

# In The Supreme Court of Ohio

CHESAPEAKE EXPLORATION, L.L.C., et al.,	)	Case No. 2014-0067
	)	
	)	
Petitioners,	)	On Certified Questions of State Law from
	)	the United States District Court for the
vs.	)	Southern District of Ohio Eastern Division
	)	
KENNETH BUELL, et al.,	)	S.D. Ohio Court Case No. 2:12-cv-00916
	)	
Respondents.	)	

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**PRELIMINARY MEMORANDUM OF PETITIONERS  
ADDRESSING CERTIFIED QUESTIONS OF STATE LAW**

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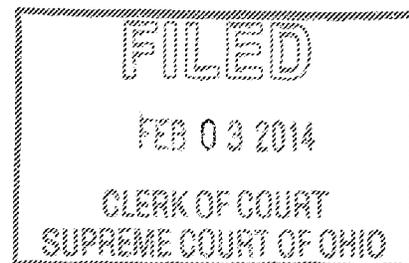
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**PRELIMINARY MEMORANDUM OF PETITIONERS  
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**I. INTRODUCTION**

The United States District Court for the Southern District of Ohio has asked this Court to answer two questions presented by the parties' pending motions for summary judgment:

“(1) Is the recorded lease of a severed subsurface mineral estate a title transaction under the [Ohio Dormant Mineral Act (“DMA”)], Ohio Revised Code § 5301.56(B)(3)(a)?; and

(2) Is the expiration of a recorded lease and the reversion of the rights granted under that lease a title transaction that restarts the twenty-year forfeiture clock under the [DMA] at the time of the reversion?”

(S.D. Ohio Case No. 2:12-CV-00916, Opinion and Order (“Dist. Ct. Op.”) filed Jan. 2, 2014, at 22.) The lower courts have wrestled with these issues in at least ten cases in the last year, and they are disputed in many other pending cases and will continue to arise. This case provides the perfect opportunity for this Court to weigh in and resolve the conflict that has arisen as a result of differing opinions from the lower courts. The relevant facts needed to resolve the certified questions are not in dispute and the certified issues are ripe for review on the record before this Court. Petitioners respectfully request that pursuant to Supreme Court Practice Rule 9.07, the Court accept the certified questions and order full briefing and arguments on the merits of these questions.

Under Supreme Court Practice Rule 9.01(A), this Court may answer certified questions of law from federal courts when those questions “may be determinative of the proceeding” and “there is no controlling precedent in the decisions of this Supreme Court.” That test is met here. If these questions are answered in the affirmative, then petitioners — plaintiffs below — will be

entitled to summary judgment.<sup>1</sup> This Court’s answer would thus be “determinative of the proceeding.” There is no “controlling precedent” from this Court; indeed, no Court of Appeals has yet addressed either of these questions and the absence of controlling precedent has led to the divergent results identified above. This Court’s guidance would therefore be helpful to the U.S. District Court, the parties, and other parties facing the same issues in cases that are pending under the DMA. Moreover, this Court’s determination of these issues will help conserve public and private resources in pending and future cases by settling Ohio law.

## II. THE CASE IN THE DISTRICT COURT

Plaintiffs in the District Court, the petitioners here, are North American Coal Royalty Company (“North American”), the record owner of mineral rights beneath approximately 90 acres in Harrison County, Chesapeake Exploration, L.L.C., CHK Utica, L.L.C., Larchmont Resources, L.L.C., Dale Pennsylvania Royalty, LP, and TOTAL E&P USA, INC., the lessees of the oil and gas rights, and third-party defendant Dale Property Services Penn, LP, which previously held an interest in the oil and gas lease and assigned it to plaintiff Dale Pennsylvania. Defendants are the record owners of the surface rights; they claim that under the 1989 DMA, title to the mineral interest was “deemed abandoned and vested” in them. The DMA provides that a severed mineral interest is deemed abandoned if the interest was not used in specified ways for a period of 20 years. R.C. 5301.56(B) (1989). The interest is not deemed abandoned if it

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<sup>1</sup> On the other hand, if these questions are answered in the negative, the District Court will still need to determine whether the 1989 version or the 2006 version of the DMA applies. Plaintiffs maintain that the 2006 version applies to any abandonment claim first asserted after 2006, a position recently adopted in *Dahlgren v. Brown Farm Properties, L.L.C.*, Carroll C.P. No. 13CVH27445 (Nov. 5, 2013) (attached as Exhibit A). The District Court has not ruled on that issue. If the 2006 version applies, plaintiffs would be entitled to summary judgment, notwithstanding the certified questions, because the defendants have not, and cannot, satisfy the procedural requirements of the 2006 version.

was the subject of a recorded title transaction or if another so-called “savings event” occurred — such as actual production, the issuance of a drilling permit, or the filing of a claim to preserve the interest. *Id.* Defendants claim that no savings event occurred in the 20 years before the DMA went into effect.

Plaintiffs deny this, and contend that there were a number of savings events, including oil and gas leases executed in 1974 and 1984, a recorded assignment of the 1984 lease in 1985, and the termination of the 1984 lease and reversion of the mineral interest to North American’s predecessor in 1989.<sup>2</sup>

Defendants argue that an oil and gas lease does not qualify as a savings event because it is not a “title transaction” as defined in the Ohio Marketable Title Act, R.C. 5301.47(F). They also argue that even if a lease is a title transaction, the expiration of a lease is not, so the mineral interest was abandoned to them in 2004 or 2005 – 20 years after the second lease was signed or assigned, and just a year or two before the DMA was amended to add procedural requirements that defendants have not met.

The parties filed cross-motions for summary judgment on these issues.

North American’s principal lessee, Chesapeake Exploration, has been actively developing oil and gas wells in Harrison County. Under its current Harrison County lease with North American, Chesapeake completed the drilling of a well in March 2011 and successfully commenced production in June 2011.

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<sup>2</sup> Plaintiffs also contend that several recorded conveyances of the surface rights, in which the original reservation of mineral rights was noted, qualify as title transactions under the DMA. The District Court rejected that argument. Also, as noted in footnote 1 above, plaintiffs contend that the 2006 amendments to the DMA apply to any claim of abandonment asserted after 2006. There is no dispute that defendants failed to comply with any of the procedural requirements of the 2006 amendments.

### III. THE DORMANT MINERAL ACT

The DMA was enacted in 1989 and amended in 2006. It was modeled in part on the Uniform Dormant Mineral Interests Act (“UDMIA”), which was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws in 1986. *See, e.g.*, S.B. 223, H.B. 521, Proponent Testimony, 1989 DMA, at 3 (attached as Exhibit B) (noting that the draft legislation that would become the DMA “contains the essential elements recommended by the National Conference of Commissioners on Uniform State Laws” and attaching a copy of the UDMIA for consideration); *Dahlgren v. Brown Farm Properties, L.L.C.*, Carroll C.P. No. 13CVH 27445, at 8-10 (Nov. 5, 2013) (Ex. A) (quoting from and discussing the UDMIA at length). The basic purpose of dormant mineral legislation is “to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources.” *Texaco, Inc. v. Short*, 454 U.S. 516, 525 n. 15 (1982); *see also, e.g.*, W. Va. Code § 55-12A-1 *et seq.* (stating purpose to remove “barriers to . . . development caused by interests in minerals owned by unknown or missing owners or by abandoning owners”); *Dahlgren*, at 8-9 (quoting UDMIA’s explanation of how uncertain or defective title can hinder mineral development).

One of the main aims of the Ohio legislature in enacting and amending the DMA was likewise to “encourage the development of minerals in Ohio which have been previously ignored due to defects in title,” S.B. 223, H.B. 521, Proponent Testimony, 1989 DMA, p. 3, and to promote “new production sites”:

Ohio has had an active energy production industry since the mid 1800’s. During this period, landowners in mineral producing areas have frequently severed the mineral rights in their lands from the surface rights. Through the decades, ownership of the severed minerals has been transferred and fractionalized through estates and business transfers. Today, those old severed mineral rights may be the key to new production sites, as advances in current

technology and the high cost of energy make reworking old oil and gas fields possible.

H.B. 288, Sponsor Testimony, 2006 DMA, p. 1 (attached as Exhibit C).

The purpose of the DMA is to identify truly dormant mineral interests and bring them back into use, not to deprive the mineral owners of their rights. That was specifically addressed by the committee drafting the UDMIA, which explained that the clearing of title “should not be an end in itself and should not be achieved at the expense of a mineral owner who wishes to retain the mineral interests,” as that interest often represents a significant investment that was bargained for by the owner. UDMIA, Prefatory Note, at 4. Rather, the “objective is to clear title of worthless mineral interests and mineral interests about which no one cares.” *Id.*

The policies underlying the DMA are consistent with the general public policy of Ohio that “it is an essential government function and public purpose of the state to . . . encourage the increased utilization of the state’s indigenous energy resources . . . .” R.C. 1551.18; *see Newbury Twp Bd. of Trs. v. Lomak Petro.*, 62 Ohio St. 3d 387, 389 (1991) (“It is the public policy of the State of Ohio to encourage oil and gas production . . .”).<sup>3</sup>

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<sup>3</sup> As first enacted, the DMA did not specify any procedure for notice to the mineral owner of an abandonment claim, or for the mineral owner to contest an alleged abandonment, or for an abandonment to be recorded. *See Dahlgren*, at 12. In 2006, the legislature amended the DMA to include “significant procedural provisions” that must be followed before any abandonment and vesting in the surface owner can occur. *Id.* at 1. The amendments thus corrected deficiencies in the 1989 version of the Act, which did not include “any express provision for its implementation.” *Id.* at 12-13. The 2006 amendments, among other things, specified that the landowner must give notice to the holder of the mineral interest, must file an affidavit of abandonment, and must cause the county recorder to memorialize the record with an entry stating that the mineral interest was abandoned. R.C. 5301.56(E)-(G).

#### IV. ANALYSIS

**A. If The Court Finds That A Recorded Lease Of A Severed Subsurface Mineral Estate Is A Title Transaction Under The DMA, That May Determine The Outcome Of The Federal Action, And There Is No Controlling Precedent Directly On Point.**

There is no dispute that in 1974 and 1984, North American's predecessor in interest entered into recorded oil and gas leases, and that the 1984 lease was assigned in 1985. These transactions prevented the oil and gas rights from vesting in respondents if they were "title transactions" under the DMA. By answering the District Court's first question in the affirmative, the Court will thus provide a legal basis for the District Court to enter summary judgment under the 1989 Act.

**1. The DMA's Plain Language Does Not Exclude Leases As Title Transactions.**

Under the DMA, a savings event occurs if the severed oil and gas estate was "the subject of a title transaction . . . filed or recorded in the office of the county recorder."

R.C. 5301.56(B)(3). A "title transaction" is defined as "*any* transaction affecting title to *any* interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage." R.C. 5301.47(F) (emphasis added).

The District Court properly noted that the list of transactions in § 5301.47(F) is "non-exhaustive" and that "failure to include an oil and gas lease in the list does not mean an oil and gas lease is not a title transaction." (Dist. Ct. Op. at 14-15); *see also Eisenbarth v. Reusser*, Monroe C.P. No. 2012-292, at 10 (June 6, 2013) ("The fact that the words 'lease' or 'oil and gas lease' do not appear in the non-exhaustive list in the . . . statute does not end this Court's inquiry.") (attached as Exhibit D).

**2. Most Courts Have Concluded That An Oil And Gas Lease Is A “Title Transaction” Under The DMA.**

Most courts have concluded that an oil and gas lease is a “title transaction,” and therefore a savings event under the DMA. *See McLaughlin v. CNX Gas Co.*, No. 5:13CV1502, at 5 (N.D. Ohio Dec. 13, 2013) (attached as Exhibit E); *M & H Ptshp. v. Hines*, Harrison C.P. No. CVH-2012-0059, at 6 (Jan. 14, 2014) (attached as Exhibit F); *Dahlgren*, at 18 (Ex. A); *Eisenbarth*, at 10 (Ex. D); *Lipperman v. Batman*, Belmont C.P. No. 12-CV-0085, at 7 (Dec. 16, 2013) (attached as Exhibit G); *Taylor v. Crosby*, Belmont C.P. No. 11CV422, at 7 (Sept. 16, 2013) (attached as Exhibit H); *Davis v. Consolidation Coal Co.*, Harrison C.P. No. CVH-2011-0081, at 3, 7 (Aug. 28, 2013) (finding that the recorded release of a lease is a title transaction) (attached as Exhibit I); *Bender v. Morgan*, Columbiana C.P. No. 2012-CV-378, at 5 (March 20, 2013) (attached as Exhibit J).

Respondents have cited two related cases in which one court ruled differently: *Swartz v. Householder*, Jefferson C.P. No. 12 CV 328 (July 17, 2013), and *Shannon v. Householder*, Jefferson C.P. No. 12 CV 328 (July 17, 2013) (attached as Exhibits K and L). *Swartz* and *Shannon* are essentially identical decisions that include no reasoned explanation for the holding that oil and gas leases are not title transactions.

The District Court characterized the “nature of an oil and gas agreement in Ohio” as “unsettled.” (Dist. Ct. Op. at 17.) It also noted that two decisions of this Court, *Harris v. Ohio Oil Co.*, 57 Ohio St. 118 (1897) and *Back v. The Ohio Fuel Gas Co.*, 160 Ohio St. 81 (1953), “take divergent views of the nature of oil and gas leases” (Dist. Ct. Op. at 18), and that these “divergent views” have been cited and relied upon by trial courts in DMA cases, though neither Supreme Court case arose under or involved the DMA.

The proper analysis under the DMA should have little to do with how Ohio law classifies an oil and gas lease for other purposes or in other contexts, because the issue under the DMA is whether a mineral interest is dormant or not. The drafters of the UDMIA recognized this fact, specifically noting that a title transaction “include[s] a recorded oil, gas, or mineral lease, *regardless whether such a lease is recognized as an interest in land in the particular jurisdiction.*” UDMIA, Comments to Section 4 (emphasis added). The presence of an active oil and gas lease is evidence that the interest is not dormant and “affects title” – whether or not state law would classify the lease itself as an interest or estate in land for other purposes. Nevertheless, the lower courts have drawn on this Court’s jurisprudence concerning oil and gas leases from non-DMA cases.

Under the view set forth in *Harris*, an oil and gas lease creates a fee simple determinable and gives the lessee “ownership of the oil and gas estate.” *See Kramer v. PAC Drilling Oil & Gas, L.L.C.*, 197 Ohio App. 3d 554, 2011-Ohio-6750, 968 N.E.2d 64, ¶ 11 (9th Dist.). Citing this, most courts have found that a lease, as well as any subsequent assignment, is “clearly a ‘title transaction’ as contemplated under R.C. 5301.47,” and thus a savings event under the DMA. *Bender*, at 5 (emphasis added). The court in *Bender* found this “inescapable” and explained:

[A]n oil and gas lease does more than merely permit use of minerals for development. Rather, an oil and gas lease does actually convey (a determinable fee interest) in the oil and gas (severed mineral interests in this case) in place, for production. . . . A lessee to an oil and gas lease acquires a “vested, though limited, estate in the lands for the purposes named in the lease . . . .” *Harris v. Ohio Oil Co.* (1897), 57 Ohio St. 118, 130-31. . . . As stated in *Kramer*, an oil and gas lease “convey[s] ownership of the oil and gas estates” to the lessee; again, subject to reverter.

*Id.* at 4-5 (emphasis by the *Bender* court).

Relying instead on this Court's *Back* opinion, respondents argued in the District Court that an oil and gas lease is a mere "license," and does not convey or affect title. But the *Back* case did not even involve an oil and gas lease. In fact, this Court noted and relied on the gas company's concession that the instrument conveying the oil and gas rights to it was *not* a lease: "the instrument noted in question is not a 'lease' because it grants rights in perpetuity, reserved nothing in the nature of rent, and the rights granted are not subject to defeasement upon the happening of any conditions." *Back*, 160 Ohio St. at 85. The Court then found that the instrument "as a whole, bears the earmarks of a license" rather than a lease or deed of conveyance. *Id.* at 86. The *Back* opinion did not cite or mention *Harris*, and certainly did not overrule it or change the law set forth in *Harris*, as well as other Supreme Court opinions on oil and gas leases. See *Brown v. Fowler*, 65 Ohio St. 507, 521 (1902) ("The instrument grants the oil and gas, and also the land for the purpose of operating thereon for said oil and gas, and it is therefore a lease, and *not merely a license.*") (citing *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 176 (1896) (emphasis added)).

By answering the District Court's first question, this Court thus has an opportunity to clarify its own jurisprudence on oil and gas leases in the context of the DMA.

The District Court cited *In re Frederick Petroleum Corp.*, 98 B.R. 762 (Bankr. S.D. Ohio 1989), for its discussion of Ohio law on this issue. *Frederick Petroleum* shows the different approaches taken by this Court and other courts to the construction of oil and gas instruments in contexts other than the DMA:

The Ohio courts in early cases distinguished between instruments which purported to convey title to the land containing the oil and gas and those which merely granted the right to explore for and produce oil and gas. . . . [W]hen the instrument in question granted "all petroleum and gas in and under the following described tract of land, and also the said tract of land" for the purpose of drilling

for oil and gas, the instrument was found to be a lease, not a license.

*Id.* at 764. The *Frederick Petroleum* court cited *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161 (1896) and *Harris* as examples of cases in which the conveyance was found to be a true lease that conveyed title, and *Back* as a case in which the instrument was found to be a mere license. The District Court noted that “[n]either of these cases addresses the nature of the transaction at issue in this case” and that both were decided before the DMA was even enacted. (Dist. Ct. Op. at 19, 20.) A decision from this Court now in the context of the DMA would clarify for lower courts the interpretation and significance of the Court’s earlier decisions.<sup>4</sup>

Ultimately, however, it should not be necessary to decide whether an oil and gas lease conveys title to an estate, or is a “license,” because the definition of “title transaction” is so broad:

It is difficult for the Court to conceive of a broader definition than the one chosen by Ohio law. By its plain language, the statute

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<sup>4</sup> Petitioners argued in the District Court that this Court’s apparently “divergent” opinions were really consistent, and that the Court’s different analyses can be explained by the different language in the relevant instruments. The documents in *Woodland Oil* and in *Harris* specifically “granted, demised and *let the lands described* to the lessee, for the purpose and with the exclusive right of drilling and operating for petroleum oil and gas, for five years, and as much longer as oil and gas are found in paying quantities.” *Harris*, 57 Ohio St. at 129 (emphasis added); *see also Woodland Oil*, 55 Ohio St. at 176 (“By the instrument in question the plaintiff below granted, demised and let the oil, gas, *and tract of land* for the purpose and with the right of drilling and operating for oil and gas for five years . . . .”) (emphasis added). The document in *Back*, by contrast, purported to convey only the “oil and gas in and under” the lands. *Back*, 160 Ohio St. at 85.

The 1974 and 1984 leases in this case are identical in their essential aspects to the *Woodland Oil* and *Harris* leases. The 1984 lease thus provided that the lessor “by these presents does grant, demise, lease and let unto lessee, exclusively, for the purposes of prospecting and exploring by geophysical and other methods, drilling, mining, operating for and producing oil and gas . . . *all that certain tract of land* . . . described as follows, to wit: . . . .” (attached as Exhibit M) (emphasis added). That is indistinguishable from the *Harris* instrument, which provided that the lessor “granted, demised, and let onto the said party of the second part, for the purpose and with the exclusive right of drilling, operating for petroleum oil and gas, *all that certain tract of land* . . . known and described as follows: . . . .” *Harris*, 57 Ohio St. at 119 (emphasis added).

does not require a conveyance or transfer of real property in order to constitute a title transaction. . . . Even if Defendant's property interests through the lease are something less than a grant of real property, those interests quite clearly still **affect** title to the mineral interests in the property.

*McLaughlin*, No. 5:13CV1502, at 5 (emphasis in original).

The leases here not only “affected title” to the mineral rights, but also clearly affected title to the surface rights. “[A]pplying the principle that a good and indefeasible title imports such ownership of the land as enables the owner to exercise absolute control and dominion of it as against all others, an outstanding oil or gas right renders title to the surface land defective.” 68 Oh. Jur. 3d (ed. 2011) Mines and Minerals § 29. If a lease renders the surface title defective, it clearly “affects” that title.

It is significant that “no [oil and gas] lease is valid until it is filed for record” (except as between the parties). R.C. 5301.09. The obvious purpose of this recording requirement is to put any purchaser of the surface on notice that an oil and gas lease exists, because the lease clearly will “affect” his title to the property. Moreover, Ohio has an elaborate statutory process for declaring oil and gas leases forfeited that is almost identical to the process under the DMA for declaring mineral interests abandoned. *See* R.C. 5301.332.<sup>5</sup> The existence of this procedure underscores the importance of oil and gas leases to persons who are searching title in Ohio, and confirms that, in the legislature's view, an outstanding oil and gas lease “affects title.”

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<sup>5</sup> If an oil and gas lessee does not abide by specific covenants or the lease expires, the lessor may have the lease publicly cancelled by following three steps: (1) by serving notice on the lessee of his intent to declare the lease forfeited; (2) by filing, thirty to sixty days later, an affidavit of forfeiture with the county recorder; and (3) if the lessee has not claimed that the lease remains in full force and effect, by causing the county recorder to note upon the margin of the recorded lease that it has been cancelled. “Thereafter the record of the lease shall not be notice to the public of the existence of the lease or of any interest therein or rights thereunder.” R.C. 5301.332.

The concerns underlying the DMA about uncertain ownership and unused mineral rights are not implicated where the mineral rights are subject to a recorded lease – there is no “uncertainty” about ownership of the rights, and no impediment to their development. To the contrary, a lease encourages and promotes development, like the development that has actually occurred under this very lease in Harrison County.

**B. Whether The Expiration Of A Recorded Lease And The Reversion Of The Rights Granted Under That Lease Is A Title Transaction That Restarts The 20-Year Forfeiture Clock Under The DMA May Also Determine The Outcome Of The Federal Action, And Has Not Been Addressed In Ohio Law.**

No Ohio court has addressed the second question certified by the District Court: whether the reversion of an oil and gas interest at the termination of a lease is a transaction affecting title and a savings event under the DMA. The Court’s answer to this question would be important, not only for determining the outcome of this case, but also for future Ohio DMA cases.

If the reversion of oil and gas rights to the lessor upon the termination of a lease is a title transaction under the DMA, then in this case the reversion of the mineral interests in 1989 restarted the 20-year clock. By 2009, the DMA had been amended to require that claimants follow specific notice and affidavit procedures before mineral rights may be deemed abandoned. Respondents do not claim to have followed those procedures; thus if the termination was a savings event, petitioners are entitled to summary judgment. Respondents try to avoid this by arguing that even if an oil and gas lease (or assignment thereof) is a savings event, the termination of a lease is not, so the 20-year period expired no later than 2004 or 2005, before the 2006 amendments.

Although no Ohio court has addressed this issue, at least two other states have, resulting in a split of authority. The Michigan Supreme Court decided the issue in a case that arose under Michigan’s DMA – a model for Ohio’s DMA. *See* S.B. 223, H.B. 521, Proponent Testimony,

1989 DMA, at 2-3. The relevant facts were strikingly similar to the facts here: the owner of severed oil and gas interests leased those interests in 1951 for a primary term of ten years, and the lease provided that it would terminate after the first year or any year thereafter in which drilling or production did not occur, unless “delay rental” payments were made. The lessee made all of those payments as required, and the lease expired or terminated in 1961. *Energetics, Ltd. v. Whitmill*, 442 Mich. 38, 497 N.W.2d 497, 500-01 (1993).

The question before the Michigan Supreme Court was whether the 20-year period of the Dormant Minerals Act began to run when the lease was executed and recorded, or when the lease terminated. The court held that “a new twenty-year dormancy period commences when the reversionary interest is transferred at the termination of the lease.” *Id.* at 504. “Were this not so and defendant’s contention accepted, termination of plaintiffs’ interests by running of the twenty-year period would have the effect of treating as abandoned those interests which were being actively maintained for nearly a 10-year period of time . . . . This cannot be so. *Herein, the property interests could not commence to become dormant after the original lease . . . until relinquishment and transfer back to the lessors of said rights.*” *Id.* at 503 (quoting *Mask v. Shell Oil Co.*, 77 Mich. App. 25, 31-32, 257 N.W.2d 256 (Mich. Ct. App. 1977) (emphasis in original)).

The *Energetics* court noted that a “separate act of recording” upon termination of the lease was unnecessary, because the recorded lease was sufficient notice to anyone of the lease’s term and expiration; “[a]nyone checking the status of the title of the subject matter property would have to be on notice of the recorded lease and its expiration date, that being the expiring of the lease at the end of its term”. *Id.* at 502 (quoting trial court’s decision); *see also id.* at 504 (“When a lease is recorded, the provisions of the lease are available to anyone who conducts a

title search. The terms of the lease indicate whether further inquiry may be required to determine if the lease continues in force.”).

The Nebraska Supreme Court came to the opposite result under Nebraska's statute in *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010), expressly distinguishing the Michigan ruling. But *Ricks* is not pertinent or persuasive here, because Nebraska's dormant mineral statute contains unique language not found in Ohio's or Michigan's DMA. The Nebraska statute provides that a savings event occurs only when the “record owner of [the] mineral interest has . . . exercised publicly the right of ownership.” The *Ricks* court found that the owners only “publicly exercised” their ownership when they executed and recorded the oil and gas leases, not when the leases expired, because the expiration “was initiated either by the lessee or simply by operation of law — not by the record owners.” 784 N.W.2d at 436. Ohio's DMA does not contain this “public exercise” requirement or anything like it. It states only that the mineral interest must be the “subject of a title transaction.” The mineral interest here was the “subject of” a title transaction until 1989, when the 1984 lease expired.

As the District Court noted, the Michigan Supreme Court's analysis is instructive here. (Dist. Ct. Op. at 21.) The 1984 Ohio lease had an essentially identical structure to the Michigan lease – one that is typical of oil and gas leases. It had a primary term of five years, and provided that it would terminate unless annual delay rental payments were made. Under the terms of the lease, the lessees made delay rental payments, perpetuating or extending the lease until 1989, when ownership of the oil and gas reverted to the lessor. For five years, the lessor was thus collecting rent for the oil and gas under respondents' property. Anyone checking the files of the county recorder would find the lease and would see that it had a five-year term that would last until 1989 if the payments were made. It would make no sense, and would not in any way serve

the purpose of the DMA, to hold that the lessor had begun to “abandon” its interest at the same time it was collecting rent and thus actively maintaining its interest in the oil and gas – yet that is the position that respondents took in the District Court. This Court should clarify that in Ohio the termination of a recorded lease is a title transaction and a savings event.

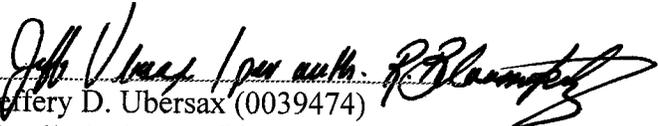
An answer to the District Court’s second question would determine the outcome of the federal action and provide valuable guidance to other courts facing DMA cases that involve the same or similar forms of lease.

## V. CONCLUSION

The District Court’s certified questions present dispositive issues in the federal action that have not been addressed in any previous decision of this Court. The Court should accept the questions for full briefing and argument on their merits.

Respectfully submitted,

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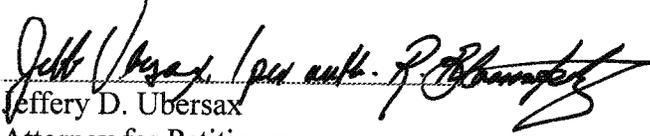
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**CERTIFICATE OF SERVICE**

I certify that on this 3rd day of February 2014, a copy of the foregoing was served via regular U.S. Mail upon the following:

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# **EXHIBIT A**

FILED

2013 NOV -5 AM 11:01

IN THE COURT OF COMMON PLEAS  
FOR CARROLL COUNTY

CAPTIONED COMMON PLEAS  
WILLIAM R. KOVILWEND

~~2013 FILE~~ 234 PAGE # 8

RONALD EDWARD DAHLGREN, et al.

