

ORIGINAL

Case No. 2014-0067

In the Supreme Court of Ohio

ON CERTIFICATION OF QUESTION OF STATE LAW FROM
THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION
CASE No. 2:12-CV-00916

CHESAPEAKE EXPLORATION, L.L.C., ET AL.,
Plaintiffs-Petitioners,
v.
KENNETH BUELL, ET AL.,
Defendants-Respondents.

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PRELIMINARY MEMORANDUM OF DEFENDANTS-RESPONDENTS ARIEH AND SUNNI ORDRONNEAU, DENNIS AND MARGARET ELIAS, AND JEFFREY AND JANICE ELIAS

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Now come Arieh and Sunni Ordronneau, Dennis and Margaret Elias, and Jeffrey and Janice Elias (hereinafter collectively referred to as “Defendants-Respondents”) and respectfully submit this preliminary memorandum in support of certification in accordance with S.Ct.Prac.R. 9.05(A).

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States District Court for the Southern District of Ohio has certified two questions of law to this Court, both of which satisfy this Court’s standard of review, and accordingly should be reviewed and answered. Both of these certified questions concern the interpretation and application of the Ohio Dormant Mineral Act (“ODMA”) R.C. § 5301.56, *et seq.*, an act of critical importance in Ohio’s emerging Utica shale play that has yet to be interpreted or applied by this Court. Defendants-Respondents are confident that the existing case law and statutes that address these questions direct the District Court to render a decision in their favor; however, due to the increasing prevalence of oil and gas litigation in Ohio and the likelihood these issues will be recurring in nature, these questions should be addressed and answered now by this Court.

As the District Court stated, “[b]ecause federal courts act as outsiders, there is a ‘responsibility to make sure that questions of state law are ‘settled right,’ not...just ‘settled.’” (Certification Opinion and Order, pgs. 21-22, citing *Rutherford v. Columbia Gas*, 575 F.3d 616, 627 (6th Cir.2009) (Clay, J., concurring)). In furtherance of this principle, by addressing and answering these certified questions, this Court can not only settle the issues in the present case, but provide guidance for all Ohio courts, state and federal, as these questions continue to be presented. Accordingly, this court should review and answer both certified questions.

A. The Certified Questions Involve Issues That Continue To Be Brought Before Both Ohio Courts of Common Pleas And U.S. District Courts. By Reviewing And Answering These Questions, This Court Can Provide Guidance And Stability With Respect To The ODMA.

The District Court certified the following questions to this Court:

1. Is the recorded lease of a severed subsurface mineral estate a title transaction under the ODMA, 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 ODMA at the time of the reversion?

(Certification Opinion and Order, pg. 22). Both of these questions involve the interpretation and application of the ODMA, which was first passed by the General Assembly on March 22, 1989, and later amended on June 30, 2006. The District Court is correct in stating that this Court has yet to address any case involving the interpretation and application of the ODMA. However, ODMA issues are frequently being presented and ruled upon in Ohio's lower courts.¹

As set forth more fully below, while Defendants-Respondents are confident that the majority of these lower courts are accurately interpreting the plain language of the ODMA and the applicable case law, the time is right for this Court to address these recurring issues. Many of these lower courts are confined to making decisions based on the language of the ODMA, which this court has not interpreted, and by looking to courts in other jurisdictions, such as Oklahoma.

¹ See, e.g., *Wendt, et al., v. Dickerson, et al.*, Tuscarawas C.P. No. 2012 CV 02 0315 (February 21, 2013); *Wiseman v. Potts, Morgan* C.P. No. CV-08-0145 (June 29, 2010); *Cobbs v. Estate of John Kaplun*, Carroll C.P. No. CVH-11-26621 (June 21, 2011); *Walker, Jr. v. Noon*, Noble C.P. No. 212-0098 (March 20, 2013); *Swartz, et al., v. Jay Householder Sr., et al.*, Jefferson C.P. No. 12-CV-328 (July 17, 2013); *Shannon, et al., v. Householder Sr., et al.*, Jefferson C.P. No. 12-CV-226 (July 17, 2013); *Tribett, et al., v. Shepherd, et al.*, Belmont C.P. No. 12-CV-180 (July 22, 2013); *Farnsworth, et al., v. Burkhardt, et al.*, Monroe C.P. No. 1012-133 (July 16, 2013); *Dalhren v. Brown Farm*, Carroll C.P. No. 13 CVH27445 (November 5, 2013); *M&H Partnership v. Walter Vance Hines, et al.*, Harrison C.P. No. CVH-2012-0059 (January 14, 2014); *Gentile, et al., v. Ackerman, et al.*, Monroe C.P. No. 2012-110 (January 13, 2014).

