N.E.2d 821, 824 (Ohio Ct. App. 1997) (citing Hindall v. Martinez, 591 N.E.2d 308 (Ohio Ct. App. 1990)) ("If the use is either by permission or accommodation for the owner, then it is not adverse.").

believes he owns that which he does not.[196] Instead, the courts will look to the possession alone and determine whether the record owner allowed it.[197]

In certain contexts, possession carries a strong presumption of permissiveness. For instance, a mortgagor is not hostile to the rights of a mortgagee.[198] Similarly, a tenant is not hostile to those rights of a landlord.[199] Where permission becomes relevant in the context of minerals, however, is in the production of those minerals.[200]

Because "[n]o possession can be deemed adverse to a party who has not at the time the right of entry and possession,"[201] an oil company acting under a valid lease may not claim ownership of minerals as a result of adverse possession.[202] Pennsylvania has held that a lease constitutes permission to use the land and, thus, is not hostile.[203] However, some jurisdictions, such as Texas, have held that when a lease terminates and an oil company continues to operate under the presently invalid lease, that act may rise to the level of hostility necessary to establish adverse possession.[204] Ohio has not ruled on this particular issue, but will likely follow the Texas line of cases because of the thoroughness of the law of this traditional oil and gas producing state.

4. Exclusive

Next, adverse possession requires a claimant to prove that he was in the exclusive possession of the property.[205] In order to satisfy this exclusivity element, a claimant's possession need not be exclusive of all individuals.[206] "Rather, it must be exclusive of the [record owner] entering onto the land

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[196] *See Evanich*, 2008-Ohio-3820, at ¶ 9.

[197] *Id.*

[198] *See* Allen v. Everly, 24 Ohio St. 97, 111 (Ohio 1873) ("No principle is better settled than that a mortgagor occupies by the express or implied consent of the mortgagee, and therefore his possession is not adverse.").

[199] *See* Gilbert v. City of Dayton, 59 N.E.2d 954, 957 (Ohio Ct. App. 1944) ("A well recognized, general principle of the law is that a lessee may not question the title of his lessor.").

[200] *See, e.g.*, Nat. Gas Pipeline Co. v. Pool, 124 S.W.3d 188, 195–98 (Tex. 2003).

[201] Stein v. White, 143 N.E. 124, 126 (Ohio 1924).

[202] *See* Lehmann v. Keller, 684 A.2d 618, 620 (Pa. Super. Ct. 1996).

[203] *Id.*

[204] *See Pool*, 124 S.W.3d at 190.

[205] *See, e.g.*, Bauer v. Bush, 193 N.E.2d 529, 531 (Ohio Ct. App. 1962).

[206] *See* Walls v. Billingsley, No. 1-92-100, 1993 WL 135808, at *2 (Ohio Ct. App. Apr. 28, 1993).

and asserting his right to possession."[207] It must also exclude third persons who may enter and claim possession of the property, or who claim the record owner permits them to enter.[208]

However, these exclusions need not be absolute. A claimant must only exclude to the extent the record owner might do so.[209] For instance, allowing a neighbor to come onto the property to prune trees does not negate a claim of exclusivity.[210] Because the neighbor only enters the property for a single act, the image that the claimant is in possession of the property is not destroyed.[211]

Exclusivity for a severed mineral estate raises another issue not yet answered by Ohio courts. Thus, other jurisdictions may similarly supply guidance. Arkansas follows the same rule for a severed mineral estate as Ohio does for surface adverse possession claims: a claimant must actively possess the minerals to the exclusion of the record owner and third parties.[212]

If multiple parties repeatedly dig holes to mine coal to burn, their continued takings are not adverse possession, but a series of trespasses between the lot.[213] Much like a repeated trespasser may not adversely possess surface rights, a repeated trespasser may not adversely possess minerals.[214]

Moreover, in Kansas, when a claimant uses the subsurface rights by merely storing natural gas, his possession is also not exclusive because another may actively produce in other formations.[215] It is not exclusive, furthermore, because the injected gas is stored and occupies the subsurface jointly with the native gas.[216]

Typically, exclusion comes from an exclusive right to produce the minerals,[217] whether by leasing the entire working interest[218] or being the

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[207] *Id.*

[208] *Id.*

[209] *See id.*

[210] *See* Nelson v. Vandemarr, 573 P.2d 1232, 1237 (Or. 1978).

