

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.,
Petitioners-Petitioners,
v.
KENNETH BUELL, ET AL.,
Defendants-Respondents.

RESPONDENTS ARIEH AND SUNNI ORDRONNEAU, DENNIS AND MARGARET ELIAS, AND JEFFREY AND JANICE ELIAS' MERIT BRIEF

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INTRODUCTION

A. The Court Should Answer Both Certified Questions Of Law In The Negative.

This case is before the Court on the certification of two questions of law by The United States District Court for the Southern District of Ohio (“District Court”), which this Court has agreed to answer. Both questions concern the Ohio Dormant Mineral Act, R.C. § 5301.56 (“ODMA”), which was enacted in 1989¹ as a means to encourage oil and gas production in the state of Ohio. The two questions this Court will answer are as follows:

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 reversion?²

This Court should answer both questions in the negative. With respect to certified question 1, a recorded lease of a severed subsurface mineral estate is not a title transaction under the ODMA for the following reasons:

1. The plain language of the ODMA does not include an oil and gas lease as a title transaction;

¹ 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 29, 2006 contained no notification requirement and resulted in automatic abandonment of the minerals and vesting of the same in the surface owner. Respondents submit that this case is controlled by the version of the ODMA in effect from March 22, 1989 until June 29, 2006 and assert that the mineral interest at issue was abandoned and vested with the surface estate prior to June 30, 2006.

² Both questions before the Court concern the interpretation of language that is included in the 1989, 2006, and 2014 versions of the ODMA. Respondents’ claims in this case were brought under the 1989 version of the ODMA, which was neither repealed nor expressly abrogated by the 2006 or 2014 amendments, and is therefore still applicable. *City of Cincinnati v. Thomas Soft Ice Cream, Inc.*, 52 Ohio St.2d 76, 78-79, 369 N.E.2d 778(1977) (“When the legislature intend to repeal a statute, we may, as a general rule, expect them to do it in express terms, or by the use of words which are equivalent to an express repeal. No court will, if it can be consistently avoided, determine that a statute is repealed by implication.”). [internal citations omitted]. Accordingly, this Court’s answers to the certified questions would necessarily apply to each version of the ODMA. Copies of all versions of the ODMA are attached in the appendix (“Appx”). (Appx. Exhibit A – 1989 version; Exhibit B – 2006 version; Exhibit C – 2014 version).

2. To hold that an oil and gas lease constitutes a title transaction under the ODMA would render other provisions of the ODMA superfluous, violating well-settled principles of statutory construction; and
3. Both this Court's ruling in *Back v. Ohio Fuel Gas Co.*, 160 Ohio St. 81, 113 N.E.2d 865 (1953) and subsequent interpretations of *Back* make it clear that an oil and gas lease is a license, and therefore does not constitute a title transaction.

While Petitioners devote the majority of their merit briefs arguing the reasons that an oil and gas lease should be considered a title transaction, even if this Court were to agree with their position, certified question 2 still must be answered in the negative. The expiration of an oil and gas lease does not constitute a title transaction that qualifies as a savings event under the ODMA because:

1. The plain language of the ODMA, which requires all title transactions to be **recorded** in the county recorder's office, demonstrates that the expiration of an oil and gas lease, which is not recorded, does not constitute a title transaction that qualifies as a savings event, and therefore has no effect on the twenty-year abandonment period;
2. The Ohio case law Petitioners cite in support of their argument that the expiration of an oil and gas lease constitutes a title transaction that qualifies as a savings event is distinguishable because those cases involved recorded releases of the oil and gas lease whereas in this case, the expiration of the oil and gas lease at issue was never recorded, and therefore, does not qualify as a savings event under the ODMA;
3. The definition of "subject of a title transaction" as set forth in *Walker v. Noon*, 2014-Ohio-1499 and *Dodd, et al. v. Croskey, et al.*, 2013-Ohio-4257 does not support the expiration of an oil and gas lease qualifying as a title transaction;
4. Petitioners' reliance on The Michigan Supreme Court's decision in *Energetics, Ltd. v. Whitmill* is not controlling on this Court, and was based on the specific language of Michigan's Dormant Mineral Statute, which differs from the language the General Assembly chose to include in the ODMA; and
5. To hold that the expiration of an oil and gas lease, particularly one that is not recorded, is a title transaction that qualifies as a savings event undermines the public policy that motivated the General Assembly to enact the ODMA.

B. By Answering No To Certified Questions Of Law 1 and 2, Both The Plain Language And The Intent Of The ODMA Will Be Upheld.

Ohio's current oil and gas boom is not foreign to this state. Ohio has a long history of oil and gas production dating back to the mid-1800s. As a result, land transactions in Ohio have frequently resulted in the seller of a particular piece of property reserving the mineral interest underlying the same property. However, prior to the passage of the ODMA, many of these mineral interest reservations were either forgotten or ignored by their holders. Therefore, Ohio passed the ODMA on March 22, 1989 to create a mechanism by which mineral interests that had been abandoned or ignored and un-developed for the statutorily proscribed time period of twenty-years would vest to the owner of the surface estate regardless of whether the "holder" was known or unknown. For instance, the owner of a dormant mineral interest may not be motivated to develop the minerals since undeveloped rights may not be taxed and are not subject to adverse possession by surface occupancy. (See Petitioner North American's Merit Brief, Appendix. Pg. 107). The logic being if abandoned for the statutory period the surface owner would then have the opportunity to adequately use and develop the mineral interests underlying his or her property.

To effectuate the vesting of abandoned and/or ignored mineral interests to the surface owner, the ODMA set forth a twenty-year dormancy period. Consequently, if for a period of twenty-years, the mineral interest was not involved in a "savings event," as set forth by the act, then the mineral interest vests in the surface owner of the property. See R.C. § 5301.56(B)(3)(a)-(f).³ One such savings event is actual production from the mineral interest or withdrawal of minerals from the mineral interest. R.C. § 5301.56(B)(3)(b). Another savings event, which is at issue herein, occurs when the mineral interest is the subject of a title transaction that is filed or recorded in the county recorder's office where the property is

³ As mentioned in footnote 2, the 1989 version of the ODMA, under which Respondents assert their claims, includes this same language. The citation for the 1989 ODMA is R.C. § 5301.56(B)(1)(C)(i)-(vi). For the purposes of clarity throughout this brief, Respondents will cite to the most recent version of the ODMA, as that is the citation format the U.S. District Court for the Southern District of Ohio used in its Petition for Certification. However, and for the reasons already set forth in footnote 2, an interpretation of language in the most recent version of the ODMA would necessarily apply to all previous versions, as no express repeal occurred. See *supra*, footnote 2.

located. R.C. § 5301.56(B)(3)(a). In the absence of any such savings event, the plain language of the ODMA and the policy surrounding its passage mandates the abandonment of the mineral interest and the transfer of the same to the surface owner so the resources can be developed as intended. The General Assembly chose to make the determinative issue and the abandonment expressly conditioned on the inaction of the holder whether that holder was known or unknown.

C. The Petitioners In This Case Should Not Be Rewarded For Ignoring The Mineral Interests Underlying The Property For Approximately Twenty-Four Years. Therefore, The Court Should Answer Both Certified Questions In The Negative.

The facts of this case as they relate to the property at issue are complex. However, for the purposes of this Court's analysis, only two events related to the property are pertinent and must be analyzed when answering Certified Questions 1 and 2: an oil and gas lease that was recorded on February 6, 1984 ("1984 Lease"); and the unrecorded expiration of that lease on February 6, 1989 ("unrecorded expiration of the 1984 Lease").

The mineral interest underlying Respondents' property was leased in 1984 but no activity was ever undertaken pursuant to the 1984 Lease by the oil and gas company to develop the mineral interest. Consequently, the 1984 Lease expired in 1989. The mineral interest remained dormant for a period of twenty-four years, from 1984 until the mineral interest was purportedly transferred by quitclaim deed in 2008 to Petitioner North American Coal Royalty Company -- four years after the twenty-year abandonment period provided in the ODMA. Petitioners are now desperately attempting to retain the mineral interest which they ignored for a period of twenty-four years and which they abandoned by operation of Ohio law.

While Petitioners attempt to cast Respondents as landowners who "seek to use the ODMA to try and deprive a *known* mineral estate owner...of the rights that the surface owners never had," the plain language and purpose of the ODMA supports Respondents' position, not Petitioners'. (Petitioner Chesapeake's Merit Brief, pg. 2).⁴ Petitioners and their successors could have easily preserved their ownership of the mineral

⁴ For Petitioners, the sole focus of the ODMA is to "clear title to allow for production of oil and gas." (Petitioner Chesapeake's Merit Brief, pg. 6). Respondents do not deny that the clearing of title to allow for production was indeed one

interest by filing a notice of preservation as provided in the ODMA. *See* R.C. § 5301.56(B)(3)(e). Instead, Petitioners chose to do nothing for a period of twenty-four years and now ask this Court give back to them what they clearly abandoned under Ohio law by finding that an oil and gas lease constitutes a title transaction and the expiration of an oil and gas lease qualifies as a savings event under the ODMA.