Guidance from other jurisdictions can be instructive, but it is by no means binding on Ohio courts as many of these out-of-state courts are interpreting dormant mineral rights statutes which vary in language and operation from the ODMA.

While Defendants-Respondents maintain that the overwhelming majority of case law supports their position on both of these certified questions, they are asking this Court to reaffirm and apply this case law in the context of the ODMA to create uniformity in the State of Ohio on these issues. Doing so will provide stability and guidance for all Ohio courts and future litigants.

B. With Respect To Certified Question 1, This Court Has Already Determined That An Oil And Gas Lease Is A License Rather Than A Deed Of Conveyance. This Is But One of Several Reasons That The Court Should Answer The Certified Question In The Negative.

The Court should accept certified question 1 for review and answer the question in the negative. Pursuant to the ODMA, a mineral interest is deemed abandoned and reunited with the surface estate unless during the preceding twenty (20) years, a “savings event” occurred, with one such event being that “the mineral interest has been the **subject of a title transaction** that has been filed or recorded in the office of the county recorder...” R.C. § 5301.56(B)(3)(a). [emphasis added].

In *Back v. Ohio Fuel Gas Co.*, this Court held that an oil and gas lease is a license and not a deed of conveyance. 160 Ohio St. 81, 89, 113 N.E.2d 865 (1953). While the ODMA was not in effect at the time *Back* was decided, the reasoning is still sound and has been supported by federal courts in Ohio and other states.² As such, this Court should review and answer certified question 1 by applying its previous decision in *Back* to cases invoking the language of the

² *Wellington Resource Group LLC v. Beck Energy Corp.*, S.D. Ohio No. 2:12-CV-104, 2013 WL 5311412, * 5 (Sept. 20, 2013) (relying on *Back* the court indicated “[i]t is this Court’s opinion that the Ohio Supreme Court would still hold that oil and gas leases are not part of the real estate in Ohio.”); *Halliburton Oil Producing Co. v. Grothaus*, 981 P.2d 1244, 1251 (Ok.1998) (an oil and gas lease “constitutes a right to search for and capture [oil and gas]”); *Bd. of County Cmrs of Johnson County v. Greenhaw*, 734 P.2d 1125, 1128 (Kan.1987) (“[a] leasehold estate, except an oil and gas lease, is real estate under Kansas Law.”)

ODMA. In doing so, this Court should find that an oil and gas lease is not a title transaction, but rather merely a license to extract natural resources. There are several additional reasons that certified question 1 should be answered in the negative and Defendants-Respondents look forward to addressing those arguments in their merit brief should this Honorable Court accept certified question 1.

C. This Court Should Review And Answer Certified Question 2 In The Negative For Several Reasons. For Example, The ODMA Makes It Clear That Any Title Transaction Must Be Recorded. To Permit The Expiration Of A Lease, Which Is Not Recorded, To Constitute A Title Transaction Would Negate The Plain Language Of The ODMA.

This Court should accept certified question 2 and answer the question in the negative. While there have been at least two Ohio decisions that have alluded that the expiration of a lease does not constitute a title transaction³, no Ohio state court has directly addressed this issue.⁴ While Defendants-Respondents are confident that the plain language of ODMA answers this question in the negative, as it requires any “title transaction” be “recorded,” and because the expiration of a lease is not a recorded event, this Court should review and answer the question in order to provide clarity for Ohio courts on this issue.

As set forth more fully below, the Supreme Court in Michigan addressed and answered certified question 2 in the affirmative in *Energetics, Ltd. v. Whitmill*, 497 N.W.2d 497 (MI.1993). However, this decision was based upon the unique language of the Michigan Dormant Mineral Act, which differs from the ODMA. As the District Court set forth, “[a]lthough the Michigan

³ See *Swartz, et al., v. Jay Householder Sr., et al.*, Jefferson C.P. No. 12-CV-328 (July 17, 2013) *Shannon, et al., v. Householder Sr., et al.*, Jefferson County Court of Common Pleas, Case No. 12-CV-226 (July 17, 2013); Both cases, which also held that an oil and gas lease is not a title transaction, held that even if a lease were a title transaction, the twenty year period that is relevant for the purposes of the ODMA would have started to run when the lease was entered into. The case made no mention that the expiration of a lease was also a title transaction.