[211] *Id.*

[212] *See* Hurst v. Rice, 643 S.W.2d 563, 565 (Ark. 1982).

[213] *See id.*

[214] *See id.*

[215] *See* Union Gas Sys., Inc. v. Carnahan, 774 P.2d 962, 967 (Kan. 1989).

[216] *Id.*

[217] *See* Nat. Gas Pipeline Co. v. Pool, 124 S.W.3d 188, 194 (Tex. 2003). *See also* Thomas v. Rex A. Wilcox Trust, 463 N.W.2d 190, 192 (Mich. Ct. App. 1990).

[218] *See* Hoffman v. Arcelormittal Pristine Res., Inc., No. 11CV-0322, 2011 WL 1791709, at *6–7 (W.D. Pa. May 10, 2011) (finding adverse possession where three executed leases

sole oil producer extracting the minerals after a lease has expired, as explained above.[219] Thus, based on the limited case law interpreting this issue, it seems that a claimant will be in the exclusive possession of a severed mineral estate if he is the sole claimant with the ability to satisfy the element of actual.

5. Continuous

The final element for a successful adverse possession claim is that the possession must be continuous. Generally, this means continuous occupation of the property by a claimant for twenty-one years.[220] However, in practice, the law does not have such a bright line application.[221]

Often a claimant will be out of physical occupation of the property for short periods of time, such as for vacation. A claimant may also hold possession of the property for nearly the statutory period and then sell it to another. The law has evolved to accommodate these types of situations through the doctrines of temporary interruptions and tacking.[222] Without these exceptions, a claimant would be unsuccessful in establishing adverse possession in either situation because the chain of occupation is broken, even if momentarily.[223]

a. Temporary Interruption

Although the possession must be continuous for the adverse period, it need not be wholly uninterrupted.[224] There may be breaks in possession, "with daily or weekly use generally not being required as long as the use is continuous enough to indicate prolonged and substantial use."[225] So long as the break is not of unreasonable duration, courts will uphold the use.[226]

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failed, not because there was no exclusivity, but because there was no production, or actual possession). *See also Thomas*, 463 N.W.2d at 192.

[219] *See supra* Part III.B.3.

[220] *See* Fulton v. Rapp, 98 N.E.2d 430, 431 (Ohio Ct. App. 1950).

[221] *See, e.g.*, Bullion v. Gahm, 164 Ohio App. 3d 344, 2005-Ohio-5966, 842 N.E.2d 540, at ¶ 20 (4th Dist.).

[222] *Cf. id.*; Davock v. Nealon, 32 A. 675, 675–76 (N.J. 1895).

[223] *See generally Bullion*, 842 N.E.2d (discussing at length the applicability of the tacking exception).

[224] *See, e.g.*, *id.* at 545.

[225] *Id.*

[226] *See id.*

For instance, Ohio courts have found that in certain circumstances, a four-month break is not enough to interrupt a claim of continuous use.[227] In this particular case, a land purchaser had his future wife reside on his newly-purchased land where she cleaned the residence but failed to use the pasture, which the purchaser claimed by adverse possession.[228] The court, however, upheld the continuous possession because the claimant began to work the field after the four-month break, which was "continuous enough to indicate prolonged and substantial use."[229]

This temporary interruption exception has been extended as far as seasonal work.[230] One Ohio claimant successfully argued that his possession was continuous when he used the land by planting a garden in late spring, cultivated it throughout the summer, and harvested it in the early fall.[231] Even though the garden laid dormant for the remaining time, this seasonal practice continued for forty years and was enough to be considered a substantial and prolonged use.[232]

Courts in other jurisdictions have used the temporary interruption doctrine when a claimant seeks to adversely possess a severed mineral estate. For instance, Alabama has held that "possession is continuous if the operations are continuous, or are carried on continuously at such seasons as the nature of the business and the customs of the country permit or require."[233]

Producers sometimes curtail the marketing of product from wells during the summer months when prices are lower by paying "shut-in royalties,"[234] so as not to exceed the annual allowable limits.[235] Therefore, in these situations, a claimant will have a cognizable argument consistent with both

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[227] *See id.*

[228] *Id.*

[229] *Id.*

[230] *See* Pottmeyer v. Douglas, 4th Dist. Washington No. 10CA7, 2010-Ohio-5293, at ¶ 38.