By finding that an oil and gas lease is not a title transaction and that the expiration of an oil and gas lease does not qualify as a savings event that restarts the twenty-year abandonment period under the ODMA, both the plain language of the ODMA and its purpose will be upheld.

I. STATEMENT OF THE FACTS:

A. In October of 1958, The Mineral Interest Underlying the Property Was Severed From the Surface Estate.

While the facts in this case are largely undisputed, it is important to note that not every activity involving the mineral interest can be classified as a savings event for the purposes of the ODMA.

In 1943, The North American Coal Corporation (“NA Coal”), a different entity than Petitioner North American Coal Royalty Company, owned approximately one-hundred (100) acres of property (“Property”) in Harrison County, Ohio. On January 30, 1943, NA Coal conveyed the Property to The Powhatan Mining Company (“Powhatan”) (Appx. Exhibit D).

On October 29, 1958, Powhatan conveyed the Property to Clarence and Anna Belle Sedoris, specifically reserving unto itself all coal, oil, gas, or other mineral rights (hereinafter “Reservation”) underlying the Property. (Appx. Exhibit E). This Reservation severed the mineral rights from the surface estate. Powhatan later merged into NA Coal, on January 1, 1959. (Appx. Exhibit F).

of the factors the legislature was seeking to address in passing the ODMA; however, the overriding focus and purpose was and continues to be to encourage the **development** of Ohio’s mineral. *See* H.B. 223 Sponsorship Testimony, pg. 3. Further, Petitioners frame the purpose of the ODMA as only concerning unknown mineral interest holders. However, both the sponsorship testimony of the ODMA and the Fiscal Note to its original introduction make it clear that the ODMA is not only concerned with clearing title, but with “terminating unused mineral interests.” *See* Proponent Testimony on Behalf of S.B. 223 and H.B. 521, pg. 3; Fiscal Note to S.B. 223, 117th General Assembly, Regular Session, 1987-1988 (OH 1988). The simple fact that the holder of the mineral interests is known, does not mean the holder’s interest could not be deemed abandoned due to non-use.

B. History of the Surface Estate of the Property

Due to the severance of ownership of the mineral interest and the surface estate of the Property, the two were subjected to different conveyances over the course of time. While the surface estate was transferred numerous times, the mineral estate remained dormant.

1. Respondent Dennis Elias Obtained His Surface Rights In The Property In September of 1984.

In 1968, Clarence and Anna Belle Sedoris conveyed the surface estate of Real Estate to Jerry and Janice Torok. (Appx. Exhibit G).⁵ On March 2, 1983, Jerry and Janice Torok conveyed the surface estate of the Real Estate to Levi and Naomi Miller. (Appx. Exhibit H). On September 17, 1984, Levi and Naomi Miller conveyed the entire surface estate of the Property to Dennis and Linda Elias. (Appx. Exhibit I).

2. Between 1995 and 2008, Approximately 10.37 Acres of The Property Was Transferred To Jeffrey and Janice Elias and Approximately 20.17 Acres of The Property Was Transferred to Arich and Sunni Ordronneau.

On December 4, 1989, Linda Elias conveyed her interest in the surface estate of the Real Estate to Dennis Elias. (Appx. Exhibit J). Dennis Elias conveyed approximately 10.37 acres of the Real Estate to Jeffrey and Janice Elias on April 14, 1995. (Appx. Exhibit K). Later, on October 29, 1996, Dennis Elias conveyed approximately 20.17 acres of the Real Estate to John and Marilyn Jackson. (Appx. Exhibit L). After the above conveyances Dennis Elias held title to approximately 59.66 acres of the Property.

On August 13, 2008, John and Marilyn Jackson conveyed approximately 20.17 acres of the Property to Benjamin D. Wiker. (Appx. Exhibit M). On July 27, 2011, Wiker conveyed approximately 20.17 acres of the Real Estate to Arich and Sunni Ordronneau. (Appx. Exhibit N).

⁵ As indicated in this survivorship deed, Clarence and Anna Belle Sedoris only conveyed a total of 90 acres to Jerry and Janice Torok. This was a result of 10 acres of the Property being sold to Mandy Ellen Hawk. Therefore, all further references to the "Property" refer to approximately 90 acres, not 100 acres.

C. History of the Mineral Interest Underlying The Property.

While the surface estate of the Property was frequently conveyed, the mineral interest remained dormant for decades. After the merger on January 1, 1959, NA Coal did not transfer the Reservation, i.e., the “mineral estate” or “mineral interest,” to any other individual or entity, nor did NA Coal take any action to preserve the mineral interest in accordance with the Act. In fact, NA Coal took no action with respect to the mineral interest until 1973 when it entered into an oil and gas lease with National Petroleum Corporation. (Appx. Exhibit O). National Petroleum Corporation assigned its interest in the lease, which was recorded on May 12, 1975. (Appx. Exhibit P). The 1973 lease expired, and in February of 1984, NA Coal entered into a subsequent lease with C.E. Beck⁶ (Appx. Exhibit Q). C.E. Beck assigned this 1984 lease to Carless Resources on May 30, 1985. (Appx. Exhibit R). No development of the oil and gas underlying the property was ever commenced, and the 1984 lease subsequently expired in 1989. (Appx. Exhibit S).

Petitioners have argued throughout this case that every lease, assignment, and the unrecorded lease expiration constitute “title transactions” for the purposes of the ODMA, and qualify as savings events that re-set the twenty-year dormancy clock, and further, that every day of the lease must toll the ODMA. (See Petitioner Chesapeake’s Merit Brief, pg. 20). However, as discussed below, none of these events fall within the definition of a title transaction as used by the ODMA. And even assuming *arguendo* that recorded leases and assignments were title transactions, the final recorded title transaction in this matter would have occurred on May 30, 1985. Therefore, in accordance with the ODMA, at the very latest, on May 30, 2005, the mineral interest was deemed abandoned by operation of law and the mineral interest underlying the Property vested in the Respondents.

⁶ This lease was assigned to Carless Resources, Inc. on April 11, 1985.

1. Despite Abandonment Of The Oil And Gas Mineral Interest And Its Vesting With The Surface Estate, Petitioners, Without Any Right To Do So, Entered Into Oil And Gas Lease, Thus Precluding Respondents From Leasing Their Vested Rights.

Despite the oil and gas mineral interest being abandoned and vested in the surface estate by operation of the ODMA, NA Coal changed its name to Bellaire and attempted to transfer the abandoned mineral interest to North American Coal Royalty Company (“North American”) on December 16, 2008. (Appx. Exhibit T). North American then attempted to lease the abandoned mineral interest to Mountaineer Natural Gas Company on January 28, 2009 (“2009 Lease”). (Appx. Exhibit U). Mountaineer Natural Gas Company assigned the Lease to Dale Property Services Penn, LP. (“Dale Prop.”) on May 6, 2010. (Appx. Exhibit V).

Dale Prop. assigned the 2009 Lease to Ohio Buckeye Energy, L.L.C., (“OBE”) retaining a 1.25% overriding royalty interest in the Lease. (Appx. Exhibit W). Dale Prop. subsequently assigned its overriding royalty interest to Dale Pennsylvania Royalty, LP. (“Dale Penn.”) (Appx. Exhibit X). On December 22, 2011, OBE merged with Chesapeake Exploration, L.L.C. (“Chesapeake”). (Appx. Exhibit Y).

As a result of this merger, Chesapeake effectively became the lessee of the 2009 Lease. On November 1, 2011, Chesapeake assigned an 89.2857% interest in the Lease to Total E&P USA, Inc. (Appx. Exhibit Z).

In June of 2010, Respondents Dennis and Margaret Elias, and Jeffrey and Janice Elias attempted to lease their oil and gas rights with Kenyon Energy, LLC. (Appx. Exhibit AA). Due to North American’s invalid claim to the mineral interest, the Eliases were unable to enter into an oil and gas lease. *Id.*

Respondents Arieh and Sunni Ordronneau attempted to enter into an oil and gas lease with Chesapeake in October 2011. (Appx. Exhibit BB). However, due to North American’s conduct, i.e.,

entering into the Lease with Mountaineer Natural Gas in 2009, the Ordronneaus were not able to enter into a lease. *Id.*

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 by operation of law. At the time it entered into the 2009 Lease, North American had taken no steps under the statute to preserve its mineral interest. While North American had an interest in the Reservation at one point, its failure to take any steps to preserve its interest for a period of twenty-four years resulted in the surface estate and the mineral estate merging under the ODMA and vesting with Respondents.

