PROTECTING THE "DOMINANT" INTEREST: THE APPLICATION OF LAPSE STATUTES IN MINERAL RIGHTS DISPUTES

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I. INTRODUCTION

The oil and gas industry has a widespread economic impact on the United States ("U.S.") economy.[1] The birth of this heavily regulated sector occurred in 1859 near Titusville, Pennsylvania, with the nation's "first commercially successful oil well."[2] Since the establishment of that first well, crude oil has become arguably the most used and essential commodity used by Americans to "fuel vehicles, heat homes, and power businesses."[3] Crude oil's surging importance led

1. AM. PETROL. INST., IMPACTS OF THE OIL AND NATURAL GAS INDUSTRY ON THE US ECONOMY IN 2021, at ES-2 (Apr. 2023), https://www.api.org/-/media/files/policy/american-energy/pwc/2023/api-pwc-economic-impact-report-2023.

2. Ross H. Pifer, *Drake Meets Marcellus: A Review of Pennsylvania Case Law Upon the Sesquicentennial of the U.S. Oil and Gas Industry*, 6 TEX. J. OIL GAS & ENERGY L. 47, 48 (2010-11).

3. Alyssa W. Kovach, *Fracking Wars: Severance Tax, the Solution that Makes Sense*, 32 TEMP. J. SCI. TECH. & ENV'T L. 317 (2013); *see Oil Industry*, HIST., https://www.history.com/topics/industrial-revolution/oil-

to safety and antitrust concerns, and as a result, the passage of a host of federal and state regulations aimed at protecting consumers and the economy.[4] While the U.S. traditionally relied heavily on imports to meet these needs, technological advances, such as fracking, have caused the U.S. to surpass Saudi Arabia and Russia, becoming the world's leader in oil and gas production.[5]

The production of crude oil and natural gas has historically been left to the states.[6] Consequently, many state legislatures have enacted laws to conserve production and ensure efficient operations.[7] However, these regulations have resulted in various disputes, as demonstrated in the recent *P.D. Miller Farms* case in 2023.[8] This case centers around Georgia's mineral lapse statute that authorizes owners of surface property rights to strip title from corresponding mineral rights owners in severed estates.[9] Although the District Court granted the mineral owner's motion for summary judgment, the Eleventh Circuit found issues of material fact and reversed this decision.[10] While the appellate court reversed on procedural grounds, the substance of *P.D. Miller Farms* raises an important issue regarding property interests in surface versus mineral rights and highlights that state legislatures could alter their lapse statutes to safeguard severed estates from future disputes over mineral rights.[11]

This case note will include a discussion of the interests in real property and the various rights accompanying them as they relate to *P.D. Miller Farms, LLC v. BASF Catalysts, LLC*.[12] Moreover, it will break down the various ways to acquire these interests, such as through severance, adverse possession, and lapse statutes.[13] Specifically, this case note will analyze the Georgia mineral lapse statute at issue

industry (last updated Mar. 27, 2023) ("Increasing sales of gasoline first for automobiles and then for airplanes in the early 1900s came as oil discoveries across the U.S. mounted.").

4. *See* Ronan Graham & Ilias Atigui, *A strong focus on oil security will be critical throughout the clean energy transition*, INT'L ENERGY AGENCY (Mar. 11, 2024), https://www.iea.org/commentaries/a-strong-focus-on-oil-security-will-be-critical-throughout-the-clean-energy-transition ("Much has changed in the global energy landscape since the IEA was founded 50 years ago, but the security of oil supply remains a pressing concern for governments across the globe. An enduring focus on oil security is a consequence of the continued need for oil to fuel cars, trucks, ships and aircraft, as well as to produce the petrochemicals necessary to manufacture countless everyday items").

5. Tara K. Righetti et al., *The New Oil & Gas Governance*, 130 YALE L.J. FORUM 51 (2020); *see* Jeffry Bartash, *Fracking revolution that's made the U.S. the top global oil producer is boosting the economy — and keeping emissions down*, MKT. WATCH (Mar. 22, 2019), https://www.marketwatch.com/story/fracking-revolution-thats-made-the-us-the-top-global-oil-producer-is-boosting-the-economy-and-curbing-emissions-too-2019-03-22/ ("The most influential example is the rise of fracking — extracting oil and natural gas from rock formations under the continental U.S. that had long been considered inaccessible").

6. Righetti, *supra* note 5, at 76.

7. *Id.* at 52-54.

8. P.D. Miller Farms, LLC v. BASF Catalysts, LLC, No. 22-11375, 2023 WL 106828 (11th Cir. Jan. 5, 2023).

9. *Id.* at *7.

10. *Id.* at *11.

11. *See infra* pp. 11-12.

12. *See generally P.D. Miller Farms*, 2023 WL 106828; *see also* discussion *infra* Section II.A.