⁴ In *McLaughlin v. CNX Gas Co.*, N.D. Ohio No. 5:13 CV 1502, 2013 WL 6579057, * 3 (Dec. 13, 2013), the court stated “the release of rights under [a] lease qualifies as a title transaction.” However, the court provided no analysis for this proposition.

Supreme Court's analysis is instructive, it is by no means binding as the ODMA and the [Michigan Dormant Mineral Act] differ in their definition of a savings event." (Certification Opinion and Order, pg. 21). [emphasis added]. Accordingly, for this and other reasons that will be addressed in the merit briefing, this Court should review and answer certified question 2 in the negative, as R.C. § 5301.56, *et seq.*, requires all title transactions be recorded.

STATEMENT OF FACTS

A. The Ohio General Assembly Enacted The Ohio Dormant Mineral Act To Provide Clarity As To Ownership Of Mineral Rights Underlying Real Property And To Encourage Development Of Such Rights.

To ensure that Ohio's natural resources were developed, in 1989⁵ the Ohio General Assembly adopted the ODMA. Under the 1989 version of the ODMA, if an entity or individual reserved mineral rights, other than coal, underlying real property, the failure to actively utilize and/or preserve those rights pursuant to the ODMA resulted in the mineral rights automatically vesting in the surface owner. The ODMA sets forth a list of "savings events" that can preserve an interest in mineral rights precluding abandonment. One such savings event occurs if the reserved mineral interest is 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)(3)(a). [emphasis added]. At issue herein is whether an oil and gas lease and/or its expiration constitute "title transactions" for purposes of the ODMA. Because an oil and gas lease is merely a license and not a transfer of real estate as this Court held in *Back*, a lease does not constitute a "savings event" for purposes of the ODMA. Further, the expiration of an oil and gas

⁵ Effective June 30, 2006 the legislature modified the ODMA to include a requirement to serve notice upon the mineral owner. The version in existence between 1989 and June 31, 2006 contained no notification requirement and resulted in automatic abandonment of the minerals and vesting of the minerals in the surface owner. It is apparent that the legislature determined notice was necessary for mineral reservations on a going forward basis only, as no action was taken to repeal the prior vesting of mineral rights in Ohio surface owners that had occurred between 1989 and June 30, 2006.

lease is not a recorded event, and therefore, does not comply with the plain language of the ODMA. Consequently, the expiration of an oil and gas lease cannot constitute a title transaction under the ODMA. Accordingly, the mineral rights underlying the Defendants-Respondents' Real Estate vested in the surface estate, making the Defendants-Respondents the true and rightful owners of both the surface estate and all mineral interest thereunder except coal.

B. The Mineral Rights Underlying The Real Estate Were Severed From The Surface Estate.

The Real Estate in this matter has been frequently transferred over the past seventy (70) years; however, such transfers included only the surface estate, as the mineral estate was severed and remained dormant. The mineral estate was severed from the surface estate in 1958 by virtue of language in a deed that specifically excepted and reserved the mineral rights underlying the property ("Reservation"). On January 1, 1959, the North American Coal Company ("NACC")⁶ became the owner of the mineral estate.

1. Beginning In October Of 1958, The Surface Estate And The Mineral Estate Were Conveyed Separately, Creating A Separation Of Ownership For The Mineral Rights And Surface Rights.

Beginning on or around October of 1958, the surface estate of Defendants-Respondents' Real Estate was transferred numerous times. As a result of these conveyances, Defendant-Respondent Dennis Elias obtained approximately 100 acres of the Real Estate in 1984. On or around April 14, 1995, Defendant-Respondent Dennis Elias conveyed approximately 10.37 acres of the Real Estate to Defendants-Respondents Jeffrey and Janice Elias. Shortly after this conveyance, on or around October 29, 1996, Defendant-Respondent Dennis Elias conveyed approximately 20.17 acres of the Real Estate to John and Marilyn Jackson. By virtue of subsequent conveyances, on or around July 28, 2011, Defendants-Respondents Arieh and Suni

⁶ North American Coal Company is a different entity than North American Coal Royalty Company.

Ordronneau became the owners of these 20.17 acres of the Real Estate. (a chart setting forth the history of the surface estate and mineral estate is attached hereto and incorporated by reference as **Exhibit 1**).

C. As No Savings Event Occurred To Preserve The Mineral Rights In Accordance With The ODMA, On Or Before May 30, 2005, Defendants-Respondents Became The True And Rightful Owners Of The Mineral Rights Underlying The Real Estate.