I. LAW AND ARGUMENT

A. THE OHIO DORMANT MINERAL ACT

In the 1980's, due to the great number of abandoned and non-developed mineral interests in Ohio, on March 22, 1989, the Ohio legislature enacted the Ohio Dormant Mineral Act, R.C. § 5301.56 ("ODMA"). The stated purpose of the ODMA was to "encourage the development of minerals in Ohio which has been previously ignored due to defects in title," and to

“...provide a method for the termination of dormant mineral estates and the vesting of their title in the surface owners, in the absence of certain occurrences within the preceding 20 years...”

Proponent Testimony on Behalf of S.B. 223 and H.B. 521, at 3 (Appx. Exhibit CC); Fiscal Note to S.B. 223, 117th General Assembly, Regular Session, 1987-1988 (OH 1988) (“the [ODMA] would allow non-coal mineral rights to revert to the surface landowner **if the mineral right holder does nothing to the rights for 20 years...**”) (Appx. Exhibit DD). [emphasis added]. These “certain occurrences” have come to be known as “savings events.” If one of these savings events does not occur within a twenty (20) year time frame, then the mineral interest is deemed abandoned and reunited with the surface estate. While there are several enumerated savings events within the ODMA, only one such savings event is at issue in this matter. Pursuant to the ODMA, a mineral interest is deemed abandoned and reunited with

the surface estate unless during the preceding twenty (20) years “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.” R.C. § 5301.56(B)(3)(a). [emphasis added].

Furthermore, the ODMA empowers the mineral holder to act in order protect their mineral interest from being deemed abandoned. The ODMA does not impose any forfeiture or taking upon the mineral holders. Rather, it provides a statutory framework for determining whether mineral holders have abandoned their interests. To avoid this abandonment, mineral holders simply must file a claim to preserve their interest once every twenty years—a minimal undertaking, but one Petitioners ignored.

The statutory framework of the ODMA which allows for the vesting of real property interests through automatic abandonment is not unique. In fact, Ohio’s Marketable Title Act operates in the same manner. Under Ohio’s Marketable Title Act, a real property interest which is not preserved by an enumerated preservation event during a specified time period is deemed ineffective. *See* R.C. 5301.47, et seq. Like the ODMA, the Marketable Title Act does not require the party seeking extinguishment to take any affirmative action. *See Heifner v. Bradford*, 4 Ohio St.3d 49, 446 N.E.2d 440 (1983); *See Collins v. Moran*, 7th Dist. No. 02 CA 218, 2004-Ohio-1381 (March 17, 2004); *Evans v. Cormican*, 5th Dist. No. 09 CA 76, 2010-Ohio-541 (Jan. 5, 2010) (finding that the Marketable Title Act operates, automatically, to remove clouds from title that pre-date the root of title).

The ODMA operates in the same manner as the Marketable Title Act, except the ODMA looks at a twenty-year period for purposes of abandonment rather than forty-years from the “root of title” as provided in the Marketable Title Act. Not surprisingly, the ODMA was introduced to work in conjunction with the Marketable Title Act by “terminating unused mineral interests not preserved by operations, transfers or a filing of notice of an intent to preserve interest.” (*See* Chesapeake’s Merit Brief, Ex. 8, Appex. 96). Simply put, the mineral interests “revert to the surface landowner if the mineral right holder does nothing to the rights for twenty years. To extend their rights, a mineral right

holder would simply have to file an extension with the local county recorder.” Fiscal Note to S.B. 223, 117th General Assembly, Regular Session, 1987-1988 (OH 1988)

Unfortunately for Petitioners, they failed to take any statutorily proscribed action, though simple it would have been, to preserve their ownership in the oil and gas mineral interest. Rather, Petitioners ignored the oil and gas mineral interest allowing them to languish for a period of twenty-four years.

It is for this reason that Petitioners are asking this Court to find that an oil and gas lease and the unrecorded expiration of the same lease constitute title transactions and qualify as savings events under the ODMA. However, to hold as such would not only be contrary to the plain language of the ODMA, but would undermine the stated purpose of the law, which is to “encourage the development of the minerals in Ohio.” S.B. 223, H.B. Proponent Testimony, 1989 DMA, at 3 (Appx. Tab).

B. PROPOSITION OF LAW NO. 1.: A Recorded Oil and Gas Lease Of A Severed Subsurface Mineral Estate Is Not A Title Transaction Under The ODMA.

There is no dispute that the primary method to effectuate the extraction and sale of oil and gas is by entering into an oil and gas lease. As Petitioners note throughout their briefs, “the basic document of the oil and gas industry [is a lease].” (Petitioner North American’s Merit Brief, pg. 9 (citing Williams & Meyers, *Oil and Gas Law* § 601). However, the question before the Court is not whether an oil and gas lease is the “basic document of the oil and gas industry,” but whether an oil and gas lease constitutes a title transaction under the ODMA. The answer to this question is no.

First and foremost, the plain language of the ODMA does not list a lease as a title transaction. The ODMA does not specifically define “title transaction.” However, R.C. § 5301.47(F), which sets forth definitions for terms used in the ODMA, defines the term as

“any transaction affecting title to any interest in land, including 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.”

(Appx. Exhibit EE). Each of the devices listed specifically affect title to an interest in land. A lease is noticeably absent from this list for the simple reason that it does not affect title and therefore cannot be a title transaction for the purposes of the ODMA.⁷

With deference to the particulars of the oil and gas industry, it is well-settled, and even cited by Petitioners, that an oil and gas lease authorizes “an operator, the lessee or his assignee, to enter upon described premises for the purpose of exploring for and developing the mineral resources in the premises.” (See Petitioner North American’s Merit Brief, pg. 9 (citing Williams & Meyers, *Oil and Gas Law* § 601). But the ability to enter upon, explore for, and develop mineral resources, does nothing to affect the title of that mineral interest. As this Court held in *Back v. Ohio Fuel Gas Co.*, 160 Ohio St. 81, 89, 113 N.E.2d 865 (1953) (Appx. Exhibit FF), the granting of such rights creates a mere license rather than a deed of conveyance. No estate is transferred or affected, as title to the mineral interest remains in the lessor for the duration of the lease.⁸

Contrary to Petitioners’ arguments, while a lease can indeed lead to a savings event under the ODMA (i.e., the actual production of oil and gas), the act of signing and recording a lease, which does nothing to affect title, and carries no requirement to actually produce the oil and gas, does not “serve...the purpose of the ODMA,” which was enacted to encourage of the actual production of Ohio’s natural resources. See R.C. § 5301.56(B)(3)(b); (Petitioner Chesapeake’s Merit Brief, pg. 6).

By applying its previous decision in *Back*, this Court should hold that a lease does not constitute a title transaction for the purposes of the ODMA. In doing so, it will uphold both the plain language and the purpose of the ODMA.

⁷ 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.

⁸ See *supra* note 7.

1. The Plain Language of The ODMA Does Not Include A Lease As a Title Transaction.

In construing a statute, 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). Further, courts may not delete words used or insert words not used. *Cline v. Ohio Bur. Of Motor Vehicles*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1991). As discussed above, the only definition of a “title transaction” that is applicable to the ODMA is found in R.C. § 5301.47(F), and that definition does not include a lease. *See* R.C. § 5301.47(F); *See Riddel v. Layman*, 5th Dist. No. 94CA114, 1995 WL 498812, * 2 (July 10, 1995); Baldwin’s Ohio Practice Ohio Real Estate Law, § 15:7. Petitioners allege that the “title transactions” listed in R.C. § 5301.47(F) are neither exclusive nor exhaustive, and therefore should include a lease. (Petitioner Chesapeake’s Merit Brief, pg. 11). However, every document listed clearly affects an interest in title, unlike a lease. Furthermore, had the Ohio Legislature intended for an oil and gas lease to qualify as a “title transaction” for purposes of the ODMA, it could have very easily included such language in R.C. § 5301.47(F), or even in the ODMA itself. The Legislature’s choice not to do so indicates that it did not intend for an oil and gas lease to constitute a “title transaction” for purposes of the ODMA, and it is well-settled that when construing statutes, courts may not insert words not used. *See Cline*, at 97.

i. When The ODMA Was Passed, The Legislature Removed Language Specifically Making The Recording Of A Lease A Savings Event, And Did Nothing To Change The Listed Title Transactions in R.C. § 5301.47.

There is no dispute that the ODMA was based, at least in part, on the general principles set forth in the Uniform Dormant Mineral Interests Act (“UDMA”), which was approved and recommended by the National Conference of Commissioners on Uniform State Laws in August of 1986. (Appx. Exhibit GG); *See* Proponent Testimony on Behalf of S.B. 223 and H.B. 521, at 3. However, the ODMA was not a mere recitation of the language of the UDMA. Subsection (b) of the UDMA, like that of the ODMA, “ties the determination of dormancy [of mineral rights] to nonuse.” UDMA, comment, pg. 4.

Specifically, the UDMA lists the recording of a lease as an action that “constitutes use of the...mineral interest.” UDMA, subsection (b)(3).