[231] *See id.*

[232] *Id.* ¶ 39.

[233] Pollard v. Simpson, 199 So. 560, 562 (Ala. 1940).

[234] Kevin C. Abbott & John T. Boyd, II, *Money for Nothing—Shut-In Royalty Clauses in Oil and Gas Leases*, 16 E. MIN. L. INST. Ch. 15 § 15.01 (1997) ("The primary purpose of the shut-in clause is to permit the lessee to hold onto its lease despite the fact that the well is not producing in paying quantities."). For data showing the trends in oil and gas price changes per month, see U.S. ENERGY INFO. ADMIN., U.S. NAT. GAS POWER ELECTRIC PRICE, http://www.eia.gov/dnav/ng/hist/n3045us3m.htm (last visited Feb. 24, 2016).

[235] *See, e.g.*, Pack v. Santa Fe Minerals, 869 P.2d 323, 325 (Okla. 1994).

Ohio surface law, and that of other states, for continuous possession even though there has been a temporary interruption of production.

b. Tacking

The element of continuous possession has also been relaxed with the creation of the tacking exception.[236] Tacking arises in certain instances in which a claimant may add the duration of his possession of real property with that of another claimant prior to him.[237] Tacking allows possession to be added together where one claimant is in privity with the claimant before him.[238]

Privity may be established in two ways: by blood (through inheritance) or by contract.[239] Inheritance is often the simpler of the two. When one claimant dies and his interest passes to another, the possessory periods of each claimant may be added together.[240] Privity by contract, on the other hand, usually arises where a claimant holds possession by way of conveyances that purport to give him title.[241] Furthermore, in Ohio, privity by contract may also arise if a claimant occupies the land of a record owner, and while in possession leases the land to a third person who continues to occupy it under his lease.[242] Here, the adverse possession of the tenant may be added to the period of the claimant.[243]

This concept has footing in the context of a severed mineral estate. It logically follows that, if a claimant leases a severed mineral estate to an oil producer, the possessory period of that company may be added to the claimant's possession. This is also consistent with the doctrine's application in other respects.[244] Because a lessee's use of the severed mineral estate is

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[236] *See* Zipf v. Dalgarn, 151 N.E. 174, 176 (Ohio 1926).

[237] *See, e.g.*, *id.* *Black's Law Dictionary* defines "tacking" as "the adding of one's own period of land possession to that of a prior possessor to establish continuous adverse possession for the statutory period." *Tacking*, BLACK'S LAW DICTIONARY 1681 (10th ed. 2014).

[238] *See Zipf*, 151 N.E. at 176.

[239] *Id.* at 175.

[240] *See, e.g.*, McNeely v. Langan, 22 Ohio St. 32, 37 (Ohio 1871) ("[I]t is admitted that the possession will descend to the heir without interrupting the running of the statute . . . ."); Bullion v. Gahm, 164 Ohio App. 3d 344, 2005-Ohio-5966, 842 N.E.2d 540, at ¶ 20 (4th Dist.).

[241] *See Zipf*, 151 N.E. at 175–76.

[242] *See, e.g.*, Powers v. Malavazos, 158 N.E. 654, 654 (Ohio Ct. App. 1927).

[243] *See id.*

[244] *See supra* Part III.B.1.

deemed to be the use of the lessor for determining who is claimant,[245] it logically follows that the lessee's period of use may be added to the lessor's.