While the surface estate of the Real Estate was frequently conveyed, the mineral estate remained dormant for decades until it automatically vested in the surface estate by operation of the ODMA. In fact, NACC took no action with respect to the mineral estate until 1973 when it entered into an oil and gas lease with National Petroleum Corporation, which was recorded in February of 1974. Upon the expiration of this lease, NACC again leased the mineral estate in 1984 to C.E. Beck. This 1984 lease was subsequently assigned to Carless Resources, Inc. on May 30, 1985. (See **Exhibit 1**).

All parties in this matter agree that the 1984 lease expired under its own terms in January of 1989. There was never any action taken in accordance with the 1984 lease—no permits were requested and no minerals were ever extracted from the Real Estate. In accordance with the plain language of the ODMA and the Ohio Marketable Title Act, R.C. § 5301.47, *et seq.*, neither a lease nor an assignment of the same is listed as a “title transaction,” which would preclude a mineral interest from being deemed abandoned and vested in the surface estate. However, even if a lease or assignment constituted a “title transaction” for the purposes of the ODMA, the latest date one of these events occurred was May 30, 1985. Therefore, from May 30, 1985 until May 30, 2005, the mineral rights underlying Defendants-Respondents’ Real Estate remained dormant, were abandoned pursuant to the ODMA, and, in 2005, automatically vested in the owners of the surface estate by operation of the ODMA. As a result, on or before May 30, 2005, Defendants-

Respondents became the true and rightful owners of the mineral rights underlying the Real Estate.

D. Despite No Longer Owning The Mineral Estate By Virtue Of The ODMA, North American Coal Royalty Company Entered Into An Oil And Gas Lease, Thus Precluding Landowners From Leasing Their Mineral Rights.

Despite the fact that the mineral estate vested to Defendants-Respondents on or before May 30, 2005, North American Coal Royalty Company⁷ ("North American") purportedly leased the mineral estate underlying the Real Estate on January 28, 2009. Currently, Chesapeake Exploration, L.L.C., CHK Utica, L.L.C., Larchmont Resources, L.L.C., and Dale Pennsylvania Royalty, LP, all claim in interest in the January 28, 2009 lease, with North American claiming ownership of the mineral estate. Based upon the ODMA, these claims are invalid.

In June of 2010 Dennis and Margaret Elias, and Jeffrey and Janice Elias attempted to lease their oil and gas rights with Kenyon Energy, LLC. Due to the invalid January 28, 2009 lease, and North American's invalid claim to the mineral estate, the Eliases were unable to enter into an oil and gas lease.

Arieh and Sunni Ordronneau attempted to enter into an oil and gas lease with Chesapeake in October 2011. However, Due to the invalid January 28, 2009 lease, and North American's invalid claim to the mineral estate, the Ordronneaus were not able to enter into a lease.

The ODMA is clear that if the necessary steps to preserve the mineral interest are not taken, the mineral rights automatically vest with the surface estate. At the time of the 2009 Lease, no steps had been taken under the statute to preserve the mineral interest. While NACC had an interest in the Reservation at one point, the leases it entered into, and expiration of the same, did not act to preserve such interest, thereby resulting in the surface estate and the mineral

⁷ An entity that purportedly obtained the mineral rights in December of 2008.

estate merging by operation of law on or before May 30, 2005. Such merger makes Defendants-Respondents the true and rightful owners of the mineral rights underlying the Real Estate.

STANDARD

Pursuant to S.Ct.Prac.R. 9.01, “[t]he Supreme Court may answer a question of law certified to it by a court of the United States.” This Court will invoke such power “if the certifying court...issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent...” *Id.* As the District Court pointed out, this Court has yet to render a decision on either of these certified questions, and “given the dearth of Ohio authority, the best course of action is to certify these important questions of Ohio law to the Supreme Court of Ohio.” (Certification Opinion and Order, pgs. 20-2).

The standard for answering a certified question is satisfied here. Both of these questions have yet to be decided by this Court, and both questions present an issue that will frequently reoccur in the lower courts. As the oil and gas industry continues to expand in Ohio, deciding these questions will provide guidance to Ohio courts, landowners, and companies. As the standards of S.Ct.Prac.R. 9.01 have been met, this court should address and answer both certified questions.