When first introduced, the ODMA provided that the mineral interest would not be deemed dormant if

“the interest has been **conveyed, leased, transferred, or mortgaged by an instrument filed or recorded in the recorder’s office of the county in which the lands are located.**”

S.B. 223, as introduced to the 117th General Assembly. [emphasis added]. (Appx. Exhibit HH). Like the UDMA, the ODMA originally listed a lease as a savings event. However, the final language of the ODMA specifically removed the above reference to a lease, instead requiring that the mineral interest be the “**subject of a title transaction that has been filed or recorded.**” R.C. § 5301.56(B)(3). [emphasis added]. In using the word “title transaction” the legislature tied the ODMA to the definitions of R.C. § 5301.47(F). *See supra* Section B. In doing so, the legislature could have easily modified R.C. § 5301.47(F) to include a “lease” as a title transaction, but it chose not to.

Petitioners spend a substantial amount of time arguing that the exclusion of an oil and gas lease as a title transaction would “frustrate the purpose of the ODMA.” (Petitioner Chesapeake’s Merit Brief, pgs. 8-11). However, in determining the purpose of any statute, and how it is to be applied, a court must first look to the language of the statute without inserting or deleting words. *See Cline*, at 97. And in doing so, not only does the language of the ODMA simply not include a lease as a savings event, but the history of the act demonstrates that such language was specifically removed by the legislature.

Finding a lease to not constitute a title transaction does nothing to “frustrate the purpose” of the ODMA; it upholds the purpose by applying the plain language of the statute, as all courts are required to do.

2. To Hold That A Title Transaction Includes An Oil And Gas Lease Would Render Other Provisions of The ODMA Superfluous.

A close examination of the savings events enumerated in R.C. § 5301.56(B)(3)(a)-(f) further reveals the Petitioners' assertion that an executed oil and gas lease constitutes a "title transaction" is without merit. Specifically, R.C. § 5301.56(B)(3)(b) states that the mineral interest fails to automatically vest to the surface estate where:

"[T]here has been actual production or withdrawal of minerals by the holder from the lands, **from the lands covered by a lease to which the mineral interest is subject**, or, in the case of oil and 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." (*emphasis added*).

If an executed oil and gas lease constitutes a "title transaction" under R.C. § 5301.56(B)(3)(a), and thus, is enough to preclude the mineral interest from automatically vesting in the surface estate under R.C. § 5301.56(B)(3)(a), then the "**actual production or withdrawal** of minerals...from the lands covered **by a lease** to which the mineral interest is subject" contained within R.C. § 5301.56(B)(3)(b) is rendered superfluous. *See State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. Of Edn.*, 967 N.E.2d 193, 198 (Ohio 2012) ("No part [of the statute] should be treated as superfluous unless it is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative."). [internal citations omitted] If an executed oil and gas lease was enough to prevent the mineral interest from automatically vesting in the surface estate under the ODMA, then whether there was "actual production or withdrawal" from the property covered by that lease would be irrelevant because the lease itself would operate to prevent automatic vesting. That is not the case, however. Rather, only if there is "actual production or withdrawal of minerals...from lands covered by a lease..." does the mineral

interest fail to automatically vest in the surface estate. *See* R.C. § 5301.56(B)(3)(b).⁹ This provision, when read together with R.C. § 5301.56(B)(3)(a) and R.C. § 5301.47(F), confirms that the mere act of entering into and recording a lease is not enough to create a savings event under the ODMA, but actual production from property covered by the lease is required.¹⁰

Significantly, the legislature chose to incorporate into the ODMA “actual production or withdrawal of minerals...from the lands covered by a lease to which the mineral interest is subject” as a “savings event” precluding automatic vesting. R.C. § 5301.56(B)(3)(b). Therefore, any conclusion that an executed lease covering the subject mineral interest also constitutes a savings event would be both contrary and contradictory to the plain language actually included in the ODMA. *See State ex rel. Carna*, at 484 (citing *State ex rel. Saltsman v. Burton*, 95 N.E.2d 377 (Ohio 1950) (holding: “Statutes must be construed...to operate sensibly”)). To find that a lease constitutes a title transaction would require this Court to ignore the language contained within R.C. § 5301.56(B)(3)(b) and disregard longstanding principles of statutory construction.

3. In Accordance With This Court’s Precedent, And Well-Settled Principles Of Oil and Gas Law, An Oil and Gas Lease Is a License; Therefore, It Does Not affect Title, And Is Not A Title Transaction.

i. This Court’s Decision in *Back v. Ohio Fuel Gas Co.* Should Be Applied to The ODMA.

In 1953, this Court decided *Back v. Ohio Fuel Gas Co.*, 160 Ohio St. 81, 83 113 N.E.2d 865, a case that did not involve an instrument labeled as a “lease,” but rather an instrument that purported to convey “all the oil and gas in and under” the property and granted “the right and privilege of operating

⁹ The ODMA also includes the following as a savings event: “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 the office of the county recorder of the county in which the lands are located.” R. C. § 5301.56(B)(3)(d). Just as with the language on actual production, if a lease itself were enough, there would be no need to ever rely upon the application for a drilling permit as a savings event, which would be required to actually produce the land. Accordingly, such language in the statute would be rendered meaningless.

¹⁰ In interpreting these statutory provisions, it is well-settled that “[a]ll statutes pertaining to the same general subject matter must be read *in pari material*...courts must harmonize and give full application to all provisions “unless they are irreconcilable and in hopeless conflict.” *Hughes v. Ohio Bur. Of Motor Vehicles*, 79 Ohio St.3d 305, 309, 681 N.E.2d 430 (1997)

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.

While *Back* did not address this Court’s previous decision in *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N.E. 502 (1897) (Appx. Exhibit II), which involved an instrument specifically labeled as an “oil and gas lease,” this Court made it clear that the instrument in *Back* “grants operating privileges on the land surface” to obtain oil and gas and was recorded in the lease records. *Back*, at 82. Despite Petitioners argument, *Back* is not irrelevant, and represents this Court’s last word on the rights granted under an instrument permitting one to explore for oil and gas. That right is a license, nothing more.

Petitioners further reliance on *Kramer v. PAC Drilling Oil & Gas, LLC*, 197 Ohio App.3d 554, 2011-Ohio-6750- 968 N.E. 64 (9th Dist.) and *Bender v. Morgan*, Columbiana C.P. No. 2012-CV-378, is misplaced, as both cases rely heavily on *Harris*, which is in direct conflict with this Court’s decision in *Back*, rendered nearly 60 years later.

This Court should reaffirm its decision in *Back*, and apply its holding to the ODMA, as the rights granted under an oil and gas lease constitute a mere license to enter upon property and explore for and develop minerals. *See Williams & Meyers, Oil and Gas Law* § 601. As a license, the lease neither transfers title nor affects it for the purposes of the ODMA. Therefore, a lease is not the subject of a title transaction.

ii. Courts Have Regularly Interpreted *Back* To Hold That Oil And Gas Lease In Ohio Creates A License To Enter Upon Land For The Purpose Of Drilling For Oil And Gas.

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) (Appx. Tab). While Petitioners cite to

McLaughlin v. CNX Gas Co., No. 5:13cv1502 (N.D. Ohio Dec. 13, 2013) for the proposition that a lease does qualify as a title transaction, *McLaughlin* engaged in almost no analysis of Ohio law on this issue. (Petitioner Chesapeake’s Merit Brief, pg. 15).

In *Wellington Resource Group LLC v. Beck Energy Corp.*, S.D. Ohio No. 2:12-CV-104, 2013 WL 5311412, * 4 (Sept. 20, 2013) (Appx. Exhibit JJ), the court determined that under Ohio law, “oil and gas leases have not historically been considered interests in land in Ohio.” Rather “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.” *Id.*; citing *In re Frederick*, at 766¹¹. In reaching this conclusion, the *Wellington* court engaged in an analysis of the development of Ohio law on the topic:¹²

“Indeed, from the earliest cases on this issue, Ohio courts have treated oil and gas leases as different from an interest in real property. In *Ohio Oil Co. v. Toledo, Findley & Springfield RR Co.*, 2 Ohio C.D. 505 (C.C. Ohio 1889), for example, the Circuit Court of Ohio, applying Ohio law, held that oil and gas leases “[are] not a right in the land as such, but a right to enter upon the land.” Similarly, in *Herrington v. Wood*, 3 Ohio C.D. 475 (C.C. Ohio 1892), the court explained that an oil and gas lease “is not strictly a lease, but a license coupled with a conditional grant, conveying the grantor’s interest in the gas well, conditioned that gas and oil is found in paying quantities.” *See also Miller v. Vandergrift*, 20 Ohio C.D. 730 (C.C. Ohio 1892) (“It is sufficient to say that we regard [oil and gas leases] as not leases in the ordinary acceptance of the term, but as a sale of the oil and gas under certain stipulations and provisions embodied under the contract.”). As this Court explained, in these early cases, courts generally “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.” *Frederick*, 98 B.R. at 764. Thus, in *Detlor v. Holland*, 57 Ohio St. 492, 505, 49 N.E. 690 (1898), **an agreement giving the lessee “the sole right to produce**

¹¹ The court in *In re Frederick* concluded that “an oil and gas lease is regarded under Ohio law as being more than a mere rental of the land for the specified term such as would be involved in a traditional lease.” 98 B.R. 766.