13. *See* discussion *infra* Section II.A.

in this case and explore ways to reduce potential disputes stemming from its rigid enforcement.[14]

II. BACKGROUND

A. The History of Severance of Rights to Oil and Gas

In general, landowners can have one of six possessory estates: fee simple absolute, fee simple determinable, fee simple subject to condition subsequent, life estate, fee tail, and lease.[15] However, in analyzing the issues arising from *P.D. Miller Farms*, this note will focus solely on leases and fee simple absolute estates.[16] A lease is classified as a "non-freehold estate"[17] because a leaseholder does not own the estate outright but rather obtains rights to use the estate for a defined period in exchange for consideration.[18] On the other hand, a fee simple absolute is considered a "freehold estate,"[19] and such landowners are entitled to all rights of ownership with the "unlimited power of disposition in perpetuity without condition or limitation."[20] Among these "bundle of rights" are the right to enter, use, exclude others, derive income, alienate, and transfer or destroy property rights.[21] Further, fee simple owners can sever the rights of ownership underneath their land, allowing them "to create various types of mineral interests in other persons."[22] Traditionally, this severance is done through the use of mineral leases.

A mineral lease is a contract that gives a mineral lessee the "right to explore for and produce" oil, gas, or any other mineral provided in the agreement.[23] Before severance, the minerals below are considered a part of the surface estate.[24] However, after severance, the surface and mineral estates become separate entities.[25] For example, an owner may choose to convey the property's surface alone while reserving the "remaining minerals" that lie below it, and vice versa.[26] Although it

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14. *See* GA. CODE ANN. § 44-5-168(a) (2024).

15. Chad J. Pomeroy, *A Theoretical Case for Standardized Vesting Documents*, 38 OHIO N. U. L. REV. 957, 976 (2012).

16. *Id.*

17. *See* Luke Meier, *Drafting a Texas Oil and Gas Lease to Ensure Enforceability of a Consent-to-assign Clause: How to Make an Oil and Gas 'Lease' a Lease*, 51 TEX. TECH L. REV. 169, 179 (2019).

18. *Lease*, BLACK'S LAW DICTIONARY (12th ed. 2024).

19. Meier, *supra* note 17, at 178.

20. Hoke v. O'Bryen, 281 S.W.3d 457, 460 (Tex. App. 2007) (citing Walker v. Foss, 930 S.W.2d 701, 706 (Tex. App. 1996).

21. Kamaile A.N. Turčan, *U.S. Prop. Law: A Revised View*, 45 WM. & MARY ENV'T. L. & POL'Y REV. 319, 323-24 (2021).

22. 1A NANCY SAINT-PAUL, SUMMERS OIL AND GAS § 8:1 (3d ed.), Westlaw (database updated Oct. 2024).

23. 17 RICHARD A. LORD, WILLISTON ON CONTRACTS § 50:57 (4th ed.), Westlaw (database updated May 2024).

24. W. R. Habeeb, Annotation, *Acquisition of title to mines or minerals by adverse possession*, 35 A.L.R. Fed. 2d 124 § 1 (1954).

25. Faith United Methodist Church & Cemetery of Terra Alta v. Morgan, 745 S.E.2d 461, 468 (W. Va. 2013).

26. *Id.* (citing Carlos B. Masterson, *Adverse Possession and the Severed Mineral Estate*, 25 TEX. L. REV. 139, 141 (1946)).

depends on the expressed intent of the conveyance, mineral estates are often limited to the hydrocarbons below the surface.[27] Courts have held that a general conveyance or reservation does not include minerals that can only be extracted by "destroying the surface of the land," such as sand, gravel, and limestone.[28]

The severance of these estates often leads to disputes over who is entitled to the mineral rights. The general rule is that the mineral owner holds the dominant interest, while the surface owner has the servient estate.[29] For example, if a landowner leases the property's mineral rights, the mineral lessee is permitted to use as much of the surface "as is reasonably necessary to produce and remove the minerals."[30] In other words, the lessee's interest is dominant because they may enter and "use any part of the surface of the leasehold necessary to conduct his operations."[31] Conversely, the lessor's surface estate is servient because they are prohibited from interfering with these rights.[32] Consequently, in addition to the right to enter the premises for drilling purposes, mineral owners have the "right to execute oil and gas and mineral leases," as well as to receive "bonuses, rentals, and royalties."[33]

B. Adverse Possession and Georgia's Mineral Lapse Statute

1. Introduction to Adverse Possession

As an alternative to acquiring property through deeds and other conveyances, property can be obtained through adverse possession.[34] The concept of adverse possession dates back to England in 1275.[35] This ancient doctrine arises when someone in possession of another's property acquires valid title by meeting the applicable common law, statutory, and duration requirements.[36] Traditionally, common law requires that the possession must be hostile, exclusive, open and notorious, and under claim of title or right.[37] In addition, each of these elements must be both simultaneous and continuous for the entirety of the statutory period's

27. JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 26 (West ed., 7th ed. 2018).

28. Payne v. Hoover, Inc., 486 So.2d 426, 428 (Ala. 1986); *but see id.* (quoting Heinatz v. Allen, 217 S.W.2d 994, 997 (Tex. 1949)) ("[S]ubstances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value, as for example sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement.").

29. Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971).

30. *Id.*

31. Douglas H. Gross, Annotation, *What constitutes reasonably necessary use of the surface of the leasehold by a mineral owner, lessee, or driller under an oil and gas lease or drilling contract*, 53 A.L.R. Fed. 3d 16 § 3(b) (1973).

32. *Id.*

33. Clayton Williams Energy, Inc. v. BMT O & G TX, L.P., 473 S.W.3d 341, 353 (Tex. App. 2015) (citing Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co., 223 S.W.3d 1, 14 (Tex. App. 2005)).

34. *See* Stevie Swanson, *Sitting on Your Rights*, 12 FLA. COASTAL L. REV. 305, 309 (2011).

35. *Id.* at 308.

36. 142 AM. JUR. 3D *Proof of Facts* 349, § 1 (database updated Nov. 2024) [hereinafter *Acquisition of Title to Property*].

37. *Id.*

duration.[38] However, these requirements vary by jurisdiction. For example, while Georgia and Oklahoma share the same five elements, they differ in the required length of the continuous statutory period.[39]

Regarding the first requirement, "hostile" possession merely means that the adverse possessor does not have "permission to be on the land."[40] Second, "exclusive" possession requires that the adverse possessor is the sole occupier of the land.[41] At a minimum, this exclusiveness requirement "only precludes shared possession with the record owner."[42] Next, "open and notorious" simply means that the possession of the land is evident to others.[43] To meet this standard, an adverse possessor can merely use the land the way the true owner would use land.[44] Lastly, for the possession to be under claim of title, the adverse possessor must have the intent to assert and claim ownership over the property.[45]

2. The Adverse Possession of Mineral Rights

As mentioned above, jurisdictions vary regarding what can be adversely possessed. This jurisdictional variation is especially apparent as it pertains to mineral rights. Some states maintain that simply failing to "use" the minerals or an adverse possessor's mere "possession" of the surface interest does not automatically terminate its severance from the surface estate.[46] In Texas, for instance, an adverse possessor must take steps beyond possession and use of the surface to acquire title to a severed estate.[47] Texas requires the adverse possessor to take control over the minerals in a way that notifies the true owner, such as by "actual drilling," "continuous drilling," or "taking of the oil and gas."[48] In other words, the adverse possessor must take "actual possession of the minerals below the surface by drilling" and continue to produce "them for the statutory-described period."[49] Thus, such control of the minerals must be actual and visible rather than occasional or temporary.[50]

Conversely, the law in other states holds that nonuse of the mineral interest for a certain period of time will cause the mineral owner's interest to "lapse" and

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38. *Id.* § 3.

39. *Compare* GA. CODE ANN. § 44-5-163 (2024) (Georgia requires possession of real property "for a period of 20 years" when no written evidence of title is involved), *with* OKLA. STAT. tit. 12, § 93(4) (2024) (Oklahoma requires an individual to occupy the real property for at least "fifteen (15) years").

40. *Acquisition of Title to Property*, *supra* note 36, § 10.

41. *Id.* § 9.

42. *Id.*

43. *Id*. § 12.

44. *Acquisition of Title to Property*, *supra* note 36, § 12.

45. *Id.* § 13.

46. 58 C.J.S. *Mines and Minerals* § 241, Westlaw (database updated May 2024) [hereinafter *Effect of nonuse of mineral rights*].

47. PRACTICAL LAW OIL & GAS, ADVERSE POSSESSION OF THE MINERAL ESTATE IN TEXAS, West Practical Law, W-026-6184 (last visited Nov. 8, 2024).

48. *Id.*

49. Verde Mins., LLC v. Burlington Res. Oil & Gas Co. et al., 360 F.Supp.3d 600, 621 (Tex. D. Ct. 2019) (quoting Sarandos v. Blanton, 25 S.W.3d 811, 815 (Tex. App. 2000).

50. *Id.* at 622.

revert to the surface owner.[51] Instead of relying on a typical adverse possession prerequisite of taking sufficient control of the minerals, these lapse statutes merely require a showing that the actions or inactions of a fee simple owner bar their right to ownership.[52] Consequently, these statutes make it less burdensome for the adverse possessor to take ownership interest in mineral rights.[53] While some state statutes require the surface owner to give notice of the lapse to the mineral interest owner, giving them the option to preserve their "interest by filing a statement of claim," other states, such as Georgia, do not.[54] In Georgia, surface owners are merely required to show they have a "deed to the property in issue, that the mineral rights have been severed," and that the requirements of Georgia's mineral lapse statute have been met.[55] Under this statute, the adverse possessor must show that the mineral rights owner "neither worked nor attempted to work the mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance."[56] This working requirement is satisfied when the possessor initiates an "operation to explore for, use, produce, or extract minerals in the land."[57]