ARGUMENT

- A. This Court Should Decide Both Certified Questions Of Law. Since The ODMA Was First Enacted In 1989, This Court Has Not Rendered Any Direct Opinion On The Application And Interpretation Of The Law. Doing So Will Be Determinative Of This Present Matter And Provide Guidance To Courts For Future Litigation.**

East Central Ohio is currently the epicenter for the production of oil and gas reserves. However, Ohio has a long history of oil and gas production dating back to the mid-1800s. By 1896, Ohio led the United States in oil production. Over the next 130 years, Ohio’s oil and gas

industry experienced a number of boom and bust cycles. As a result, landowners reserved their oil and gas rights in real estate transactions. However, these reservations were often forgotten by heirs and left to languish without any productive use. Additionally, because the interests were forgotten and often never probated, locating the numerous reservation owners became a significant impediment to development of Ohio's natural resources.⁸

In the 1980s, due to the great number of abandoned and non-developed mineral interests, the Ohio legislature enacted the ODMA on March 22, 1989 in order to promote the production of natural resources. Under the ODMA, a mineral interest is deemed abandoned and reunited with the surface estate unless during the preceding twenty (20) years a "savings event" occurs.⁹ The only "savings event" at issue before this court is that of a "title transaction." In accordance with the ODMA, in order to invoke this particular "savings event," "[t]he mineral interest [must have] 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)(3)(a). Both certified questions before this Court ask it to determine what does and what does not constitute a "title transaction" for the purposes of the ODMA.

This Court has never addressed either of these certified questions, or any issue for that matter concerning the interpretation or application of the ODMA. Accordingly, Ohio's state and federal courts have been left to interpret and apply the ODMA without any binding authority from which to draw. While Defendants-Respondents are confident that prior decisions from this Court can simply be applied to the context of the ODMA, for the sake of clarity in both this case

⁸ Ohio law requires all co-tenants to join in a mineral lease and the failure of one co-tenant to sign precludes development by the remaining co-tenants. See *Keys, et al. v. Pittsburg & W. Coal Co.*, 58 Ohio St. 246, 50 N.E. 911 (1898).

⁹ The Act also prescribes two other factors that will remove a mineral interest from the purview of abandonment: (1) the mineral interest is in coal or the mining rights to coal or (2) the mineral interest is held by a government body, federal, state or local. R.C. § 5301.56(B)(1) and (2). Neither of these factors are at issue in this case.

and future cases in Ohio, Defendants-Respondents respectfully ask that this Court review and answer both certified questions.

B. This Court Should Accept And Answer Certified Question 1. In Doing So, This Court Should Apply Its Holding In *Back v. Ohio Fuel Gas Co.* To The Context Of The ODMA.

Certified question 1 asks this court to consider the following:

Is the recorded lease of a severed subsurface mineral estate a title transaction under the ODMA, Ohio Revised Code § 5301.56(B)(3)(a)?

While Defendants-Respondents believe that this Court should accept and answer this question as it has yet to do so in the context of the ODMA, this Court's previous decision in *Back* provides support for the fact that an oil and gas lease is not a "title transaction" in that it does not convey a fee interest, but rather merely conveys a license¹⁰.

In *Back*, the instrument at issue before this court purported to convey "all the oil and gas in and under" the property and granted "the right and privilege of operating upon the said premises...for the obtaining of such oil and gas." 160 Ohio St. at 83-84. In further assessing this instrument, and more importantly what it granted the authority to do, this Court held that "[t]he instrument...as a whole, bears the earmarks of a license. It grants operating privileges on the land surface..." *Id.* at 86.

In analyzing *Back*, courts have determined that "oil and gas leases [based on Ohio law] are not leases as that term is traditionally used...[r]ather...Ohio courts appear to recognize that [oil and gas] leases create a license to enter upon the land for the purpose of exploring and drilling for oil and gas..." *In re Frederick Petroleum*, 98 B.R. 762, 766 (S.D. 1989); *see also*

¹⁰ There are several additional reasons why this Court should answer this question in the negative. These reasons will be addressed in Defendants-Respondents' merit brief should this Honorable Court accept certification.

Wellington Resource Group LLC v. Beck Energy Corp., S.D.Ohio No. 2:12-CV-104, 2013 WL 5311412, * 5 (Sept. 20, 2013).

In addition, while R.C. § 5301.47(F) provides a definition of a title transaction as being a “transaction affecting title to any interest in land,” this definition was created before the ODMA, and therefore is not dispositive of the question of whether a recorded lease of a severed subsurface mineral estate is a title transaction under the ODMA.