V. THE RESULT OF SUCCESS IN ADVERSE POSSESSION OF MINERAL ESTATES IN OHIO

The final concern with adverse possession of a severed mineral estate is determining what is subject to a transfer of title. Oil and gas development does not extend to all geologic formations.[246] A claimant may only extract oil and gas from one pool or one shale strata at any given moment.[247] Alternatively, a well may only cover a portion of a single tract of land.[248] In these situations, it becomes necessary to determine whether a claimant acquires title to all the underlying minerals, or only those actively produced. Thus, with respect to a severed mineral estate, three issues arise: (1) whether mining of oil and gas is adverse as to all minerals;[249] (2) whether a well producing oil and gas from a portion of a tract of land is adverse to the entire tract;[250] and (3) whether an oil and gas lease may affect what is adversely possessed.[251]

Ohio adverse possession law for surface estates provides a proper analogue: color of title.[252] Color of title is created by a document that appears to pass title, but fails to do so either because the individual conveying title does not in fact have the title to convey, or because of a defect in the mode of conveyance.[253] Although color of title provides a basis under which a potential transfer of title may be viewed, because of the uniqueness of the issues proposed, any conclusions related to severed mineral estates will necessarily be speculative.

Ohio courts—and virtually all other jurisdictions in the United States—hold that where a claimant adversely possesses land *without* color of title, he

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[245] *See id.*

[246] *See Pugh Clause*, MIN. WEB, http://www.mineralweb.com/owners-guide/lease-proposals/pugh-clause (last visited Feb. 24, 2016).

[247] *See id.*

[248] *See, e.g.*, Diederich v. Ware, 288 S.W.2d 643, 644 (Ky. Ct. App. 1956).

[249] *Id.* at 247.

[250] *Id.* at 246–47.

[251] *Id.* at 247.

[252] Black's Law Dictionary defines "color of title" as a "written instrument or other evidence that appears to establish title but does not in fact do so." *Color of Title*, BLACK'S LAW DICTIONARY 322 (10th ed. 2014).

[253] Montieth v. Twin Falls United Methodist Church, Inc., 428 N.E.2d 870, 872–73 (Ohio Ct. App. 1980).

may only take so much as he has actually occupied and improved.[254] To take an entire parcel of real property, therefore, the claimant must possess and improve the whole plot.[255] If a claimant *has* color of title, however, he may obtain title to the whole tract even if he uses only a small portion.[256]

1. Whether Mining of Oil and Gas is Adverse as to All Minerals

A 1918 federal case arising in Kentucky viewed the issue of whether adverse possession of oil was adverse to coal underlying the same tract of land.[257] Here, the court held that even though one claimant had color of title to all minerals, his production of the oil was insufficient to acquire the coal because of the stark differences in the methods of their production.[258]

One commenter, however, believes it "would appear sounder policy to declare that dominion over one mineral is dominion over all, unless the [color of title] clearly relates only to the one mineral mined."[259] Because there has been no indication otherwise, Ohio may also see this as better policy considering those justifications for the expansion of the adverse possession doctrine[260] and prior color of title precedent.

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[254] *See id.*; Oeltjen v. Akron Associated Inv. Co., 153 N.E.2d 715, 717 (Ohio Ct. App. 1958).

[255] *See id.* at 717.

[256] This has been denoted "constructive" adverse possession. *Id.*

[257] Kentucky Block Cannel Coal Co. v. Sewell, 249 F. 840, 848 (6th Cir. 1918).

[258] *Id.*

> Were the respective minerals held by different owners, the title of the oil and gas owner thereto surely would not be cut off by an adverse possession of the coal interests; and it can, to our minds, make no difference in principle that the rights to the various minerals are held by one person and under one title, for an assertion of a claimed right to mine coal by no means necessarily carried with it an assertion of right to bore for oil and gas, especially in view of the radically different means employed in mining coal and in boring for oil and gas.

Id.

[259] 1–2 PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW § 224.4, at 25 (LexisNexis 2015) (discussing "[w]hether mining of one mineral is adverse as to all minerals") [hereinafter MARTIN & KRAMER].

[260] *See supra* Part II.C.4. Because the claimant has been actively producing one mineral, it seems beneficial to allow the claimant to acquire title in all minerals which may be productively mined in order to facilitate production.