C. Procedural Aspects of Adverse Possession

1. Jurisdiction

The first issue a Georgia court must address when reviewing a claim of adverse possession is whether it has jurisdiction to hear the claim.[58] There are three types of jurisdiction that a court must consider: personal jurisdiction, subject-matter jurisdiction, and venue.[59] Personal jurisdiction requires the court to have power over the defendant.[60] In other words, personal jurisdiction circumscribes a court's "authority to bind the litigants to the judgment it renders."[61] Thus, the personal jurisdictional authority of Georgia courts extends "to all persons while within its limits."[62] Generally, it requires a showing of sufficient "minimum contact" between the defendant and the court.[63] Specifically, this requirement is met when the defendant's contacts "with the State are so continuous and systematic as to render them essentially at home in the forum."[64]

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51. *Effect of nonuse of mineral rights*, *supra* note 46, § 241.
52. Mixon v. One Newco, Inc., 863 F.2d 846, 848 (11th Cir. 1989).
53. *Id.*
54. *Effect of nonuse of mineral rights*, *supra* note 46, § 241.
55. *Mixon*, 863 F.2d at 848.
56. § 44-5-168(a).
57. Fisch v. Randall Mill Corp., 426 S.E.2d 883, 885 (1993)
58. Susan Gilles & Angela Upchurch, *Finding a "Home" for Unincorporated Entities Post-Daimler Ag v. Bauman*, 20 NEV. L. J. 693, 695 (2020).
59. *Id.*
60. *Id.* at 697.
61. *Id.*
62. GA. CODE ANN. § 50-2-21(a) (2024).
63. Gilles & Upchurch, *supra* note 59, at 697-98.
64. *Id*. at 698 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

Subject-matter jurisdiction requires the court to have the "power to hear the specific kind of claim."[65] Traditionally, state courts are governed by general jurisdiction, meaning that they can hear all cases that are not required to be heard in federal courts.[66] For example, Superior Courts in Georgia are courts of general jurisdiction, giving them "authority to exercise original, exclusive, or concurrent jurisdiction over all causes both civil and criminal, granted to them by the Constitution and laws."[67] Conversely, federal courts have limited subject-matter jurisdiction.[68] Although there are two ways to establish subject-matter jurisdiction in federal courts, this analysis is limited to the one relevant to this article: diversity jurisdiction.[69] Diversity jurisdiction allows a case to be heard in federal court if action is "between diverse citizens when the amount in controversy exceeds $75,000."[70] In other words, the parties to the case must reside in different states, and the dispute must involve an amount exceeding $75,000.[71]

Lastly, Georgia's third jurisdictional requirement is whether the chosen forum is the proper venue for the case.[72] Georgia's Constitution provides that cases of equity must "be tried in the county where a defendant resides against whom substantial relief is sought."[73] This requirement is a low burden that merely requires all defendants to be residents of the same state, with at least one being a resident of the judicial district where the case is brought.[74] Accordingly, if the parties to the case and the chosen forum meet these requirements, the court has the authority to hear the case.

2. Declaratory Judgment Actions

Declaratory judgments are an extremely common tool litigants use in the initial stages of a case to seek out a court's direction.[75] This section will introduce the three relevant declaratory actions discussed in this note: complaint for declaratory judgment, answer and counterclaim for declaratory judgment, and summary judgment in declaratory judgment actions.

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65. *Id.*

66. *Id.* at 696.

67. Schuehler v. Pait, 238 S.E.2d 65, 67 (Ga. 1977).

68. *See* JOANNA R. LAMPE, CONG. RSCH. SERV., WHERE A SUIT CAN PROCEED: COURT SELECTION AND FORUM SHOPPING 2, https://crsreports.congress.gov/product/pdf/LSB/LSB10856 (last updated Mar. 21, 2024) ("Federal courts can generally hear cases only if authorized to do so by the Constitution and a federal statute.").

69. Gilles & Upchurch, *supra* note 59, at 696 (citing 28 U.S.C. § 1332(a) (2018)).

70. *Id.*

71. *Id.*

72. *Id.*

73. G.C. CONST. art. VI, § 2, para. 3.

74. Gilles & Upchurch, *supra* note 59, at 697*; but see* 28 U.S.C. 1391(b) (2024) (In federal cases, venue is governed by 28 UCS 1391, which provides that "civil actions may be brought in: (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2)a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.").

75. Neal F. Weinrich, *Declaratory Judgment Actions: When are they Appropriate?* (Dec. 2016), https://www.bfvlaw.com/wp-content/uploads/2016/12/Weinrich-Declaratory-Judgment-Actions.pdf.