Plaintiffs

v.

BROWN FARM PROPERTIES, L.L.C. et al.

Defendants

)  
) Case No. 13CVH27445  
)  
) Judge Richard M. Markus  
) (Serving By Assignment)  
)  
)  
) FINAL OPINION AND  
) JUDGMENT  
)

FACTUAL AND PROCEDURAL HISTORY

On February 11, 2013, eight plaintiffs filed this case to quiet title for oil and gas rights they inherited from their mother or grandmother. Three defendant landowners contend that Ohio's Dormant Mineral Act deemed that the family abandoned those rights which then merged into the landowners' surface titles. The fourth defendant is a developer that holds the plaintiffs' leases for those oil and gas rights. Each defendant filed an Answer with a Crossclaim or a Counterclaim. The defendant developer supported the plaintiffs' claims.

Ohio adopted its Dormant Mineral Act as part of its Marketable Title Act on March 22, 1989, and added significant procedural provisions by an amendment on June 30, 2006. The parties agree that either the 1989 version or the 2006 version of Ohio's Dormant Minerals Act governs their dispute. No one asserted or sought to enforce an abandonment claim while the 1989 version was in effect. This Court concludes that the 2006 version controls and denies the landowners' abandonment claim, so the plaintiffs retain those rights.

On August 5, 2013, all parties jointly filed "Stipulations of Fact" which provide:

Certain parties have recently amended their pleadings so that the only claims remaining in this action by any party sound in declaratory relief or quiet title and involve the issue of whether the Defendants have ownership of the oil and gas minerals underlying their respective properties. The parties agree and stipulate to the following facts and request that the issue of the ownership of the subject minerals be finally decided by the Court based upon the stipulated facts without the need of any trial.

Those factual stipulations provide the basis for this Court's decision.

On September 16, 1949, Carl E. Dahlgren and Leora Perry Dahlgren (husband and wife) conveyed 225.59 acres in Carroll County to William Lewis Dunlap, with a deed that provided:

Excepting and reserving to Leora Perry Dahlgren all the oil and gas underlying said premises together with rights of way for pipe lines and ingress and egress to any drilling operations thereon and for the removal of said minerals from said property.

By that deed, the Dahlgrens severed the subsurface title for oil and gas from the surface title for that property. See *Gill v. Fletcher* (1906), 74 Ohio St. 295, paragraphs 1-3 of the syllabus.

Leora Dahlgren did not convey her retained mineral rights to anyone before her death on March 13, 1977. Her will and resulting probate court orders vested her mineral rights in her three children. They are the lawful successors to Leora Dahlgren's reserved rights, pursuant to probate court Certificates of Transfer which her daughter mistakenly filed with the Carroll County Probate Court rather than the Carroll County Recorder's Office. The Carroll County Probate Court issued a Certificate of Transfer for those oil and gas rights to those children on May 3, 1978.

Those reserved rights were not the subject of any title transaction that anyone recorded in

the Carroll County Recorder's Office between March 22, 1969 (twenty years before the effective date for the 1989 version of the Dormant Minerals Act) and September 17, 2009 (the date when one of the plaintiffs first recorded an oil and gas lease to a developer).

There was no drilling at, production from, or storage of oil or gas on that property or any property pooled with it before July 5, 2012. The severed oil and gas title was not separated from the surface title on tax lists for the Carroll County Auditor or the Carroll County Treasurer. No one filed a claim in the Carroll County Recorder's Office for oil or gas ownership on the relevant properties before one of the plaintiffs filed that claim on April 12, 2012.

The three defendant landowners are the lawful successors to William Dunlap's rights for the relevant properties, pursuant to duly recorded chains of title. In each of their chains of title the deeds are expressly subject to the oil and gas reservation set forth in the deed recorded at Volume 121, Page 300, which is the 1949 Dahlgren deed.

Two of the three landowner defendants first acquired their interests in the relevant properties after the 2006 amendment to Ohio's Dormant Mineral Act, so they did not and could not have asserted any abandonment claim before that amendment. The remaining landowner defendant acquired his interest in relevant property by deeds in 1999 and 2002.

None of the defendant landowners nor any of their respective predecessors in interests ever asserted any abandonment for the relevant mineral rights in any court proceeding before these landowner defendants filed their pleadings in this case.

In 2009, each of the plaintiffs leased their oil and gas interests for the relevant properties to a developer who recorded those leases in the Carroll County Recorder's Office in 2009 or 2010, and who later assigned those leases to the defendant developer.

In March of 2012, one of the defendant landowners sent the plaintiffs and the leaseholder developer a "Notice of Owner's Intent to Declare the Abandonment of Mineral Interest (Ohio Revised Code 5301.56)" for part of the relevant properties. There is no evidence that before then any of the defendant landowners or any of their predecessors in interest ever asserted to any of the plaintiffs or to any public official that any owner of those mineral interests had abandoned them.

Within 60 days after the landowners sent them a "Notice of Owner's Intent to Declare the Abandonment of Mineral Interest," five of the eight plaintiffs filed claims for their relevant mineral interests in the Carroll County Recorders' Office.

On September 3, 2013, the plaintiffs filed their Brief in Support of Request for Judgment. On October 18, 2013, the three defendant landowners filed their Motion for Judgment and Supporting Brief, and the defendant developer filed its Responsive Brief in Support of Plaintiffs' Request for Judgment. On November 1, 2013, the plaintiffs filed their Responsive Brief. The case is now ripe for this Court's decision.

#### THE UNDERLYING MARKETABLE TITLE ACT

In 1961 Ohio joined a widespread title reform movement when it enacted its Marketable Title Act as R.C. 5301.47-5301.56. In the Prefatory Note for a later proposed Uniform Marketable Title Act, the National Conference of Commissioners on Uniform State Laws explained the general purpose for those laws:

The basic idea of the Marketable Title Act is to codify the venerable New England tradition of conducting title searches back not to the original creation of title, but for a reasonable period only. The Model Act is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that he need search no further back in the record. Provisions for rerecording and for protection of persons using or occupying land are designed to prevent the

possibility of fraudulent use of the marketable record title rules to oust true owners of property.

The most controversial issue with respect to marketable title legislation is whether or not an exception should be made for mineral rights. This [Uniform] Act follows the Model Act in making no such exception. Any major exception largely defeats the purpose of marketable title legislation, by forcing the title examiner to search back for an indefinite period for claims falling under the exception.

As originally enacted, Ohio's Marketable Title Act governed all interests in land including severed mineral interests. It relies on a chain of title with a "root" record no more than 40 years old. It included R.C. 5301.47 ("Definitions"), 5301.48 ("Unbroken chain of recorded title"), 5301.49 ("Record marketable title; exceptions"); 5301.50 ("Prior interests"), 5301.51 ("Preservation of interest"); 5301.52 ("Contents of notice"); 5301.53 ("Certain rights not barred"); 5301.54 ("Effect of changes in law"), 5301.55 ("Liberal construction"), and R.C. 5301.56 ("Three year extension"). Between 1963 and 1989, the legislature adopted various amendments to those sections, which are not relevant here.

Effective March 22, 1989, the legislature repealed and rewrote R.C. 5301.56 to create Ohio's Dormant Minerals Act. Effective June 30, 2006, the legislature amended R.C. 5301.56 by adding procedures for a surface landowner to claim that a mineral rights holder has abandoned those rights and for the mineral rights holder to challenge that claim.

In their context, it is clear that the legislature has always intended that the Marketable Title Act (R.C. 4301.47-5301.55) and the Dormant Minerals Act (R.C. 5301.56) are integrated title laws which should be read together whenever they were in effect.

Thus, R.C. 5301.47 provides definitions that apply to R.C. 5301.47 to 5301.56 inclusive; and R.C. 5301.54 restricts the effect of all those sections on other statutory provisions. More

significantly, R.C. 5301.55 directs:

Sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 5301.48 of the Revised Code, subject only to such limitations as appear in section 5301.49 of the Revised Code.

The purpose of the Marketable Title Act is to, "simplify and facilitate land title transactions by allowing persons to rely on a record chain of title." *Collins v. Moran*, 2004-Ohio-1381 (7<sup>th</sup> Dist.), ¶20, quoting *Semachko v. Hopko* (1973), 35 Ohio App.2d 205; see also *Pinkney v. Southwick Investments, L.L.C.*, 2005-Ohio-4167 (8<sup>th</sup> Dist.) at ¶31.

Both the Marketable Title Act and its Dormant Minerals Act component support reliance on public documents rather than private communications for title transfers. For some purposes, the Marketable title Act permits reliance on public documents outside the county recorder's office.

R.C. 5301.47 defines reliable public records that document title interests and transfers:

As used in sections 5301.47 to 5301.56, inclusive of the Revised Code:

\* \* \* \*

(B) "Records" includes probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situate.

(C) "Recording," when applied to the official public records of the probate or other court, includes filing.

\* \* \* \*

(F) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

R.C. 5301.48 defines the holder of an "unbroken chain of title" for an interest in real property and therefore a "marketable title" for that interest to include (a) a person for whom those public records show an unbroken chain of title for that interest which extends back for at least forty years; or (b) a person for whom those public records show an unbroken chain of title for an interest that a document created within the preceding forty years. If the documents in that chain of title specifically identify a recorded document that created an interest in that property, the act preserves that interest. R.C. 5301.49(A). All interests created before an unbroken chain of title that extends back at least forty years which are not otherwise preserved by the act are "null and void" [R.C. 5301.50] and "extinguished" [R.C. 5301.49(D)].

Subject to specified exceptions, the holder of an interest with an unbroken chain of title for at least forty years need not demonstrate (a) the creation of that interest more than forty years earlier, or (b) the termination of any purported limitation on that interest more than forty years earlier. The forty years are measured back from "the time the marketability is being determined" [R.C. 5301.47(E) and R.C. 5301.51(B)]; or "is to be determined" [R.C. 5301.48]

R.C. 5301.51 and 5301.52 permit the holder to preserve an otherwise unprotected interest by recording a prescribed notice. Before the 2006 amendment that created the Dormant Minerals Act, the legislature repeatedly revised R.C. 5301.56 to provide additional three year grace periods during which the prescribed notice could preserve that interest, which it ultimately extended to December 31, 1976 [more than 15 years after the act's effective date].

#### TWO VERSIONS OF THE DORMANT MINERALS ACT

Following the adoption of Marketable Title Acts, many states added special rules for the termination of mineral rights, including temporary lease interests and permanent fee simple

ownership. Here again, the National Conference of Commissioners on Uniform State Laws explains that history in the Prefatory Note for its Uniform Dormant Interests Act, which the Conference approved in 1986 and the A.B.A. approved on February 16, 1987:

Transactions involving mineral interests may take several different forms. A *lease* permits the lessee to enter the land and remove minerals for a specified period of time; . . . . A fee title or other interests in minerals may be created by *severance*.

A severance of mineral interests occurs where all or a portion of mineral interests are owned apart from the ownership of the surface. A severance may occur in one of two ways. First, a surface owner who also owns a mineral interest may *reserve* all or a portion of the mineral interest upon transfer of the surface. In the deed conveying the surface of the land to the buyer, the seller reserves a mineral interest in some or all of the minerals beneath the surface. . . .

Second, a person who owns both the surface of the land and a mineral interest may *convey* all or a portion of the mineral interest to another person. . . . Severed mineral interests may be owned in the same manner as the surface of the land, that is, in fee simple.

Dormant mineral interests in general, and severed mineral interests in particular, may present difficulties if the owner of the interest is missing or unknown. Under the common law, a fee simple interest in land cannot be extinguished or abandoned by nonuse, and it is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals. Thus, it is possible that the only document appearing in the public record may be the document initially creating the mineral interest. Subsequent mineral owners, such as the heirs of the original mineral owner, may be unconcerned about an apparently valueless mineral interest and may not even be aware of it; hence their interests may not appear of record. If mineral owners are missing or unknown, it may create problems for anyone interested in exploring or mining, because it may be difficult or impossible to obtain rights to develop the minerals. An exploration or mining company may be liable to the missing or unknown owners if exploration or mining proceeds without proper leases. Surface owners are also concerned with the ownership of the minerals beneath their property. A mineral interest includes the right of reasonable entry on the surface for purposes of mineral extraction; this can effectively preclude development of the surface and constitutes a significant impairment of marketability.

\* \* \* \*

An extensive body of legal literature demonstrates the need for an effective means

of clearing land titles of dormant mineral interests. Public policy favors subjecting dormant mineral interests to termination, and legislative intervention in the continuing conflict between mineral and surface interests may be necessary in some jurisdictions. More than one-fourth of the states have now enacted special statutes to enable termination of dormant mineral interests, and some of the nearly two dozen states that now have marketable title acts apply the acts to mineral interests.

\* \* \* \*

*Nonuse.* A number of statutes have made *nonuse* of a mineral interest for a term of years, e.g., 20 years, the basis for termination of the mineral interest. Such a statute in effect makes nonuse for the prescribed period conclusive evidence of intent to abandon. The nonuse scheme has advantages and disadvantages. Its major attraction is that it enables extinguishment of dormant interests solely on the basis of nonuse; proof of intent to abandon is unnecessary. Its major drawbacks are that it requires resort to facts outside the record and it requires a judicial proceeding to determine the fact of nonuse. It also precludes long-term holding of mineral rights for such purposes as future development, future price increases that will make development feasible, or assurance by a conservation organization or subdivider that the mineral rights will not be exploited.

The nonuse concept should be incorporated in any dormant mineral statute. . . .

*Recording.* Another approach found in several jurisdictions, as well as in USLTA [Uniform Simplification of Land Transactions Act], is based on passage of time without recording. Under this approach a mineral interest is extinguished a certain period of time after it is recorded, for example 30 years, unless during that period a notice of intent to preserve the interest is recorded. The virtues of this model are that it enables clearing of title on the basis of facts in the record and without resort to judicial action, and it keeps the record mineral ownership current. Its major disadvantages are that it permits an inactive owner to preserve the mineral rights on a purely speculative basis and to hold out for nuisance money indefinitely, and it creates the possibility that actively producing mineral rights will be lost through inadvertent failure to record a notice of intent to preserve the mineral rights. The recording concept is useful, however, and should be a key element in any dormant mineral legislation.

\* \* \* \*

*Constitutionality.* Constitutional issues have been raised concerning retroactive application of a dormant mineral statute to existing mineral interests. The leading case, *Texaco v. Short*, 454 U.S. 516 (1982), held the Indiana dormant mineral statute constitutional by a narrow 5-4 margin. The Indiana statute provides that a

mineral right lapses if it is not used for a period of 20 years and no reservation of rights is recorded during that time. No prior notice to the mineral owner is required. The statute includes a two-year grace period after enactment during which notices of preservation of the mineral interest may be recorded.

A combination nonuse/recording scheme thus satisfies federal due process requirements. Whether such a scheme would satisfy the due process requirements of the various states is not clear. Comparable dormant mineral legislation has been voided by several state courts for failure to satisfy state due process requirements. Uniform legislation, if it is to succeed in all states where it is enacted, will need to be clearly constitutional under various state standards. This means that some sort of prior notice to the mineral owner is most likely necessary.

For Ohio, both the 1989 version and the 2006 version of the Dormant Minerals Act create statutory conditions when the owner of subsurface minerals rights is "deemed" to have abandoned those rights. Both versions designate those conditions by excluding circumstances when the owner is not deemed to have abandoned them. In the 1989 version, R.C. 5301.56(B)(1) designated conditions that denied or disqualified a statutory claim that a mineral rights owner abandoned those rights:

(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies:

(a) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53 of the Revised Code. However, if a mineral interest includes both coal and other minerals that are not coal, the mineral interests that are not in coal may be deemed abandoned and vest in the owner of the surface of the lands subject to the interest.

(b) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code.

(c) Within the preceding twenty years, one or more of the following has occurred:

(i) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which

the lands are located.

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(ii) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, from a mine a portion of which is located beneath the lands, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located.

(iii) The mineral interest has been used in underground gas storage operations by the holder.

(iv) A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 of the Revised Code, in the office of the county recorder of the county in which the lands are located.

(v) A claim to preserve the mineral interest has been filed in accordance with division (C) of this section.

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

The 1989 version provided a three year grace period after its effective date for any of the disqualifying conditions (including the filing of a mineral rights claim) to preclude abandonment.

R.C. 5301.56(B)(2).

The 2006 version designates the same conditions that deny or disqualify a statutory claim that the owner of subsurface mineral rights abandoned those rights. The critical difference between the 1989 version and the 2006 amended version of the Dormant Minerals Act is the presence in the 2006 version and the absence in the 1989 version of any express provision for its

implementation.

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For the 2006 version, the Act provides procedures for a surface owner to regain severed subsurface mineral rights in the absence of those specified circumstances. To terminate any subsurface rights the surface owner must notify each subsurface holder that he or she intends to declare that interest abandoned [R.C. 5301.56 (E)(1)] and within thirty days thereafter must file an affidavit of abandonment with the applicable county recorder [R.C. 5301.56 (E)(2)]. The notice must identify the allegedly abandoned subsurface rights and assert the statutorily defined inactivity [R.C. 5301.56 (F)]. The affidavit of abandonment must confirm the notice and allege the statutorily defined abandonment [R.C. 5301.56 (G)].

The 2006 version provides procedures for the subsurface owner to oppose the surface owner's notice by filing within sixty days thereafter a claim to preserve those rights [R.C. 5301.56 (H)(1)(a)] or an affidavit that disputes the statutorily defined abandonment. [R.C. 5301.56 (H)(1)(b)] If the subsurface holder fails to file either of those documents within that time, the recorder shall memorialize those events and thereby vest the surface owner with that subsurface holder's rights. [R.C. 5301.56 (H)(2)]

By contrast, the 1989 version of Ohio Dormant Mineral Act did not include any provision for the surface owner to notify the holder of any subsurface mineral rights about an abandonment claim before or after the alleged abandonment, or to file anything with the country recorder or anywhere else. It provided no procedure for the holder of subsurface rights to contest their alleged abandonment, and no procedure for anyone to record the abandonment anywhere.

The 2006 version for R.C. 5301.56(B)(3) permits the surface owner to send the holder of any subsurface mineral rights an abandonment notice whenever none of the statutorily defined

disqualifying events occurred within twenty years preceding that notice. The 1989 version of R.C. 5301.56(B)(1)(c) provided for its application unless: "Within the preceding twenty years one or more of the following has occurred," without specifying the event from which it measures the preceding twenty years. In lieu of the 1989 version's three year grace period after the statute's effective date for the mineral rights holder to establish <sup>h</sup> any of the disqualifying events (including a filed claim), the 2006 version permits the mineral rights holder to file that claim within 60 days after the surface owner notifies him of the claimed abandonment.

Nothing in either the 1989 version or the 2006 version denies that the Marketable Title Act (R.C. 5301.47-5301.55) remains applicable to mineral rights, at least to the extent that the Dormant Minerals Act does not expressly provide differently.

In this case, the surface landowners assert (a) that the 1989 version established the claimed abandonment automatically when none of the disqualifying events occurred within twenty years preceding its effective date or the three year grace period; and (b) that the abandonment was complete before the 2006 amendment required different procedures to assert or confirm it.

By contrast, the holders of the reserved mineral rights and the developer who holds their leases contend (a) that the 2006 version controls the abandonment procedures here because the landowners first asserted any abandonment after 2006, (b) that the landowners have not complied with the procedures required by the 2006 amendment because they never filed the required abandonment affidavit which permitted them to contest that claim, and (c) that the 2006 version precludes abandonment because disqualifying events occurred after 2006.

Counsel have not cited any appellate decision that decides whether or when to apply the

1989 version of R.C. 5301.56 for an abandonment claim filed after the 2006 amendment. But see *Dodd v. Croskey*, 7<sup>th</sup> Dist. No. 12HA6, 2013-Ohio-4257 (Sept. 23, 2013)(applying the 2006 version to events that arose before its enactment without discussion of that choice). This court has found none.

After careful consideration, this Court agrees with the holders of the subsurface mineral rights. Without any contrary statutory language, this Court concludes that the 1989 version impliedly required implementation before it finally settled the parties' rights, at least by a recorded abandonment claim that permitted the adverse party to challenge its validity, if not by an appropriate court proceeding to confirm that abandonment. Circumstances that support a claimed right do not by themselves provide a completed remedy. Absent any implementation or enforcement of claimed abandonment rights before the 2006 amendment, the landowner defendants must comply with the procedures which the 2006 amendment requires.

First, the surface owners' interpretation of the 1989 version conflicts with "the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 5301.48 of the Revised Code." R.C. 5301.55. The county recorder's records would not reveal some disqualifying conditions that prevent statutory abandonment. See R.C. 5301.56(B)(3)(c) ("The mineral interest has been used in underground gas storage operations by the holder"); 5301.56(B)(3)(f) ("In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located"). A title examiner might well find the recorded Dahlgren deed with its reservation of mineral rights, without any record that shows whether the Dahlgrens or their

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descendents preserved or abandoned those rights.

Second, interested parties could dispute compliance with disqualifying conditions, without filing anything in the recorder's office. Hence, reliance on the recorder's records to establish or avoid abandonment requires at least a recorded document if not judicial confirmation.

Third, "[f]orfeitures are not favored by the law. The law requires that we favor individual property rights when interpreting forfeiture statutes." *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 534, quoted at *Sogg v. Zurz*, 2009-Ohio-1526, 121 Ohio St.3d 449, ¶9; see also *State v. Lillock* (1982), 70 Ohio St.2d 23, 25; *Dodd v. Croskey*, *supra*, at ¶35.

Fourth, the Dormant Minerals Act employs considerably less conclusive language than the Marketable Title Act to terminate title interests. The Marketable Title Act establishes that the unprotected rights are "null and void" or "extinguished," while the Dormant Minerals Act provides that they are "deemed abandoned." Compare R.C. 5301.50 and R.C. 5301.49(D) with R.C. 5301.56(B)(1). The less conclusive language in the Dormant Minerals Act strongly suggests that it provides standards but does not resolve the issue. Compare *Blatt v. Hamilton County Bd. of Revision*, 2009-Ohio-5260, 123 Ohio St.3d , ¶22; *In Re Washington*, 2004-Ohio-6981, 10<sup>th</sup> Dist. No. 04AP429, ¶23.

Fifth, the landowners' interpretation of these provisions creates the anomaly that mineral rights are deemed abandoned when the owner has a statutorily preserved record marketable title. In this case, for example, the plaintiffs have a record marketable record title from the probate court's Certificate of Transfer less than forty years earlier, pursuant to R.C. 5301.47(A) and R.C.

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5301.48; which the defendant landowners' own deeds have preserved pursuant to R.C. 5301.49 and R.C. 5301.51. See *Toth v. Berks Title Ins. Co.* (1983), 6 Ohio St.3d 338, syllabus; *Heifner v. Bradford* (1983), 4 Ohio St. 3d 49, syllabus.

Sixth, this Court doubts that statutory abandonment is constitutionally enforceable without giving the adverse party an opportunity to dispute the relevant claims. In *Texaco v. Short* (1982), 54 U.S. 516, the federal Supreme Court ruled that Indiana's Dormant Minerals Act satisfied federal constitutional protections when a mineral owner lost his rights in specified circumstances without giving that owner advance notice. But the same opinion stated at 533-34:

The question then presented is whether, given that knowledge, appellants had a constitutional right to be advised -- presumably by the surface owner -- that their 20-year period of nonuse was about to expire.

In answering this question, it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did, in fact, occur. As noted by appellants, no specific notice need be given of an impending lapse. . . . It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause -- including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard -- must be provided. (underlining emphasis added)

Without advance notice and an opportunity to be heard, statutory abandonment may violate Art. I, Sec. 19 of the Ohio Constitution ("Private property shall ever be held inviolate"), even if it does not violate federal constitutional provisions. However, we need not determine whether statutory abandonment without prior notice satisfies that provision of the Ohio Constitution where other considerations reach the same result without addressing that concern.

In any event, Due Process requirements in both the federal and state constitutions unquestionably mandate notice and an opportunity to respond before a dispute about those rights

interest has reverted to the surface owner, the full procedural protections of the Due Process Clause -- including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard -- must be provided. (underlining emphasis added)

Without advance notice and an opportunity to be heard, statutory abandonment may violate Art. I, Sec. 19 of the Ohio Constitution ("Private property shall ever be held inviolate"), even if it does not violate federal constitutional provisions. However, we need not determine whether statutory abandonment without prior notice satisfies that provision of the Ohio Constitution where other considerations reach the same result without addressing that concern.

In any event, Due Process requirements in both the federal and state constitutions unquestionably mandate notice and an opportunity to respond before a dispute about those rights can be resolved. Courts should construe statutes in the manner that best confirms their constitutionality. *Mahoning Education Association of Developmental Disabilities v. State Employment Relations Board*, 2013-Ohio-4654, ¶19; *State v. Carnes*, 2007-Ohio-604, ¶(7<sup>th</sup> Dist.)

For the purposes of this decision, the court accepts the defendant landowners' argument that the 1989 version of Ohio's Dormant Mineral Act deemed the plaintiffs' mineral rights abandoned if none of the disqualifying conditions existed within twenty years before March 22, 1989 (the act's effective date) or before March 22, 1992 (the statutory grace period). See *Riddel v. Layman*, 5<sup>th</sup> Dist. No. 94CA114 (July 10, 1995). However, at most the absence of those conditions created an inchoate right; it could not and did not transfer ownership without judicial confirmation or at least an opportunity for the disowned party to contest their absence or the effect of their absence.

arbitrary and unsupportable assumption that their failure to develop those minerals meant that they deliberately abandoned them forever. Could the legislature deem that a surface property owner abandoned his title if he failed to develop an empty lot for some arbitrary interval? The federal Supreme Court's decision in *Texaco v. Short, supra*, may answer: "Yes." But the property owner must have an opportunity to dispute that result.

NO ABANDONMENT UNDER THE CURRENT LAW

Each of the plaintiffs leased his or her oil and gas interests for the relevant properties to a developer who recorded those leases in the Carroll County Recorder's Office in 2009 or 2010. Those recorded leases are "title transactions" that preclude any deemed abandonment for the plaintiffs' mineral interests pursuant to the 2006 version of R.C. 5301.56(B)(3)(a).

Within 60 days after a landowner sent them a "Notice of Owner's Intent to Declare the Abandonment of Mineral Interest," five of the eight plaintiffs filed statutorily sufficient claims for their relevant mineral interests in the Carroll County Recorders' Office. Those recorded claims preclude any deemed abandonment for their interests and the interests of all the remaining plaintiffs pursuant to the 2006 version of R.C. 5301.56(B)(3)(e) and 5301.56(C)(2).

Two of the landowner defendants never complied with R.C. 5301.56(E)(1) by sending or publishing notice to "each holder" of the allegedly abandoned mineral interests. None of the defendant landowners ever complied with R.C. 5301.56(E)(2) by filing an "affidavit of abandonment" in the Carroll County Recorder's office. Without those notices or affidavits, those landowners failed to invoke the abandonment procedures which the 2006 version requires to assert an abandonment claim.

FINAL JUDGMENT

~~2019 FEB 2019~~ 234/114 26

In this case, the following plaintiffs hold mineral rights for the relevant properties: Ronald Edward Dahlgren, Elsa Anne Lyle, Helen Mary Dahlgren, Martha Perry Dahlgren, Cynthia Ann Crowder, Daniel Carl Dahlgren, Charles Stephen Dahlgren, and Diane Ellen Pullins. The parties have not asked this Court to determine which plaintiff owns any allocated interest in those rights for each relevant property, and this judgment shall not serve that purpose.

In this case, the following defendants own the relevant properties: Brown Farm Properties, LLC, Brian L. Wagner, and Thomas Beadnell.

In this case, Chesapeake Exploration, LLC is the current holder of assigned leases and the defendant developer for the plaintiffs' oil and gas ownership on the relevant properties.

This Court determines and declares that each of the eight plaintiffs retains his or her respective interest in oil and gas located on or recovered from the properties designated in the Complaint and its attachments.