¹² In conducting this analysis, the Court specifically disagreed with *Binder v. Trinity OG Land Dev. & Exploration, LLC*, No. 4:11-CV-02621, 2012 WL 1970239 (N.D. Ohio, May 31, 2012), which determined that the definition of “real estate” in Ohio includes oil and gas. The *Wellington* court disagreed with *Binder* as it “does not evince a thorough exploration of the case law.” *Wellington*, at * 5. The *McLaughlin* court, which specifically makes reference to *Binder*, failed to do the same thing.

[oil and gas]” from a tract of land was not a lease, but merely a grant of an exclusive right to produce during the term.

Id. at * 4. [emphasis added]. After discussing this Court’s ruling in *Harris*, the court made it clear that *Back* was the most recent assessment of an oil and gas lease, ultimately holding that “[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,” therefore constituting mere licenses. *Id.*

Petitioners argue that even if this Court were to accept that a lease is a license, it would still “affect title” to an interest in land, thereby making it a title transaction. (Petitioner Chesapeake’s Merit Brief, pg. 15.) However, a lease does not have an effect on title to the oil and gas rights underlying property and does **not** divest the lessor of its fee simple interest in the property. 68 Ohio Jurisprudence 3d, Mines and Minerals, Section 28 (2013 (“[T]he ordinary oil and gas lease creates **no estate of the lessee in the land...**”).¹³ A lease “is not a right in the land as such but a right to enter upon the land.... And to take from underneath...such oil and gas as the lessee may find. *Id.* That right to enter the land and remove oil and gas is the extent of the right granted. There is no change in the title, nor is title affected, as the lessor remains the fee simple owner throughout the duration of the lease. While the lessee undoubtedly is granted a “limited property right” in the sense of being able to enter the land, such right does nothing to affect title. *See id.* Therefore, a lease is not a title transaction, and the answer to the first certified question must be no.

iii. Ohio Trial Courts and Jurisdictions Outside Of Ohio With More Developed Oil and Gas Law Have Determined That A Lease Is Merely A License And Does Not Affect Title.

a. The Ohio Trial Courts That Have Held A Lease Is Not A Title Transaction Have Done So Based On Application Of The Plain Language And Purpose Of The ODMA.

The issue of whether a lease is a title transaction under the ODMA has created a clear split in the Ohio trial Courts. Petitioners cite to several decisions that find a lease to be a title transaction.

¹³ *See supra* note 7.

(Petitioner Chesapeake’s Merit Brief, pgs. 17-19). In doing so, Petitioners simply brush aside *Swartz, et al., v. Jay Householder Sr., et al.*, Jefferson C.P. No. 12-CV-328 (July 17, 2013) and *Shannon, et al., v. Householder Sr., et al.*, Jefferson C.P. No. 12-CV-226 (July 17, 2013), both of which find a lease to not be a title transaction. (Appx. Exhibit KK). As stated by Petitioners, the court in *Swartz* and *Shannon* determined a lease was not a savings event as “[n]o activities were ever commenced” under the lease. *Id.* Petitioners allege that these holdings are invalid as there is no authority to support any requirement that activities commence under a lease in order for the lease to qualify as a savings event. (Petitioner Chesapeake’s Merit Brief, pg. 19). However, Petitioner’s argument misses the mark.

As discussed above, the plain language of the ODMA makes “actual production” a savings event. *See supra*, section B(2). Indeed, the over-arching purpose of the ODMA is **development** of Ohio’s energy resources. A lease is undoubtedly the mechanism that can lead to actual production and, thus development, of oil and gas resources, but standing alone it is not enough to qualify as a savings event or satisfy the purpose of the ODMA. *See id.* To satisfy the purpose of the ODMA, something more must be done - actually producing the oil and gas underlying the property. Proponent Testimony on Behalf of S.B. 223 and H.B. 521. *Swartz* and *Shannon*’s holding that the lease was not a savings event as there was no actual production was simply upholding the plain language of the ODMA and was focused upon and consistent with furthering the very purpose of the statute.

b. Jurisdictions Outside Of Ohio Have Long Held That An Oil And Gas Lease Constitutes No Transfer Of Real Property, But Rather Merely Grants A License.

As discussed in *Wellington*, there are several jurisdictions outside of Ohio with more developed oil and gas law that have determined an oil and gas lease does not create an interest in real property, and therefore does not affect title in any way.. 2013 WL 5311412, at * 6.¹⁴ The Oklahoma Supreme Court has determined that an oil and gas lease “constitutes merely a right to search for and capture” oil and gas. *Halliburton Oil Producing Co. v. Grothaus*, 1998 OK 110 (Okla. 1998). Courts in Connecticut

¹⁴ *See supra* footnote 6.

have held that a lease is not a title transaction because it does not “purport to ‘divest’ a fee simple title.” See *Johnson v. Sourignamath*, 90 Conn. App. 388, fn 11. (Conn. App. Ct. 2005) (citing Connecticut Bar Association, Connecticut Standards of Title (1999), standard 3.6, comment four). And the Kansas Supreme Court has specifically excepted oil and gas leases as being real estate under Kansas law. *Bd. of County Com’rs v. Greenhaw*, 734 P.2d 1125 (Kan. 1987).

Petitioners allege that even if an oil and gas lease does not transfer any title it at least “affects it.” (Petitioner Chesapeake’s Merit Brief, pgs. 13, 16). However, the plain language of the ODMA, this Court, and other jurisdictions have all determined that a lease for oil and gas grants the lessee a mere license to extract natural resources. Title to the oil and gas is neither transferred nor affected, as the lessor retains his full ownership for the duration of the lease.¹⁵

The ODMA is clear that in order to preserve one’s mineral interest, such interest must be the subject of a title transaction recorded in the county recorder’s office. For the reasons set forth above, a lease does not affect title, as required under the ODMA and R.C. § 5301.47(F), and therefore is not a title transaction. This Court should answer the first certified question in the negative, as doing so will comport with the plain language and the purpose of the ODMA.

C. PROPOSITION OF LAW NO. 2: The Expiration Of An Oil And Gas Lease Does Not Constitute A Savings Event Under The ODMA, And Therefore, Does Not Restart the Twenty-Year Abandonment Period.

For the reasons set forth above, as a recorded oil and gas lease does not make the mineral interest the “subject of a title transaction” for the purposes of the ODMA, the expiration of an oil and gas lease also does not make the mineral interest the “subject of a title transaction.” Even if this Court should disagree with Landowners’ assertion and find that a recorded oil and gas lease does constitute a title transaction for purposes of the ODMA which restarts the twenty-year abandonment period, this Court must reject Petitioners’ argument that the unrecorded expiration of an oil and gas lease also constitutes a savings event under the ODMA.

¹⁵ See *supra* footnote 7.

In accordance with the ODMA, the mineral interest must be the "...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]. The simple expiration of an oil and gas lease is neither filed nor recorded and therefore by the plain language of the ODMA does not qualify as a savings event. Even assuming *arguendo* that the expiration of an oil and gas lease could qualify as a savings event under the ODMA, such expiration would have to be "filed or recorded" by, for example, filing a recorded release of oil and gas lease. *See infra*, Section C(2). No such document was filed at the expiration of the 1984 Lease in this matter.

Therefore, even if this Court determines that the expiration of an oil and gas lease could constitute a savings event, such a decision should be narrowed to comply with the language of the ODMA and require that any expiration must be filed or recorded. Doing so will comport with both the plain language and intent of the ODMA.

1. The Plain Language Of The ODMA Demonstrates That The Expiration Of An Oil And Gas Lease Does Not Qualify As A Title Transaction And Therefore Is Not A Savings Event That Affects The Twenty-Year Abandonment Period.

As discussed above, 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, 594-95, 589 N.E.2d 1319 (1992). To accomplish this, a court must first look to the language of the statute itself to determine the legislative intent. *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 218, 574 N.E.2d 457 (1991). [overruled on other grounds]. In doing so, effect must be afforded to every word and clause within the statute. *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409 at ¶ 11. Consequently, courts may not delete words used or insert words not used. *Cline v. Ohio Bur. Of Motor Vehicles*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1991). Further, courts do not have authority to ignore the plain and unambiguous language of a statute under the guise of statutory interpretation. *Wray v. Wymer*, 77 Ohio App.3d 122, 132, 601 N.E.2d 503 (4th Dist. 1991). Rather, when the statutory language itself clearly expresses the legislative intent, the

courts need look no further. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 106, 304 N.E.2d 378 (1973) (citing *Katz v. Department of Liquor Control*, 166 Ohio St. 229, 141 N.E.2d 294 (1957)).