Generally, courts only grant a complaint for declaratory judgment "when it will terminate the controversy giving rise to the proceeding."[76] In other words, the litigant's complaint must allege facts demonstrating substantive legal issues entitling them to declaratory relief.[77] Specifically, Georgia courts have held that such relief "applies where a legal judgment is sought that would control or direct future action, and it requires the presence in the declaratory action of a party with an interest in the controversy adverse to that of the petitioner."[78]

Subsequently, a defendant may file an answer and counterclaim for declaratory judgment of its own. In response to the complaint, the defendant may deny or admit to the allegations.[79] If the defendant chooses the former, it has the burden of providing an alternative recitation of the disputed facts and any affirmative defenses that may apply.[80] Alternatively, if the defendant chooses to admit to the matters within the complaint, it may file an admission stipulating the alleged facts.[81] However, simply failing to answer would constitute an admission to the allegations.[82]

In addition to the defendant's answer, he may file a counterclaim against the plaintiff. Generally, courts allow a declaratory judgment counterclaim "when it has greater ramifications than the original suit."[83] For example, this action would be appropriate if there were issues beyond what the plaintiff alleged.[84]

Lastly, at any time, either litigant may file a motion for summary judgment. A party is entitled to summary judgment if the movant can show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[85] However, even if the nonmovant fails to present such evidence, the court may nonetheless deny the motion or grant a continuance to allow the nonmovant to obtain additional discovery.[86] Courts exercise this provision "where it would be unjust to grant summary judgment without allowing the opposing party an opportunity to present his opposing evidence."[87]

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76. FED. R. CIV. P. 57 advisory comm. notes (1937).

77. 26 C.J.S. *Declaratory Judgments* § 148, Westlaw (database updated May 2024) [hereinafter *Declaratory Judgments*].

78. Lapolla Indus, Inc. v. Hess, 750 S.E.2d 467, 470 (Ga. Ct. App. 2013).

79. *Declaratory Judgments*, *supra* note 78, § 149.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Declaratory Judgments*, *supra* note 78, § 150.

84. *Id.* § 150.

85. FED. R. CIV. P. 56(a).

86. FED. R. CIV. P. 56(d)(1)–(2).

87. Jean F. Rydstrom, Annotation, *Sufficiency of showing, under Rule 56(f) of Fed. Rules of Civ. Proc., of inability to present by affidavit facts justifying opposition to motion for summary judgment*, 47 A.L.R. Fed. 206 § 2(a) (1980).

III. ANALYSIS

A. Factual Background and Procedural History

1. The Parties and the Issue

P.D. Miller Farms concerns a dispute between a Georgia surface owner and a mineral-rights owner over who possessed the valid title of a land's mineral rights.[88] Initially, W. B. Miller purchased the surface rights to the 600-acre Georgia property in 1943, while the Floridin Company reserved its mineral rights.[89] Today, the surface rights have remained in the Miller Family and are now held by the plaintiff, P.D. Miller Farms, LLC ("Miller").[90] After a series of conveyances, the property's mineral rights are now owned by the defendant, BASF Catalysts, LLC ("BASF").[91]

This dispute arose in November 2020, when BASF entered the property with the intention of exploring its minerals.[92] However, upon entering the property, BASF personnel discovered newly planted pine trees, prompting BASF to meet with Miller's owner.[93] During the meeting, Miller disputed BASF's mineral rights ownership and successfully requested BASF to leave the property.[94]

2. Procedural History

Following this incident, Miller filed a declaratory judgment action in the Superior Court of Decatur County, Georgia, alleging that BASF's rights to the property's minerals had lapsed.[95] Miller argued that it acquired the mineral rights through adverse possession under section 44-5-168(a) of the Georgia Code.[96] Subsequently, BASF successfully removed the case to the "Middle District of Georgia after demonstrating that the district court had diversity jurisdiction over this action as BASF is domiciled in New Jersey."[97] There, BASF answered the complaint and filed its own counterclaim for declaratory judgment on the grounds that: "(1) BASF's mineral rights on the property are valid; and (2) BASF has the right to exercise its mineral rights . . . without the interference of P.D. Miller Farms."[98]

BASF then moved for summary judgment, presenting evidence that it allegedly complied with the lapse statute by working the minerals and paying taxes on them in 2019.[99] Regarding the working requirement, BASF presented affidavits

88. *P.D. Miller Farms*, 2023 WL 106828, at *2.

89. *Id.*

90. *Id.*

91. *Id.*

92. *P.D. Miller Farms*, 2023 WL 106828, at *2.

93. *Id.* at *2-3.

94. *Id.* at *3.

95. *Id.*

96. *P.D. Miller Farms*, 2023 WL 106828, at *3; *see* § 44-5-168(a).

97. *P.D. Miller Farms*, 2023 WL 106828, at *3; *see id.* at *1 n.1 ("[W]e granted BASF's motion to supplement the record to establish that it is a citizen of Delaware and New Jersey. Because P.D. Miller Farms is a citizen of Georgia, we concluded that the parties are diverse.").