This issue will continue to be presented to the lower courts.¹¹ By accepting and answering this question, both state and federal courts in Ohio will be able to decide ODMA issues more effectively. Accordingly, Defendants-Respondents requests that this Court review and answer certified question 1 and determine that a recorded lease of a severed subsurface mineral estate is not a title transaction under the ODMA.

C. This Court Should Accept And Answer Certified Question 2. In Doing So, This Court Should Apply The Plain Language Of The Statute, Which Requires Any Title Transaction Be Recorded. As The Expiration Of A Lease Is Not Recorded, Such Expiration Is Not A Title Transaction.

Certified question 2 asks this Court to determine

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 ODMA at the time of the reversion?

This is a question that no Ohio state court has addressed.¹² In fact, there are only a few courts throughout the country that have addressed this issue, none of which have applied the specific language of the ODMA. Accordingly, this question should be reviewed and answered by this Court. In doing so, Defendants-Respondents ask that this Court apply the plain language of the

¹¹ See *Swartz, et al., v. Jay Householder Sr., et al.*, Jefferson County Court of Common Pleas, Case No. 12-CV-328 (July 17, 2013) *Shannon, et al., v. Householder Sr., et al.*, Jefferson County Court of Common Pleas, Case No. 12-CV-226 (July 17, 2013); Both cases held that a lease is not a title transaction.

¹² See footnotes 3 and 4.

ODMA and determine that any “title transaction” that is not “recorded” cannot act as a savings event¹³.

R.C. § 5301.56(B)(3)(a) states that a mineral interest will not be deemed abandoned, and thus, will not automatically vest in the surface estate, if, within the preceding twenty years:

“[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...” [emphasis added].

This language not only requires that the mineral interest be the subject of a title transaction but that such transaction be “filed or recorded.” To determine that the expiration of a lease and “reversion”¹⁴ of the rights granted thereunder constitute a “title transaction” would contravene the plain language and purpose of the ODMA.

The expiration of an oil and gas lease is not a recorded event. Similarly, any “reversion” at the end of the lease is not filed or recorded. Furthermore, permitting an expiration or reversion to act as a savings event and restart the twenty year clock would be contrary to the stated purpose of the ODMA, which is to allow mineral rights to vest in the surface estate if not used.¹⁵ To determine that the expiration of a lease and subsequent reversion starts a new twenty year clock would mean that a lease with a twenty year term could be recorded, not be acted upon, and at the end of that twenty year time-frame the holder of the mineral rights would receive another twenty years within which to take action to preserve the mineral rights. Such a

¹³ There are additional reasons why this Court should answer this question in the negative. These reasons will be addressed in Defendants-Respondents’ merit brief should this Honorable Court accept certification.

¹⁴ Ohio courts have determined that a lessor retains his fee simple interest when entering into a lease. See *Culberson Trans. Serv., Inc. v. John Alden Life Ins. Co.*, 10th Dist. No. 96APE11-1501, 1997 WL 358857, *5 (June 30, 1997), citing *Smith v. Harrison*, 42 Ohio St. 180 (1884). Accordingly, if the lessor transfers nothing in fee, the expiration of the lease transfers nothing back.

¹⁵ On November 18, 1988, the General Assembly indicated that the ODMA “would allow non-coal mineral rights to revert to the surface landowner if the mineral right holder does nothing with the rights for 20 years...” Fiscal Note to S.B. 223, 117th General Assembly, Regular Session, 1987-1988 (OH 1988).

proposition is not in accordance with the stated purpose or plain language of the ODMA. Nor does it promote the extraction of natural resources in this state.

In *Energetics, Ltd. v. Whitmill*, N.W.2d 497 (Mich.1993), the Michigan Supreme Court determined that the expiration and reversion after a lease has ended did constitute a title transaction. However, the court in *Energetics* founded its argument on the language included within the Michigan Statute, which varies from the language employed by the Ohio Legislature in the 1989 Act.¹⁶ Because the *Energetics* court's reasoning was grounded in the specific language employed by the Michigan Legislature, it provides no benefit to any Ohio court in interpreting the ODMA.