Because the Ohio legislature clearly and unambiguously required a title transaction to be “...**filed** or **recorded** in the office of the County Recorder of the county in which the lands are located...” [emphasis added] in order to qualify as a savings event under the ODMA, the well-settled principles of statutory construction compel this Court to find that the unrecorded expiration of an oil and gas lease does not constitute a savings event for purposes of the ODMA. R.C. § 5301.56(B)(3)(a).

i. The Plain Language Of R.C. § 5301.56(B)(3)(a) Requires This Court To Find That The Unrecorded Expiration Of An Oil And Gas Lease Does Not Qualify As A Savings Event Under The ODMA.

A mineral interest is abandoned under the ODMA if, within the preceding twenty years, the mineral interest has not been the “...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). Therefore, in order to avoid abandonment under the ODMA and thus qualify as a “savings event,” the mineral interest must be:

- (1) the ***subject of a title transaction***; that was
- (2) ***filed or recorded*** in the office of the recorder of the county in which the lands are located within the 20-year period.

It is this plain statutory requirement which Plaintiff’s ignore, that the title transaction must be filed or recorded, that ultimately undermines and renders unpersuasive Petitioners’ argument that an unrecorded expiration of an oil and gas lease acts as a savings event under the ODMA.

Therefore, in the case at bar, because the expiration of the 1984 Lease was never filed or recorded with the Harrison County Recorder, or any county recorder for that matter, it cannot qualify as a savings event under the ODMA. Consequently, the twenty-year period of abandonment commenced

on the date the 1984 Lease was recorded in the Harrison County Records and ended twenty years later on February 6, 2004.¹⁶

ii. The Duration Of The “Title Transaction” At Issue Is Immaterial-Only The Date On Which The “Title Transaction” Is Recorded Matters For Purposes Of The ODMA.

In order to qualify as a savings event for purposes of the ODMA, the mineral interest must be the “subject of a title transaction that is filed or recorded in the office of the County Recorder of the county in which the lands are located” within the preceding twenty-years. *See* R.C. § 5301.56(B)(3)(a). This recordation of the title transaction is a one-time event that occurs on a definitive date at a definitive time and which is unaffected, not only by the purported length of the underlying title transaction, but also by the number of unrecorded “transfers” that take place under the recorded document. The key, for purposes of the ODMA, is whether the mineral interest was the subject of a title transaction that was *recorded* within the preceding twenty years, not whether a transfer of the mineral interest took place pursuant to a document that was recorded *at any time*.

For instance, if a deed is executed in 1965, but recorded ten years later in 1975, the savings event under the ODMA would not be the execution of the deed, at which time the subject property was transferred, but rather the recordation of the deed, which occurred ten years after the transfer took place. By requiring the mineral interest to be the subject of a title transaction that is recorded to qualify as a savings event, the Ohio Legislature ensured that the date on which the twenty-year abandonment period commenced would be easily discernible. Consequently, if a mineral interest is the subject of a title transaction that is recorded on January 1, 1975 then one seeking to declare the mineral interest abandoned knows that, assuming no other savings events take place, the mineral interest cannot be deemed abandoned under the ODMA until January 1, 1995 (20 years from the recording date) at the

¹⁶ The 1984 Lease was assigned on May 30, 1985 and recorded in the Harrison County Records on the same date. Therefore, even if this Court were to find that this assignment of the 1984 Lease and subsequent recordation qualifies as a “savings event,” the twenty-year abandonment period still ended on May 30, 2005 and prior to the effective date of the 2006 version of the ODMA.

earliest. This Court must reject Petitioners' argument that unrecorded "title transactions" qualify as savings events as it is in contravention of the plain language of the ODMA and would transform clear and unambiguous legislation into an unworkable system shrouded in uncertainty.

2. The Ohio Case Law Petitioners Cite To Support Their Argument That The Expiration Of An Oil And Gas Lease Qualifies As A Title Transaction All Involved Recorded Release Documents, And Therefore, Did Not Address The Question In This Case-Whether The Unrecorded Expiration Of An Oil And Gas Lease Qualifies As Savings Event Under The ODMA.

Petitioners cite two Ohio Common Pleas Court decisions and one United States District Court for the Northern District of Ohio decision in support of their argument that the expiration of an oil and gas lease qualifies as a title transaction. (See Petitioner North American's *Merit Brief*, pg. 20; (See Petitioner Chesapeake's *Merit Brief*, pg. 20) (citing *Davis v. Consolidation Coal Co.*, Harrison C.P. No. CVH-2011-0081 (August 28, 2013); *Schucht v. Bedway Land and Minerals Co.*, CVH 2012-0010 (April 21, 2014); and *McLaughlin v. CNX Gas Co.*, N.D. Ohio No. 5:13CV1502, 2013 WL 6579057 (Dec. 13, 2013)). Importantly, in *Davis*, *Schucht*, and *McLaughlin*, upon the expiration of the oil and gas leases at issue therein, Release documents were recorded in the respective county recorder's offices of the counties in which the lands were located. *Davis*, at 3, 7¹⁷ (Appx. Exhibit LL); *Schucht*, at 1, 8 (Appx. Exhibit MM); *McLaughlin*, at * 2¹⁸ (Appx. Exhibit NN). Consequently, the *Davis*, *Schucht*, and *McLaughlin* courts, once they concluded that the expiration of the oil and gas lease constituted a title transaction, were able to point to a recorded instrument which satisfied the ODMA's recordation requirement and find that the twenty-year period of abandonment started anew. *Id.*

Petitioners herein have no such document to which they can point this Court because none exists. The expiration of the 1984 Lease was never recorded, and therefore, Petitioners are unable to satisfy the clear and unambiguous requirement that the title transaction, in order to qualify as a savings event and

¹⁷ "A title transaction [partial release of lease] **was recorded** in the Harrison County Recorders' office on August 10, 1993." [emphasis added].

¹⁸ "On July 6, 1992, Kelt Resources, Inc. **executed a Partial Release of Oil and Gas Lease.**" The Release filed is attached hereto. (Appx. Exhibit OO)

restart the twenty-year abandonment period, be filed or recorded with the County Recorder in the county in which the lands are located. This failure to record a release of the 1984 Lease is fatal to Petitioners' argument that the twenty-year abandonment period commenced upon the expiration of the 1984 Lease in 1989. Consequently, this Court must find that the unrecorded expiration of the 1984 Lease does not qualify as a savings event under the ODMA and failed to restart the twenty-year abandonment clock.

3. The Definition Of "Subject Of A Title Transaction" Under The ODMA As Defined By Ohio Case Law Does Not Apply To The Expiration Of An Oil And Gas Lease Whether the Expiration is Recorded or Not.

In *Walker v. Shondrick-Nau*, 7th Dist. No. 13 NO 402, 2014-Ohio-1499 (Appx. Exhibit PP) and *Dodd, et al. v. Croskey, et al.*, 7th Dist. No. 12 HA 6, 2013-Ohio-4257 (discretionary appeal accepted by the Ohio Supreme on a different issue, cross appeal on this issue not accepted, 2013-1730) (Appx: Exhibit QQ) the Seventh District Court of Appeals defined "subject of a title transaction" when analyzing various issues under the ODMA. In doing so, the Seventh District stated "[i]n order for the mineral interest to be the 'subject of' the title transaction the grantor must be conveying that [mineral] interest or retaining that [mineral interest]." *Walker* at ¶ 26 citing *Dodd*. Here, Petitioners ask this Court to find that the mineral interest was the subject of a title transaction when the 1984 Lease expired. However, the mineral interest holder neither conveys a mineral interest nor retains a mineral interest upon the expiration of an oil and gas lease. Rather, any reversionary interest (or right of reversion) was retained by Lessor at the time the oil and gas lease was executed and not when it expired. Upon expiration of the lease, no conveyance is made to the lessor, nor is any conveyance necessary. Any rights that the lessee had under the lease simply terminate. Consequently, because the mineral interest holder neither conveys nor retains the mineral interest at the expiration of an oil and gas lease, the mineral interest cannot be the *subject of* a title transaction as defined by *Walker* and *Dodd*, and therefore, does not qualify as a savings event. Therefore, this Court should find that the expiration of an oil gas lease does not constitute a title transaction under the ODMA.

4. The Michigan Supreme Court's Holding In *Energetics, Ltd. v. Whitmill* Is Not Controlling And Was Based On The Language Of Michigan's Dormant Mineral Statute Which Differs Significantly From The Language The Ohio Legislature Chose To Adopt When Enacting The ODMA.