98. *Id.*

99. *Id.* at *3-4.

and other supporting documents from its employees.[100] For example, a mining supervisor, Randolph Jenkins, said he planned to have BASF's drilling contractor work on the property.[101] Jenkins also noted that BASF "would have" entered and marked hole locations on the property and speculated that "there appeared to be a large deposit of valuable minerals on the Miller tract."[102] Additionally, BASF relied on an affidavit from a mining engineer, Nathalie LeGare, who alleged that "she contacted the survey company to locate the hole locations" for Logan Drilling USA to drill.[103] In support, she provided "a survey plot identifying the hole locations" and invoices from BASF's drilling company that led her to believe it drilled holes and obtained core samples from the property.[104] Such invoices indicated that BASF had intermittently worked the property from June 21 to July 11, 2019.[105] Moreover, LeGare added that following the alleged hole drilling on July 11, BASF made further plans to explore the Miller property.[106] Lastly, as for the tax payment claim, BASF presented evidence that it paid taxes on the mineral rights nearly "every year since 1998."[107] However, both parties agree that this evidence "did not correspond to the mineral rights on the Miller property" because of a clerical error.[108]

In response to BASF's "working" evidence, Miller provided an affidavit from its owner, stating that neither he nor any of his employees had "seen, observed, heard of, nor seen signs of anyone working, or attempting to work, the mineral rights" despite being on the farm "virtually every day."[109] Additionally, he stated that contrary to BASF's affidavits, "none of my trees, roads, ditches, pasture indicate that equipment and personnel were ever on the property."[110] Concerning the tax payment issue, Miller presented an affidavit from the county's Tax Commissioner, John Mark Harrell.[111] Harrell stated that there is no evidence of BASF "being invoiced for, or paying, any taxes for the mineral interests."[112] In addition, Miller submitted an affidavit of the county's Chief Appraiser, Amy Rathel, who stated that while BASF did pay taxes on the mineral rights of a particular property, such payment was for a "different nearby piece of property owned in fee simple by BASF."[113]

Despite the contradictory evidence presented by each party, the district court "granted BASF's motion for summary judgment."[114] It found that BASF provided

100. *P.D. Miller Farms*, 2023 WL 106828, at *4.
101. *Id.*
102. *Id.*
103. *Id.*
104. *P.D. Miller Farms*, 2023 WL 106828, at *4.
105. *Id.*
106. *Id.* at *5.
107. *Id.*
108. *P.D. Miller Farms*, 2023 WL 106828, at *5.
109. *Id.*
110. *Id.*
111. *Id.* at *6.
112. *P.D. Miller Farms*, 2023 WL 106828, at *6.
113. *Id.*
114. *Id.*

"unrefuted evidence that it worked its mineral rights to a sufficient degree to retain those rights" under the mineral lapse statute.[115] However, the court failed to address the issue of whether BASF "paid taxes on the mineral rights during the statutory period."[116] Nonetheless, the court "granted BASF's motion for summary judgment" as it found "no genuine issue of material fact" remained.[117]

Miller then appealed to the Eleventh Circuit Court of Appeals to dispute the finding that BASF "worked" the mineral rights.[118] On appeal, the court reversed the district court's order, finding that BASF failed to meet its burden to show that "there was no genuine question that it either worked or attempted to work the mineral rights or paid taxes on those mineral rights."[119] It found that although BASF's argument that it drilled four holes on the Miller property would meet the statutory requirement, BASF failed to show that its invoices for work performed "correspond[ed] to holes drilled on the Miller property."[120] Further, the court noted that Miller's affidavits created issues regarding BASF's payment of taxes on the Miller property's mineral rights.[121]

B. The Eleventh Circuit Properly Concluded that the District Court Erred in Granting BASF's Motion for Summary Judgment.

The circuit court correctly found issues of material fact as to BASF's "working" of the minerals and tax payments. Considering how courts have held that merely conducting genealogical research and taking rock samples does not satisfy the working requirement on its own, the Circuit Court reasonably concluded that BASF's inconsistent and contradictory affidavits were unpersuasive.[122] Although much of Miller's opposing evidence relies on personal testimony, it does not create grounds to strike the affidavits because "an affidavit by a person who was directly involved" amounts to "personal knowledge and is sufficient to warrant denial of a summary-judgment motion."[123]

C. GA. CODE ANN. § 44-5-168 Should Incorporate a Notice Requirement

Georgia's mineral lapse statute sets out to promote the "use of the state's mineral resources and the collection of taxes" and deter "holders of mineral rights who neither use nor pay taxes upon them" from sitting on their rights.[124] However, since the law is a lapse statute, it does not "require the surface owner to assert any acts of dominion over the surface estate or the minerals below."[125] Consequently,

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115. *Id.*

116. *P.D. Miller Farms*, 2023 WL 106828, at *7.

117. *Id.* at *6.

118. *Id.* at *8.

119. *Id.* at *11.

120. *P.D. Miller Farms*, 2023 WL 106828, at *9-10.