This Court quiets ownership and title to those mineral rights in the plaintiffs and not in the surface landowner defendants.

This Court determines and declares that each of the landowner defendants retains his or its surface ownership for those properties.

This Court determines and declares that the defendant developer retains its rights as the holder of recorded and assigned leases to those oil and gas rights.

Within sixty days after this Court files its judgment with the Clerk of the Carroll County Common Pleas Court and any subsequent appeals from that judgment are exhausted, each of the plaintiffs or their counsel shall file a copy of this Final Opinion and Judgment in the Carroll

County Recorder's Office, together with a claim that satisfies R.C. 5301.56(C)(1).

The plaintiffs shall recover the costs of this case, not including attorney fees or litigation expenses.

*Richard M. Markus*

Judge Richard M. Markus, Retired Judge Recalled to Service pursuant to Ohio Constitution, Art. IV, §6(C) and R.C. 141.16 and assigned to the Carroll County Common Pleas Court for this matter.

THE CLERK SHALL MAIL TIME STAMPED COPIES OF THIS FINAL OPINION AND JUDGMENT TO ALL COUNSEL AND THE ASSIGNED VISITING JUDGE

COMMON PLEAS COURT - 234 PAGE # 27

# **EXHIBIT B**

PROPONENT TESTIMONY ON BEHALF OF  
SENATE BILL 223 AND HOUSE BILL 521,  
AN OHIO DORMANT MINERAL ACT

Ohio presently has a Marketable Title Act, R.C. §5301.47 et seq., which became effective September 29, 1961. It was amended September 30, 1974 to exclude any right, title, estate or interest in coal and coal mining rights from operation of the Act. Section 5301.48 of the Act states that a person has a marketable title to an interest in land if he has an unbroken chain of record title for a period of not less than 40 years. Chain of title is then defined by two clauses, the first of which states the case where the chain of title consists of only a single instrument or transaction and the second where it consists of two or more instruments or transactions. The Act provides that the requisite chain of title is only effective if nothing appears of record purporting to divest the claimant of the marketable title.

The obvious purpose of the Marketable Title Act is to simplify land title transactions by making it possible to determine marketability through limited title searches over some reasonable period thus avoiding the necessity of examining the record back to the patent for each new transaction. This is obviously a legitimate and desirable objective but in the absence of specific statutory authority, interests created and interests appearing in titles prior to that period would not necessarily be eliminated and would continue to be an impediment to marketability. Marketable Title Acts do not cure and validate errors or irregularities in conveyancing instruments but bar or extinguish interests which have been created by or result from irregularities in instruments recorded prior to the period prescribed by the statute and thereby free present titles from the effect of those instruments. In this very general sense, the Marketable Title Act is curative in character.

The Ohio Marketable Title Act was based on the model Marketable Title Act which was drafted by Professor Lewis M. Simes and Clarence B. Taylor as part of the Michigan research project, a comprehensive study undertaken to set up standard statutory language to provide for the simplification of real estate conveyances. At the time of that study in 1959, there were ten Marketable Title Acts in effect, including Michigan's. The Michigan Act, which had been in effect for 15 years and subjected to considerable testing and experience, appeared to be the best piece of draftsmanship and embodied the most practical approach for attaining the desired objective. The Michigan Act served as the basis for drafting the model Act. The Ohio Marketable Title Act was the tenth Marketable Title Act enacted after the Michigan study and was patterned directly from the model Act.

It is apparent from the legislative history of the Ohio Marketable title Act and subsequent interpretation by courts and

practitioners since its enactment that it was the general intent of the act to apply to mineral interests except coal. Simes and Taylor, in their Model Act, pointed out that the single principal provision in the Marketable Title Act which makes it ineffective to bar dormant mineral interests is the provision that the record title is subject to such interest and defects as are inherent in the muniments of which the chain of record title is formed. This provision is included in the Model Act, as well as the Michigan and Ohio Acts. From a practical standpoint, any reference in the recorded chain of title to previously-created mineral interests may serve to keep those interests alive. This issue was the subject of Heifner v. Bradford, 4 O.S. 3d 49 (1983). In that case, the trial court upheld the validity of a severed mineral interest which was based upon transactions in a chain of title separate from the title claimed by the possessor of the surface interest. The severed mineral chain, however, contained transactions recorded during the 40-year period prescribed by the Act and the court held that transactions inherent in muniments of title during the period constituted a separate recognizable chain of title entitled to protection under the Act. The Appellate Court reversed in a decision acknowledging the fact that a precise reading of the statute upheld the trial court's decision but relied on legislative history to the effect that it was the intent of the drafters to extinguish severed mineral interests.

The Ohio Supreme Court overruled the Court of Appeals based upon a strict reading of the statute. Due to this obvious limitation in the Act, recognized by Simes and Taylor and highlighted by Heifner, it would appear that the Ohio Marketable Title Act is not generally effective as a means of eliminating severed mineral interests.

As a general principle, minerals are not deemed to be capable of being abandoned by a non-user unless they are actually possessed. Ohio is in the majority of jurisdictions which hold that a severed interest in undeveloped minerals does not constitute possession. Michigan's legislators recognized the importance of including minerals in those defects and errors which should be eliminated by operation of time and non-use. The Michigan Act and the Model Act provide an additional mechanism for the elimination of dormant mineral interests which, when used in conjunction with the Marketable Title Act, is effective in accomplishing this goal. Under the Michigan Act, owners of severed mineral interests are required to file notice of their claims of interest within 20 years after the last use of the interest. A three-year grace period was provided for initial filing under the Michigan Act. Any severed mineral interest deemed abandoned or extinguished as a result of the application of the Michigan Act vests in the owner of the surface.

The major distinction between the proposed bill for consideration by the Ohio legislature and the Michigan Act is that the Michigan Act applies only to interests in oil and gas. It is apparent from the 1974 amendment of the Ohio Marketable Title Act

that the Ohio Legislature has deemed it advisable for the Marketable Title Act to apply to all mineral interests except coal. The proposed Ohio Dormant Mineral Act has been drafted to conform to the Ohio Marketable Title Act and apply to any mineral interest except an interest in coal as defined by §5301.53(E) of the Marketable Title Act. The proposed Bill, if passed, would have lead to the desired result as stated by the Appellate Court in Heifner of terminating unused mineral interests not preserved by operations, transfers or a filing of notice of an intent to preserve interest.

The proposed bill also contains the essential elements recommended by the National Conference of Commissioners on Uniform State Laws at its annual conference in Boston in August, 1986. I have enclosed a copy of the Uniform Dormant Mineral Interests Act with prefatory notes and comments for your review.

California, Illinois, Indiana, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, Washington and Wisconsin all have adopted Dormant Mineral Acts. All but Pennsylvania, Virginia and Tennessee have companion Marketable Title Acts.

I believe that enactment of the Dormant Mineral Act will encourage the development of minerals in Ohio which have been previously ignored due to defects in title. The development of minerals would lead to severance tax revenues and enhance the economy of areas of the state which may have no other source of revenue production.

I feel that companies engaged in the development of minerals as well as owners of property subject to title defects not cured by the Marketable Title Act would benefit from the enactment of the proposed dormant minerals statute.

This testimony was prepared and presented by William J. Taylor, attorney and partner in Kincaid, Cultice & Geyer, 50 North Fourth Street, Zanesville, Ohio 43701, (614) 454-2591. Mr. Taylor's practice involves extensive mineral title work and his firm represented the prevailing party in Heifner v. Bradford, the leading Ohio Supreme Court case dealing with the Ohio Marketable Title Act. He frequently lectures and writes articles involving mineral title topics, including "Practical Mineral Title Opinions" and "The Effects of Foreclosing on Oil and Gas Leases" published by the Eastern Mineral Law Foundation. He is a member of the Ohio State Bar Association Natural Resources Committee, the Federal Bar Association Committee on Natural Resources, and the Legal Committee of the Ohio Oil and Gas Association.

**UNIFORM DORMANT MINERAL INTERESTS ACT**

Drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

and by it

Approved and Recommended for Enactment  
in All the States

At its

**ANNUAL CONFERENCE  
MEETING IN ITS NINETY-FIFTH YEAR  
IN BOSTON, MASSACHUSETTS  
AUGUST 1-8, 1986**

With Prefatory Note and Comments

## UNIFORM DORMANT MINERAL INTERESTS ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Dormant Mineral Interests Act was as follows:

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Final, approved copies of this Act are available on 8-inch IBM Displaywriter diskettes, and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS  
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## UNIFORM DORMANT MINERAL INTERESTS ACT

### PREFATORY NOTE

#### Nature of Mineral Interests

Transactions involving mineral interests may take several different forms. A lease permits the lessee to enter the land and remove minerals for a specified period of time; whether a lease creates a separate title to the real estate varies from state to state. A profit is an interest in land that permits the owner of the profit to remove minerals; however, the profit does not entitle its owner to possession of the land. A fee title or other interests in minerals may be created by severance.

A severance of mineral interests occurs where all or a portion of mineral interests are owned apart from the ownership of the surface. A severance may occur in one of two ways. First, a surface owner who also owns a mineral interest may reserve all or a portion of the mineral interest upon transfer of the surface. In the deed conveying the surface of the land to the buyer, the seller reserves a mineral interest in some or all of the minerals beneath the surface. Certain types of sellers, such as railroad companies, often include a reservation of mineral interests as a matter of course in all deeds.

Second, a person who owns both the surface of the land and a mineral interest may convey all or a portion of the mineral interest to another person. This practice is common in areas where minerals have been recently discovered, because many landowners wish to capitalize immediately on the speculative value of the subsurface rights.

Severed mineral interests may be owned in the same manner as the surface of the land, that is, in fee simple. In some jurisdictions, however, an oil and gas right (as opposed to an interest in nonfugacious minerals) is a nonpossessory interest (an incorporeal hereditament).

#### Potential Problems Relating to Dormant Mineral Interests

Dormant mineral interests in general, and severed mineral interests in particular, may present difficulties if the owner of the interest is missing or unknown. Under the common law, a fee simple interest in land cannot be extinguished or abandoned by nonuse, and it is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals. Thus, it is possible that the only document appearing in the public record may be the document initially creating the mineral interest. Subsequent mineral owners, such as the heirs of the original mineral owner, may be unconcerned

about an apparently valueless mineral interest and may not even be aware of it; hence their interests may not appear of record.

If mineral owners are missing or unknown, it may create problems for anyone interested in exploring or mining, because it may be difficult or impossible to obtain rights to develop the minerals. An exploration or mining company may be liable to the missing or unknown owners if exploration or mining proceeds without proper leases. Surface owners are also concerned with the ownership of the minerals beneath their property. A mineral interest includes the right of reasonable entry on the surface for purposes of mineral extraction; this can effectively preclude development of the surface and constitutes a significant impairment of marketability.

On the other hand, the owner of a dormant mineral interest is not motivated to develop the minerals since undeveloped rights may not be taxed and may not be subject to loss through adverse possession by surface occupancy. The greatest value of a dormant mineral interest to the mineral owner may be its effectual impairment of the surface estate, which may have hold-up value when a person seeks to assemble an unencumbered fee. Even if one owner of a dormant mineral interest is willing to relinquish the interest for a reasonable price, the surface owner may find it impossible to trace the ownership of other fractional shares in the old interest.

An extensive body of legal literature demonstrates the need for an effective means of clearing land titles of dormant mineral interests. Public policy favors subjecting dormant mineral interests to termination, and legislative intervention in the continuing conflict between mineral and surface interests may be necessary in some jurisdictions. More than one-fourth of the states have now enacted special statutes to enable termination of dormant mineral interests, and some of the nearly two dozen states that now have marketable title acts apply the acts to mineral interests.

#### Approaches to the Dormant Mineral Problem

The jurisdictions that have attempted to deal with dormant mineral interests have adopted a wide variety of solutions, with mixed success. The basic schemes described below constitute some of the main approaches that have been used, although many states have adopted variants or have combined features of these schemes.

Abandonment. The common law concept of abandonment of mineral interests provides useful relief in some situations. As a general rule, severed mineral interests that are regarded as separate possessory estates are not subject to abandonment. But less than fee interests in the nature of a lease or profit may be subject to abandonment. In some jurisdictions the scope of

the abandonment remedy has been broadened to extend to oil and gas rights on the basis that these minerals, being fugacious, are owned in the form of an incorporeal hereditament, and hence are subject to abandonment.

The abandonment remedy is limited both in scope and by practical proof problems. Abandonment requires a difficult showing of intent to abandon; nonuse of the mineral interest alone is not sufficient evidence of intent to abandon. However, the remedy is useful in some situations and should be retained along with enactment of dormant mineral legislation.

Nonuse. A number of statutes have made nonuse of a mineral interest for a term of years, e.g., 20 years, the basis for termination of the mineral interest. Such a statute in effect makes nonuse for the prescribed period conclusive evidence of intent to abandon.

The nonuse scheme has advantages and disadvantages. Its major attraction is that it enables extinguishment of dormant interests solely on the basis of nonuse; proof of intent to abandon is unnecessary. Its major drawbacks are that it requires resort to facts outside the record and it requires a judicial proceeding to determine the fact of nonuse. It also precludes long-term holding of mineral rights for such purposes as future development, future price increases that will make development feasible, or assurance by a conservation organization or subdivider that the mineral rights will not be exploited.

The nonuse concept should be incorporated in any dormant mineral statute. Even a statute based exclusively on recording, such as the Uniform Simplification of Land Transfers Act (USLTA) discussed below, does not terminate the right of a person who has an active legitimate mineral interest but who through inadvertence fails to record.

Recording. Another approach found in several jurisdictions, as well as in USLTA, is based on passage of time without recording. Under this approach a mineral interest is extinguished a certain period of time after it is recorded, for example 30 years, unless during that period a notice of intent to preserve the interest is recorded. The virtues of this model are that it enables clearing of title on the basis of facts in the record and without resort to judicial action, and it keeps the record mineral ownership current. Its major disadvantages are that it permits an inactive owner to preserve the mineral rights on a purely speculative basis and to hold out for nuisance money indefinitely, and it creates the possibility that actively producing mineral rights will be lost through inadvertent failure to record a notice of intent to preserve the mineral rights. The recording concept is useful, however, and should be a key element in any dormant mineral legislation.

Trust for unknown mineral owners. A quite different approach to protecting the rights of mineral owners is found in a number of jurisdictions, based on the concept of a trust fund created for unknown mineral owners. The basic purpose of such statutes is to permit development of the minerals even though not all mineral owners can be located, paying into a trust the share of the proceeds allocable to the absent owners. The usefulness of this scheme is limited in one of the main situations we are concerned with, which is to enable surface development where there is no substantial mineral value. The committee has concluded that this concept is beyond the scope of the dormant mineral statute, although it could be the subject of a subsequent act.

Escheat. A few states have treated dormant minerals as abandoned property subject to escheat. This concept is similar to the treatment given personal property in the Uniform Unclaimed Property Act. This approach has the same shortcomings as the trust for unknown mineral owners.

Constitutionality. Constitutional issues have been raised concerning retroactive application of a dormant mineral statute to existing mineral interests. The leading case, Texaco v. Short, 454 U.S. 516 (1982), held the Indiana dormant mineral statute constitutional by a narrow 5-4 margin. The Indiana statute provides that a mineral right lapses if it is not used for a period of 20 years and no reservation of rights is recorded during that time. No prior notice to the mineral owner is required. The statute includes a two-year grace period after enactment during which notices of preservation of the mineral interest may be recorded.

A combination nonuse/recording scheme thus satisfies federal due process requirements. Whether such a scheme would satisfy the due process requirements of the various states is not clear. Comparable dormant mineral legislation has been voided by several state courts for failure to satisfy state due process requirements. Uniform legislation, if it is to succeed in all states where it is enacted, will need to be clearly constitutional under various state standards. This means that some sort of prior notice to the mineral owner is most likely necessary.

#### Draft Statute

A combination of approaches appears to be best for uniform legislation. The politics of this area of the law are quite intense in the mineral producing states, and the positions and interests of the various pressure groups differ from state to state. It should be remembered that the dormant mineral portion of USLTA was felt to be the most controversial aspect of that act.

A statute that combines a number of different protections for the mineral owner, but that still enables termination of dormant mineral rights, is likely to be the most successful. Such a combination may also help ensure the constitutionality of the act from state to state. For these reasons, the draft statute developed by the committee consists of a workable combination of the most widely accepted approaches found in jurisdictions with existing dormant mineral legislation, together with prior notice protection for the mineral owner.

Under the draft statute, the surface owner may bring an action to terminate a mineral interest that has been dormant for 20 years, provided the record also evidences no activity involving the mineral interest during that period, the owner of the mineral interest fails to record a notice of intent to preserve the mineral interest within that period, and no taxes are paid on the mineral interest within that period. To protect the rights of a dormant mineral owner who through inadvertence fails to record, the statute enables late recording upon payment of the litigation expenses incurred by the surface owner; this remedy is not available to the mineral owner, however, if the mineral interest has been dormant for more than 40 years (i.e., there has been no use, taxation, or recording of any kind affecting the minerals for that period). The statute provides a two-year grace period for owners of mineral interests to record a notice of intent to preserve interests that would be immediately or within a short period affected by enactment of the statute.

This procedure will assure that active or valuable mineral interests are protected, but will not place an undue burden on marketability. The combination of protections will help ensure the fairness, as well as the constitutionality, of the statute.

The committee believes that clearing title to real property should not be an end in itself and should not be achieved at the expense of a mineral owner who wishes to retain the mineral interest. In many cases the interest was negotiated and bargained for and represents a substantial investment. The objective is to clear title of worthless mineral interests and mineral interests about which no one cares. The draft statute embodies this philosophy.

## UNIFORM DORMANT MINERAL INTERESTS ACT

### SECTION 1. STATEMENT OF POLICY.

(a) The public policy of this State is to enable and encourage marketability of real property and to mitigate the adverse effect of dormant mineral interests on the full use and development of both surface estate and mineral interests in real property.

(b) This [Act] shall be construed to effectuate its purpose to provide a means for termination of dormant mineral interests that impair marketability of real property.

#### COMMENT

This section is a legislative finding and declaration of the substantial interest of the state in dormant mineral legislation.

### SECTION 2. DEFINITIONS.

As used in this [Act]:

(1) "Mineral interest" means an interest in a mineral estate, however created and regardless of form, whether absolute or fractional, divided or undivided, corporeal or incorporeal, including a fee simple or any lesser interest or any kind of royalty, production payment, executive right, nonexecutive right, leasehold, or lien, in minerals, regardless of character.

(2) "Minerals" includes gas, oil, coal, other gaseous, liquid, and solid hydrocarbons, oil shale, cement material, sand and gravel, road material, building stone, chemical substance, gemstone, metallic, fissionable, and nonfissionable ores, colloidal

and other clay, steam and other geothermal resource, and any other substance defined as a mineral by the law of this State.

#### COMMENT

The definitions in this section are broadly drafted to include all the various forms of minerals and mineral interests. This includes both fugacious and nonfugacious, as well as organic and inorganic, minerals. The Act does not distinguish among minerals based on their character, but treats all minerals the same.

The reference to liens in paragraph (1) includes both contractual and noncontractual, voluntary and involuntary, liens on minerals and mineral interests. It should be noted that the duration of a lien may be subject to general laws governing liens. For example, a lien that by state law has a duration of 10 years may not be given a life of 20 years simply by recording a notice of intent to preserve the lien pursuant to Section 5 (preservation of mineral interest by notice), just as a mineral lease which by its own terms has a duration of five years is not extended by recordation of a notice of intent to preserve the lease. Likewise, if state law requires specific filings, recordings, or other acts for enforceability of a lien, those acts must be complied with even though the lien is not dormant within the meaning of this Act. Conversely, an instrument that creates a security interest which, by its terms, endures more than 20 years, cannot avoid the effect of the 20-year statute. See Section 4(c) (termination of dormant mineral interest).

The definition of "minerals" in paragraph (2) is inclusive and not exclusive. "Coal" and other solid hydrocarbons within the meaning of paragraph (2) includes lignite, leonardite, and other grades of coal. This Act is not intended to affect water law but is intended to affect minerals dissolved or suspended in water. See Section 3 (exclusions).

While Section 2 defines the term "minerals" and "mineral interest" broadly, the definitions serve the limited function of determining mineral interests that are terminated pursuant to this Act. They are not intended to redefine minerals and mineral interests for purposes of state law other than this Act.

#### SECTION 3. EXCLUSIONS.

(a) This [Act] does not apply to:

(1) a mineral interest of the United States or an Indian tribe, except to the extent permitted by federal law; or

(2) a mineral interest of this State or an agency or political subdivision of this State, except to the extent permitted by state law other than this [Act].

(b) This [Act] does not affect water rights.

#### COMMENT

Public entities are excepted by this section because they have perpetual existence and can be located if it becomes necessary to terminate by negotiation a mineral interest held by the public entity. A jurisdiction enacting this statute should also exclude from its operation interests protected by statute, such as environmental or natural resource conservation or preservation statutes.

This Act does not affect mineral interests of Indian tribes, groups, or individuals (including corporations formed under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1600 et seq.) to the extent that the interests are protected against divestiture by superseding federal treaties or statutes.

Although this Act affects minerals dissolved or suspended in water, it is not intended to affect water law. See Comment to Section 2 (definitions).

While Section 2 (definitions) defines the terms "minerals" and "mineral interest" broadly, the definitions serve the limited function of determining mineral interests that are terminated pursuant to this Act. They are not intended to redefine minerals and mineral interests for purposes of state law other than this Act.

#### SECTION 4. TERMINATION OF DORMANT MINERAL INTEREST.

(a) The surface owner of real property subject to a mineral interest may maintain an action to terminate a dormant mineral interest. A mineral interest is dormant for the purpose of this [Act] if the interest is unused within the meaning of subsection (b) for a period of 20 or more years next preceding commencement of the action and has not been preserved pursuant to Section 5. The action must be in the nature of and requires

the same notice as is required in an action to quiet title. The action may be maintained whether or not the owner of the mineral interest or the owner's whereabouts is known or unknown. Disability or lack of knowledge of any kind on the part of any person does not suspend the running of the 20-year period.

(b) For the purpose of this section, any of the following actions taken by or under authority of the owner of a mineral interest in relation to any mineral that is part of the mineral interest constitutes use of the entire mineral interest:

(1) Active mineral operations on or below the surface of the real property or other property unitized or pooled with the real property, including production, geophysical exploration, exploratory or developmental drilling, mining, exploitation, and development, but not including injection of substances for purposes of disposal or storage. Active mineral operations constitute use of any mineral interest owned by any person in any mineral that is the object of the operations.

(2) Payment of taxes on a separate assessment of the mineral interest or of a transfer or severance tax relating to the mineral interest.

(3) Recordation of an instrument that creates, reserves, or otherwise evidences a claim to or the continued existence of the mineral interest, including an instrument that transfers, leases, or divides the interest. Recordation of an instrument constitutes use of (i) any recorded interest owned by any person in any mineral that is the subject of the instrument,

and (ii) any recorded mineral interest in the property owned by any party to the instrument.

(4) Recordation of a judgment or decree that makes specific reference to the mineral interest.

(c) This section applies notwithstanding any provision to the contrary in the instrument that creates, reserves, transfers, leases, divides, or otherwise evidences the claim to or the continued existence of the mineral interest or in another recorded document unless the instrument or other recorded document provides an earlier termination date.

#### COMMENT

This section defines dormancy for the purpose of termination of a mineral interest pursuant to this Act. The dormancy period selected is 20 years -- a not uncommon period among the various jurisdictions.

Subsection (a) provides for a court proceeding in the nature of a quiet title action to terminate a dormant mineral interest. The device of a court proceeding ensures notice to the mineral owner personally or by publication as may be appropriate to the circumstances and a reliable determination of dormancy.

Subsection (b) ties the determination of dormancy to nonuse. Each paragraph of subsection (b) describes an activity that constitutes use of a mineral interest for purposes of the dormancy determination. In addition, a mineral interest is not dormant if a notice of intent to preserve the interest is recorded pursuant to Section 5 (preservation of mineral interest).

Paragraph (b)(1) provides for preservation of a mineral interest by active mineral operations. Repressuring may be considered an active mineral operation if made for the purpose of secondary recovery operations. A shut-in well is not an active mineral operation and therefore would not suffice to save the mineral interest from dormancy.

Paragraph (b)(1) is intended to preserve in its entirety a mineral interest where there are active operations directed toward any mineral that is included within the interest. Thus, if there are fractional owners of a mineral interest, activity by one owner is considered activity by all owners. Other interests owned by other persons in the minerals that are the object of

the operations are also preserved by the operations. For example, oil and gas operations by a fractional oil, gas, and coal owner would save not only the interests of other fractional oil and gas owners but also the interests of oil and gas lessees and royalty owners holding under either the oil and gas owner or any fractional owner, as well as the interests of holders of any other mineral interest in the oil and gas that is the object of the operations. The oil and gas operations suffice to save the coal interest of the oil, gas, and coal owner, as well as other minerals included in any of the affected mineral interests, not just the interest in oil and gas that is the subject of the particular operations. This is the case regardless whether the mineral interest was acquired in one instrument or by several instruments. However, oil and gas operations by a fractional oil, gas, and coal owner would not save the mineral interest of a fractional coal owner if the interest does not include oil and gas.

Under paragraph (b)(2), taxes must be actually paid within the preceding 20 years to suffice as a qualifying use of the mineral interest.

Paragraph (b)(3) is intended to cover any recorded instrument evidencing an intention to own or affect an interest in the minerals, including a recorded oil, gas, or mineral lease, regardless whether such a lease is recognized as an interest in land in the particular jurisdiction.

Under paragraph (b)(3), recordation has the effect of preserving not only the interests of the parties to the instrument in the minerals that are the subject of the instrument, but also the recorded interests of nonparties in the subject minerals, as well as other recorded interests of the parties in other minerals in the same property. Thus, recordation of an oil and gas lease between a fractional owner and lessee preserves the interest in oil and gas not only of the fractional owner but also of the co-owners; moreover, the recordation preserves the interest of the fractional owner in other minerals that are not the subject of the lease, whether the other minerals were acquired by the same instrument by which the oil and gas interest was acquired or by a separate instrument.

Recordation of a judgment or decree under paragraph (b)(4) includes entry or recordation in a judgment book in a jurisdiction where such an entry or recordation becomes part of the property records. The judgment or decree must make specific reference to the mineral interest in order to preserve it. Thus, a general judgment lien or other recordation of civil process such as an attachment or sheriff's deed of a nonspecific nature would not constitute use of the mineral interest within the meaning of paragraph (b)(4).

Subsection (c) is intended to preclude a mineral owner from evading the purpose of this Act by contracting for a very long or indefinite duration of the mineral interest. A lien on minerals having a 30-year duration, for example, would be subject to termination after 20 years under this Act if there were no further activities involving the minerals or mineral interest. A person seeking to keep the lien for its full 30-year duration could do so by recording a notice of intent to preserve the lien pursuant to Section 5 (preservation of mineral interest by notice). It should be noted that recordation of a notice of intent to preserve the lien would not extend the lien beyond the date upon which it terminates by its own terms.

**SECTION 5. PRESERVATION OF MINERAL INTEREST BY NOTICE.**

(a) An owner of a mineral interest may record at any time a notice of intent to preserve the mineral interest or a part thereof. The mineral interest is preserved in each county in which the notice is recorded. A mineral interest is not dormant if the notice is recorded within 20 years next preceding commencement of the action to terminate the mineral interest or pursuant to Section 6 after commencement of the action.

(b) The notice may be executed by an owner of the mineral interest or by another person acting on behalf of the owner, including an owner who is under a disability or unable to assert a claim on the owner's own behalf or whose identity cannot be established or is uncertain at the time of execution of the notice. The notice may be executed by or on behalf of a co-owner for the benefit of any or all co-owners or by or on behalf of an owner for the benefit of any or all persons claiming under the owner or persons under whom the owner claims.

