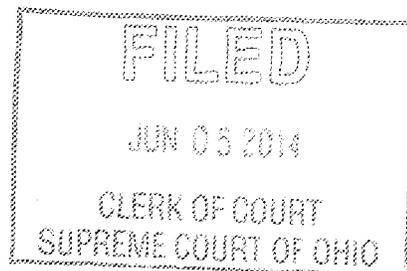


ORIGINAL

IN THE SUPREME COURT OF OHIO



HANS MICHAEL CORBAN,

Petitioners,

Case No. 2014-0804

v.

CHESAPEAKE EXPLORATION,
L.L.C., et al.

Respondents.

On Certified Questions of State Law from
the United States District Court for the
Southern District of Ohio Eastern Division

S.D. Ohio Court Case No, 2:13-cv-00246

**PRELIMINARY MEMORANDUM OF PETITIONER HANS CORBAN
ADDRESSING CERTIFIED QUESTIONS OF STATE LAW**

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I. INTRODUCTION

The U. S. District Court for the Southern District of Ohio has certified the following two questions to this Court:

1. Does the 2006 version or the 1989 version of the ODMA apply to claims asserted after 2006 alleging that the rights to oil, gas and other minerals automatically vested in the surface land holder prior to the 2006 amendments as a result of abandonment?
2. Is the payment of a delay rental during the primary term of an oil and gas lease a title transaction and “savings event” under the ODMA?

Petitioner, Hans Corban, respectfully submits that, should this Court choose to exercise its jurisdiction in this matter, it should hold (1) that the 2006 amendment of R.C. 5301.56 [sometimes referred to as either the “ODMA” or the “DMA”] may not be applied to divest surface owners of title to the Mineral Interest under their property if the title to the Mineral Interest vested in the surface owner prior to the 2006 amendment under the original version of R.C. 5301.56, and (2) that delay payments under an oil and gas lease are not “title transactions” as defined by R.C. 5301.47, and, in any event, cannot be a “savings event” under R.C. 5301.56 unless they were “recorded.”

II. ARGUMENT

As will be shown below, this Court has recently addressed the legal issue presented by the first question, and the legal issue posed by the second question is easily resolved.

- A. This Court Has Repeatedly, And Recently, Ruled That A Statute, Or The Amendment Thereof, That Has Prospective Application Is Nonetheless Barred By The Retroactivity Clause Of The Ohio Constitution If That Prospective Application Would Destroy Property Rights Which Were Vested Prior To The Effective Date Of The Statute, Or The Amendment Thereof**

The Petitioner Hans Corban has argued that title to the Mineral Interest under his property vested in him under the original 1989 version of R.C. 5301.56, and that it was vested in

him prior to the effective date of the 2006 amendment of that statute. The Respondents argue that the 2006 version of R.C. 5301.56 applies herein and that, under its amended provisions, and unlike the provisions of the original statute, ownership of a Mineral Interest does not automatically vest in the surface owner, and that, instead, the surface owner must do certain things for title to the Mineral Interest to vest in the surface owner. The Respondents then argue that because the Petitioner did not perform the acts required by the 2006 amendment, they retained title to the Mineral Interest. It should be noted that the Respondents' argument in this regard was recently rejected by the Seventh District in *Swartz v. Householder*, 2014-Ohio-2359.

If the Petitioner Corban is correct that there was no statutory savings event for a twenty year period prior to the effective date of the 2006 amendment (which issue has not been certified to this Court), such that title to the Mineral Interest vested in him pursuant to the provisions of the original enactment and prior to the effective date of the amendment of that statute, then the application of the 2006 amendment would divest him of his previously vested title to the Mineral Interest, which this Court has recently held is constitutionally forbidden:

Generally, our determination that the statute applies prospectively would end the inquiry required by *Van Fossen*. However, a statute that applies prospectively may nonetheless implicate the Retroactivity Clause. As we noted in *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745,

the constitutional limitation against retroactive laws "include[s] a prohibition against laws which *commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights*, particularly property rights, which had been vested anterior to the time of enactment of the laws." [*Van Fossen*,] 36 Ohio St.3d at 105, 522 N.E.2d 489, quoting Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence* (1936), 20 Minn.L.Rev. 775, 781-782.

(Emphasis added [by the Court].) *Id.* at ¶ 14.