121. *P.D. Miller Farms*, 2023 WL 106828, at *11.

122. *See, e.g.*, *Fisch*, 426 S.E.2d at 886 ("The owner of a mineral interest must do more than conduct genealogical research and pick up rock samples to meet the statutory requirement of working or attempting to work the mineral rights.").

123. 6B CHRISTINE M. G. DAVIS ET AL., CARMODY-WAIT § 39:128 (2d ed. 2019).

124. *Fisch*, 426 S.E.2d at 885 (citing Hayes v. Howell, 308 S.E.2d 170, 175 (1983)).

125. *Mixon*, 863 F.2d at 848.

mineral owners can unknowingly lose their interests with no recourse.[126] While the U.S. Supreme Court has held that mineral lapse statutes lacking a notice requirement do not violate due process rights,[127] some states have nonetheless mandated this requirement.[128]

For example, Ohio's Dormant Mineral Act ("DMA") requires surface owners to give mineral owners notice and opportunity to preserve their interest before the estate can lapse.[129] After receiving the surface owner's notice of intent to declare the interest abandoned, the mineral owner may exercise its preservation rights by timely filing an affidavit within sixty days of such notice.[130] In its affidavit, the mineral owner must provide a description of its interest with any recording information supporting the claim and a declaration of its intent to retain the rights.[131]

However, suppose the mineral owner fails to file this affidavit in a timely manner. In that case, the surface owner may quiet title in the minerals by showing that it attempted to notify the mineral owner and that the mineral owner did not preserve their interest.[132] DMA requires surface owners to "exercise reasonable diligence to identify" and serve notice by mail to "all holders of the severed mineral interest."[133] If this reasonable attempt does not reveal the mineral owners, "the surface owner may provide notice by publication."[134] In other words, when notice cannot be mailed, publication is sufficient to meet the DMA's notice requirement.[135] Considering the uncertainty associated with the number and ownership of severed mineral interests in any particular estate, this publication exception is needed as "a surface owner can never be certain that he has identified every successor and assignee of every holder who appears in the public record."[136]

Similarly, the Kansas Mineral Lapse Act follows a procedure where these competing interests are equitably balanced by providing that the mineral interest will not lapse "until the surface owner gives notice of the lapse and the mineral interest owner fails to respond" within sixty days.[137] Under this Act, surface owners may file such notice only if the mineral owner failed "to take any affirmative steps to maintain" their interest for over twenty years.[138] The Act requires the "surface owner to make reasonable efforts to identify and contact the owners of

126. *Id.*

127. *See* Texaco, Inc. v. Short, 454 U.S. 516, 536, 540 (1982) (finding that the Dormant Mineral Interest Act did not violate the Fourteenth Amendment because the "Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run" where the Act "furthers a legitimate statutory purpose" of encouraging multiple ownership and use of mineral interests).

128. *See, e.g.*, OHIO REV. CODE ANN. § 5301.56(C) (West 2014); KAN. STAT. ANN. § 55-1604(b) (West 2024).

129. Gerrity v. Chervenak, 166 N.E.3d 1230, 1234 (Ohio 2020).

130. *Id.*

131. § 5301.56(C)(a), (c).

132. *Gerrity*, 166 N.E.3d at 1234.

133. *Id.*

134. *Id.* at 1242.

135. *Id.* at 1236.

136. *Gerrity*, 166 N.E.3d at 1236.

137. Scully v. Overall, 840 P.2d 1211, 1214 (Kan. Ct. App. 1992) (quoting David E. Pierce, *July 1 is Deadline for Filing Claims to Preserve "Unused Mineral Interests*," 25 CIRCUIT RIDER 6 (1986)).

138. *Id.* at 1211.

the lapsed interest."[139] As an alternative to providing proof of "actual knowledge that the mineral interest had lapsed," notice by publication will also suffice under the Act.[140]

Georgia *should* implement a similar notice requirement to avoid ownership uncertainty and better preserve the equity interest as the legislatures did in Ohio and Kansas.[141] Modeling this new notice requirement after these laws would provide Georgia mineral owners an opportunity to protect their interests.[142] Further, a notice requirement is unlikely to impact the statute's purpose of preventing mineral owners from sitting on their rights because the mineral owner would likely be unable to satisfy the current stringent working requirements before the sixty-day window closed.[143] In other words, while adding this notice requirement to the existing work and tax obligations may create a complex and time-consuming procedure, it would still help achieve the legislative goal by ensuring that only those who meet these requirements can retain their mineral interests.[144] Lastly, it must also be noted that Georgia's seven-year lapse period is thirteen years shorter than both the Ohio and Kansas statutes.[145] Thus, regardless of the preceding reasons, mandating a notice procedure with an opportunity for the mineral owner to preserve is justified because of the statute's abridged lapse duration.