Petitioners urge this Court to follow the analysis adopted by the Michigan Supreme Court in *Energetics, Ltd. v. Whitmill*, 497 N.W.2d 497 (Mich.1993) (Appex. Exhibit RR), in which the Michigan Supreme Court, after analyzing the unique language of the Michigan Dormant Mineral Act, concluded that that the expiration of an oil and gas lease constituted a title transaction that restarted the specified period of abandonment. This Court should refuse to follow the holding in *Energetics* for the following reasons:

1. The language of the ODMA differs from the language of Michigan's Dormant Mineral Statute, which served as the basis for the decision in *Energetics*. This distinction is important, as application of the plain language of the ODMA shows that neither a lease nor the expiration of a lease is a title transaction.
2. The reasoning of *Energetics* is both flawed and inapplicable to the ODMA.
3. The decision in *Ricks v. Vapp* is both analogous and instructive, as it shows that each state should analyze the unique language of its own Dormant Mineral Act rather than adopting the analysis of courts from other jurisdictions interpreting different language.

i. The ODMA Specifically Excludes Language That Served As The Basis For the *Energetics* Decision.

With respect to the Michigan Dormant Mineral Statute ("Michigan Act"), the language the Michigan Legislature chose to incorporate varies significantly from the language employed by the Ohio legislature in the ODMA. The language of the Michigan Act states in pertinent part:

"Any interest in oil or gas in any land owned by any person other than the surface owner, which has not been sold, leased, mortgaged, or transferred by instrument recorded...for a period of 20 years shall...be deemed abandoned..."

M.C.L.A. 554.291(1). The initial draft language of R.C. § 5301.56(B)(3)(a) concerning savings events that would preclude a mineral interest from being deemed abandoned read:

“The interest has been conveyed, leased, transferred, or mortgaged by an instrument filed or recorded...”

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 draft language with the following:

“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). [emphasis added]. As discussed above, in requiring that the mineral interest be the “subject of a title transaction,” the General Assembly chose to use and apply the definition already set forth in R.C. §5301.47(f) for the ODMA, which neither included nor referenced a lease or the expiration of the same. *See supra*, section (B)(1)(i). Petitioners argue that by using the term “title transaction” the General Assembly made the ODMA broader than the Michigan Act. (Petitioner Chesapeake’s Merit Brief, pg. 25). However, by using the term “title transaction,” the definition of which is clearly set forth in R.C. § 5301.47(F), the ODMA is even more defined than the Michigan Act, which provided no such guidance. A “title transaction” is “any transaction affecting title to any interest in land...” R.C. § 5301.47(F). The list of instruments set forth in R.C. § 5301.47(F) does not include a lease, and rightfully so, as set forth above a lease grants no title nor does it affect any interest in land.¹⁹ Title remains in the lessor for the duration of the lease.²⁰

Central to Petitioners’ argument is their assertion that the ODMA was “modeled” on the Michigan’s Act, and therefore this Court must adopt the Michigan Supreme Court’s reasoning in *Energetics*. Though William J. Taylor, Esq., in his testimony on behalf of the ODMA acknowledges similarities between the Michigan and Ohio Acts, he does not assert that Ohio’s proposed legislation is

¹⁹ *See supra* note 7.

²⁰ *See supra* note 7.

simply a regurgitation of Michigan's legislation. *See* Proponent Testimony on Behalf of S.B. 223 and H.B. 521. In fact, as indicated above, the proposed language in the ODMA mirrored Michigan's language but was ultimately modified prior to passage. Further, Taylor states that Ohio's proposed bill contains the essential elements of the Uniform Dormant Mineral Interests Act, which is attached to his testimony. *See id.* A careful examination of the UDMA shows that though some elements of the UDMA were adopted by Ohio, many were not.

Clearly, had the Ohio Legislature's intent been that the ODMA be nothing more than crafting the 2.0 version of Michigan's Dormant Mineral Act, it simply would have adopted Michigan's language in total. However, that is not what the Ohio Legislature chose to do. Rather, the ODMA incorporated aspects of various dormant mineral statutes adopted by other states as well as some, but not all, portions of the UDMA. Consequently, this Court should examine the ODMA for what it is, unique legislation that mandates its own analysis and interpretation when determining what action is required to meet the standards incorporated therein.²¹

ii. The Reasoning Of The *Energetics* Court Was Flawed In Its Own Application Of The Michigan Act, And Such Flawed Reasoning Should Not Be Applied To The ODMA.

While Petitioners urge this Court to follow and adopt the holding in *Energetics*, the reasoning of the court in *Energetics* was flawed, and such flawed reasoning should not be permitted to serve as the basis for interpreting a completely different statute [the ODMA] in a different state. In analyzing the statutory language of the Michigan Act, the court in *Energetics* identified the language as "ambiguous." 497 N.W.2d at 502-503. ("...we find it significant that the Legislature, without providing further guidance, added the broader, more inclusive term "transferred" to its list of preserving events. Where the wording of a statute is ambiguous, we seek to discern the intent of the Legislature..."). In doing so,

²¹ Significantly, the Michigan Supreme Court found the language of the Michigan Dormant Mineral Act to be ambiguous which allowed it to discern the legislative intent from sources other than the language of the statute. *Energetics* at 48. Because the ODMA language is clear and unambiguous, this Court's analysis should be confined to the plain language of the statute.

the court stated that it believed “the purpose of the act will best be served by construing the statutory language “transferred by instrument recorded” to include the reversion...of a recorded lease. *Id.* at 503.

First and foremost, the court’s statement shows that its reasoning was based on language that is not even included in the ODMA, thereby requiring this Court to make its own interpretation and decision on this issue. Moreover, unlike the Michigan Act, and the application of the same in *Energetics*, the ODMA’s inclusion of the words “subject of a title transaction” creates no ambiguity. R.C. § 5301.47(f) provides a clear definition of “title transaction,” and such definition does not include a lease. *See supra*, Section (B)(1)(i).

Furthermore, based upon the plain language of the Michigan Act, which requires any transfer of the mineral interest be recorded, the holding of *Energetics* was decided in error. If a state’s dormant mineral act requires a title transaction, transfer, conveyance, etc. to be **recorded** in order to qualify as a savings event precluding abandonment of the mineral interest, then an **unrecorded** title transaction, transfer, conveyance, etc. cannot qualify as a savings event because it does not comply with the statute’s clear and unambiguous recordation requirement. The Michigan Supreme Court erred when it found that an unrecorded expiration of an oil and gas lease qualified as a savings event under its dormant mineral act. *Id.* at 505. This Court should recognize *Energetics* for what it is—a flawed decision that offends the plain language of the Michigan Dormant Mineral Act—and decline to adopt its analysis.

iii. The Decision In *Ricks v. Vapp* Is Instructive To This Court’s Analysis As It Shows That Each State Must Apply Its Own Dormant Mineral Statute. In Doing So, The ODMA Does Not Yield The Same Result of *Energetics*.

Like this Court, the Nebraska Supreme Court was asked to adopt the *Energetics* holding in *Ricks v. Vap, et al.*, 280 Neb. 130 (Neb. 2010) (Appex. Exhibit SS) and find that the expiration of an oil and gas lease precluded abandonment of the mineral interest under the Nebraska Dormant Mineral Act. The Nebraska Supreme Court, as this Court should do, declined to adopt the *Energetics* holding, and held that “...the Michigan Court’s reasoning was grounded in the unique language of the Michigan statute,

which...simply required that an oil and gas interest be 'sold, leased, mortgaged or transferred' to avoid abandonment..." *Ricks* at 135.

Petitioners argue that "Nebraska's Dormant Mineral Act contains unique language not found in Ohio's or Michigan's DMA" which provides that "a savings event occurs only when the 'record owner of [the] mineral interest has...exercised publicly the right of ownership.'" (*See North American's Merit Brief*, pg. 23). Petitioners ignore the fact that the ODMA also provides the opportunity for the mineral interest owner to take action to prevent the abandonment of the mineral interest. In fact, North American, the record owner of the mineral interest herein, could have taken action under R.C. § 5301.56(B)(3)(f), which permits the record owner to file a claim to preserve the mineral interest from being deemed abandoned. North American, instead of proactively taking steps to ensure the mineral interest was not deemed abandoned under the ODMA chose to do nothing from February 6 of 1984 until December 16, 2008.

Almost twenty-five years passed during which North American chose to take no action whatsoever with regard to the oil and gas mineral interest at issue herein. Petitioners now ask this Court excuse this neglect by adopting the reasoning of the Michigan Supreme Court which interpreted vastly different language from the language the Ohio Legislature chose to incorporate into the ODMA. This argument should be rejected by this Court as it does not accord with the plain and unambiguous language of the ODMA which requires a title transaction to be filed or recorded with the County Recorder of the county in which the land is located in order to qualify as a savings event.