(c) The notice must contain the name of the owner of the mineral interest or the co-owners or other persons for whom the

mineral interest is to be preserved or, if the identity of the owner cannot be established or is uncertain, the name of the class of which the owner is a member, and must identify the mineral interest or part thereof to be preserved by one of the following means:

(1) A reference to the location in the records of the instrument that creates, reserves, or otherwise evidences the interest or of the judgment or decree that confirms the interest.

(2) A legal description of the mineral interest. [If the owner of a mineral interest claims the mineral interest under an instrument that is not of record or claims under a recorded instrument that does not specifically identify that owner, a legal description is not effective to preserve a mineral interest unless accompanied by a reference to the name of the record owner under whom the owner of the mineral interest claims. In such a case, the record of the notice of intent to preserve the mineral interest must be indexed under the name of the record owner as well as under the name of the owner of the mineral interest.]

(3) A reference generally and without specificity to any or all mineral interests of the owner in any real property situated in the county. The reference is not effective to preserve a particular mineral interest unless there is, in the county, in the name of the person claiming to be the owner of the interest, (1) a previously recorded instrument that creates, reserves, or otherwise evidences that interest or (2) a judgment or decree that confirms that interest.

#### COMMENT

This section is broadly drawn to permit a mineral owner to preserve his or her own interest but also any or all interests of one or more other persons. This section permits the mineral owner to preserve the interests of the co-owners by specifying the interests to be preserved, the mineral interest being preserved may be overriding royalty or sublease or executive interest. In this situation, the mineral owner may elect also to preserve any or all of the interests subject to it, by specifying the interests in the notice of intent to preserve. The mineral owner may also elect to preserve the interest as to some or all of the minerals included in the interest.

Where the mineral interest being preserved is of limited duration, recordation of a notice under this section does not extend the interest beyond the time the interest expires by its own terms. Where the mineral interest being preserved is a lien, recordation of the notice does not excuse compliance with any other applicable conditions or requirements for preservation of the lien.

The bracketed language in paragraph (c)(2) is for use in a jurisdiction that does not have a tract index system. It is intended to assist in indexing a notice of intent to preserve an interest despite a gap in the recorded mineral chain of title.

Paragraph (c)(3) permits a blanket recording as to all interests in the county, provided that there is a prior recorded instrument, or a judgment whether or not recorded, that establishes the name of the mineral owner in the county records. The blanket recording provision is a practical necessity for large mineral owners. Where a county does not have a general index of grantors and grantees, it will be necessary to establish a separate index of notices of intent to preserve mineral interests for purposes of the blanket recording.

#### SECTION 8. LATE RECORDING BY MINERAL OWNER.

(a) In this section, "litigation expenses" means costs and expenses that the court determines are reasonably and necessarily incurred in preparing for and prosecuting an action, including reasonable attorney's fees.

(b) In an action to terminate a mineral interest pursuant to this [Act], the court shall permit the owner of the mineral interest to record a late notice of intent to preserve the mineral interest as a condition of dismissal of the action, upon payment into court for the benefit of the surface owner of the real property the litigation expenses attributable to the mineral interest or portion thereof as to which the notice is recorded.

(c) This section does not apply in an action in which a mineral interest has been unused within the meaning of Section 4(b) for a period of 40 or more years next preceding commencement of the action.

#### COMMENT

This section applies only where the mineral owner seeks to make a late recording in order to obtain dismissal of the action. The section is not intended to require payment of litigation expenses as a condition of dismissal where the mineral owner secures dismissal upon proof that the mineral interest is not dormant by virtue of recordation or use of the property within the previous 20 years, as prescribed in Section 4 (termination of dormant mineral interest). Moreover, the remedy provided by this section is available only if there has been some recordation or use of the property within the previous 40 years.

#### SECTION 7. EFFECT OF TERMINATION.

A court order terminating a mineral interest [, when recorded,] merges the terminated mineral interest, including express and implied appurtenant surface rights and obligations, with the surface estate in shares proportionate to the ownership of the surface estate, subject to existing liens for taxes or assessments.

#### COMMENT

In some states it is standard practice for judgments such as this to be recorded. In other states entry of judgment alone may suffice to make the judgment part of the land records.

Merger of a terminated mineral interest with the surface is subject not only to existing tax liens and assessments, but also to other outstanding liens on the mineral interest. However, an outstanding lien on a mineral interest is itself a mineral interest that may be subject to termination under this Act. It should be noted that termination of a mineral interest under this Act that has been tax-deeded to the state or other public entity is subject to compliance with relevant requirements for release of tax-deeded property.

The appurtenant surface rights and obligations referred to in Section 7 include the right of entry on the surface and the obligation of support of the surface. However, termination of the support obligation of the surface under this Act does not terminate any support obligations owed to adjacent surface owners.

It is possible under this section for a surface owner to acquire greater mineral interests than the surface owner started with. Assume, for example, there are equal co-owners of the surface, one of whom conveys his or her undivided 50% share of minerals. Upon termination of the conveyed mineral interest under this Act, the interest would merge with the surface estate in proportion to the ownership of the surface estate, so that each owner would acquire one-half of the mineral interest. The end result is that the conveying surface owner would hold an undivided one-fourth of the minerals and the nonconveying surface owner would hold an undivided three-fourths of the minerals. This result is proper since the reversion represents a windfall to the surface estate in general and to the conveying owner in particular, who has previously received the value of the mineral interest.

In the example above, assume that the conveyed mineral interest is not terminated, but instead the owner of the mineral interest executes a 30-year mineral lease. If the lease is terminated under this Act after 20 years have run, the interest in the remaining 10 years of the lease would merge with the surface estate in proportionate shares, at the end of which time it would expire, leaving the interest of the mineral owner unencumbered.

**SECTION 8. SAVINGS AND TRANSITIONAL PROVISIONS.**

(a) Except as otherwise provided in this section, this [Act] applies to all mineral interests, whether created before, on, or after its effective date.

(b) An action may not be maintained to terminate a mineral interest pursuant to this [Act] until [two] years after the effective date of the [Act].

(c) This [Act] does not limit or affect any other procedure provided by law for clearing an abandoned mineral interest from title to real property.

(d) This [Act] does not affect the validity of the termination of any mineral interest made pursuant to any predecessor statute on dormant mineral interests. The repeal by this [Act] of any statute on dormant mineral interests takes effect [two] years after the effective date of this [Act].

**COMMENT**

The [two]-year grace period provided by this section is to enable a mineral owner to take steps to record a notice of intent to preserve an interest that would otherwise be subject to termination immediately upon the effective date because of the application of the Act to existing mineral interests. Thus, a mineral owner may record a notice of intent to preserve an interest during the [two]-year period even though no action may be brought during the [two]-year period. Subsection (d) is intended for those states that repeal an existing dormant mineral statute upon enactment of this Act.

**SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

**SECTION 10. SHORT TITLE.**

This [Act] may be cited as the Uniform Dormant Mineral Interests Act.

**SECTION 11. SEVERABILITY CLAUSE.**

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect any other provision or application of this [Act] that can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

**SECTION 12. EFFECTIVE DATE.**

This [Act] takes effect \_\_\_\_\_.

**SECTION 13. REPEALS.**

The following acts and parts of acts are repealed:

- (1) \_\_\_\_\_.
- (2) \_\_\_\_\_.
- (3) \_\_\_\_\_.

# **EXHIBIT C**

John P. Hagan  
State Representative

50<sup>th</sup> House District  
Parts of Stark County

**District Office**

11301 Marlboro Avenue NE  
Alliance, Ohio 44601  
Telephone: (330) 935-2407  
Fax: (330) 935-0742

**Capitol Office**

Riffe Center  
77 South High Street  
Columbus, Ohio 43215  
Toll Free: (800) 282-0253  
Telephone: (614) 466-9078  
Fax: (614) 224-4932

*E-Mail:*

[District50@ohr.state.oh.us](mailto:District50@ohr.state.oh.us)

**Committees**

Public Utilities and Energy,  
*Chair*

Ways and Means

Financial Institutions, Real  
Estate & Securities

Economic Development  
and Environment

Appointments  
Power Siting Board

Transportation  
Improvement District  
Board of Trustees of Stark  
County

Ohio Steel Industry  
Advisory Council

**COMMITTEE NOTICE**  
**HOUSE PUBLIC UTILITIES AND ENERGY**  
**COMMITTEE**  
**REP. JOHN P. HAGAN – CHAIRMAN**

**Date:** Wednesday, June 15<sup>th</sup>, 2005  
**Time:** 9:30 am  
**Room:** Statehouse Room 017

**\*\*REVISION\*\***

**BILLS SCHEDULED TO BE HEARD**

<u>Bill</u>	<u>Sponsor</u>	<u>Title</u>	<u>Status</u>
HB 288	Wagoner	Abandoned Mineral Rights/ Oil and Gas Comm.	1 <sup>st</sup> Hearing Sponsor
HB 251	Uecker	State Facilities-Efficient Energy Use	2 <sup>nd</sup> Hearing Prop/Opp/IP
HB 85	Blessing	Do Not Aggregate	2 <sup>nd</sup> Hearing Prop/Opp/IP

**\*\* All witnesses please provide the committee with 30 copies of  
written testimony 24 hours prior to the committee hearing.**

CC:  
Committee Members  
Speaker's Office  
Nate Filler – Speaker's Office  
Jodi Allalen – Clerk's Office  
Sonja Herd – Clerk's Office  
Laura Clemens – Clerk's Office  
All Interested Parties

Legislative Information Office  
Statehouse Press Room  
Mary Connor - LSC  
Monica Piper – LSC  
Ruhaza Ridzwan - LSC Fiscal  
Ellen Aiello - Minority Caucus  
Michael Culp - Minority Chief of Staff

**MINUTES OF THE MEETING OF THE  
PUBLIC UTILITIES & ENERGY COMMITTEE  
June 15, 2005**

The meeting of the House Public Utilities and Energy Committee convened at 09:36 a.m. in room 017

With a quorum present, Chairman Hagan moved to dispense with the reading of the minutes of June 1, 2005. With no objection, the minutes were accepted.

The Chairman called up House Bill 288 for the first hearing and Sponsor Testimony.

Representative Wagoner gave sponsor testimony for House Bill 288 and questions were asked by Representatives Garrison and Buehrer.

The Chairman called up House Bill 251 for the second hearing and proponent and opponent testimony.

Janine Migden Ostrander testified on behalf of the Ohio Consumers Council as a proponent of HB 251 and questions were asked by Representative Buehrer.

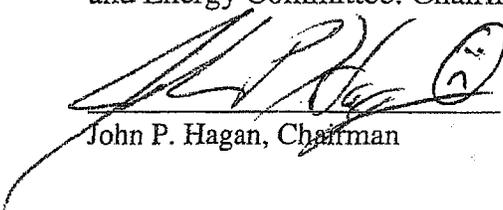
Kevin Schmidt testified on behalf of Public Policy Sources as a proponent of HB 251 and questions were asked by Representative Buehrer.

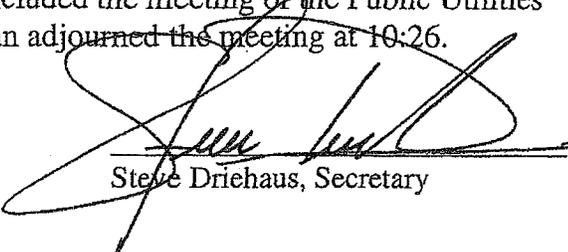
James Nargang testified on behalf of the Board of Regents as an interested party of HB 251 and questions were asked by Representatives Daniels, Blessing and Stewart.

The Chairman called up House Bill 85 for the second hearing and proponent and opponent testimony.

Tom Froehle testified on behalf of Industrial Energy Users Ohio as a proponent of HB 85 and questions were asked by Representative Carmichael.

With no further business this concluded the meeting of the Public Utilities and Energy Committee. Chairman Hagan adjourned the meeting at 10:26.

  
John P. Hagan, Chairman

  
Steve Driehaus, Secretary



*Mark D. Wagoner, Jr.*

*State Representative, 46th House District*

**HOUSE BILL 288**  
**REPRESENTATIVE MARK WAGONER**  
**SPONSOR TESTIMONY**  
**BEFORE THE OHIO HOUSE PUBLIC UTILITIES COMMITTEE**

Chairman Hagan and members of the House Public Utilities Committee, I thank you for the opportunity to present sponsor testimony on House Bill 288.

House Bill 288 seeks to update Ohio's mineral rights law. House Bill 288 contains two proposed amendments to Ohio's existing statutory scheme affecting energy production. The bill is designed, first, to address technical problems with Ohio's current Dormant Mineral Statute and, second, to resolve procedural problems with The Ohio Oil and Gas Commission. The General Assembly can take these two steps to help increase the availability of domestic energy supplies without adversely affecting the environment or state tax collections.

Turning first to the Dormant Mineral Statute, Ohio has had an active energy production industry since the mid 1800's. During this period, landowners in mineral producing areas have frequently severed the mineral rights in their land from the surface rights. Through the decades, ownership of the severed minerals has been transferred and fractionalized through estates and business transfers. Today, those old severed mineral rights may be the key to new production sites, as advances in current technology and the high cost of energy make reworking old oil and gas fields possible.

The problem is that it may be difficult - if not impossible - to find the owners or in some cases the multiple partial interest owners of such old severed mineral rights. Twenty years ago, Ohio joined the majority of oil and gas producing states by passing a Dormant Mineral Statute that permitted the surface owner to reunite severed mineral rights with the surface estate if the mineral rights had been abandoned. Unfortunately, Ohio's Dormant Mineral Statute has seldom been used, in large measure because the statute did not clearly define when a mineral interest became abandoned and exactly how the process to reunite the mineral ownership with the surface ownership was to be accomplished.

House Bill 288 removes the ambiguity of the existing statute with a clear definition of when a mineral right is deemed abandoned. The mineral right will be deemed abandoned if there

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Toledo, Ohio 43606  
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is both (1) no active use of the mineral rights and (2) a failure by the mineral right owner to file to preserve the inactive mineral right for future use for at least 20 years from the time a surface owner petitions to reunite the surface with the inactive mineral interest.

The first part of House Bill 288 is designed to fix perceived problems with the existing statutory provisions. The Bill will neither alter the balance between surface owner and mineral right owners, nor will the Bill change the environmental or conservation requirements to drill or produce in Ohio. Finally, the bill will not adversely affect tax revenues. In fact, if the bill has its intended results of bringing back old or marginal oil and gas fields to production, the bill should increase Ohio's collection of severance and ad valorem tax.

The second issue addressed in House Bill 288 deals with the administrative practices involved with the permitting and regulation of oil and gas wells in Ohio. Currently, an administrative appeal from a decision by the Chief of the Division of Mineral Resources Management in the Department of Natural Resources is to a body called the Ohio Oil and Gas Commission. The Commission has five (5) members and the current statute provides that no decision may be made without the concurrence of three members. The problem is that, in practice, it may be impossible to get three of the five Commissioners to even hear, much less decide, an appeal. Lack of a quorum can occur because of vacancies on the Commission, illness of a Commissioner or because a Commissioner has to recuse him or herself due to a conflict of interest. If a quorum of Commissioners cannot be assembled, or three votes secured, the appeal is stalled indefinitely.

A similar problem exists within our Courts and is addressed by appointing visiting judges. H.B. 288 applies the same technique by permitting the Chair of the Oil and Gas Commission to appoint visiting Commissioners from the pool of members who make up the oil and gas Technical Advisory Council. The Technical Advisory Council member go through the same screening and appointment process as the Oil and Gas Commissioners and have oil and gas experience and technical skills. Thus, drawing temporary members for the Oil and Gas Commission from the Technical Advisory Council will vest the Commission with the same skill set as the Commission's regular members and will allow the Commission to proceed to decide appeals which are now stalled.

In closing, I hear concerns about the availability and cost price of energy. Given the Ohio's national preeminence in manufacturing and its four month heating season, it is not surprising that Ohio ranks within the top ten states for energy consumption. What is less well

known is that Ohio is also among the top ten states for natural gas and oil production. In fact, almost 15% of the natural gas burned in Ohio's homes and factories is produced locally. House Bill 288 is a small step towards improving local production by streamline existing program and regulations to make them more efficient. It is step worth taking.

The Ohio State Bar Association has played an integral role in drafting and reviewing this legislation and supports it. I ask for your support to pass this bill too. Chairman Hagan and members of the committee, I thank you for your time and I would be happy to answer your questions at this time.

# **EXHIBIT D**

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, OHIO

2013 JUN -6 PM 1:47

LELAND EISENBARTH, et al. ,

Plaintiffs

BETH ANN ROSE  
CLERK OF COURTS

v.

Case No. 2012-292

DEAN F. REUSSER, et al. ,

Defendants.

JUDGMENT ENTRY

(Incorporating Findings of Fact and Conclusions of Law)

This matter is before the Court for non-oral hearing on the following:

- (1). Stipulation of the Parties;
- (2). Plaintiffs' Motion for Summary Judgment;
- (3). Defendants' Response to Plaintiffs' Motion for Summary Judgment;
- (4). Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Summary Judgment;
- (5). Defendants' Motion for Summary Judgment;
- (6). Plaintiffs' Memorandum Contra to Defendants' Motion for Summary Judgment;
- (7). Defendants' Reply in Support of Defendants' Motion for Summary Judgment; *and*
- (8). Defendants' Motion to Strike.

Based on the applicable law and the filings of the parties, the Court hereby makes the following findings and orders.

Monroe County  
Common Pleas  
Court  
- - -  
Julie R. Selmon  
Judge

FINAL APPEALABLE  
ORDER

COPY

The facts of the within case are undisputed and are set forth below.

In 1954, William H. Eisenbarth owned two tracts of land in Monroe County, Ohio, one totaling approximately 126.4530 acres (hereinafter "Tract I") and the other approximately 26.797 acres (hereinafter "Tract II"). At that time, William Eisenbarth had two children, Paul Eisenbarth and Mildred Reusser. In early 1954, William Eisenbarth executed a warranty deed which transferred the surface rights to Tracts I and II to Paul and Ida Eisenbarth, his son and daughter-in-law. As to the oil and gas and other mineral rights, the deed included the following provision:

There is reserved however by the Grantor William H. Eisenbarth one half of all Oil and Gas and all other minerals underlying said lands together with all rights to develop [sic] any or all of said the one half of Oil, Gas and other Mineral and to remove the same from the premises.

The right to lease however is given to Paul Eisenbarth and Ida Eisenbarth the grantees in this deed.

Several months later, William H. Eisenbarth transferred all of his right, title and interest to the severed mineral interest to his daughter Mildred Reusser, via a Royalty Deed dated April 2, 1954.

Within months of receiving the surface rights, one half the oil and gas rights, and the executive right to sign oil and gas leases, Paul and Ida Eisenbarth signed an oil and gas lease with C.H. McCammon on March 19, 1954.

They subsequently signed an oil and gas lease with J. F. Hall on August 30, 1957. They also signed an oil and gas lease with E & W Oil Company on June 29, 1967. Finally, they signed an oil and gas lease with Stocker & Sitler Oil Company on

August 2, 1973.

Paul and Ida Eisenbarth continued to own both tracts of land transferred to them by William Eisenbarth until September 28, 1989, when they transferred Tract II to their son Keith Eisenbarth via a warranty deed. This transfer was made subject to all reservations of record which would include the recorded reservation of one-half the oil and gas underlying the property by William H. Eisenbarth. Paul and Ida Eisenbarth continued to own Tract I until Paul died on December 4, 1989. A Certificate of Transfer filed on February 21, 1990 noted the transfer of Paul's interest in Tract I to his wife Ida. The legal description of Tract I attached to the Certificate of Transfer included the reservation language from the 1954 deed. Ida Eisenbarth continued to own Tract I until her death on January 24, 1998. A Certificate of Transfer filed September 9, 1998 noted the transfer of Ida's interest in Tract I to the Plaintiffs, her sons. Again, the legal description of Tract I attached to the Certificate of Transfer included the reservation language from the 1954 deed to Paul and Ida Eisenbarth.

On October 27, 1998, Plaintiffs transferred Tract I to themselves via a joint and survivorship deed. The exception of one half the oil and gas underlying the tract reserved by their grandfather William H. Eisenbarth is repeated in this deed, including the volume and page number where the 1954 deed was recorded. Plaintiffs then signed an oil and gas lease with Viking International Resources Co., Inc. on January 22, 2008.

On January 1, 2009, Plaintiffs caused a Notice of Abandonment directed to William Eisenbarth, Mildred Reusser, Martha Rose Maag and their unknown heirs, devisees, executors, administrators, relicts, next of kin and assign to be published in the

*Monroe County Beacon*. Plaintiffs filed an Affidavit of Abandonment on February 16, 2009 with the Monroe County Recorder claiming that the oil and gas interest had not been the subject of title transactions filed or recorded in the Monroe County Recorder's Office within the last twenty years.

However, on February 19, 2009, Defendants filed an Affidavit of Claim to Preserve Mineral Interest pursuant to Ohio Revised Code § 5301.56(C) with the Monroe County Recorder, claiming to be the holders of the Severed Mineral Interest. On that same date, Defendants also recorded a Royalty Deed dated April 2, 1954, transferring all of William E. Eisenbarth's right, title and interest in and to the Severed Mineral Interest to his daughter, Mildred Reusser.

Mildred Reusser died testate on October 2, 2002, leaving the residuary of her estate to the Defendants. Defendants in this case are the heirs of Mildred Reusser and are claiming title to the Severed Mineral Interest as reserved in the Reservation Deed.

Plaintiffs claim that they were unaware of the above-mentioned Claim to Preserve and as a result, on March 6, 2009, Plaintiffs sent notice to the Monroe County Recorder instructing her to note that the Severed Mineral Interest was abandoned.

Thereafter, Plaintiffs signed an oil and gas lease with Northwood Energy Corporation on March 15, 2012. This lawsuit followed, having been filed on September 13, 2012 where Plaintiffs seek a declaration that Defendants' rights to the oil and gas underlying Tracts I and II are abandoned pursuant to both the former and current version of the Dormant Minerals Act. Defendants then filed a Counterclaim seeking a declaratory judgment that Plaintiffs could not rely upon the prior version of the Dormant Minerals Act,

that the Severed Mineral Interest had been the subject of a title transaction in the twenty (20) years prior to Plaintiffs' filing their Notice of Abandonment and other relief. Also at issue is the signing bonus Plaintiffs received from their most recently-executed oil and gas lease whereby Plaintiffs received \$766,250.00.

Civil Rule 56 governs Summary Judgment motions. Civil Rule 56(C) provides that Summary Judgment shall be granted once it is determined that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for Summary Judgment is made. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St. 3d 447, 448 (1996); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64 (1978). If the moving party makes such a showing, the non-moving party then must produce evidence on any issue for which the party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St. 3d 108, Syllabus ¶3 (1991); (*Celotex Corp. v. Catrett*, 477 U.S. 317 [1986] approved and followed).

In this case, the oil and gas reservation contained in the Reservation Deed states that "the right to lease . . . is given to Paul and Ida Eisenbarth . . ." (The parents of the Plaintiffs). Plaintiffs thus claim that Plaintiffs are solely entitled to one hundred percent (100%) of the incidents of ownership of those leasing rights, including any signing bonus. Yet, Defendants claim they are entitled to half the proceeds of any bonus payment.

In seeking a declaration that Defendants' one-half interest in all the oil and gas and

all other minerals including Tracts I and II has been abandoned, Plaintiffs rely on both the previous and current version of the Dormant Minerals Act. In doing so, Plaintiffs claim that (over certain twenty year periods), the Defendants' mineral interest has not been the subject of any title transactions.

The Dormant Minerals Act of 1989 sets forth six savings events which, if they occurred in preceding twenty years, would prevent a deemed abandonment of the reserved minerals. R. C. § 5301.56(B)(1)(c). The first of these savings events looks to whether "[t]he mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the County Recorder of the County in which the lands are located." R. C. § 5301.56(B)(1)(c)(i) .

Thus, in determining whether the Defendants' mineral interest can be deemed abandoned under the Dormant Minerals Act, the Court must consider the title transactions which occurred during this period and whether those transactions affected the mineral rights to the property.

A "title transaction", as defined by ORC § 5301.47(F) means "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's or sheriff's deed, or decree of any Court, as well as warranty deed, quit claim deed or mortgage."

Defendants' claim both that: (1) an oil and gas lease is a title transaction; and (2) deeds transferring the surface of the property that recited the oil and gas reservation contained in the Reservation Deed constitutes a title transaction.

In *Dodd v. Croskey*, Case No. CVH-2011-0019 (Harrison County Common Pleas

Court, October 29, 2012), the Court was presented with facts similar to the within facts of the case currently before this Court. In 1947, the landowners conveyed the surface rights while excepting and reserving all oil and gas to themselves. The deed under which the surface owners claimed title described the premises conveyed and specifically noted the reservation of oil and gas rights in 1947. The Plaintiffs argued that the inclusion of the exception and reservation language in the deed did not qualify as a "title transaction" under the Dormant Minerals Act. The Court rejected that contention and held, as a matter of law, that the mineral interest is the subject of a title transaction where the deed in question conveys the surface rights while excepting oil and gas rights which were previously reserved.

However, the recent decision of *Walker v. Noon*, Noble County Common Pleas Court CVH 212-0098 found otherwise. In *Walker*, the facts were also nearly identical to the facts in the within case. In that case, two (2) conveyances after the Reservation Deed (in 1970 and 1977) "specifically not[ed] that the oil and gas had previously been reserved."

The Court in *Walker* held:

"The question becomes, do the surface transfers in 1970 and 1977 count as 'title transactions'? The Court believes the answer to be no. They would be within the twenty year period prior to March 22, 1989. However, to be 'title transactions', they would need to affect an interest in the land (§ 5301.47[F]), and for purposes of this case that interest is the mineral interest. [§ 5301.56(B)(1)(c)(i)]. While the surface transfers reference the mineral reservation, those transfers do not affect the mineral interest."

In *Walker*, the Court also recognized that a title transaction must affect the mineral interest to qualify as a savings condition. The Severed Mineral Interest must be the subject

of that title transaction according to ORC § 5301.56(B)(1)(c)(i) and not just a repetition of a prior oil and gas reservation.

Additionally, in *Wendt v. Dickerson*, Case No. 2012 CV 02 0133 (Tuscarawas County Common Pleas Court, February 21, 2013), the transfer to the Plaintiffs contained the following oil and gas reservation:

"Reservation by John R. Dickerson and Marjorie I. Dickerson, their heirs and assigns for all of the oil and gas with the right to drill for in Warranty Deed for record December 17, 1952, in Volume 133, Page 69."

The Court found that, regardless of the repetition of that reservation in the Plaintiff's deed, "no deed executed before or after 3/22/1992 transferred the property at issue 'subject to' the Defendant's mineral interest nor did they operate to create or preserve the interest of the Defendants in that case." *Wendt* at 18.

Similarly, in *William Wiseman, et al. v. Arthur Potts, et al.*, Morgan C.P. 08CV0145 (2008), the Morgan County Common Pleas Court found that a severed oil and gas interest was deemed abandoned based upon the prior version of the Ohio Dormant Minerals Act. In *Wiseman*, the Defendants argued that subsequent deeds that repeated the oil and gas reservation were "title transactions" that operated as savings conditions under the previous version of ORC § 5301.56. However, the Court in *Wiseman* found that "there is no genuine issue as to material fact and that the Motion of the Plaintiffs [landowners] for Summary Judgment quieting title to the oil and gas rights that are the subject of the Complaint should be and hereby is granted." *Wiseman v. Potts*, Morgan C.P. 08CV0145 (2008).

This Court finds that a recitation of the original oil and gas reservation in subsequent

transfers of the surface do not affect the Severed Mineral Interest and therefore do not constitute "title transactions" under ORC § 5301.56(B)(1)(c)(i) . The Court finds that the Severed Mineral Interest was not deeded, transferred or otherwise conveyed in any of the following title transactions and as a result, title thereto was not affected. These transactions include:

Tract I

- Reservation Deed (1954)
- Certificate of Transfer from Paul E. Eisenbarth (date of death 12/4/89) to Ida Eisenbarth dated February 16, 1990 and recorded in Volume 200, Page 522 of the Deed Records of Monroe County, Ohio.
- Certificate of Transfer from Ida M. Eisenbarth (date of death 1/24/1998) to Plaintiffs dated August 28, 1998, filed September 9, 1998 and recorded in Volume 45, Page 473 of the Official Records of Monroe County, Ohio.
- Survivorship Deed from Plaintiffs to Plaintiffs in joint survivorship dated October 27, 1998, filed October 30, 1998 and recorded in Volume 46, Page 979 of the Official Records of Monroe County, Ohio.