Longbottom v. Mercy Hosp. Clermont, 137 Ohio St. 3d 103, 109, 2013-Ohio-4068 (quoting *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745). As noted above, the Seventh District recently reached the same conclusion—the 2006 amendment does not retroactively destroy previously vested property rights. *Swartz, supra*.

In fact, this rule is also set forth in the Ohio Revised Code, which specifically refers to the retroactive effect of the amendment of a statute:

The...amendment...of a statute does not...[a]ffect the prior operation of the statute...or...[a]ffect any...right...previously acquired...thereunder....

R.C. § 1.58. This is so well-settled it is properly characterized as “hornbook” law:

A law that operates only prospectively and does not affect vested rights is not retroactive and thus not precluded by the constitutional ban on retroactive laws; only if a law takes away or impairs vested rights acquired under existing laws or creates a new obligation or disability with respect to prior transactions or considerations is it retroactive.

17 Ohio Jur. 3d Constitutional Law § 476.

In sum, the legal question posed by the first certified question has already been answered by this Court, *albeit* in a different context, in the negative – the Ohio Constitution prohibits statutory amendments from retroactively divesting a person, like the Petitioner Hans Corban, of property rights that had vested under the original version of the statute. *See also Swartz, supra*.

Accordingly, because this Court has repeatedly, and recently, held that a statute, or an amendment thereof, may not destroy property rights that vested prior to the effective date of the statute or its amendment, the Petitioner Hans Corban respectfully requests this Court, in the event it accepts jurisdiction in this matter, to hold, as did the Seventh District in *Swartz, supra*, that the 2006 amendment of R.C. 5301.56 may not be applied to divest a surface owner of land

of his or her title to the Mineral Interest underneath that property if that title vested in the surface owner pursuant to the provisions of the original statute and prior to the effective date of the 2006 amendment of R.C. 5301.56.

B. This Court Should Hold That Oil And Gas Leases, The Expiration of Oil And Gas Leases, And Delay Rental Payments Under An Oil And Gas Lease, Are Not “Title Transactions” As Defined By R.C. 5301.47, And That, Even If They Are, They Are Not “Savings Events” Under Either Version Of R.C. 5301.56 Unless They Were “Recorded”

Although the Respondents herein argued that a 1984 oil and gas lease, and its 1985 assignment, was a “title transaction,” that argument, if correct, would not mean that that title to the Mineral Interest did not vest in the Petitioner under the original version of R.C. 5301.56, because there was still a twenty year period (1984-2004 or 1985-2005) after the execution and recordation of the 1984 lease and its assignment wherein no statutory saving event occurred, which twenty year period expired prior to the effective date of the 2006 amendment of R.C. 5301.56.

Accordingly, the Respondents argued that, even though the lessee took no production activity under the 1984 oil and gas lease, such that it would have automatically lapsed, the lessee was able to forestall the expiration of the 1984 oil and gas lease until 1989 by making delay payments, which were made in 1985, 1986, 1987 and 1988. The Respondents then argue that the “reversion” of the oil and gas rights to the lessor in 1989 at the expiration of the 1984 lease constituted a “title transaction.”¹

As noted by the District Court in this case, the issue whether the expiration of an oil and gas lease constitutes a “title transaction” that was recorded, *i.e.*, a statutory savings event under

¹ Of course, under either version of R.C. 5301.56, a “title transaction,” to be a statutory savings event, must have been recorded, and the Respondents make no claim that any of the delay payments were recorded, or that the expiration of the lease was recorded.

either version of R.C. 5301.56, is already pending before this Court in *Chesapeake Exploration, L.L.C. v. Buell*, Case No. 2014-0067. With regard to the issue whether delay payments can be properly characterized as a “title transaction,” although the District Court noted that the Respondents cited no case law or other authority in support of this proposition, it nonetheless certified that question to this Court.

Because there is a dearth of authority² discussing whether delay payments are “title transactions,” it is helpful to first discuss the larger issue of whether oil and gas leases, or their expiration, can be considered “title transaction.” As will be shown below, Ohio law does not support the Respondents’ arguments (1) that an oil and gas lease is a “title transaction,” (2) that the expiration of an oil and gas lease is a “title transaction,” or (3) that delay payments under an oil and gas lease are a “title transaction.”