5. Petitioners' Arguments That The Unrecorded Expiration Of An Oil And Gas Lease Qualifies As A Title Transaction And Savings Event That Restarts The Twenty-Year Abandonment Period And That The Abandonment Period Is Tolled During The Primary Term Of An Oil And Gas Lease Undermine The Public Policy Concerns, Which, In Part, Motivated The Ohio Legislature To Pass The ODMA.

Ohio adopted the ODMA, in part, to simplify record title related to severed mineral interests and to provide a mechanism by which mineral interests which remained dormant for the statutory

proscribed time period of twenty years would automatically be deemed abandoned and vested in the owner of the surface estate in order to encourage the production of Ohio's natural resources. Petitioners' argument that the unrecorded expiration of an oil and gas lease constitutes a savings event that restarts the twenty-year abandonment period would negate the Ohio Legislature's intent to simplify record title related to severed mineral interests by forcing title examiners to guess the commencement date of the abandonment period rather than relying on clearly identifiable recordation dates. Further, Petitioners' argument that the abandonment period is tolled during the primary term of an oil and gas lease undermines Ohio's public policy of encouraging the production of natural resources and is inapposite to the plain and unambiguous language of the ODMA.

i. **Finding The Expiration Of An Oil And Gas Lease To Qualify As A Savings Event Would Undermine The ODMA's Intent To Provide A Clearly Defined Abandonment Period, And Instead, Would Render The ODMA Unworkable.**

Not only is Petitioners' argument that the unrecorded expiration of an oil gas lease constitutes a savings event under the ODMA in direct contravention of the clear and unambiguous language of the statute, but it would wholly undermine the Ohio Legislature's intent to clarify record title relative to severed mineral interests. One need look no further than the 1984 Lease to understand the confusion that would emanate from the Court's adoption of this argument.

The 1984 Lease, like most oil and gas leases, contained both a primary term and a secondary term. The specific language of the 1984 Lease stated that it

"shall remain in force for a primary term of Five (5) years...[and] 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...

(Appx. Exhibit Q). [emphasis added].²² While the primary term has a finite ending, the secondary term does not. In fact, whether or a lease has expired under the secondary term is one of the most heavily

²² Some secondary terms in oil and gas leases are written with even broader language giving the lessee sole discretion as to whether the lease has expired or not, with no production requirement of any kind.

litigated oil and gas issues in Ohio at this time.²³ Petitioners argue that it is evident to anyone searching title that the 1984 Lease expired in 1989, and therefore, could easily conclude that the twenty-year abandonment period commenced at that time.²⁴ However, such an argument overlooks the fact that the 1984 Lease, like nearly all oil and gas leases entered into, includes the possibility of a secondary lease term. A title searcher would have no idea whether a lease was being held in accordance with a secondary term based on the plain language of the recorded lease. To hold that the expiration of a lease, which is unrecorded, constitutes a title transaction would only further complicate the job of a title searcher, because there would be no document filed or recorded, indicating when the lease actually expired. This would be both contrary to the ODMA and create an unworkable system for searching and verifying title in the oil and gas industry.

Furthermore, the 1984 Lease required the oil and gas company to drill a well within twelve (12) months of the lease execution date in order to maintain the lease in effect. (Appx. Exhibit Q). If the oil and gas company did not satisfy this requirement, but wanted to maintain the lease beyond this 12 month period, it could do so by tendering to NA Coal a “delay rental” payment on or before the lease expiration date. Essentially, the 1984 Lease was a one year lease with four one year option periods.²⁵

While Petitioners assert that delay rental payments were made in this case, one searching title will have no way of knowing whether the oil and gas company continued to make delay rental payments for all five years in order to extend the lease term, or, simply allowed the lease to expire at some period before year five. To further complicate matters, many oil and gas companies, like those herein, fail to record Release Documents, which formally evidence the expiration of an oil and gas lease and provide notice to the public that the oil and gas lease is no longer in effect.

²³ See e.g., *David E. Cameron, et al., v. Hess Corporation, et al.*, S.D. Ohio 2:12-cv-00168 and *Anthony J. Kelich, Jr., et al., v. Hess Corporation, et al.*, S.D. Ohio 2:13-cv-00140.

²⁴ This same line of reasoning was used in *Energetics*' misinterpretation. For the *Energetics* court “anyone checking...title...would have to be on notice of the recorded lease and its expiration date.” 497 N.W.2d at 502.

²⁵ This “delay rental” option is commonly used in oil and gas leases and is still utilized today.

It is impossible for title examiners to determine whether an oil and gas lease expired under the secondary term contained in the lease or whether an oil and company tendered delay rental payments in order to maintain an oil gas lease beyond the first twelve month period. Such a system is wholly unworkable. It is for this reason that the Ohio Legislature required title transactions to be filed or recorded in order to qualify as a savings event, as this requirement clearly provides notice to the public as to when the twenty-year abandonment period commences.²⁶ This Court should reject Petitioners' argument that the unrecorded expiration of an oil and gas lease qualifies as a savings event as this argument undermines the purpose of the ODMA which sought to clarify record title related to severed mineral interests, not muddle it in ambiguity.

ii. The Abandonment Period Is Not Tolloed During The Primary Term Of An Oil And Gas Lease But Rather Continues To Run And Thus Requires A Subsequent Savings Event To Preclude Abandonment.

Petitioners also argue that the twenty-year abandonment period should be tolled during the primary term of an oil and gas lease because the lease is the vehicle through which production of the mineral interest is achieved. (Petitioner Chesapeake's Merit Brief, pg. 25. This Court should reject this argument for several reasons.

First, the production or withdrawal of minerals from lands covered by a lease qualifies as a separate savings event under the ODMA. *See* R.C. § 5301.56(3)(b). Therefore, if the oil and gas company engages in drilling under the oil and gas lease which results in production or withdrawal of oil, gas, or hydrocarbons, the abandonment period starts anew. However, if no activity to produce oil, gas, or hydrocarbons is ever undertaken pursuant to the oil and gas lease, then the abandonment period would continue uninterrupted.

²⁶ To further complicate matters, landowners and oil and gas companies often disagree whether an oil and gas lease remains in effect. These disputes often require court intervention in order to determine whether an oil and gas lease remains in force. If a lessor and lessee are unable to agree on whether an oil and gas lease remains in effect, it is difficult to understand how one searching title will be able to conclude whether said lease is in effect merely through examination of title.

Second, under Petitioners’ argument, oil and gas companies and landowners could easily avoid abandonment under the ODMA by entering into oil and gas leases with a primary term in excess of twenty years, even when no activity is undertaken pursuant to the oil and gas lease to develop the mineral interest. For example, in *McLaughlin*, the lease at issue provided for a primary term of *fifty* years. Under Petitioners’ argument, a lease with a fifty year primary term would preclude abandonment of the mineral interests for seventy years in total—fifty years the lease is in effect and twenty years after the lease’s expiration. Such a result is absurd and clearly undermines the purpose of the ODMA. Even the *McLaughlin* Court recognizes this absurdity and stated that after the first twenty years of the primary term, a new savings event would have to occur in order to preclude abandonment of the mineral interest which remained under an active oil and gas lease. *See McLaughlin*, at 4.

Moreover, an examination of the Comment to section 4(c) of the UDMA clearly demonstrates that the abandonment period is not intended to be tolled during the primary term of an oil and gas lease. It states:

“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.”

(Appex. at Tab). Further, evidence that the abandonment period is not tolled during the primary term of an oil and gas lease is found in Comment to Section 7 of the UDMA, which states:

“[A]ssume 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.”

(Appex. at Tab). Clearly, the drafters of the UDMA, which Ohio used as a template for the ODMA, did not intend for the abandonment period to be tolled while the mineral interest was the subject of an oil

and gas lease or other contract as such tolling undermines the purpose of the Act—to encourage production of natural resources that are abandoned and thus ignored for a specified period of time by allowing those mineral interests to vest with the owner of the surface estate. Consequently, this Court should reject Petitioners’ argument that the abandonment period is tolled during the primary term of an oil and gas lease.

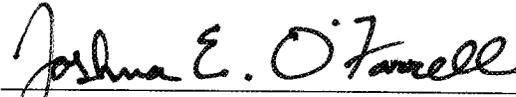
Petitioners’ arguments that the unrecorded expiration of an oil and gas lease qualifies as a savings event that restarts the twenty-year abandonment period and that the abandonment period is tolled during the primary term of an oil and gas should be rejected by this Court because they undermine intent of the Ohio Legislature which passed the ODMA to clarify record title related to severed mineral interests and to encourage production of Ohio’s natural resources.

II. CONCLUSION

For the reasons set forth herein, Respondents respectfully request that this Court answer both certified questions in the negative. In accordance with this Court’s precedent, and the plain language of the ODMA, a recorded lease of a severed subsurface mineral estate is not a title transaction. Furthermore, the expiration of an oil and gas lease does not qualify as a savings event under the ODMA and therefore does not restart the twenty-year abandonment period provided therein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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