Tract II

- Reservation Deed (1954)
- Warranty Deed from Paul and Ida Eisenbarth to Plaintiff Keith Eisenbarth dated September 28, 1989, filed October 2, 1989 and recorded in Volume 199, Page 547 of the Deed Records of Monroe County, Ohio.

Again, none of these transactions affected title to the property at issue in this case, more specifically the Severed Mineral Interest. Instead, these transactions only affect title to the surface of the property. Accordingly, they do not constitute a savings condition

under ORC § 5301.56.

Next, this Court must determine whether an oil and gas lease constitutes a "title transaction." ORC § 5301.47(F) specifically provides that: "Title Transaction" means "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's or sheriff's deed, or decree of any Court, as well as warranty deed, quit claim deed, or mortgage." The fact that the words "lease" or "oil and gas lease" do not appear in the non-exhaustive list in the above-cited statute does not end this Court's inquiry. Rather, the Court must decide if an oil and gas lease is a "transaction affecting title to any interest in land." This issue was most recently addressed by the Columbiana County Court of Common Pleas in *Bender v. Morgan*, Case No. 2012-CV-378 (Columbiana County, March 20, 2013). In *Bender*, the Court found that "an oil and gas lease is clearly a 'title transaction' as contemplated under R.C. § 5301.47(F)." *See Id.* at 5.

More specifically, the Court found:

Moreover, an oil and gas lease does more than merely permit use of minerals for development. Rather, an oil and gas lease does actually convey (a determinable fee interest) in the oil and gas (severed mineral interests in this case) in place, for production. That conveyance is subject to reverter in the event there is no production and the lease otherwise expires by its own terms. "Oil and gas in place are the same as any part of the realty, and capable of separate reservation or conveyance," citing *Pure Oil Co. v Kindall* (1927), 116 Ohio St. 188, 201. A lessee to an oil and gas lease acquires a "vested, though limited, estate in the lands for the purposes named in the lease . . .", citing *Harris v. Ohio Oil Co.* (1897), 57 Ohio St. 118, 130-31. Under the typical language of a habendum clause found in an oil and gas lease, such generally creates a determinable fee interest, subject to reverter to the lessor if

conditions are not satisfied. E.g., *Tisdale v. Walla* (December 23, 1994), Ashtabula App. No. 94-A-0008; *Kramer v. PAC Drilling Oil & Gas* (December 29, 2011), 2011-Ohio-6750, ¶11. As stated in *Kramer*, an oil and gas lease "convey[s] ownership of the oil and gas estates" to the lessee; again, subject to reverter. *Id.* Because of the possibility of reverter, the oil and gas lease conveys a fee simple determinable rather than a fee simple absolute. *Id.* In any event, an oil and gas lease is clearly a "title transaction" as contemplated under R. C. § 5301.47(F).

It is inescapable that an instrument which conveys a fee simple determinable in oil and gas minerals (in place) is a "title transaction" as contemplated by the broad definition found in the Marketable Title Act.

In this case, Paul and Ida Eisenbarth signed an oil and gas lease on August 2, 1973, which was recorded on January 23, 1974. As a matter of simple math, this occurred within the twenty (20) years preceding both the date the Dormant Minerals Act was passed in 1989 and the date it became effective in 1992. Plaintiffs contend, however, that the "severed" mineral interest was not the subject of such a lease because their parents (and predecessors in interest) signed this lease only in regard to the undivided one-half of the oil and gas rights which had been conveyed with the surface rights. This argument is inconsistent with both the facts of this case and the law.

Plaintiffs contend that the leases their parents signed (including those in 1954, 1957 and 1967) could not have affected the undivided one-half of the oil and gas rights retained by William Eisenbarth (and later conveyed to Mildred Reusser and then Defendants) because a lease must be signed by the grantor. Elsewhere, however, Plaintiffs emphasize that the 1954 deed conveying the surface rights and one-half the mineral interest to their parents also conveyed the executive right (the right to sign leases). As Plaintiffs have

acknowledged, this means that the owners of the Severed Mineral Interest could not have signed an oil and gas lease because that right belonged to Paul and Ida Eisenbarth and their successors in interest. Their argument that the oil and gas leases signed by Plaintiffs and their parents could not have affected Defendants' interest "without the Defendants' signature [sic]" directly contradicts their argument that "Defendants have no right or ability to execute an oil and gas lease on the Property."

This Court finds that when Paul and Ida Eisenbarth signed the lease in 1973, they were exercising the executive right conveyed to them in 1954. The Court finds that the oil and gas lease in question covered all of the oil and gas underlying the property, not just the one-half belonging to Paul and Ida Eisenbarth.

Thus, this Court finds that the mineral interest in this case was clearly the subject of a title transaction when Paul and Ida signed a lease conveying rights to the oil and gas to a third party. Based on the foregoing, the Court finds in Defendants' favor that their oil and gas interest has not been abandoned under the Ohio Dormant Minerals Act since one of the savings provisions under Ohio Revised Code § 5301.56(B)(1)(c) has been satisfied.

Next, since this Court found that the mineral interest has not been abandoned, this Court must now decide the issue of who is rightfully entitled to any bonus money received by Plaintiffs. Plaintiffs seek a declaration from this Court that possessing the executive right (the right to lease) carries with it an entitlement to all bonus money received. Thus Plaintiffs contend that the only interest Defendants can claim is an interest in the royalty or subsequent delay rental payments. Defendants claim otherwise. Defendants contend that the executive right (the right to lease) and the right to bonus money are two (2)

separate rights and since William Eisenbarth did not convey the right to receive the bonus money related to the one-half mineral interest he retained, such a declaration would be inappropriate. Defendants contend they are entitled to one-half of the bonus money, or \$383,125.00.

In the within case, the oil and gas reservation contained in the Reservation Deed read that William Eisenbarth reserved "one-half of all oil and gas and all other minerals underlying said lands together with all rights to develop any or all of said one-half of oil, gas and other minerals and to remove the same from the premises." Meanwhile, "the right to lease . . . was given to Paul Eisenbarth and Ida Eisenbarth . . .".

In support of their position, Plaintiffs rely on *Buegel v. Amos*, Case No. 577, 1984 WL 7725 (7<sup>th</sup> Dist. June 5, 1984). The *Buegel* case dealt with a non-participating royalty interest. In the within case, the Court finds that the language of reservation created a mineral fee interest in the Grantor, William Eisenbarth, not a royalty interest. See *Lighthouse v. Clinefelter*, 36 Ohio App. 3d 204, 206 (9<sup>th</sup> Dist. 1987) (retaining ownership in one-half of the minerals beneath the surface retains a fee simple estate in those minerals); 2 Williams & Meyers, Oil and Gas Law, § 338 at 198.

Moreover, the *Buegel* Court held: "The distinguishing characteristics of a 'non-participating royalty interest' are: (1) such share of production is not chargeable with any of the costs of discovery and production; (2) the owner has no right to do any act or thing to discover and produce the oil and gas; (3) the owner has no right to grant leases; and (4) the owner has no right to receive bonuses or delay rentals." *Buegel*, 1984 WL 7725 at 2.

The *Buegel* Court relied exclusively upon *Mounger v. Pittman*, 108 So.2d 565 (Miss. 1959) in determining what the characteristics of a non-participating royalty are. The *Mounger* Court expressly held that the right to receive a bonus is a distinct right retained by the grantor unless specifically conveyed to the grantee.

Thus, this Court finds consistent with the 7<sup>th</sup> District's ruling in *Buegel* that William Eisenbarth retained the right to receive the bonus money associated with his one-half interest in the oil and gas in place, which right was eventually conveyed to the Defendants.

Based on all of the foregoing, the Court finds there are no genuine issues of material fact that remain to be litigated from Plaintiffs' Complaint or Defendants' Counterclaim. Consistent with the findings herein, Defendants are entitled to judgment as a matter of law. Defendants are hereby ordered title to one-half of the oil, gas and other minerals underlying Tracts I and II quieted in themselves. The Court further orders Plaintiffs to pay one-half of any bonus money received to Defendants.

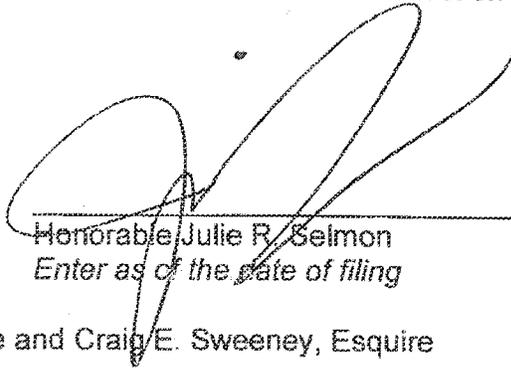
The Clerk is hereby ordered to forward a certified copy of this order to the Monroe County Recorder, to add a marginal notation on the deed recorded at Volume 129, Page 503 stating that the Severed Mineral Interest was not abandoned pursuant to the Affidavit of Abandonment recorded in Volume 178, page 681.

The Court further finds that there is no just reason for delay, and that this "Judgment Entry Incorporating Findings of Fact and Conclusions of Law" is a final appealable order, as defined under Civil Rule 54.

The costs of this proceeding shall first be taken from the deposits previously filed by both Plaintiffs and Defendants. Any remaining balance shall be divided equally between

the parties. Judgment is hereby granted the Clerk of this Court to collect on her costs.

**IT IS SO ORDERED.**



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Honorable Julie R. Selmon  
*Enter as of the date of filing*

Copies to: Richard A. Yoss, Esquire and Craig E. Sweeney, Esquire  
YOSS LAW OFFICES

Andrew P. Lycans, Esquire and Patrick E. Noser, Esquire  
CRITCHFIELD, CRITCHFIELD & JOHNSTON, LTD.

c: \oil&gas decisions \  
eisenbarth-reusseropinionanddecision  
June 4, 2013 (2:10PM)Jay

Monroe County  
Common Pleas  
Court  
---  
Julie R. Selmon  
Judge

# **EXHIBIT E**



The Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The Court stated that “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-65 (citations and quotation marks omitted). Additionally, the Court emphasized that even though a complaint need not contain “detailed” factual allegations, its “[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.” *Id.* (internal citation and quotation marks omitted). In so holding, the Court disavowed the oft-quoted Rule 12(b)(6) standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (recognizing “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”), characterizing that rule as one “best forgotten as an incomplete, negative gloss on an accepted pleading standard.” *Twombly*, 550 U.S. at 563.

*Id.* at 548.

If an allegation is capable of more than one inference, this Court must construe it in the plaintiff’s favor. *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) (citing *Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993)). This Court may not grant a Rule 12(b)(6) motion merely because it may not believe the plaintiff’s factual allegations. *Id.* Although this is a liberal standard of review, the plaintiff still must do more than merely assert bare legal conclusions. *Id.* Specifically, the complaint must contain “either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.” *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (quotations and emphasis omitted).

## II. FACTS

The issue squarely before this Court is a rather narrow one. Plaintiff Nancy McLaughlin seeks a declaration that certain mineral rights were abandoned under Ohio’s Dormant Mineral Act (the “ODMA”) and therefore merged with her surface rights. In contrast, Defendant asserts

that certain events took place that prevent application of the ODMA. Plaintiff does not dispute that these events took place, but rather she claims that they do nothing to alter her conclusion that the mineral rights were abandoned. As such, the Court is presented with a pure issue of law to resolve this matter.

As general background, in 1957, Consolidation Coal Company acquired 143 acres of land in Carroll County, Ohio inclusive of mineral rights to the property. In 1977, Consolidation entered into an Option to Lease with Republic Steel Corporation related to oil and gas rights on the lands acquired in 1957. In 1979, Republic exercised its option and leased the oil and gas rights to this land. In 1985, Consolidation conveyed the land to Conoco, reserving its oil and gas rights. In 1988, Conoco conveyed its rights to DuPont Energy Coal Holdings. On December 12, 1988, DuPont conveyed its interests to International Environmental Services, again noting the reservation of oil and gas rights. On July 6, 1992, Kelt Resources, Inc. executed a Partial Release of Oil and Gas Lease. In that document, Kelt released its rights to a portion of the oil and gas lease entered into by Consolidation and Republic.

On May 25, 1994, Plaintiff and her late husband acquired the surface rights to the 143-acre tract through a sheriff sale that was conducted based on the delinquent tax status of International Environmental Services. On September 29, 2011, Consolidation conveyed the oil and gas rights to Defendant CNX. On June 13, 2013, Plaintiff filed this action to quiet title, alleging that the mineral rights merged with the surface rights no later than January 3, 2005 because following the 1985 severance, twenty years passed without a title transaction. With that background in mind, the Court reviews the parties' arguments.

### III. ANALYSIS

The Ohio Dormant Mineral Act (“ODMA”), as codified in Ohio Revised Code (“O.R.C.”) § 5301.56, establishes a process by which mineral interests may be deemed abandoned and to have vested to the owner of the surface rights. Specifically, O.R.C. § 5301.56(B) provides in pertinent part as follows:

(B) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if the requirements established in division (E) of this section are satisfied and none of the following applies:

...

(3) Within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section, one or more of the following has occurred:

(a) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.

While the parties agreed on the underlying facts, they sharply dispute the application of the above provisions of the ODMA.

Plaintiff argues that the memorandum of lease relied upon by Defendant is nothing more than a license and therefore cannot act in any manner to preserve rights under the ODMA. In support, Plaintiff relies heavily on *Back v. The Ohio Fuel Gas Co.*, 160 Ohio St. 81 (1953). Plaintiff contends that *Back* makes clear that the lease at issue is nothing more than a license. Plaintiff then asserts that because a license does not formally pass property, it cannot be found to be a title transaction. The Court finds no merit in this assertion.

O.R.C. § 5301.47(F) provides:

(F) “Title transaction” means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee’s, assignee’s,

guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

As the above definition makes clear, title transaction means *any transaction* affecting title to *any interest* in land. It is difficult for the Court to conceive of a broader definition than the one chosen by Ohio law. By its plain language, the statute does not require a conveyance or transfer of real property in order to constitute a title transaction. Rather, the statute simply requires a transaction that affects title to any interest in the land.

Moreover, Plaintiff's reliance on *Wellington Resource Group LLC v. Beck Energy Corp.*, 2013 WL 5311412 (S.D. Ohio Sept. 20, 2013) also does little to assist Plaintiff's arguments. In *Wellington*, the district court concluded: "In essence, this Court reaffirms its prior conclusion in *Frederick*, where it stated that 'Ohio courts, if given the opportunity to do so, would characterize the property interests involved [here] as being like or similar to the interest recognized under Oklahoma law,' and common to many oil-producing states, and hold that oil and gas leases are not a grant of real property." *Id.* at \*7. Plaintiff again incorrectly assumes that an actual transfer of real property is required under the ODMA when the plain language of the statute requires far less.

Even if this Court were to agree with the analysis in *Wellington* and ignore the contrary conclusion reached by a member of this District in *Binder v. Trinity OG Land Development and Exploration*, 2012 WL 1970239, at \*3 (N.D. Ohio May 31, 2012), it would not aid Plaintiff's claim. Even if Defendant's property interests through the lease are something less than a grant of real property, those interests quite clearly still **affect** title to the mineral rights in the property. As the lease itself was a title transaction, there can be no dispute that the release of rights under that lease qualifies as a title transaction as well. Accordingly, Plaintiff's claims must fail as a matter of law.

In reaching this conclusion, the Court is mindful of Plaintiff's argument that Ohio's statute includes numerous specific items that qualify as title transactions and that oil and gas leases are not among those listed transactions. However, the list is certainly not an exclusive list and an oil and gas lease falls within the same category of documents listed within the statute. Moreover, contrary to Plaintiff's argument, including the oil and gas lease as a title transaction would not render any portion of the ODMA superfluous. One savings event that includes "actual production or withdrawal of minerals" is not made superfluous by the Court's conclusion. Herein, the original lease appears to have a term of fifty years. Thus, there are factual scenarios that would allow the lease itself to operate as a savings event for twenty years, but thereafter only actual production or a new title transaction would operate as a savings event. Accordingly, the Court's construction does not render any portion of the ODMA meaningless.

Finally, the Court rejects Plaintiff's assertion that she acquired the mineral rights through the sheriff sale of the surface rights. The Court agrees with Defendant – the sale could not have included the mineral interests as they were not owned by the party delinquent in its taxes – International Environmental Services. As the mineral interests were not owned by IES, they could not have been subject to any tax lien or any sheriff sale. Accordingly, Plaintiff could not have acquired them through such a transaction.

**IV. CONCLUSION**

Defendant's motion for judgment on the pleadings is GRANTED. Defendant shall file a notice within seven days of this order stating whether it intends to pursue the remaining counterclaims in this matter.

IT IS SO ORDERED.

Date: December 13, 2013

/s/ John R. Adams  
Judge John R. Adams  
UNITED STATES DISTRICT COURT

# **EXHIBIT F**

IN THE COURT OF COMMON PLEAS  
HARRISON COUNTY, OHIO  
GENERAL DIVISION

14 JAN 14 PM 12:17  
LESLIE A. GIBSON  
CLERK OF COURTS  
HARRISON COUNTY, OHIO

**M & H PARTNERSHIP**  
Plaintiff

Case No. CVH-2012-0059

vs.

**WALTER VANCE HINES, ET AL.**  
Defendants

**JUDGMENT ENTRY**

This matter is before the Court on Plaintiff's Motion For Summary Judgment filed on March 26, 2013 and Defendant's Motion For Summary Judgment filed March 7, 2013.

The Court has also considered the parties' replies and surreplies to said Motions including that if Defendant Chesapeake Exploration, LLC. The Court further recognizes the factual stipulations of the parties filed with the Court on March 21, 2013.

This matter is before the Court on a Complaint To Quiet Title filed by Plaintiff. Plaintiff contends that they are the surface and mineral owners of the disputed property. They claim ownership of the surface rights to the property through purchase on April 7, 2006. This ownership issue is not in dispute.

Plaintiff claims ownership of the mineral interest of the property pursuant to O.R.C. §5301.56 Ohio's Dormant Mineral Act as it was written in the 1989 version.

Defendants' Hines family do not dispute Plaintiffs surface right ownership. Defendant's Hines family do dispute Plaintiffs claim to the property's mineral rights.

Defendants' Hines family claim that Dormant Mineral Act does not apply to divest them of their mineral interest in the property because qualifying transactions have occurred in the necessary time frame.

Defendants' Hines family further argues that if no qualifying transactions are deemed to have occurred the correct version of ORC §5301.56 is the 2006 version and under said statute they properly preserved their mineral interest.

An examination of the 1989, 2006 ODMA §5301.56 is necessary as well as a review of interpreting case law in resolving the dispute.

#### **O.R.C. §5301.56 (1989 version)**

The factors to which Courts must look to decide whether a mineral interest holder had displayed sufficient activity to preserve their rights over a 20 year period or whether the mineral interest had grown stale based upon a lack of activity or interest by the mineral rights holder:

- (i) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located;
- (ii) There has been actual production or withdrawal of minerals by the holder.
- (iii) The mineral interest has been used in underground gas storage operations by the holder;
- (iv) A drilling or mining permit has been issued to the holder.

(v) A claim to preserve the interest has been filed in accordance with division (c) of this section.

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

In the case at bar, items (ii), (iii), (iv), (vi) have conclusively not been completed by the mineral estate holder. Item (v) claim to preserve interest was not filed in the requisite time period.

Therefore, the item which is controlling pursuant to the 1989 act is item (i) whether the mineral interest has been subject of a title transaction that has been file or recorded in the office of the county recorder of the county in which the lands are located.

A brief discussion on transfers of interest is necessary

1. Surface Rights.

A.) The surface rights were severed from the mineral rights by deed on June 1, 1961. The surface rights passed to Selway Coal Company with Vance and Eleanor Hines reserving the oil and gas rights.

B.) Selway Coal Company passed the surface rights to Robert Fleagane on February 29, 1975.

C.) Robert Fleagane to Shell Mining Company January 1, 1989.

D.) Shell Mining to R & F Coal Company November 12, 1991.

E.) R & F Coal Company merger with Capstone Holding Company  
February 9, 2000.

F.) Capstone Holding Company to Emanuel J. Miller Et Al. April 20,  
2001.

G.) Capstone Holding Company to William and Judith Ledger August 6,  
2001.

H.) Emanuel J. Miller Et Al to M & H Partnership April 7, 2006.

Deeds A, B, C, and D contain reservation clauses for oil and gas within the deed. Transaction E, F, G, and H did not recite the reservation. Thus the last title transaction noting the reservation of oil and gas on the surface property was November 12, 1991.

## 2. Oil and Gas Rights.

A. The surface rights were severed from the mineral rights by deed on June 1, 1961. The surface rights passed to Consolidation Coal Company with Vance and Eleanor Hines reserving the oil and gas rights.

B. A lease of the oil and gas rights was recorded from Walter v. Hines to Harry J. Iles on July 15, 1969.

C. An oil and gas lease from Walter Vance Hines, Richard Scott Hines and David Chris Hines and Richard Scott Hines as Power of Attorney for Drue Anne Hines Danz to Chesapeake Exploration L.L.C. dated October 31, 2011 and recorded February 14, 2012.

The Seventh District Court of Appeals in *Dodd v. Croskey* Case No. 12 HA 6 Ohio App. 7<sup>th</sup> Dist (2013) ruled on what constitutes and whether or not a mineral interest has been the "subject of" a title transaction which has been filed or recorded in the office of the county recorder of the county in which the land are located.

The Seventh District held that "The common definition of the word "subject" is, topic of interest, primary theme or basis for action. Under this definition the mineral interests are not the subject of the title transaction.

In the case at bar, the Court finds pursuant to the *Dodd* decision supra, that the last title transaction that the mineral interests were subject of occurred July 15, 1969. Wherefore, under the 1989 Dormant Mineral Act the Court must decide whether the 1969 transaction was a savings event.

The effect of the 1969 transaction relies on interpretation of the statute and its 20 year look back period.

*Riddell v. Layman* 5<sup>th</sup> Dist. App. (1995 WL 498812) is the only appellate decision which touches upon the appropriate 20 year look back period for the 1989 Dormant Mineral Act. The *Riddell* Court decided that "the title transaction must have occurred within the proceeding twenty years from the enactment of the statute, which occurred on March 22, 1989. Appellee Layman recorded the deed on June 12, 1973, was within the preceding twenty years from the date the statute was enacted."

The Riddel case dealt with a 1994 complaint and a 1973 reservation. Wherefore, the Court specifically finds that a rolling 20 year period of look back is not authorized by the 1989 statute. The Court finds that the 20 year period for a look back is 20 years from enactment March 22, 1989. Wherefore, a title transaction that the mineral interest is subject of must have occurred on or after March 22, 1969 to serve as a savings event.

The Court finds that Walter Vance Hine's lease of mineral interest to Harry J. Isles on July 15, 1969 is a title transaction and that the mineral interest at issue in this matter were the subject of that title transaction. As such, the July 15, 1969 lease serves as a savings event pursuant to the 1989 dormant mineral act and the holding in Riddel Supra.

#### 2006 Dormant Mineral Act.

In 2006, the Ohio legislature amended the dormant mineral act and provided additional due process safeguards to mineral interest holders.

The additional steps germane to this case are:

- 1) Recording of an affidavit of abandonment §5301.56 (E)(2).
- 2) Holder may file a claim to preserve mineral interests within 60 days of notice of affidavit of abandonment §5301.56 (H)(1).

In the case at bar, Defendant promptly filed their claim to preserve mineral interest within the 60 day time limit.

Plaintiff's further claim that answering Defendant's do not have standing in this matter in that they are not the successors in interest to the original holder's

of mineral interest Vance and Eleanor Hines. The Court finds that Plaintiff's argument to be without merit. The Court finds that through Ohio's Law of Succession that the mineral interest herein passed from Vance Hines and Eleanor Hines and then to their only heir their son Walter Vane Hines and then from Walter Vance Hines to his children the Defendant's herein. The Court specifically finds Defendant's to be the lineal descendants of the original holders and the successors in interest to the original holders mineral interest.

The Court finds pursuant to both the 1989 and 2006 Dormant Mineral Act the Defendants have preserved their mineral interest. Under 1989 Act, the Court finds the July 15, 1969 lease of minerals from Walter Vance Hines occurred within the statutory look back period as defined in Riddel and as such was a savings event under the statute. Under the 2006 Act, the Court finds that Defendant's properly preserved their mineral rights by filing a notice of preservation with the county recorder.

The Court finds the 2006 law is the applicable law in the case. In *Dodd v. Croskey* Seventh Dist App (2013) 12 HA 6 (9/12/2013) the Court applied the 2006 law in determining the parties claim. The claim involved a 1947 oil and gas reservation with no further title transactions that the mineral interest were subject.

The Court did not address its choice of the 2006 Act over the 1989 Act in *Dodd*. However, it is clear from their decision that the 2006 law was applied.

This Court is convinced that applying the 2006 law is the appropriate statute in this case for the following reasons.

R.C. 5301.56 is part of the Marketable Title Act. The Marketable Title Act is ORC 5301.47 – 5301.56. The act is to be read in total and not as separate independent statutes. The purpose of the act is to establish a marketable chain of title. ORC 5301.55 liberal construction “Sections 5301.47 to 5301.56 so inclusive, of the Ohio Revised Code shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transaction by allowing persons to rely on a record chain of title as described in Section 5301.48 of the Ohio Revised Code, subject only to such limitations as appear in Section 5301.49 of the Ohio Revised Code”.

The application of an “automatic” vesting clause of the 1989 Dormant Mineral Act is contrary to simplifying and facilitating land title transaction by allowing persons to rely on a record chain of title.

This Court does not believe it was the legislative intent at enactment to make surface holders automatically vested in the mineral rights pursuant to the 1989 Dormant Mineral Act. The terms automatic vesting, terminated, null and void, or extinguished were not used in the statute.

Those terms null and void and extinguished are used in other parts of the marketable title act but the Dormant Mineral Act uses the term abandoned.

The Court does not believe the difference in language to be unconscious. The Court finds pursuant to the Marketable Title Act that Plaintiff at the minimum must have filed a quiet title action prior to 2006 to have the 1989 law apply. Absent such action and determination, notice of the reversion of mineral

interest would not be apparent in the record chain of title and thus violate the purpose of the Marketable Title Act.

Since in this matter no action was filed until 2012, Plaintiff must conform to the applicable law currently in place to perfect their abandonment claim. And such the 2006 Dormant Mineral Act is controlling.

The Court finds this ruling is not in conflict with *Texaco v. Short* 454 U.S. 516 (1982). *Texaco v. Short* required due process before title vested in the surface holder. In the case at bar, Defendant Hines family was not given any due process consideration prior to this suit. There is no evidence of a Quiet Title Action filed between 1989 and 2006. In order for the Plaintiff's interest to vest some court action or recording of said interest must have occurred. Plaintiff failed to assert its claim prior to 2006 as such Plaintiff interest did not vest prior to 2006 and is subject to the 2006 amended statute.

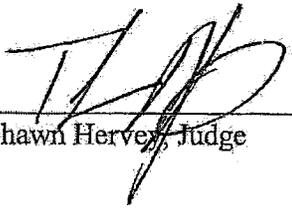
WHEREFORE, it is the ORDER of the Court that:

Plaintiff's Motion For Summary Judgment is denied.

Defendants, Hines Family, Motion For Summary Judgment is granted.

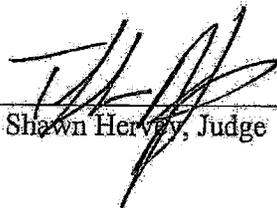
Defendants, Hines Family, is the lawful owner of the oil and gas interest at issue in this matter. Plaintiff's claim of ownership fails under the 1989 and 2006 Dormant Mineral Act. The Court holds the 2006 Dormant Mineral Act to be controlling.