Further, in *Ricks v. Vap, et al.*, 784 N.W.2d 432 (Neb.2010), the Supreme Court of Nebraska, was asked to apply the *Energetics* holding in a particular case and find that the expiration of an oil and gas lease precluded abandonment under the Nebraska Act. The Supreme Court of Nebraska declined to adopt *Energetics*, and held that "...the Michigan Court's reasoning was grounded in the unique language of the Michigan statute. *Ricks* at 436. Because the language employed by the Michigan Legislature differed from the language contained within Nebraska's Dormant Mineral Statute, the Nebraska Supreme Court declined to adopt the *Energetics* holding."¹⁷

¹⁶ The draft language of what is now R.C. § 5301.56(B)(3)(a) read: "The Interest has been conveyed, leased, transferred, or mortgaged by an instrument filed or recorded..." S.B. 223, 117th General Assembly, Regular Session, 1987-1988 (OH 1988). As this Court can readily discern, this draft language is very similar to the language employed by the Michigan Act. The Ohio Legislature, however, chose to replace this language with "The Mineral Interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder..."

¹⁷ "Nebraska's statute...expressly requires "the record owner of such mineral interest" to "exercis[e] [] publicly the right of ownership" by performing one of the actions specified in the statute during the statutory period. In other words, the *Whitmill* court's reasoning regarding whether the mineral interest had been "transferred" is inapplicable under Nebraska's statute, and the court's reasoning regarding when the interest had been "leased" supports the district court's conclusion, in this case, that it had been leased *by the record owner* only when the lease was executed and properly recorded. The record in this case is clear that the record owners of the disputed mineral interests last "leased" the interests within the meaning of the statute at the time the leases were executed and properly recorded.

As noted by the District Court, there is no decision on certified question 2 that is binding on any Ohio Court. As such, Defendants-Respondents ask that this Court review and answer Certified question 2 by looking to the plain language and intent of the ODMA.¹⁸ In doing so, this Court can provide guidance and clarity as to the interpretation and application of these issues under the ODMA and settle the determinative issues in this case.

CONCLUSION

For the foregoing reasons, Defendants-Respondents respectfully request that this Court answer the certified questions.

Respectfully submitted,

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because that was when *they* publicly exercised their right of ownership.” *Ricks v. Vap*, 784 N.W.2d 432, 436 (Neb.2010)

¹⁸ In construing a statute, a court’s paramount concern is the legislative intent in enacting the statute. *State v. S.R.*, 63 Ohio St.3d. 590, 594, 589 N.E.2d 1319 (1992). [internal citations omitted]. A court must first look to the language of the statute itself to determine legislative intent. *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 218, 574 N.E.2d 457 (1991). [overruled on other grounds]. Further, effect must be afforded to every word and clause within the statute. *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 11 (2006). [internal citations omitted]. Courts do not have authority to ignore the plain and unambiguous language of a statute under the guise of statutory interpretation. *State v. Krutz*, 28 Ohio St.3d 36, 38, 601 N.E.2d 503 (1991). [internal citations omitted].

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was delivered via Regular U.S. Mail, postage prepaid, this 3rd day of February, 2014 to the following:

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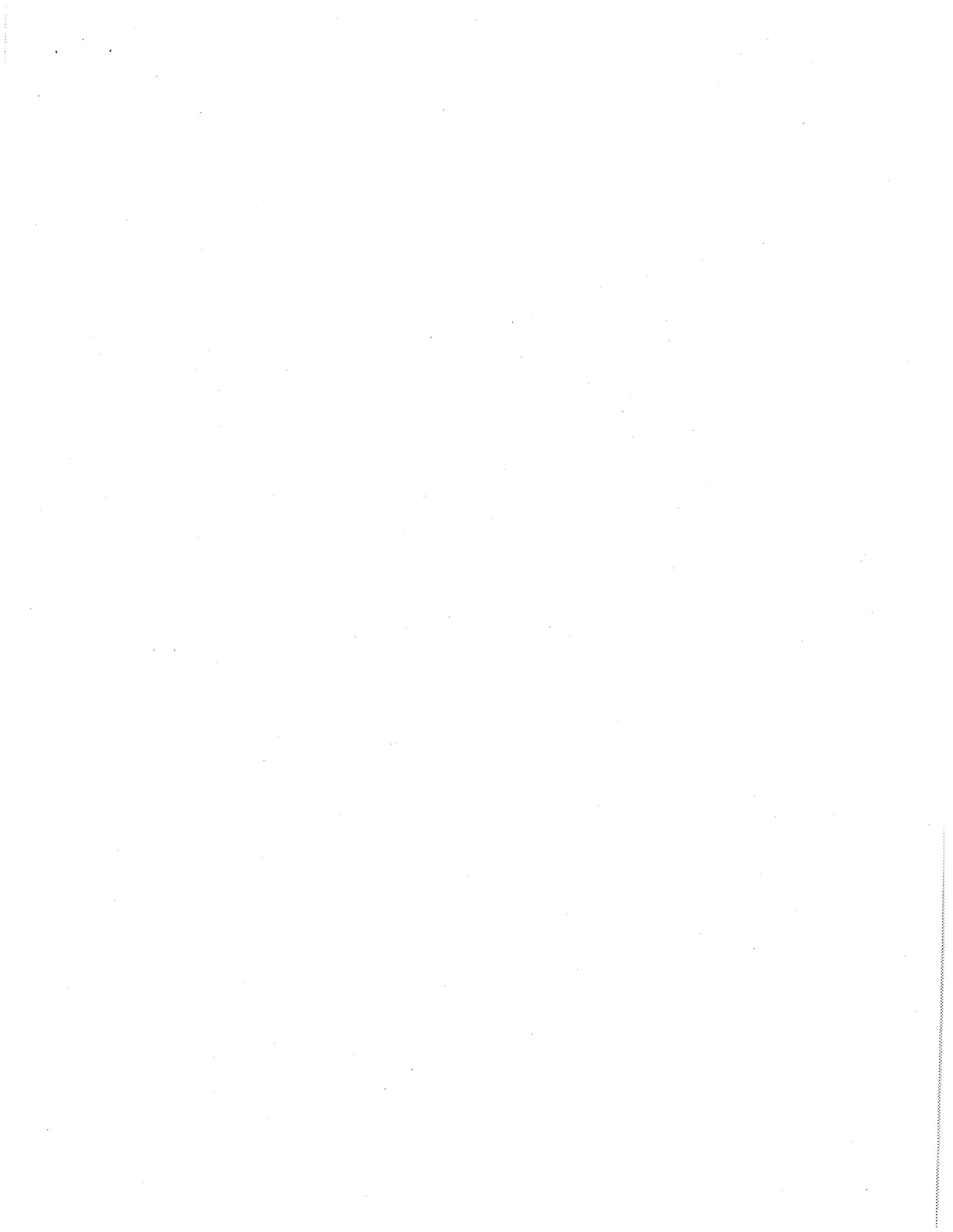
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In the Supreme Court of Ohio

ON CERTIFICATION OF QUESTION OF STATE LAW FROM
THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION
CASE NO. 2:12-CV-00916

CHESAPEAKE EXPLORATION, L.L.C., ET AL.,
Plaintiffs-Petitioners,
v.
KENNETH BUELL, ET AL.,
Defendants-Respondents.

EXHIBITS TO RESPONDENTS' PRELIMINARY MEMORANDUM

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SUMMARY OF THE REAL ESTATE

Surface Estate

January 30, 1943

Quit-Claim Deed:
North American Coal Corporation to
Powhatan Mining

Vol. 112, Page 14-21

100 Acres

Oct. 29, 1958

Warranty Deed: Powhatan Mining to
Clarence and Anna Belle Sedoris,
reserving coal, oil, gas, and mineral
rights

Vol. 42, Page 330-31

100 Acres

April 18, 1968

Survivorship Deed: Clarence and Anna
Belle Sedoris to Jerry and Janice Torok

Vol. 161, Page 147-149

90 Acres

March 2, 1983

Survivorship Deed: Jerry and Janice
Torok to Levi and Naomi Miller

Vol. 209, Page 614-616

90 Acres

September 17, 1984

Survivorship Deed: Levi and Naomi
Miller to Dennis and Linda Elias

Vol. 214, Page 361-363

90 Acres

Mineral Estate

Oct. 29, 1958

Warranty Deed: Powhatan Mining
to Clarence and Anna Belle Sedoris,
reserving coal, oil, gas, and mineral
rights

Vol. 42, Page 330-31

January 1, 1959

North American Coal Corporation
and Powhatan Mining Company
merge; Powhatan's interest is
transferred to North American Coal
Corporation.

S.R. 12, Page 142-143

January 30, 1973

North American Coal Corporation
leased the Mineral Rights to National
Petroleum Corporation. Recorded
February 6, 1974.

(not a title transaction)
Vol. 53, Page 668

May 12, 1975

National Petroleum Corporation
assigned its interest to American
Exploration Company by a recorded
assignment.

(not a title transaction)

January 16, 1984

North American Coal Corporation
leased the Mineral rights to C.E.
Beck, recorded on February 6, 1984.

(not a title transaction)

Vol. 68, Page 597