D. Future Implications

1. How would these modifications impact the present case?

If Georgia modeled its statute after Ohio's DMA, BASF would receive notice and have an opportunity to preserve its mineral interest by timely filing an affidavit within sixty days of receiving Miller's notice of abandonment.[146] Consequently, this additional procedure would moderate Georgia's harsh lapse statute, allowing mineral owners to act and retain their rights.[147]

Assuming Georgia instituted a notice requirement with retroactive effect, Miller could likely argue that it provided BASF with proper notice when it met with BASF, disputed its ownership of the rights, and requested that it leave the premises.[148] Consequently, if the court found that Miller's ousting amounted to proper notice, then BASF's interest would be deemed abandoned because it failed to timely file an affidavit to preserve its interest.[149] Nonetheless, these ramifications are merely speculative, given that Georgia's legislature has yet to implement such a requirement.

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139. *Id.* at 1214 (quoting Pierce, *supra* note 138, at 9).
140. *Id.* at 1213 (quoting § 55-1604(b)).
141. *See Gerrity*, 166 N.E.3d at 1241; *see also Skully*, 840 P.2d at 1214.
142. *Scully*, 840 P.2d at 1214.
143. *See Gerrity*, 166 N.E.3d at 1234.
144. *Id.*; *see* § 44-5-168(a).
145. *See Gerrity*, 166 N.E.3d at 1234; *see also Skully* 840 P.2d at 1212.
146. *Gerrity*, 166 N.E.3d at 1234.
147. *Id.*
148. *P.D. Miller Farms*, 2023 WL 106828, at *3.
149. *Id.*

2. What would be the future of mineral rights litigation if Georgia refused this modification?

Although Georgia is not bound by law to include a notice provision in its lapse statute, adopting a notice requirement would reduce mineral rights disputes and make any future disputes easier to adjudicate. These benefits could persuade the state legislature to consider amending Georgia's mineral lapse statute.[150] However, even if Georgia makes this change, the benefits would be limited to Georgia and matters resolved under Georgia law.[151] Therefore, it is unlikely that a case involving this modification would reach the U.S. Supreme Court. Instead, cases interpreting a revised Georgia lapse statute would be limited to the Georgia Supreme Court or as persuasive authority in jurisdictions with similar statutes.

Assuming Georgia refuses to add a notice provision to its lapse statute, mineral rights litigation would likely continue to arise, as it has in other states that lack notice provisions.[152] Unlike in Georgia, however, most of these statutes have lapse periods of twenty years.[153] Consequently, due to Georgia's short seven-year lapse period, disputes over mineral rights will likely continue to be prevalent among dominant and servient interests.

IV. CONCLUSION

In *P.D. Miller Farms*, the Eleventh Circuit reversed and remanded the District Court's opinion for failing to recognize an issue of material fact.[154] Despite the fact that appellate courts are reluctant to overturn decisions of fact, the contradictory evidence presented by each party suggested that substantial questions of fact remain as to whether BASF properly worked the minerals, complying with the mineral lapse statute.[155] Accordingly, the circuit court properly relied on sufficient evidence to remand the lower court's grant of summary judgment.

These procedural issues aside, the substance of *P.D. Miller Farms* shows the complications and difficulties arising from Georgia's mineral lapse statute and its lack of a notice requirement. Following the *P.D. Miller Farms* opinion, Georgia should consider making legislative modifications to its statute as it could insulate severed estates from future mineral rights disputes. As demonstrated in the Ohio and Kansas statutes, lapse statutes become more equitable and easily resolved by

150. *Gerrity*, 166 N.E.3d at 1241.

151. *See* § 44-5-168(a).

152. *See generally* Lakeland Area Prop. Owners Ass'n v. Oneida Cnty., 957 N.W.2d 605 (Wis. Ct. App. 2021); Westervelt v. Woodcock, 15 N.E.3d 75 (Ind. Ct. App. 2014).

153. *See, e.g.*, WIS. STAT. ANN. § 706.057(3)(a) (West 2024) ("[A]n interest in minerals lapses if the interest in minerals was not used during the previous 20 years."); IND. CODE ANN. §§ 32-23-10-2 (West 2024) ("An interest in coal, oil and gas, and other minerals, if unused for a period of twenty (20) years, is extinguished and the ownership reverts to the owner of the interest out of which the interest in coal, oil and gas, and other minerals was carved."); MICH. COMP. LAWS ANN. § 554.291(1) (West 2024) ("Any interest in oil or gas in any land owned by any person other than the owner of the surface . . . shall . . . be deemed abandoned, unless the owner" undertakes a certain event within twenty years, such as the "transfer of record of that interest," "issuance of a drilling permit," "actual production or withdrawal . . . or the use of that interest in oil or gas in underground gas storage operations . . . .").

154. *P.D. Miller Farms*, 2023 WL 106828, at *4.

155. *Id.*

incorporating a notice requirement with an opportunity to preserve their mineral interests. Although mineral owners are the dominant interest, it is nonetheless in the best interest of the oil and gas industry that they have the option to preserve their rights.

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