SO ORDERED.

  
\_\_\_\_\_  
T. Shawn Herve, Judge

NOTICE: FINAL APPEALABLE ORDER

This is a final appealable order. For each party who is not in default, serve notice to the attorney for each party and to each party who represents himself or herself by regular mail service with certificate of mailing making notation of same upon case docket.

  
\_\_\_\_\_  
T. Shawn Heryny, Judge

Stamped Copies:

Attorney Patrick E. Noser  
Attorney T. Owen Beetham  
Attorney Clay K. Kellar

# **EXHIBIT G**

IN THE COURT OF COMMON PLEAS  
BELMONT COUNTY, OHIO

BELMONT CO., OHIO

2013 DEC 16 PM 1 07

WAYNE K. LIPPERMAN, et al.

Plaintiffs

v.

NILE E. BATMAN, et al.

Defendants

CYNTHIA K. Mc  
CLERK OF COURT  
CASE NO. 12-CV-0085  
JUDGMENT ENTRY

---

This matter having come on before this Court upon Plaintiff Wayne K. Lipperman, et al.'s Motion For Summary Judgment having been filed with this Court on October 3, 2013 and Defendants Reserve Energy Exploration Company and Equity Oil & Gas Funds, Inc's Motion For Summary Judgment filed with this Court on October 4, 2013. Thereafter, Responses and Replies were filed regarding the same. After having reviewed said filings this Court makes the following ruling.

**STATEMENT OF FACTS**

The Plaintiffs are the surface owners of approximately 41.23 acres in Pultney Township, Belmont County, Ohio. The Defendants Nile E. Batman and Kathryn Batman claim an interest in the mineral rights based upon a reservation of one-half (1/2) of all the oil and gas in a deed from a predecessor in title being John Clark, with said deed dated May 25, 1926 and recorded at Volume 602, Page 162 in the records of the Belmont

County Recorder. The Plaintiffs claim that the Defendants have abandoned their interest in the oil and gas based upon their failure to comply with the requirements of the Ohio Dormant Mineral Act. (ODMA). The Plaintiffs signed a lease with Defendant Reserve Energy on April 7, 2006. The Defendants signed a lease with Reserve Energy on November 1, 2008 for one-half (½) of the oil and gas underlying the parcel in question. The Plaintiffs have couched their argument within the 1989 version of the ODMA and have not complied with the notice requirements of the 2006 version of the Act. Therefore, this Court shall conduct its analysis of the issues herein in light of the 1989 version of the ODMA.

#### **STANDARD OF REVIEW**

Ohio Rule of Civil Procedure Rule 56 provides that summary judgment is warranted when "it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Ohio Rule of Civil Procedure 56(c).

Pursuant to Temple v. Wean United Inc., 50 Ohio St. 2d 317, 327, 364 N.E. 2d 267, 274 (1977) summary judgment is appropriate when the moving party demonstrates that (1) no genuine issues of material fact remain to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion that is adverse to the party against whom the motion is made.

1989 OHIO DORMANT MINERAL ACT

The 1989 version of the ODMA became effective March 22, 1989. It provided for a twenty (20) year look back provision regarding abandonment of mineral interests and a three year grace period through March 22, 1992 to come into compliance with the Act.

Ohio Rev. Code Section 5301.56 (B)(1), (B)(1)(c)(i), (v) provides in pertinent part:

(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface if none of the following applies:

(c) Within the preceding twenty years, one or more of the following has occurred;

(i) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located;

\*\*\*

(v) A claim to preserve the interest has been filed in accordance with division (C) of this section [.]

There are a number of other savings events that are not relevant to our discussions in the case at bar. The Plaintiffs claim that the Defendant Batmans have abandoned their mineral interest and that there have not been savings events upon which the Batmans can rely.

THE BATMAN AFFADAVIT

In analyzing the twenty (20) year look back period from March 22, 1989, this Court must review the Batman Affidavit of Preservation recorded September 14, 1981.

The Batman Affidavit was filed within the twenty (20) year look back window of the ODMA. This Court finds that the language contained in the affidavit complies with the requirements of Ohio Rev. Code Section 5301.52. As such, it qualifies as a savings event pursuant to the 1989 ODMA. Should the 1989 ODMA relate only to the years 1969-1989 plus the three year grace period, the Batman Affidavit would be sufficient to preclude abandonment by the Defendant Batmans. Whether the 1989 ODMA is stagnant or rolling requires further analysis.

### **THE TWENTY YEAR WINDOW**

Ohio Rev. Code Section 5301.56 (D)(1) provides:

A mineral interest may be preserved indefinitely from being deemed abandoned under division (B)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(c) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

A stagnant twenty (20) year look back period would have no need for a provision calling for indefinite preservation of mineral interest through successive filings of preservation claims. Based upon the same, this Court finds the 1989 Dormant Mineral Act to provide for a "rolling look back period." Having so found, the Batmans are required to identify an additional savings event after the recording of their Affidavit to Preserve Interest on September 14, 1981 and before September 14, 2001.

### THE BATMAN WILL

Frances Batman held a one-half (1/2) interest in the oil and gas in the parcel in question when she died in 1981. Her will was filed for record in County Court of Dakota County, Nebraska on October 21, 1981. Subsequently her will was filed for record with the Belmont County Probate Court on May 15, 1989. A certification from the Nebraska court was appended to the Batman Will prior to when it was filed with the Belmont County Probate Court. The will provided for the transfer of Frances Batman's interest in the parcel herein to her son, the Defendant Nile Batman. The Batman Will was recorded with the Belmont County Recorder on April 10, 1989, some nineteen (19) days after the 1989 ODMA went into effect. A Certificate of Transfer was not recorded in the office of the Belmont County Recorder.

It is the position of the Defendants that the Batman Will is a title transaction and acts as a savings event pursuant to the 1989 ODMA. Ohio Rev. Code 5301.47 (F) defines a title transaction as follows:

(F) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

The failure to file the Certificate of Transfer does not negate the title transaction established by the filing of the Batman will with the Belmont County Recorder. The definition of title transaction provides for "any transaction affecting title to any interest in land including by will or descent..." See ORC 5301.47 (F). A number of other methods of

transfer are listed "... tax deed, or by trustee's, assignee's, guardians, executor's, administrator's, or sheriff's deed..." Id. Certificates of Transfer are not listed in the definition of title transaction.

In Ohio Northern Univ. v. Ramga (July 12, 1990), 3<sup>rd</sup> Dist. App. No. 2-88-1, 1990 Ohio App LEXIS 2946 at \*9, the Court of Appeals held that "title to real estate generally passes by testate succession at the time of death[.]" In the dissenting opinion of Ramga, Judge Whiteside discussed the application of a certificate of transfer in regard to a transfer of real estate through the Probate Court.

The certificate of transfer is provided by R.C. 2113.61(A) and is issued by the probate court, not as a document transferring the real estate but as a certification that the real estate has been transferred either by devise under a will or by statutory intestate succession. R.C. 2113.62 provides that such certificate of transfer may be recorded by the county recorder. The issuance of such certificate of transfer, however, is not a prerequisite to the transfer of title to the property, nor to the marketability or alienability of title to such real property. R.C. 2113.61 commences with the words, "[w]hen real estate passes \* \* \* under a will\* \* \* [" clearly connoting that the transfer itself was effected by admission of the will to probate and that the certificate is merely a memorialization of such transfer which has previously occurred. Id at \* 11-12.

The Second District Court of Appeals stated the following regarding the application of certificates of transfer.

Upon proper application, a probate court must issue a certificate of transfer for record in the county in which real estate is situated, which must recite the names of devisees and the interest in the parcel of real estate inherited by each. R.C. 2113.61. Though the certificate of transfer is not a conveyance, it does constitute a memorialization by probate court of what occurred with respect to a real estate title upon the death of the decedent.

Platt v. Estate of Petrosky (July 24, 1992), 2d Dist. App. No. 91-CA-105, 1992 Ohio App. LEXIS 3953, at \*3.

In accordance with Ramga and Petrosky supra, the certificate of transfer is not the conveyance document but rather the will itself is the vehicle by which the inherited property is transferred. Wherefore, this Court finds the Batman Will, recorded on April 10, 1989, to be a title transaction and savings event pursuant to the 1989 ODMA and in accordance with the spirit of the law which essentially calls for one to "use it or lose it."

#### THE BATMAN LEASE

When applying the "rolling look back period," in order for the Batmans to avoid abandonment of their mineral interests pursuant to the 1989 ODMA, they must be able to rely on a savings event prior to April 9, 2009. The Defendant Batmans entered into a lease with Defendant Reserve Energy. The same was recorded with the Belmont County Recorder on December 3, 2008. The Ohio Supreme Court has held that an oil and gas lease is "more than a mere license," it conveys "a vested, though limited, estate in the lands for the purposes named in the lease." Harris v. Ohio Oil Co. (1897), 57 Ohio St. 118, 130.

An oil and gas lease is a "title transaction" pursuant to Ohio Rev. Code 5301.47 (F). "The transaction must merely 'affect' the interest. Clearly, an oil and gas lease is an instrument which affects an interest in such minerals." Bender v. Morgan Columbiana Co. C.P. Case No. 2012-CV-387, at 4.

The Batman oil and gas lease recorded on December 3, 2008 fulfills the requirements of the 1989 ODMA.

EQUITY OIL AND GAS FUNDS, INC.

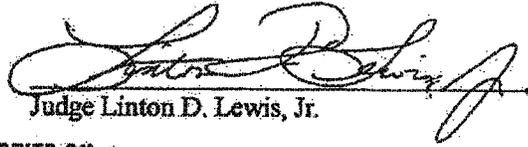
The Plaintiffs' Motion For Summary Judgment relates to the validity of the Batman lease. The Defendant Equity Oil & Gas Funds, Inc. has no interest in the Batman lease. Therefore, the Plaintiffs are foreclosed from obtaining judgment against Defendant Equity in relation to the same.

CONCLUSION

After having considered Plaintiff Wayne K. Lipperman et al.'s Motion For Summary Judgment and Defendants Reserve Energy Exploration Company and Equity Oil & Gas Funds, Inc.'s Motion For Summary Judgment and after construing the evidence most strongly in favor of the nonmoving parties and having determined that there is no genuine issue as to any material fact and that reasonable minds can come to but one conclusion and further that there is no just reason for delay, this Court makes the following ruling.

This Court finds that Reserve Energy Exploration Company and Equity Oil & Gas Funds, Inc. are entitled to judgment herein. This Court grants the Motion For Summary Judgment of Reserve Energy and Equity Oil and Gas. This Court denies the Motion For Summary Judgment of Plaintiffs Wayne K. Lipperman et al. Plaintiffs' Complaint is hereby dismissed with prejudice. Costs shall be assessed to the Plaintiffs herein. This is a

final appealable order. IT IS SO ORDERED.

  
Judge Linton D. Lewis, Jr.

**ENDED**

CLERK SERVED COPIES ON  
ALL THE PARTIES OR  
THEIR ATTORNEYS

WITHIN THREE (3) DAYS OF ENTERING THIS JUDGMENT UPON THE JOURNAL, THE CLERK SHALL SERVE NOTICE OF THIS JUDGMENT AND ITS DATE OF ENTRY UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR. SERVICE SHALL BE MADE IN A MANNER PRESCRIBED IN CIVIL RULE 5 (B) AND SHALL BE NOTED IN THE APPEARANCE DOCKET. CIVIL RULE 58.

# **EXHIBIT H**

IN THE COURT OF COMMON PLEAS BELMONT COUNTY, OHIO

FILED  
COMMON PLEAS COURT  
BELMONT CO., OHIO

2013 SEP 16 PM 1 42

CYNTHIA K. MCGEE  
CLERK OF COURT

BENJAMIN F. TAYLOR et al., :

Plaintiffs, :

vs. :

DONALD L. CROSBY, et al., :

Defendants. :

Case No. 11 CV 472

ORDER

This matter having come on before this Court upon Defendants Donald L. Crosby, Tammy Crosby, Richard Crosby and Janis Crosby's (Crosby's) Motion For Summary Judgment filed with this Court on November 27, 2012, Plaintiff's Cross Motion on December 28, 2012, Defendant PC Exploration and XTO Energy, Inc's (XTO's) Cross Motion For Summary Judgment and Memorandum Contra filed January 11, 2013 and Defendant Crosby's Memorandum In Opposition filed January 16, 2013. After having considered the same, this Court finds the following.

STATEMENT OF FACTS

Benjamin Belt (Belt) previously owned 108.708 acres in Richland Township, Belmont County, Ohio which is the subject of this action. In 1971, Belt transferred the property in question to Eli and Virginia Bell (collectively, the Bells). (the 1971 Transaction). Belt reserved "an undivided one half interest in and to all oil and gas in and underlying the" subject property. Mr. Belt leased the oil and gas to United Petroleum Corporation on July 10, 1975. On July 5, 1979, the Bells conveyed their entire interest to

Donald and Richard Crosby (who, together with their spouses, are the Crosby Defendants), subject to Belt's "undivided one half interest in and to all oil and gas in and underlying the" subject property. (the 1979 Transaction). From 1979 to the present, Donald and Richard Crosby have been the owners of the surface rights. Mr. Belt died on January 8, 1993. His estate was not probated until May, 2011 at which time Belt's interest in the parcel was transferred via probate.

On October 29, 2007, the Crosby Defendants leased the mineral rights in the subject property to Reserve Exploration Company (Reserve). Reserve assigned their interest in the lease to Petroleum Corporation on May 15, 2008.

#### SUMMARY JUDGMENT STANDARD

Ohio Rule of Civil Procedure Rule 56 provides that summary judgment is warranted when "it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Ohio Rule of Civil Procedure 56(c).

Pursuant to Temple v. Wean United Inc., 50 Ohio St. 2d 317, 327, 364 N.E. 2d 267, 274 (1977) summary judgment is appropriate when the moving party demonstrates that (1) no genuine issues of material fact remain to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion that is adverse to the party against whom the motion is made.

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**PLAINTIFF'S CLAIMS**

On October 19, 2011 the Plaintiff's herein filed the present action consisting of six claims.

Count One Declaratory Judgment to declare the lease between the Crosby Defendants and Reserve null and void.

Count Two Declaratory Judgment that Section 5301.56 (E) requires certified mail service to declare mineral rights abandoned.

Count Three Declaratory Judgment that Section 5301.56, the abandonment statute, is unconstitutional.

Count Four Slander of Title by recording documents in Belmont County and not affording the allegedly required notice provided in Section 5301.56.

Count Five Plaintiff's request an accounting of the "rentals and royalties paid" to the Crosby Defendants.

Count Six Injunctive Relief to preclude the implementation of the lease and removal of oil and gas.

**DEFENDANT'S POSITION**

The Defendants argue that the lease between Defendants Crosby and Reserve is a valid lease in that the Plaintiffs possess no interest in the oil and gas in question. For that reason it is the Defendant's position that the Plaintiffs have no claim for Slander of Title,

and accounting of the "rentals and royalties paid" nor Injunctive Relief.

The Defendants further argue that they have complied with the service requirements of ORC Section 5301.56(B) and that the abandonment statute is constitutional.

#### THE CONSTITUTIONALITY OF THE 1989 OHIO DORMANT MINERAL ACT

The Ohio Dormant Mineral Act was enacted in its original form on March 22, 1989. The act has been characterized as a "use it or lose it" statute. The Ohio Legislature attempted to balance the interests of property owners and the compelling public interest in drilling, producing and marketing the mineral interests of this state. Dormant and abandoned mineral interests were viewed as of no benefit to the state, while making use of the state's mineral resources was for the public good.

In order to negate the retroactive effect of the Act, the following language was inserted at 5301.56(B)(2).

(2) A mineral interest shall not be abandoned under division (B)(1) of this section.....until three years from the effective date of this section.

The oil and gas owners thereby were given 3 years to meet one of the "Savings Events" provisions. A similar statute was enacted in Indiana and provided for a two year grace period. This act was upheld by the United States Supreme Court in Texaco Inc. v. Short, 454 US 516 (1982). In Texaco, it was held that, "There was no constitutional right for a mineral interest owner to receive individual notice that his right will expire."

Based upon Texaco, this Court finds the 1989 Ohio Dormant Mineral Act to be

constitutional.

### APPLICATION OF THE 1989 OHIO DORMANT MINERAL ACT

The Ohio Dormant Mineral Act has been characterized as a "use it or lose it" statute. In order to preserve one's interest in a severed mineral right one must meet the requirements of ORC 5301.56. In accordance with (B)(1) the mineral interest held by any person, other than the owner of the surface, shall be deemed abandoned and vested in the owner of the surface unless: the interest is in coal or the interest is held by the government. ORC 5301.56 also provides protection if within the preceding 20 years the mineral interest has been the subject of a title transaction, there has been actual production or withdrawal of the minerals, underground gas storage has taken place, a drilling or mining permit has been issued, a claim to preserve the interest has been filed or a separately listed tax parcel has been created for the mineral interest.

In the case at bar the only portion of ORC 5301.56 that is applicable herein deals with whether the property in question has been the subject of a title transaction. Applying the requirements of the 1989 Ohio Dormant Mineral Act, we must first look to the years 1992 back to 1969. The act provides for a 20 year look back period from March 22, 1989, but also allows for a three year grace period to March 22, 1992.

The Plaintiffs argue that the 1989 Act is a static 20 years plus the grace period. The Defendants take the position that the look back period is a rolling 20 years. The Plaintiffs rely on Riddell v. Layman, 94 CA 114, 5<sup>th</sup> District, Licking County (1995). Riddell was presented with the question of whether a 1965 deed recorded in 1973

qualified as a title transaction. A "rolling look back period" was not an issue.

ORC 5301.56 (D)(1) provides:

A mineral interest may be preserved indefinitely from being deemed abandoned under division (B)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(C) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

A static 20 year look back period would have no need for a provision providing for indefinite preservation of mineral interests through successive filings of preservation claims. Based upon the same, this Court finds the 1989 Ohio Dormant Mineral Act to provide for a "rolling look back period."

#### TITLE TRANSACTIONS

In the case at bar, there are three transactions of worthy note. One is the 1971 Transaction wherein Benjamin Belt transferred the surface herein and reserved one half of the oil and gas. This transfer qualified as a Savings Event and protected the Belt mineral interest for 20 years and additionally under March 22, 1992 including the grace period.

A second transaction occurred in 1979 when the Bells conveyed their entire interest in the property in question to the Defendant Crosbys. The 1979 Transaction provided for the reservation of Belt's "undivided one half interest in and to all oil and gas in and underlying the" subject property. This Court does not find the oil and gas herein to be the subject of this title transaction as required by ORC 5301(B)(1)(C). The subject of

the transaction is that which is conveyed, being the surface and the unreserved one half oil and gas that was transferred. The crux of the Ohio Dormant Mineral Act is that it is a "use it or lose it" statute. To transfer the surface and one half the oil and gas was totally within the control of the Bells in 1979. Their transaction with the Defendant Crosbys could have been by quitclaim deed with no mention of the Belt reservation. The fact that it was mentioned does not make it the subject of the title transaction and in no way shows proof of Mr. Belt "using" the oil and gas in question. Be that as it may, the 1979 Transaction would have only protected the mineral interest until 1999 by use of the 20 year rolling look back application.

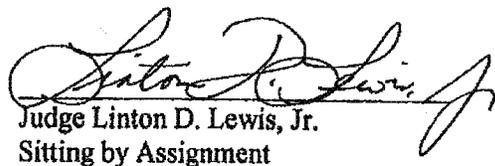
Mr. Belt's 1975 lease to United Petroleum qualifies as a title transaction and preserved the mineral interest for Mr. Belt until 1995.

Pursuant to the 1989 version of ORC 5301.56, as of 1995 the oil and gas interest held by Mr. Belt was deemed abandoned and vested in the owner of the surface. As to ORC 5301.56 effective June 30, 2006, any discussions regarding the same are moot in that any oil and gas interest of Mr. Belt and the Plaintiffs had been abandoned and vested in the Defendants prior to that date. See Wendt v. Dickerson, Tuscarawas County C.P. Case No. 2012 CV 020135, 2/21/2013, Walker v. Noon, Noble County C.P. Case No. 212-0098, March 20, 2013.

#### CONCLUSION

Wherefore, after having considered the Motions for Summary Judgment and after construing the evidence most strongly in favor of the nonmoving parties and having

determined that there is no genuine issue as to any material fact and further that reasonable minds can come to but one conclusion and further that there is no just reason for delay, this Court grants the Summary Judgment Motion of Defendants Crosby, Cross Motions of Defendant PC Exploration, Inc. and XTO Energy, Inc. and denies Plaintiff's Cross Motion For Summary Judgment. Plaintiff's Complaint is hereby dismissed. Costs to the Plaintiffs. This is a final appealable order. **IT IS SO ORDERED.**

  
Judge Linton D. Lewis, Jr.  
Sitting by Assignment

WITHIN THREE (3) DAYS OF ENTERING THIS JUDGMENT UPON THE JOURNAL, THE CLERK SHALL SERVE NOTICE OF THIS JUDGMENT AND ITS DATE OF ENTRY UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR. SERVICE SHALL BE MADE IN A MANNER PRESCRIBED IN CIVIL RULE 5 (B) AND SHALL BE NOTED IN THE APPEARANCE DOCKET. CIVIL RULE 58.

# **EXHIBIT I**

**IN THE COURT OF COMON PLEAS  
HARRISON COUNTY, OHIO  
GENERAL DIVISION**

**ROBERT E. DAVIS, ET AL.,**

Plaintiff

**CASE NO. CVH-2011-0081**

vs.

**CONSOLIDATION COAL COMPANY**

Defendant

**JUDGMENT ENTRY**

This matter came before the Court on Plaintiffs Motion For Summary Judgment filed July 6, 2012 and Defendant's Cross Motion For Partial Summary Judgment filed on August 8, 2012.

SUMMARY OF CASE:

The dispute between the parties concerns competing claims regarding the ownership of the mineral rights, excluding coal, in and beneath 77.75 acres of real property in Harrison County, Ohio. Defendant Consolidation Coal Company (Herein referred to as Consol) and Plaintiffs Robert Davis, James Albright and Barbara Albright (Herein referred to as Plaintiffs) both claim title to the mineral estate. Plaintiffs file this action for declaratory judgment seeking a declaration of their rights and an order quieting title in them. Consol filed counterclaims, also seeking declaratory judgment and an order quieting title in Consol. Both parties now seek summary judgment.

STATEMENT OF THE FACTS:

On October 9, 1967 Consol sold real estate to Robert E. Davis and Marilyn Jean Davis subject to all reservations and conditions as contained in a deed from John M. Wheeler to Howard Coffland (Herein referred to as the

Wheeler deed). In the Wheeler deed, Wheeler conveyed his entire interest in the property, reserving and excepting from that conveyance however;

.... All producing oil and gas wells on the premises aforesaid together with the right to drill and operate two additional wells on the second tract above described and all proceeds therefrom to be the property of the grantors in this deed.

Grantors also have the right to extend any and all existing leases for so long as oil or gas is found in paying quantities and the proceeds of said wells under said existing leases together with two additional wells to inure to the grantors herein, their heirs and assigns forever.

Consol then expressly reserved for itself all oil and gas rights not previously excepted and reserved by Wheeler by adding the following to that reservation:

Excepting and reserving to Consol herein, its successors and assigns, all right, title, and interest in and to the oil, gas and other minerals not heretofore accepted and reserved by predecessors and title of the grantor herein, together with the right to explore and operate and extract the same by any method now or hereafter used or practiced.

Since the Wheeler deed, Consol has completed four title transactions on the subject property.

- 1) By deed recorded 10/9/1967, as the then fee simple owner of the property, Consol conveyed the surface rights to Plaintiffs predecessors in title, but retained ownership of the mineral estate.
- 2) By Memorandum of Lease recorded September 25, 1981, Consol conveyed a leasehold interest in the mineral estate to Republic Steel. Republic Steel later changed its name to LTV Steel Company.

- 3) By assignment of lease recorded May 30, 1985, LTV Steel Company assigned its leasehold interest in Mineral Estate to Carless Resources, Inc. later changed its name to Kelt Ohio, Inc.
- 4) By a partial release of lease recorded August 10, 1993 Kelt Ohio Inc. released all interest in the mineral estate resulting in the reversion of that interest to Consol. On February 22, 2011, Attorney Shawn P. Lindsay sent Consol a Notice Of Intent To Declare Oil and Gas Mineral Rights abandoned pursuant to §5301.56 of the Ohio Revised Code. This letter alleged that for the previous 20 years, starting from February 22, 1991, no Saving Act ( i.e. title transaction) set forth in O.R.C. §5301.56 had occurred. On March 21, 2011, Robert Belesky, Vice President for Consol filed an affidavit to preserve the mineral interests under the Plaintiffs land citing the above title transactions as Saving Acts.

Both parties have moved for Summary Judgment. OHIO R. CIV. P. 56 provides in pertinent part:

Summary Judgment shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

A Summary Judgment shall not be rendered unless it appears from such evidence and only therefrom, that reasonable minds can come to but one

conclusion and that conclusion is adverse to the party against whom the Motion for Summary Judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

The Supreme Court of Ohio in *Temple v. Wear United Inc.* (1977) 50 OHIO St. 2<sup>nd</sup> 317 at 327 held "Before Summary Judgment may be granted, there must be first, no genuine issue as to any material act that remains to be litigated; second. the moving parties are entitled to Judgment as a matter of law; and third it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the Motion For Summary Judgment is made, that conclusion is adverse to that party".

IN CONSIDERING THE PARTIES MOTIONS FOR Summary Judgment, the Court finds it must examine two issues.

First, the Court must examine the "Wheeler" deed and its reservations. Secondly, the Court must apply the facts of this case to the Ohio Dormant Mineral Act §5301.56 of the Ohio Revised Code.

#### **I. Wheeler Deed**

The crux of the Plaintiffs argument is that Consol had no right to reserve or lease minerals underlying the Co-Plaintiff's property because of the reservation of producing oil and gas wells and their royalties contained in the Wheeler deed.<sup>1</sup> Specifically, the Co-Plaintiffs argue that because the Wheeler deed only gave Consol mineral rights subject to a reservation, the subsequent title transactions are

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<sup>1</sup> Plaintiffs argue that the Defendants failed to follow a procedure to extinguish the excepted interest of the wells in the Wheeler Deed. However, Plaintiffs provide no citation as to what exact procedure is to be followed.

invalid to save Consol from application of Ohio's Dormant Mineral Act. However, the language from the Wheeler deed is clear that it contains only limited rights, reserving and excepting only the royalties from producing oil and gas wells with the right to drill and operate two additional wells. The language is clear that Consol, at the very least, retains the balance interest of the Mineral Estate as proscribed by the deed.

Furthermore, it is clear that all of the wells on the property cited by both defendants and plaintiffs have been plugged and abandoned and/or are "dry holes" - meaning they were never in production. (Defendant's Reply to Plaintiff's Response to Defendant's Combined Cross Motion for Partial Summary Judgment, pg. 5). It is also noteworthy that these wells were all deemed abandoned long ago - between the years 1916 and 1930. It is therefore clear that the reservation in the Wheeler deed has been self-extinguished by its own express language- given that none of the reserved wells are currently producing wells.<sup>2</sup> By these terms, Consol therefore retains the entire interest in the Mineral Estate to lease as it chooses.

## **II. Ohio Dormant Minerals Act**

Plaintiffs argue that both the historic and current versions of Ohio's Dormant Mineral Act divest the interest in the Mineral Estate from Consol. Specifically, the Plaintiffs argue that the title transactions are void because Consol had no right to lease the mineral interests in the first place because of the

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<sup>2</sup> No evidence was brought forth by Plaintiffs that any wells were drilled pursuant to the right, reserved in the Wheeler Deed, to develop two additional wells. In fact, the information provided on the wells given in Plaintiff's Exhibit M and cited in the Defendant's Reply to Plaintiff's Response (pg. 5-6) shows that the last well drilled on the property occurred prior to the date of the Wheeler Deed.

reservations contained in the Wheeler deed. While it is in dispute which version of the act should apply to the case at bar, Consol identified three record title transactions to defeat the application of both versions of the act to retain interest in the Mineral Estate.