2. Whether a Well Producing Oil and Gas from a Portion of a Tract of Land Is Adverse to the Entire Tract

In 1956, another Kentucky claim arose in which an appellate court reviewed a suit stemming from the production of minerals by two wells placed in the corner of a fifty-six-acre tract of land.[261] There, the surface owner leased the acreage based on a deed purporting to grant him title that mistakenly failed to mention an oil and gas sale in 1859.[262] After considering decisions from other jurisdictions on the issue, the majority held—over a sharp dissent—that this deed was enough to grant the claimant color of title to all the oil underlying his land and not only that into which he drilled.[263] The court placed strong emphasis on the invalid deed because of its decisions on principles of "constructive" adverse possession.[264] To date, Ohio has also placed a strong emphasis on its color of title jurisprudence.[265] Thus, it seems likely that Ohio will also follow decisions of this type should it ever face a similar case.

3. Whether an Oil and Gas Lease May Affect What Is Adversely Possessed

As shown above, generally a lessor will be deemed a claimant for adverse possession purposes.[266] When the roles are switched,[267] however, it becomes relevant whether the no-longer-valid lease under which the oil producer is acting becomes color of title to all minerals.[268]

Many mineral leases restrict the depth to which an oil producer may drill.[269] A lease may limit drilling to only the Utica Shale or otherwise.[270] But when a lease is silent, an oil producer has the right to drill down to the center of the earth.[271] This may seem to purport color of title. Yet Texas (a state which implies that a lessee may become a claimant),[272] has held that a

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[261] *See* Diederich v. Ware, 288 S.W.2d 643, 644 (Ky. Ct. App. 1956).

[262] *Id.* at 645.

[263] *Id.* at 648.

[264] *See* MARTIN & KRAMER, *supra* note 259, at 23.

[265] *See supra* Part V.

[266] *See supra* Part III.B.1.

[267] *See supra* Part III.B.3.

[268] *See supra* Part III.B.3.

[269] *See Pugh Clause*, *supra* note 246.

[270] *See id.*

[271] *See id.*

[272] *See supra* text accompanying note 97.

lease may not convey color of title.[273] Thus, any lessee as claimant may only adversely possess the oil and gas that they have actually taken from the ground.[274]

Because Ohio has also held that a lease is a permissive use of the land by a lessee under a lessor,[275] Ohio should also limit an oil company's adverse possession to those minerals in which it has already taken from the ground. By generally being a permissive use, at best an invalid lease could be construed as purporting a right to use the underlying minerals, and not ownership thereto.

VI. CONCLUSION

Because of Ohio's strong return to its roots in oil and gas development, the state will continue to progress toward refining its oil and gas jurisprudence.[276] With no end in sight to Ohio's shale boom,[277] courts will continue to review historic doctrines in light of their intended justifications.[278]

As it currently stands, one of those doctrines, adverse possession, continues to apply in full force. Specifically, adverse possession of severed mineral estates, recognized by *Gill*,[279] will continue to be a colorable claim under existing Ohio law.[280]

Provided that a claimant is able to successfully show actual drilling of a well, actual production from that well, and that he maintained possession for twenty-one years, he may be able to acquire title to the oil and gas produced, despite no lease or deed evidencing the conveyance.[281]

Nonetheless, because Ohio has yet to strongly recognize these types of suits, one area that may be heavily litigated in the future will remain what is subject to a transfer of title if adverse possession is successful.[282] However, this issue is not unique to Ohio.[283] Despite existing law from other oil and gas producing states regarding requirements for adverse possession of a

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[273] *See* White v. Rosser, 27 S.W. 1062, 1063 (Tex. Civ. App. 1894).

[274] *Id.*

[275] *See supra* Part III.B.1.

[276] *See supra* Part I.

[277] *See* Shingler, *supra* note 6.

[278] *See supra* Part II.C.

[279] Gill v. Fletcher, 78 N.E. 433, 435 (Ohio 1906).

[280] *See supra* Part III.A.

[281] *See supra* Part IV.

[282] *See supra* Part V.

[283] *See supra* Part V.

severed mineral estate, there has been little case law concerning the outcome thereof in any state.[284] With general adverse possession of surface estates providing a clear analogue through color of title, Ohio will likely be up for the challenge, even if it is contrary to those few cases.[285]

[284] *See generally* MARTIN & KRAMER, *supra* note 259, at § 224.

[285] *See supra* Part V.1.