According to the 1989 historical version of the act, if the mineral interests are found dormant, they are deemed abandoned. Title to those interests is then vested in the surface owner. However, a mineral interest is not deemed dormant if it was the subject of a recorded title transaction within the twenty-year period immediately preceding the Act's 1989 effective date.<sup>3</sup> O.R.C. § 5301.47(F) defines "title transaction" to mean any transaction affecting title to any interest in land . . ."

To defeat this argument, Consol has provided evidence that two separate title transactions were recorded in the Harrison County Recorders' Office during the period between March 22, 1969 and March 22, 1989. Specifically, Consol conveyed a leasehold interest to Republic Steel on September 25, 1981 for a period of 50 years of a portion of the oil and gas rights Consol possessed. (Exhibit 1, at ¶12). An Assignment of Lease was then recorded on May 30, 1985 in which Republic Steel conveyed the leasehold interest in the Mineral Estate it obtained from Consol to an entity known as Charles Resources. (Exhibit 1, at ¶14).

According to the amended/current version of the act, a mineral interest is not deemed dormant if it was the subject of a recorded title transaction within the twenty-year period immediately preceding the date on which notice is served or

published – in this case February 25, 2011. A title transaction was recorded in the Harrison County Recorders' office on August 10, 1993 – during the period between February 1991 and February 2011.

While the Plaintiff's argument would hold more merit if the reservations in the Wheeler deed did not give Consol rights to lease mineral interests, that is not the case here. It is clear that the Wheeler deed conveyed mineral interests only with certain reservations that have been self-extinguished by its own express language. Therefore, Consol did have the right to lease its Mineral Estate - making the title transactions valid and saving acts, under the Dormant Mineral Act.

The Court finds the evidence is clear and unambiguous.

The Court finds the Evidence sufficient to make findings and that no genuine issue of material fact remains to be litigated.

The Court finds that Judgment in favor of the Consolidation Coal Company is appropriate after reviewing the evidence in a light favorable to Plaintiffs.

WHEREFORE, IT IS THE ORDER of the Court that:

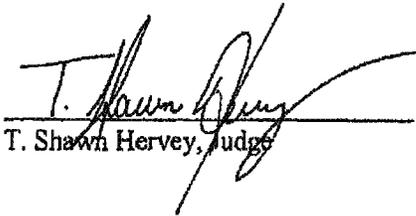
1. Plaintiff's Motion For Summary Judgment is denied.
2. Defendant's Motion For Partial Summary Judgment is granted.
3. Consol is granted Declaratory Judgment against Plaintiffs as sole owner of the mineral estate of the subject 77.75 acres.

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<sup>3</sup> Ohio Rev. Code §5301.56(B) (1989 version).

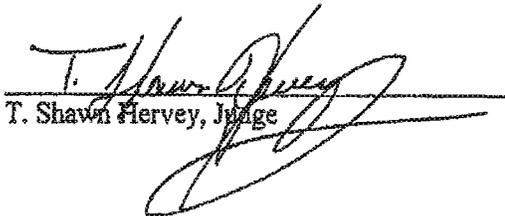
4. Title to 77.75 acres is hereby quieted as to the mineral estate in favor of Consolidation Coal Company and against any claim of Plaintiffs.
5. Court Costs are assessed against Plaintiff and each party shall be responsible for their own attorney's fees.

**SO ORDERED.**

  
T. Shawn Hervey, Judge

NOTICE: FINAL APPEALABLE ORDER

This is a final appealable order. For each party who is not in default, serve notice to the attorney for each party and to each party who represents himself or herself by regular mail service with certificate of mailing making notation of same upon case docket.

  
T. Shawn Hervey, Judge

Stamped Copies:  
Attorney Brad L. Hillyer  
Attorney Geoffrey Mosser  
Attorney Michael Dortich

**EXHIBIT J**

IN THE COURT OF COMMON PLEAS  
COLUMBIANA COUNTY, OHIO

VIRGINIA A. BENDER,	)	CASE NO. 2012-CV-378
	)	
Plaintiff,	)	JUDGE RICHARD D. REINBOLD, JR.
	)	(By Assignment)
vs.	)	
	)	
BENNY L. MORGAN, et al.,	)	<u>OPINION AND JUDGMENT ENTRY</u>
	)	<u>ON MOTIONS FOR SUMMARY</u>
Defendants.	)	<u>JUDGMENT</u>

I. Introduction.

Before the Court are cross-motions for summary judgment filed by the plaintiff, Virginia A. Bender ("Bender"), and the defendants, Benny L. Morgan, Martha Jayne Dorr, Sherry Lee Blosser, David Blosser and Ronald Wayne Collier (collectively the "Dorr Heirs"). Plaintiff's motion was filed on October 25, 2012, and the defendants' motion was filed on November 1, 2012. The Dorr Heirs also submitted a reply brief on November 26, 2012. The Court heard oral arguments on the motions on March 15, 2013. The plaintiff Bender was represented by Attorney Mark Ropchock, and the defendant Dorr Heirs by Attorney James Mathews.

For the following reasons, the motion for summary judgment of the defendant Dorr Heirs is hereby GRANTED, and the plaintiff's motion for summary judgment is DENIED.

The material facts in this case are not in dispute. Central to the determination of the issues between the moving parties is the reservation of oil and gas interests by Harry Dorr in 1947. It is undisputed that Harry Dorr was the titled owner of the Property at issue in this case, in fee, at the time he transferred the property, and other parcels, in 1947. Pursuant to a Warranty Deed dated March 17, 1947, and recorded March 28, 1947, Dorr conveyed land to Lorretta Brauningner. That deed was recorded at O.R. Vol. 716, Page 456, of the Columbia County Records. Importantly, that deed included a reservation of oil and gas rights, creating the severance at issue in this case:

The Grantor also excepts from the operations hereof and reserves to himself, his heirs and assigns, all oil and gas in and underlying the aforesaid Tracts No. 1 and No. 2.

(Wagoner Aff., ¶7, Exhibit C-4; Vol. 716, at Page 457).

The plaintiff Bender is currently the surface owner of the Property at issue. The surface interest is described as a 52.687 acre tract (the "Property"), described in O.R. Vol. 491, Page 991 of the Columbia County Records. It is undisputed that plaintiff Bender owns the surface rights to the Property, pursuant to a Certificate of Transfer from the estate of her late father, Earl W. Lomax. In this case, the plaintiff has asserted that she is also entitled to the mineral rights (oil and gas interests in the Property), by operation of the Ohio Dormant Mineral Act, R.C. 5301.56. The Dorr Heirs, on the other hand, maintain that the plaintiff's surface ownership remains subject to the 1947 severance of the oil and gas rights, created by the predecessor in title of the Dorr Heirs.

There are two versions of the Dormant Mineral Act, or "DMA," at issue in this case. The DMA was first enacted effective March 22, 1989. The DMA was amended by the General Assembly effective June 30, 2006. Pursuant to the 1989 version, a severed mineral interest may be subject to abandonment and merger with the surface owner "automatically," unless the interest was held by the government, the interest was in coal, or otherwise preserved by a "savings event." Under the 2006 version, the potential abandonment of a mineral right must be triggered by a surface owner's publication or service of "notice," then coupled with the timely recording of an affidavit of abandonment. The Court will address the issues presented under the DMA in reverse order.

**II. Plaintiff's Claim Under the 1989 Version of the DMA Fails Because The Record Demonstrates "Savings Event" – the Recording of Oil and Gas Leases – Within the 20-Year Period Predating March 22, 1989.**

The parties have presented a series of recorded oil and gas leases in the relevant chain of title. These leases, with corresponding assignments, are set forth in the Wagoner Affidavit and Exhibits. The leases were recorded: Book 110, Page 258, Recorded June 15, 1976; Book 116, Page 235, Recorded February 12, 1981; Book 62, Page 919, Recorded February 13, 1985; and Book 171, Page 933, Recorded March 31, 1988. (Exhibits C-7, C-9, C-12, C-15).

Plaintiff acknowledges that one of the Savings Events found in both versions of the DMA is a "title transaction" involving the mineral interest. Former R.C. 5301.56(B)(1), (c)(i); current (B)(3)(a). The sole question presented for the Court's determination is whether an oil and gas lease represents a "title transaction." The plaintiff agrees that "[i]f the aforesaid oil and gas leases and their assignments constituted 'title transactions' under R.C. 5301.47(F), then Plaintiffs

concede that these instruments were Savings Events pursuant to the 1989 Act (R.C. 5301.56(B)(1)(c)(i)) because the oil and gas rights in the Realty were 'the subject of' these transactions." (Plaintiff's Memorandum, Sec. II(b)(ii), (p. 6). Given the nature of interest conveyed by an oil and gas lease, the Court finds that such represents a "title transaction" as defined by law.

A "title transaction" does not have to be a conveyance. R.C. 5301.47(F) broadly defines a "title transaction" as follows:

(F) "Title transaction" means **any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.**

(Emphasis added). The transaction must merely "affect" the interest. Clearly, an oil and gas lease is an instrument which affects an interest in such minerals.

Moreover, an oil and gas lease does more than merely permit use of minerals for development. Rather, an oil and gas lease does actually convey (a determinable fee interest) in the oil and gas (severed mineral interests in this case) in place, for production. That conveyance is subject to reverter in the event there is no production and the lease otherwise expires by its own terms. "Oil and gas in place are the same as any part of the realty, and capable of separate reservation or conveyance." Pure Oil Co. v. Kindall (1927), 116 Ohio St. 188, 201. A lessee to an oil and gas lease acquires a "vested, though limited, estate in the lands for the purposes named in the lease . . . ." Harris v. Ohio Oil Co. (1897), 57 Ohio St. 118, 130-31. Under the typical language of a habendum clause found in an oil and gas lease, such generally creates a

determinable fee interest, subject to reverter to the lessor if conditions are not satisfied. E.g., Tisdale v. Walla (Dec. 23, 1994), Ashtabula App. No. 94-A-0008; Kramer v. PAC Drilling Oil & Gas (Dec. 29, 2011), 2011-Ohio-6750, ¶11. As stated in Kramer, an oil and gas lease “convey[s] ownership of the oil and gas estates” to the lessee; again, subject to reverter. Id. (Emphasis added). Because of the possibility of reverter, the oil and gas lease conveys a fee simple determinable rather than a fee simple absolute. Id. In any event, an oil and gas lease is clearly a “title transaction” as contemplated under R.C. 5301.47(F).

It is inescapable that an instrument which conveys a fee simple determinable in oil and gas minerals (in place) is a “title transaction” as contemplated by the broad definition found in the Marketable Title Act. Thus, the oil and gas leases identified in this record were “title transactions,” and the “mineral interest” (that is, the severed interest passing from Harry Dorr to Vesta Dorr, then to their children and grandchildren) was “the subject of a [series of] title transaction[s] . . . recorded in the office of the county recorder.” (Exhibits C-7-15).

Using the retroactive “look back” period for the 1989 version of the DMA as described in the case of Riddel v. Layman (July 10, 1995), Licking App. No. 94 CA 114, 1995 Ohio App. LEXIS 6121, the oil and gas leases occurred within the 20-year period before the March 22, 1989 effective date. Consequently, when plaintiff’s predecessor held the Property at the time the 1989 version of the DMA became effective and operative, the Dorr mineral interest could not be deemed abandoned. Likewise, when plaintiff acquired the surface estate in 1995, the 1989 version of the Act did not operate to produce any abandonment or merger of the mineral interest to the plaintiff’s benefit. If one focuses attention on the 1988 oil and gas lease alone (Exhibit C-

15; Vol. 171, Pg. 933), there can be no determination of abandonment under the 1989 features of the DMA. That title transaction in the mineral estate existed within the 20-year look back before enactment of the DMA. Further, extending forward from the 1988 oil and gas lease, looking prospectively another 20-year period, that time extends beyond passage and enactment of the amended version of the Act in 2006 – at which time the 1989 version ceased to exist. Accordingly, the plaintiff Bender did not acquire any right under the former version of the DMA while it was still in effect.

**III. Plaintiff's Claim Under the 2006 Version of the DMA Fails Because The Plaintiff Failed to Timely Record an Affidavit of Abandonment.**

The Dormant Mineral Act is part of the Ohio Marketable Title Act, R.C. 5301.47 to 5301.56. *E.g.*, Pinkney v. Southwick, (Aug. 11, 2005), 2005-Ohio-4167, ¶31. Under R.C. 5301.56(B), if one conforms to the criteria for abandonment, the surface owner of property may claim rights to the abandoned mineral interests. Subsection (B) directs compliance with subsection (E). Thus, the first step requires that notice must be given to the mineral interest holder or the holder's successors. R.C. 5301.56(E)(1). Next, for the mineral rights to vest with the surface owner, (E)(2) requires that an affidavit of abandonment must be timely filed with the county recorder.

R.C. 5301.56 requires, in pertinent part:

(B) Any mineral interest held by any person, . . . shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interests if the requirements established in division (E) of this section are satisfied and none of the following applies:

(E) **Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface of the lands subject to the interest shall do both of the following:**

(1) Serve notice by certified mail . . . If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation . . .

(2) **At least thirty, but not later than sixty days after the date on which the notice required under division (E)(1) of this section is served or published, as applicable, file in the office of the county recorder of each county in which the surface of the land that is subject to the interest is located an affidavit of abandonment . . . .**

(Emphasis added). One utilizing the Act "shall do both," serve or publish notice and timely record an affidavit. When "shall" is used in a statute, it conveys something that is mandatory. *E.g., Paris Hill v. Erb Lumber* (1998), 133 Ohio App. 3d 1. The Act specifically states that in order for the mineral rights to vest with the surface property owner, the affidavit of abandonment must be filed not later than sixty days after the publication or service of the notice.

In this instance, the plaintiff admits that her affidavit of abandonment was not recorded in a timely manner but, instead, was recorded sixty-one days after publication of her notice. Plaintiff published a notice of her intent to declare the mineral interests abandoned in the Morning Journal of Columbiana County on August 18, 2011. (Complaint ¶7; Plaintiff's Exhibit 17, p. 3). Plaintiff subsequently filed an affidavit of mineral interest abandonment, in an attempt to complete the second stage of the abandonment process. (Complaint ¶8). (However, the affidavit was filed sixty-one days after the notice was published (on October 18, 2011). (Vol. 1828, Page 599). Consequently, the Court finds that the affidavit was late and ineffective as a

matter of law. Further, the Court finds that the mineral rights in the Property, created by the 1947 severance to which the Dorr Heirs are successors, were not deemed abandoned.

The record further demonstrates that on December 16, 2011, Benny L. Morgan, on behalf of the defendant Dorr Heirs, filed a Claim to Preserve Mineral Interests in the Property. (Exhibit "C"). Consequently, the plaintiff Bender cannot simply start the process for seeking abandonment under the 2006 version of the DMA once again. If the plaintiff were to serve another notice, the date of that notice would be the reference point for the 20-year look back period under the current version of the code. The recorded Claim to Preserve of the defendant Dorr Heirs (Vol. 1844, Page 692) is a Savings Event which would preclude abandonment. Further, since the recording of the Claim to Preserve, a separate tax parcel number has been created by Columbiana County for the mineral interest of the Property, in the names of the Dorr Heirs. This separate tax parcel designation (2704111000) is another Savings Event which precludes the plaintiff Bender from attempting to use the procedures outlined in the current version of the DMA.

#### IV. Conclusion.

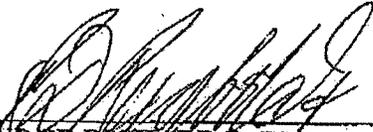
The Court finds that there are no genuine issues of material fact remaining for trial in this case, and the Dorr Heirs are entitled to judgment as a matter of law. Consequently, the motion for summary judgment of the defendant Dorr Heirs is hereby GRANTED, and the plaintiff's motion for summary judgment is DENIED.

The Court hereby declares and determines that the defendant Dorr Heirs are the holders of the mineral interests in the Property, pursuant to the 1947 severance of such interests. Thus,

title to those interests is hereby quieted in the names of the Dorr Heirs, and a certified copy of this judgment entry shall be recorded pursuant to R.C. 5303.01.

The Court further finds that there is no just reason for delay.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
**JUDGE RICHARD D. REINBOLD, JR.**  
(By Assignment)

Dated: 3/20/13

Copies to:

Robert J. Tscholl, Esq.  
James F. Mathews, Esq.  
Richard V. Zurz, Jr., Esq./Mark A. Ropchock, Esq.  
Steven G. Janik, Esq./Audrey K. Bentz, Esq.

TO THE CLERK OF COURT AND COUNTY RECORDER

Index to: Vol. 716, Page 456  
Vol. 491, Page 991

TO THE CLERK OF COURT

This is a Final Appealable Order, in accordance with Ohio R. Civ. P. 54(A), and the Clerk of Courts is directed to serve filed-stamped copies of this Entry to counsel of record, pursuant to Ohio R. Civ. P. 58(B).

  
\_\_\_\_\_  
**JUDGE RICHARD D. REINBOLD, JR.**  
(By Assignment)

# **EXHIBIT K**

IN THE COURT OF COMMON PLEAS OF JEFFERSON COUNTY, OHIO

FILED  
COMMON PLEAS COURT

DAN L SWARTZ et al

2013 JUN 17 P 3:26

Plaintiffs

JOHN A. BETHMAN  
CLERK OF COURTS  
JEFFERSON COUNTY, OH

-vs-

JAY HOUSEHOLDER SR et al

Defendants

JOURNAL ENTRY GRANTING  
PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT  
AND OVERRULING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

Case No. 12CV328

This case arises as a dispute over the ownership of the mineral, oil, gas, etc rights of certain real estate (hereinafter referred to as the "subject real estate"). The parties have entered into stipulations of fact which resolve the factual issues, and both the plaintiffs and defendants have filed motions for summary judgment. The Court, therefore, considers each parties motion in accordance with Civil Rule 56 and the standard required by said rule and the case law applicable thereto.

The parties stipulate that plaintiffs are the owners of the entire surface of the subject real estate of approximately 71.8 acres but dispute the ownership of the mineral, oil and gas rights.

The plaintiffs contend that they are the owner of the oil and gas (the "mineral interest") rights as they are the surface owner of the real estate and, that by virtue of ORC§5301.56, the Dormant Minerals Act of 1989 (hereinafter the "DMA of 1989"), they are vested with said mineral interest by operation of law.

The plaintiffs additionally contend that they are the owner of the mineral rights by virtue of ORC§5301.56, the Dormant Minerals Act of 2006 (hereinafter the "DMA of 2006").

The defendants contend that the DMA of 1989 did not divest them of the mineral interest and, secondly, that they had preserved their mineral interest in accordance with the DMA of 2006.

Two issues are addressed by the parties in their motions for summary judgment as being dispositive of the issues of ownership of the mineral interest underlying the subject real estate, and the Court addresses each issue as follows:

**Issue #1** is the application of ORC§5301.56, the Dormant Minerals Act of 1989, as it existed prior to 2006 (hereinafter referred to as the DMA of 1989), and whether said DMA of 1989 was self-executing as to the abandonment of mineral, oil, gas, etc. rights which had been reserved under reservation clauses included in deeds conveying title to real estate.

**Issue #2** is the application of ORC§5301.56, the Dormant Minerals Act of 2006, as it currently exists after having been amended by legislation in 2006 (hereinafter referred to as the DMA of 2006). Said DMA of 2006 is very similar to the DMA of 1989 but includes notification actions to be taken by the surface owner of the real estate in order to effectuate the abandonment of dormant mineral rights.

Plaintiffs chain of title and the subject reservations contained therein are not at issue.

The Court finds the following facts have been established by the parties stipulation and the documents which have been properly submitted by the parties:

**As Regards the 1946 Reservation of the Mineral Interest:**

On August 30, 1946, Elva L. Lawrence, Alma J. Lawrence, Chellissa Swickard, Walter Swickard, Jetta A. Householder, and Arthur L. Householder (the "reserving parties"), transferred the property to Cleve Landis and Marie Landis, husband and wife, by Warranty

Deed recorded September 12, 1946, at Volume 214, page 127, of the Official Records of Jefferson County, Ohio, reserving the mineral interest to themselves (the "reserving deed"). (See Stip., ¶3) The reserving deed conveyed the property with the following limitation:

Excepting and reserving all minerals underlying said premises. This reservation of minerals includes coal, clay, oil, and gas, and any and all other minerals whether named herein or not, underlying the above described premises, together with all mineral rights incident to the mining and removing or developing said minerals.

(See Ex. B attached to plaintiff's Complaint)

Defendants claim to own the mineral interest as heirs of the reserving parties based upon the reserving deed (See Stip. ¶1; Ex.F; Answer ¶5). The reserving parties never conveyed the mineral interest to any of the defendants (nor to anyone else, for that matter) (See Stip. ¶10). Defendants are, however, the only living heirs of the reserving parties, and so it is believed that they are entitled to ownership of the mineral interest if it has not been abandoned by operation of law (See Stip. ¶¶4, 10). Plaintiffs are the fee owners of the property, which was conveyed to them by warranty deed without reservations recorded May 8, 2002, at Official Record Volume 486, page 873 (See Stip. ¶1; Ex.B). If the mineral interest has vested in the surface owner of the property, it has vested in the plaintiffs (See Stip. ¶1; See Ex. B).

As to Issue #1, the Court finds that the DMA of 1989 is applicable to the issue of the ownership of the mineral interest, that by the clear wording of said DMA of 1989 (§5301.56(B)(1), as highlighted below) said statute was self-executing and that under the facts as stipulated in this case the excepting and reserving clause contained within plaintiffs' chain of title is not now effective having been abandoned by inaction as contemplated by said statute.

The Court finds, therefore, that by virtue of the application of the DMA of 1989, the plaintiffs are the owner of the mineral interest.

Said DMA of 1989 states, in pertinent part as follows:

§5301.56(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies:

(a) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53 of the Revised Code.

(b) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code.

(c) Within the preceding twenty years, one or more of the following has occurred:

(i) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located;

(ii) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located;

(iii) The mineral interest has been used in underground gas storage operations by the holder.

(iv) The drilling or mining permit has been issued to the holder, provide that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 of the Revised Code, in the office of the county recorder of the county in which the lands are located.

(v) A claim to preserve the interest has been filed in accordance with division (c) of this section.

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

[Emphasis added]

Subsequent to the conveyance by Elva Lawrence and Alma Lawrence to the plaintiffs' predecessor in title (to-wit: Cleve Landis and Maris Landis on August 30, 1946), and on March 17, 1978, Elva L Lawrence and Alma J Lawrence executed an oil and gas lease as lessors to Beldon and Blake Corp (Lease Volume 54, page 710) for a term of twenty (20) years; however, no activity was ever commenced.

Also, subsequent to the conveyance by Elva Lawrence and Alma Lawrence to the plaintiffs said predecessors in title on July 12, 1979, a Certificate of Transfer was recorded from Elva Lawrence to Alma Lawrence (Volume 588, page 284) purporting to transfer the subject real estate but also containing the same exception and reserving clause previously referenced.

Neither the mineral lease to Belden and Blake Corp, nor the Certificate of Transfer (Volume 588, page 284), are activities which under the statute prevent the abandonment of said mineral interests. No activities were ever commenced under said oil and gas lease. The Certificate of Transfer was executed subsequent to the conveyance of the subject real estate to the plaintiffs (therefore there was no interest to be transferred) and, further, the Certificate of Transfer specifically contained the same previously referenced excepting and reserving clause, so even had it been effective, it would not have been a title transaction of which the mineral interest had been the subject.

Further, even had the oil and gas lease (dated March 17, 1978) or the Certificate of Transfer (dated July 12, 1979) been considered as such a title transaction, the twenty year period of inactivity would have run, at the latest, on July 13, 1999, prior to the effective date of the DMA of 2006 and subsequent to the effective date of the DMA of 1989 which, including the three (3) year grace period, is March 22, 1992. Thus, the mineral rights vested in the surface owner on or before July 13, 1999.

Defendants contention that the twenty (20) year term of the lease caused a tolling of the twenty (20) year statutory period of inactivity contemplated by the DMA of 1989 is unpersuasive and not supported by any persuasive authority.

Said statute (DMA of 1989) is found to be self-executing upon the happening of the actions stated therein and no action on behalf of the plaintiffs was necessary to effectuate the abandonment. None of the provisions listed in §5301.56(B)((1)(a)-(c) applies to the facts in this case.

Plaintiffs are, therefore, found to be the owner of the mineral interest.

As to Issue #2, the Court finds that the issues in this case have been determined as stated in the findings under Issue #1, and that Issue #2, the DMA of 2006, is not applicable to this matter but rather the DMA of 1989 is determinative. Further, the Court finds that the DMA of 2006 is not retroactive but applies only prospectively in accordance with ORC §1.48 as the same was not "expressly made retroactive" as is required under said statute.

The Court finds, based upon the pleadings, all matters in the court file and affidavits timely filed in this action, that there is no genuine issue of material fact and, reasonable minds can come to but one conclusion even when viewing the evidence most favorably in favor of the

defendant, and that conclusion is adverse to the defendant, and plaintiffs are entitled to judgment as a matter of law, and the Court hereby GRANTS summary judgment in favor of the plaintiffs.

The plaintiffs as owners of the surface are found to be the owner of the mineral rights underlying the subject real estate, and title to the same shall be quieted in favor of the plaintiffs.

Further, based upon the above, the defendants' motion for summary judgment is hereby OVERRULED.

The Court is aware that this ruling has the effect of finding that, based upon the DMA of 1989, many excepting and reserving clauses in current deeds actually may be of no effect, in that they no longer except or reserve the mineral rights and, thus, surface land owners may actually also be owners of the mineral rights as regards minerals underlying the surface lands, notwithstanding an exception or reservation of mineral clause included in the deed conveying the real estate to the surface owner; however, that is the clear intent of the legislators in their enactment of the DMA of 1989, as well as the DMA of 2006. The function of the Court in this matter is to interpret and apply the law as enacted by the legislature as there was no challenge to the statute itself.

The plaintiffs shall prepare any documents necessary for recording and quieting plaintiffs' mineral interest.

THIS IS A FINAL APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

cc:  
Clinton G Bailey Esq  
Brandon Cogswell Esq

  
Judge David E Henderson

# **EXHIBIT L**

IN THE COURT OF COMMON PLEAS OF JEFFERSON COUNTY, OHIO

FILED  
COMMON PLEAS COURT

JUL 17 P 3:26

ERNEST SHANNON et al

Plaintiffs

-vs-

JAY HOUSEHOLDER SR et al

Defendants

JOHN A. PORTISAN  
CLERK OF COURTS  
JEFFERSON COUNTY, OH

JOURNAL ENTRY GRANTING  
PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT  
AND OVERRULING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

Case No. 12CV226

This case arises as a dispute over the ownership of the mineral, oil, gas, etc rights of certain real estate (hereinafter referred to as the "subject real estate"). The parties have entered into stipulations of fact which resolve the factual issues, and both the plaintiffs and defendants have filed motions for summary judgment. The Court, therefore, considers each parties motion in accordance with Civil Rule 56 and the standard required by said rule and the case law applicable thereto.

The parties stipulate that plaintiffs are the owners of the entire surface of the subject real estate of approximately 118 acres but dispute the ownership of the mineral, oil and gas rights.

Three issues are addressed by the parties in their motions for summary judgment as being dispositive of the issues of ownership of the mineral, oil, gas, etc. underlying the subject real estate, and the Court addresses each issue as follows:

Issue #1 is the interpretation and meaning of the following clause (hereinafter referred to as the reservation clause with limitations) which is included in plaintiffs' deed to the subject

real estate as conveyed to the plaintiffs from Elva Lawrence and Alma Lawrence by warranty deed recorded at Deed Volume 542, page 515 (dated April 9, 1976), to-wit:

**EXCEPTING AND RESERVING** all the coal, oil and gas and other minerals in, on and under said premises, with all the mining rights necessary and incident thereto. And further the right to mine and remove the said coal and to make all the necessary openings and entries in doing so; with the further right to erect all ventilation and other necessary openings in mining and removing said coal therefrom, with the further right to erect and construct tipples and tracks and other structures on the land. And also the right to drill and operate for oil and gas on said premises, with all the rights necessary and incident thereto.

These exceptions and reservations are limited to those property rights which have been excepted and reserved in Grantors' chain of title.

Issue #2 is the application of ORC§5301.56, the Dormant Minerals Act of 1989, as it existed prior to 2006 (hereinafter referred to as the "DMA of 1989"), and whether said DMA of 1989 was self-executing as to the abandonment of mineral, oil, gas, etc. rights which had been reserved under reservation clauses included in deeds conveying title to real estate.

Issue #3 is the application of ORC§5301.56, the Dormant Minerals Act of 2006, as it currently exists after having been amended by the legislation in 2006 (hereinafter referred to as the "DMA of 2006"). Said DMA of 2006 is very similar to the DMA of 1989 but includes notification actions to be taken by the surface owner of the real estate in order to effectuate the abandonment of dormant mineral rights.

Plaintiffs' chain of title and the subject reservations contained therein are not at issue. For ease of analysis the plaintiffs refer to mineral rights in their chain of title in two manners, to-wit:

(1) the one-half "transferred mineral rights" as relates to the conveyance from the Estate of J H Lawrence of a 1/4 interest to his daughter, Elva L Lawrence, and of a 1/4 interest to his daughter, Alma J Lawrence (Certificate of Transfer Volume 213, page 252, on August 9, 1946) and, thereafter, from Elva L

Lawrence and Alma J Lawrence to plaintiffs (Warranty Deed Volume 542, page 515, on August 9, 1976). Said Certificate of Transfer (Volume 213, page 252) contains no mineral reservation clause.

(2) the one-half "reserved mineral interest" as relates to the conveyances from the estate of J H Lawrence of a 1/4 interest to his daughter, Chellissa Swickard, (Certificate of Transfer Volume 213, page 252) and of a 1/4 interest to his daughter, Jetta Householder, (Certificate of Transfer Volume 213, page 252). The Certificate of Transfer contains no mineral reservation clause. However, the subsequent conveyance from Chellissa Swickard (Volume 349, page 384) to Elva Lawrence and Alma Lawrence, as well as the subsequent conveyance from the heirs of Jetta Householder (Volume 283, page 213 and Volume 283, page 209) to Elva Lawrence and Alma Lawrence do contain "coal, oil, gas and other minerals" reservations, to-wit:

**EXCEPTING AND RESERVING** all the coal, oil and gas and other minerals in, on and under said premises, with all the mining rights necessary and incident thereto. And further the right to mine and remove the said coal and to make all the necessary openings and entries in doing so, with the further right to erect all ventilation and other necessary openings in mining and removing said coal therefrom, with the further right to erect and construct tipples and tracks and other structures on the land. And also the right to drill and operate for oil and gas on said premises, with all the rights necessary and incident thereto.

As to Issue #1, the Court finds that the excepting and reserving clause with limitations contained in plaintiffs' deed from Elva L. Lawrence and Alma J. Lawrence (the grantors) (Deed Volume 542, page 515, dated April 9, 1976) is not effective to have reserved the mineral rights as to the referenced "one-half transferred rights". The Court finds that the language in said excepting and reserving clause is clear and unambiguous and clearly states that:

These exceptions and reservations are limited to those property rights which have been excepted and reserved in Grantors' chain of title.

Thus, this limitation clause is clearly a part of and related to the claimed excepting and reserving clause. There were no mineral rights reservations contained within the grantors' chain of title when conveyed from the Estate of J. H. Lawrence to Elva L. Lawrence and Alma J. Lawrence, nor were there any conveyances of said mineral rights from Elva Lawrence and Alma

Lawrence prior to their conveyance to the plaintiffs on April 9, 1976. Therefore, by the clear wording of said conveyance there were no mineral rights reserved, as there were no property rights excepted and reserved within the chain of title when conveyed to the plaintiffs.

Plaintiffs are, therefore, found to be the owner of the "one-half transferred mineral rights".

As to Issue #2, the Court finds that the DMA of 1989 is applicable to the issue of the ownership of the "one-half reserved mineral interest", that by the clear wording of said DMA of 1989 (§5301.56(B)(1), as highlighted below) said statute was self-executing and that under the facts as stipulated in this case the excepting and reserving clause contained within plaintiffs' chain of title is not now effective having been abandoned by inaction as contemplated by said statute.

The Court finds, therefore, that by virtue of the application of the DMA of 1989, the plaintiffs are the owner of the "one-half reserved mineral interest".

Said DMA of 1989 states, in pertinent part as follows:

§5301.56(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies:

(a) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53 of the Revised Code.

(b) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code.

(c) Within the preceding twenty years, one or more of the following has occurred:

(i) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder.

of the county in which the lands are located;

(ii) There as been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located;

(iii) The mineral interest has been used in underground gas storage operations by the holder.

(iv) The drilling or mining permit has been issued to the holder, provide that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 of the Revised Code, in the office of the county recorder of the county in which the lands are located.

(v) A claim to preserve the interest has been filed in accordance with division (c) of this section.

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

[Emphasis added]

Subsequent to the conveyance by Elva Lawrence and Alma Lawrence to the plaintiffs (dated April 9, 1976), on March 17, 1978, Elva L. Lawrence and Alma J. Lawrence executed an oil and gas lease as lessors to Beldon and Blake Corp (Lease Volume 54, page 710); however, no activity was ever commenced.

Also, subsequent to the conveyance by Elva Lawrence and Alma Lawrence to the plaintiffs (dated April 9, 1976), on July 12, 1979, a Certificate of Transfer was recorded from

Elva Lawrence to Alma Lawrence (Volume 588, page 284) purporting to transfer the subject real estate but also containing the same exception and reserving clause previously referenced.

Neither the mineral lease to Belden and Blake Corp, nor the Certificate of Transfer (Volume 588, page 284), are activities which under the statute prevent the abandonment of said mineral interests. No activities were ever commenced under said oil and gas lease. The Certificate of Transfer was executed subsequent to the conveyance of the subject real estate to the plaintiffs (therefore there was no interest to be transferred) and, further, the Certificate of Transfer specifically contained the same previously referenced excepting and reserving clause, so even had it been effective, it would not have been a title transaction of which the mineral interest had been the subject.

Further, even had the oil and gas lease (dated March 17, 1978) or the Certificate of Transfer (dated July 12, 1979) been considered as such a title transaction, the twenty year period of inactivity would have run, at the latest, on July 13, 1999, prior to the effective date of the DMA of 2006 and subsequent to the effective date of the DMA of 1989 which, including the three (3) year grace period, is March 22, 1992. Thus, the mineral rights vested in the surface owner on or before July 13, 1999.

Said statute (DMA of 1989) is found to be self-executing upon the happening of the actions stated therein and no action on behalf of the plaintiffs was necessary to effectuate the abandonment. None of the provisions listed in §5301.56(B)(1)(a)-(c) applies to the facts in this case.

Plaintiffs are, therefore, found to be the owner of the "one-half reserved mineral interest".

As to Issue #3, the Court finds that the issues in this case have been determined as stated in the findings under Issue #1 and Issue #2, and that Issue #3, the DMA of 2006, is not applicable to this matter but rather the DMA of 1989 is determinative. Further, the Court finds that the DMA of 2006 is not retroactive but applies only prospectively in accordance with ORC§1.48 as the same was not "expressly made retroactive" as is required under said statute.

The Court finds, based upon the pleadings, all matters in the court file and affidavits timely filed in this action, that there is no genuine issue of material fact and; reasonable minds can come to but one conclusion even when viewing the evidence most favorably in favor of the defendant, and that conclusion is adverse to the defendant, and plaintiffs are entitled to judgment as a matter of law, and the Court hereby GRANTS summary judgment in favor of the plaintiffs.

The plaintiffs are found to be the owner of the mineral rights underlying the subject real estate, and title to the same shall be quieted in favor of the plaintiffs.

Further, based upon the above, the defendants' motion for summary judgment is hereby OVERRULED.

The Court is aware that this ruling has the effect of finding that many excepting and reserving clauses in current deeds actually may be of no effect, in that they do not except or reserve the mineral rights and, thus, surface land owners may actually also be owners of the mineral rights as regards minerals underlying the surface lands, notwithstanding an exception or reservation of mineral clause included in the deed conveying the real estate to the surface owner; however, that is the clear intent of the legislators in their enactment of the DMA of 1989, as well as the DMA of 2006. The function of the Court in this matter is to interpret and

apply the law as enacted by the legislature as there was no challenge to the statute itself.

The plaintiffs shall prepare any documents necessary for recording and quieting plaintiffs' mineral interest.

THIS IS A FINAL APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

  
Judge David E Henderson

cc:

Clinton G Bailey Esq  
Brandon Cogswell Esq

# **EXHIBIT M**

68-597

Assigned Lease Vol 70, pg 317

### OIL AND GAS LEASE

Agreement Made and entered into this 16th day of January, 1988 by and between THE NORTH AMERICAN COAL CORPORATION, an Ohio Corporation

of 12800 Shaker Boulevard, Cleveland, Ohio 44120 hereinafter called lessor (whether one or more), and C. E. Beck of 32 National Transit Building, Oil City, Pennsylvania 16301 hereinafter called lessee:

1. Witnesseth That lessor, for and in consideration of Ten and No/100 Dollars such to hand paid, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of lessee to be paid, kept and performed, her granted, defined, leased and let, and by these presents does grant, demise, lease and let unto lessee, exclusively, for the purposes of prospecting and exploring by geophysical and other methods, drilling, mining, operating for and producing oil and gas, and of laying pipelines, building and maintaining roadways and of building tanks, power stations and structures thereon to produce, treat, save, care for and remove said production, all that certain tract of land situate in the Township of Archer County of Harrison State of Ohio described as follows, to wit:

See Exhibit "A", attached hereto and made a part hereof, for a description of the premises leased herein.

of Section 3, Township 12, Range 12, and containing 3.033.12 acres, more or less, and including all lands and interests therein, contiguous or appurtenant to said described land and owned or claimed by lessor, whether or not specifically described above.

2. It is agreed that this lease shall remain in force for a primary term of Five (5) years from this date, and if lessee shall commence to drill within said primary term or any extension thereof, lessee shall have the right to continue drilling to completion with reasonable diligence; said term shall extend as long thereafter as oil and gas, or either of them is or can be produced by lessee from said land or from a communitized unit as hereinafter provided.

3. In consideration of the premises lessee covenants and agrees: To deliver to the credit of lessor, free of cost, into tank reservoirs or into the pipe line to which lessee may connect wells on said land, the actual one-eighth (1/8) part of all oil produced and saved from the leased premises.

To pay lessor one-eighth (1/8) of the gross proceeds at the wellhead, payable quarterly, for the gas from each well where gas is found, while the same is being used off the premises, and if used in the manufacture of gasoline a royalty of one-eighth (1/8), payable monthly at the prevailing market rate for gas at the wellhead. Where such gas is not sold or used for a period of one year, and there is no producing gas or oil well on said land or on a communitized unit, as hereinafter provided, including said land, lessee may pay or tender as royalty the sum of One Dollar (\$1.00) multiplied by the number of acres subject to this lease at the end of each such one year period, payable annually at the end of each such year during which gas is not sold or used, and while such royalty is so paid or tendered this lease shall be held as a producing property under the above paragraph setting forth the primary term hereof.

To pay lessor for gas produced from any oil well and used off the premises or in the manufacture of gasoline or any other product a royalty of one-eighth (1/8) of the proceeds, payable monthly at the prevailing market rate at the wellhead.

Lessor agrees to pay one-eighth (1/8) of any and all taxes levied or assessed upon the production of oil or gas from said land, and lessee is hereby authorized to pay such taxes and assessments on behalf of lessor and to deduct the amount so paid from any monies payable to lessor hereunder.

4. If no well be commenced on said land on or before the 31st day of JANUARY, 1988, this lease shall terminate as in both parties, unless lessee shall on or before that date pay or tender to lessor or lessor's credit in full at the address above Bank of Three Thousand Thirty-Five and 12/100 Dollars which shall operate as the depository

regardless of changes in ownership of said land, the sum of Three Thousand Thirty-Five and 12/100 Dollars which shall operate as a rental and cover the privilege of delaying the commencement of a well for 12 months from said date. The payment herein referred to may be made in currency, draft, or check at the option of lessee, and the depositing of such currency, draft or check in any postoffice, with sufficient postage and properly addressed to lessor, or said bank, on or before said last mentioned date, shall be deemed payment as herein provided. In like manner and upon the payments or tenders, the commencement of a well may be further deferred for the period of the same number of months successively during the term of this lease. It is understood and agreed that the consideration first recited herein, the down payment, covers not only the privilege granted to the date when said first rental is payable as aforesaid, but also lessor's option of extending that period as aforesaid and any and all other rights conferred. Any payment or tender which is omitted or is erroneous in whole or in part as to periods, amounts, or denominations shall nevertheless be sufficient to extend the time within which operations for drilling may be commenced in the same manner as though a proper payment had been made; provided, however, Lessee shall correct such error within thirty (30) days after Lessee has received written notice thereof from Lessor.

5. If during the primary term of this lease and prior to the discovery of oil or gas, lessee shall drill a dry hole or holes on this land or land communitized therewith, or if during the primary term of this lease production of this land or on land communitized therewith shall cease from any cause, this lease shall not terminate provided, within 12 months from the expiration of the last rental period for which rental has been paid or before the next ensuing rental paying date, whichever occurs later in time, operations for the drilling of a well shall be commenced or lessee tenders the payment of rentals in the manner and amount hereinafter provided.

6. If lessee owns a less interest in the above described land oil and gas estate than the entire undivided fee simple estate therein, then the royalties and rentals herein provided for shall be paid to lessor only in the proportion which lessor's interest bears to the whole and undivided fee.

7. Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for lessee's operation thereon except water from the wells of lessor. When requested by lessor, lessee shall bury lessee's pipe line below plow depth. No well shall be drilled nearer than 200 feet to the house or barn now on said premises without written consent of lessor. Lessee shall pay for damages caused by lessee's operations to growing crops or said land. Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing. One Hundred Sixty (160)

8. For the purpose of oil and/or gas development and production under this lease, lessor does hereby grant to lessee, the right to pool or communitize said premises, or any part thereof, with other land to cooperate in oil development and/or gas production, and to execute all necessary instruments and to execute and/or a gas development unit of not more than approximately three thousand (3000) acres, and that lessee shall in no event be required to drill more than one well on said unit. Each well may be created by lessee's recording in the Register of Deeds Office within the county or counties in which said unit is situated, an instrument identifying the unit so created. If such oil or gas well shall not be drilled on the premises herein leased it shall nevertheless be deemed to be upon the leased premises within the meaning of all the covenants, expressed or implied, in this lease, and lessee shall participate in the one-eighth (1/8) royalty from such oil and/or gas development and only in the proportion that the number of acres owned by lessor within the limitations of such development unit bears to the total number of acres included therein. At the option of lessee, a diagonal well spacing pattern may be followed.

9. Notwithstanding anything to the contrary herein contained or implied by law, all present and future rules and regulations of any governmental agency pertaining to well spacing, drilling or production units, use of material and equipment or otherwise shall be binding on the parties herein with the effect as though incorporated herein at length.

10. If the estate of either party hereto is assigned and the privilege of assigning in whole or in part is expressly allowed in the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rents or royalties shall be binding on lessee until 30 days after lessee has been furnished with a written transfer or assignment or a true copy thereof; and rentals shall be adjusted in accordance with such change of ownership or assignment at the next succeeding rental anniversary after receipt by lessee of written notification in lessee of such change of ownership or assignment. It is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to deduct or affect the share hereof as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payments of said rentals.

579

11. Whenever any well or wells on said lands shall be used by lessee for the injection of water brine or other fluids produced from lands other than said leased premises for disposal as a conservation measure, lessee shall pay to lessor the sum of One Hundred Dollars (\$100.00) per year for each well so used in addition to all other considerations specified in this lease. The injection of water, brine, or other fluids into subsurface strata shall be made only into strata below those surrounding domestic fresh water and lessee agrees to protect adequately lessor's fresh water supply from injury as a result of any of its operations.

12. If the leased premises are now or shall hereafter be owned by severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each separate owner bears to the entire leased acreage. Provided, however, if the leased premises consist of two or more non-adjacent tracts, this paragraph shall apply separately to each non-adjacent tract, and further provided that if a portion of the leased premises is hereafter consolidated with other lands for the purpose of operating the consolidated tract as one lease, this paragraph shall be inoperative as to such portion so consolidated. There shall be no obligation on the part of the lessee to effect wells on separate tracts which the land covered by this lease may be hereafter divided by sale, devise, or otherwise, or to furnish separate measuring or receiving tanks.

13. Lessor hereby warrants and agrees to defend the title to said lands hereby described and agrees that lessee shall have the right at any time to release for lessee, by payment, any mortgages, taxes or other liens on the above described lands, in the event of default of payment by lessee, and be subrogated to the rights of the holder thereof, and the undersigned lessors for themselves and their heirs, successors, and assigns, hereby surrender and release all rights of dower and homestead to the premises herein described, insofar as said right of dower and homestead may in any way affect the purposes for which this lease is made as recited herein.

14. Lessee may at any time surrender this lease as to all or any part of the lands covered thereby, by delivering or making a release thereof to lessor, if the lease is not recorded, or by placing a release thereof of record in the proper county, if the lease is recorded; and if surrendered only as to a part of said lands, any delay rentals or acreage payments which may thereafter be payable hereunder shall be reduced proportionately.

15. Lessee shall have the exclusive right to use any stratum or strata underlying the premises for the storage of gas or liquids and may, for such purpose, deepen and replete to operation any and all abandoned wells on the premises and may drill new wells thereon for the purpose of locating and storing gas or liquids in such stratum or strata and withdrawing such gas or liquids therefrom. If Lessee intends to use the premises for such purpose or stratum that it is so using the premises, Lessee may deliver to Lessor or have recorded in the county or counties in which this lease is recorded a declaration that the premises are being used, or from a specified date will be used for gas or liquid storage, and thereafter Lessee shall have the exclusive right to use the premises for such gas or liquid storage until such time as Lessee may deliver to Lessor or have recorded in such county or counties a surrender of the right granted to Lessee by this paragraph or until Lessee shall intentionally abandon the right to use the premises for such storage. During the period or periods that Lessee shall utilize the premises for the storage of gas or liquids, the royalties herein provided to be paid to Lessor shall accrue and become payable only on such gas and liquids as shall have been taken from such premises by Lessee over and above the amount thereof which Lessee hereinafter shall have stored in such stratum or strata. For and during the period or periods that Lessee uses said premises for such storage, Lessee shall pay to Lessor a minimum royalty of One Dollar (\$1.00) per acre per year on the number of acres covered by this lease, such payment to be made not later than sixty (60) days from and after the end of each twelve-month period during which the premises are utilized for storage. Lessee is expressly granted the right to use so much of the surface of the premises as is reasonably necessary in the exercise of the rights granted to Lessee by this paragraph. The rights granted to Lessee by this paragraph shall continue in force for the period of time hereinafter specified, but this lease, insofar as it grants to Lessee the right to prospect, explore and produce oil and gas from stratum or strata other than those employed in such storage, shall not be continued in force solely by the storage of oil or liquid as provided in this paragraph.

16. For additional terms and conditions see ADDENDUM, attached hereto and made a part hereof.

IN TESTIMONY WHEREOF WE SIGN, This 16th day of January, 1984

Signed and Acknowledged in the Presence of:

*Robert E. Uhler*  
 Robert E. Uhler  
*Andrew S. Good*  
 Andrew S. Good

*Otes Bennett, Jr.*  
 Otes Bennett, Jr., Chairman and Chief Executive Officer  
*Thomas A. Koss*  
 Thomas A. Koss, Secretary  
*C. N. Beck*  
 C. N. Beck, Lessee

CORPORATION ACKNOWLEDGEMENT

STATE OF OHIO  
 COUNTY OF CUYAHOGA

do hereby certify that on this 16th day of January, 1984, before me a Notary Public, the undersigned, *Otes Bennett, Jr. and Thomas A. Koss*, who acknowledged themselves to be the Chairman and Chief Executive Officer and Secretary of The North American Coal Corporation, and that they are such officers, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by *Otes Bennett, Jr. and Thomas A. Koss*, Chairman and Chief Executive Officer and Secretary.

*Shirley P. Hunsbaker*  
 SHIRLEY P. HUNSBAKER, NOTARY PUBLIC  
 My Commission Expires March 2, 1985

STATE OF PENNSYLVANIA  
 COUNTY OF VENANGO

On this 26th day of January, A.D. 1984, before me, the undersigned, a Notary Public in and for said county, in the State aforesaid, personally appeared *C. E. Beck*

to me known as the person described in and who executed the foregoing instrument and acknowledged that he had executed the same free act and deed.

*James Hittslock*  
 JAMES HITTLOCK, Notary Public  
 OR CV, Venango Co., Pa.  
 My Commission Expires October 24, 1985

Acting in \_\_\_\_\_ County,  
 C. E. Beck, 32 National Transit Building, Oil City, PA 16301

2/3  
 MC  
 2/3



Exhibit "A"

Attached to and made a part of that certain Oil and Gas Lease by and between THE NORTH AMERICAN COAL CORPORATION, Lessor, and C. E. BECK, Lessee, dated January 16, 1984, covering the following described lands, to wit:

Archer Township, Harrison County, State of Ohio

Tract No.	Acres	Grantor	Date	Vol.	Pg.	Pres. Surface Ow.
1	19.98	Merle S Bolitho	9-13-43	113	167	M & L Tabacchi
2	128.98	"	"	"	"	"
3	50.00	"	8-18-43	"	96	"
4	26.28	"	"	"	"	"
5	19.64	"	"	"	97	D Green & R For
6	158.42	"	"	"	"	J C & Helen Car
7	95.85	"	"	"	"	D Green & R For
8	77.00	"	"	"	"	"
9	15.00	"	"	"	"	"
10	60.00	Otway T. Dunlap	4-14-45	116	395	Nacco
11	13.32	Clarence C Fay	7-30-48	124	523	"
12	102.53	Laura E Freshwater	5-3-43	112	438	"
13	32.76	"	"	"	"	"
14	50.00	"	6-28-43	"	585	Geo Valesko
15	60.00	Ralph E Galbraith	8-24-44	115	158	"
16	71.80	Jesse S Hall	6-19-43	112	539	O H & H D Corb
17	27.28	"	"	"	"	Nacco
18	56.47	Ray V Strausbaugh	9-7-43	113	468	O H & H D Corb
19	0.50	"	"	"	"	"
20	35.71	Cleve Hines	5-23-42	110	531	O H & H D Corb
21	22.46	Oakley A Hennis	10-14-43	113	480	Oakley A Henni
22	20.39	B Frank Thompson	7-2-43	112	620	Nacco
23	34.54	Frank Wright	4-30-46	119	520	"
24	165.29	Robt J Montgomery	11-25-41	110	20	"
25	123.39	Junius Galbraith	12-31-41	110	51	"
26	65.43	J R Thompson etal	10-9-43	113	454	William Campe
27	9.83	"	"	"	"	"
28	70.21	Cleve Hines	5-23-42	110	531	William Galbre
29	107.18	"	"	"	"	Nacco
30	79.00	Frank Montgomery	7-6-42	"	629	"
31	5.19	J R Thompson etal	8-17-43	113	85	Jewett Sports
32	6.32	"	"	"	"	Farmers Club
33	95.70	"	"	"	"	"
34	15.00	John C Arbaugh	6-16-42	111	23	"
35	52.64	"	"	"	"	Clarence Kado
36	90.21	"	"	"	134	Nacco
37	77.13	C F Thompson	"	"	"	"
38	55.38	"	"	"	"	"
39	13.64	"	"	"	"	"
40	110.00	"	"	"	"	"
41	61.90	Jacob F Mattern	4-26-45	116	402	Frank E Dosso
42	8.96	Frank Montgomery	7-6-42	110	629	Nacco
43	4.56	"	"	"	"	"
44	33.95	J R Thompson	8-17-43	113	85	"
45	82.00	J M Thompson	8-6-43	111	136	"
46	19.03	Pgh. Con. Coal	4-30-48	123	504	Jay C Carson
47	50.00	"	"	"	"	"
48	67.75	"	"	"	"	"
49	65.03	John G Worley	7-21-44	115	50	Nacco
50	27.25	"	"	"	"	"
51	132.00	Pgh. Con. Coal	4-30-48	123	504	Edwin E Mills
52	55.99	Asbury Freshwater	"	"	147	Max Edwards
53	40.00	Pgh. Con. Coal	4-30-48	"	504	Nacco
54	36.18	"	"	"	"	"

3,033.12 Acres Total  
 signed for identification this 16th day of January, 1984:

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*C. E. Beck*  
 C. E. Beck, Lessee

THE NORTH AMERICAN COAL CORPORATION  
*C. Bennett, Jr.*  
 BY: C. E. Bennett, Jr., Chairman and  
 Chief Executive Officer  
*Thomas A. Koza*  
 BY: Thomas A. Koza, Secretary

ADDENDUM

Attached to and made a part of that certain Oil and Gas Lease by and between THE NORTH AMERICAN COAL CORPORATION, Lessor, and C. E. Beck, Lessee, dated January 16, 1984, and effective January 31, 1984, covering Lands situate in Archer Township, Harrison County, State of Ohio.

16. Notwithstanding any other provision of this lease to the contrary, each gas well or drilling well will excuse the payment of delay rentals only as to the 160 acres allocated to each such gas well or drilling well, and 40 acres to each oil well, and rentals must be paid on the remaining acreage covered hereby in order that Lessee's rights hereunder continue in effect as to such remaining acreage. Production of oil or gas on a portion of the leased premises or lands unitized therewith will extend this lease beyond its primary term only as to such portions of the leased premises as may be included in a producing unit or units, provided, however, this lease shall not terminate if actual drilling operations are being conducted on the leased premises or lands unitized therewith, and such operations shall continue to maintain this lease in force and effect beyond its primary term so long as actual drilling operations are being conducted with no cessation of more than ninety (90) consecutive days from the completion of one well and the commencement of drilling of another well.

17. Location of drillsites shall be determined by the mutual consent of the parties hereto; however, such consent shall not be unreasonably withheld by Lessor.

~~18. It is the intent of this document to lease to Lessee all oil and gas mineral rights in Archer Township, Harrison County, Ohio, which rights are owned by Lessor at the date of execution of this lease, whether or not included on Exhibit A-1, attached hereto and made a part hereof. It is understood by the parties hereto that the Lessor owns no surface rights on any of the described premises.~~

18. Notwithstanding any other provision of this lease to the contrary, it is specifically understood and agreed by Lessee that Lessor owns no surface rights on any of the above described properties and that Lessor grants to Lessee all of the foregoing rights and privileges only to the extent that Lessor owns and has the right to grant the same.

19. Lessee warrants that it will comply with any and all restrictions, servitudes and other encumbrances of record applicable to the oil and gas hereby leased.

Lessee further warrants that it will indemnify and hold harmless Lessor, its past and present directors, officers, employees, agents, affiliates, successors and assigns from and against any and all claims, demands, actions, causes of action, suits, liability, loss or damage, including the expense of defending the same, arising from or in any way relating to Lessee's failure to comply with any and all such restrictions, servitudes and encumbrances.

Signed for identification this 16th day of January, 1984:

37388  
W Reg.  
LABAN C. BLACKBURN  
Harrison Co. Recorder  
Received FEB 6 1984  
at 10:45 clock A.M.  
Recorded FEB 6 1984

\$14.00 Pd.

THE NORTH AMERICAN COAL CORPORATION  
*O. Bennett*  
BY: Otis Bennett, Jr., Chairman and  
Chief Executive Officer  
*Thomas A. Kozz*  
BY: Thomas A. Kozz, Secretary  
*C. E. Beck*  
C. E. Beck, Lessee