1. Oil And Gas Leases Are Not “Title Transactions”

A “title transaction” is defined by R.C. 5301.47(F), and refers to transactions where the “title” to an “interest in land” is conveyed by “deed,” not when a “mineral interest” is “leased”:

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

A federal district court recently observed that, Ohio law, like the law in most of the other states with significant oil and gas production, provides that an oil and gas lease is not “an interest in real property,” which, of course, would mean that an oil and gas lease is not a “title transaction” because it does not affect “title to an interest in land”:

² Petitioner would posit that this dearth of authority results from the fact that the proposition that the private act of mailing of a delay payment check from a lessee to a lessor is a recorded title transaction is somewhat incredible.

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 addition, this Court finds persuasive the decisions of other states with a more extensive history of oil and gas production. In Oklahoma...an oil and gas lease merely “constitutes a right to search for and capture [oil and gas],” not an interest in real property.... Many other oil-and gas producing states have come to a similar conclusion....

Wellington Resource Group, LLC v. Beck Energy Corp. (September 20, 2013), Case No. 2:12-CV-104 (attached hereto as Ex. 1).

2. The Model DMA, And The DMA’s Of Other States, Unlike Ohio’s DMA, Expressly Define A Lease As A Savings Event

It is important to note that both the Model DMA, which was presented to the Ohio General Assembly by the proponents of the enactment of the original (1989) DMA, and the Ohio legislation “As Introduced,” expressly identified “leases” as a statutory savings event. *See* Ex. 2 (Proponent Testimony with Model DMA attached), and Ex. 3 (S.B. 223 “As Introduced”). Not surprisingly, therefore, some of the DMA’s enacted by other states expressly provide, consistent with the Model DMA, that the execution of an oil or gas lease is, by itself, a savings event. For example, the Michigan DMA statute expressly includes leases in the list of transactions that constitute a savings event:

(1) Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, **leased**, mortgaged, or transferred by instrument recorded in the register of deeds office for the county where that interest in oil or gas is located for a period of 20 years shall...be deemed abandoned....

MCLS § 554.291.

The Ohio General Assembly, however, in enacting the Ohio DMA, did not provide that the mere execution of an oil and gas lease is a savings event, and, instead, expressly provided that a lease is a savings event only if there was “actual production” pursuant to the lease:

(b) There has been **actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease** to which the mineral interest is subject....

R.C. 5301.56 (B)(3)(b)(emphasis added). This is the only reference to an oil and gas lease as a saving event in the statute.

3. Some States’ Statutory Definition Of A “Title Transaction” Expressly Include Leases

Some of the DMA’s enacted by other states, on the other hand, instead of listing the types of transactions that constitute a statutory savings event (like the model DMA), simply state that a “title transaction” is a statutory savings event, and then, like Ohio, provide a separate statutory definition of “title transaction.” Importantly, however, some of these other states expressly define “title transaction” as including leases. For example, the Oklahoma statute (16 Okla. St. §78) includes leases in the definition of a “title transaction”:

(f) “Title transaction” means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, mineral deed, **lease** or reservation, or by trustee’s, referee’s, guardian’s, executor’s, administrator’s, master in chancery’s, sheriff’s or marshal’s deed, or decree of any court, as well as warranty deed, quitclaim deed, or mortgage.

Ohio’s definition of “title transaction,” as shown above, does not define “leases,” let alone oil and gas leases, as “title transactions.” Thus, an oil and gas lease should not be considered to be a “title transaction.”

4. Even If The Lapse Of The 1984 Lease Was A “Title Transaction,” It Was Not Recorded

The Stipulated Facts show that the 1984 oil and gas lease was executed on January 16, 1984, was recorded on April 6, 1984, and was assigned to Carless Resources on April 11, 1985, which assignment was recorded on May 30, 1985. The Stipulated Facts also show that the next lease was not recorded until May 5, 2010, more than 20 years after the 1984 lease was executed or recorded, and then assigned. Thus, even assuming, *arguendo*, that an oil and gas lease constitutes a "title transaction," it is undisputed that there were no leases or assignments that were “recorded” during the 20 years from May 30, 1985, until May 30, 2005, which 20-year period ended prior to the 2006 amendment of the DMA, such that title to the Mineral Interest vested in the Petitioner under the original statute and prior to its amendment.

The Respondents, therefore, argue that the critical date is not the date that they recorded the lease or the assignment, it is the date that the 1984 lease (which was for a term of five years) terminated, *i.e.*, January 16, 1989:

[T]he 20 year period did not begin to run until the last of these title transactions – the reversion of the mineral interest...at [the] expiration of the 1984 lease on or about January 16, 1989.

Defendants’ Motion for Summary Judgment, p. 17. The Respondents fail to refer this Court to any Ohio legal authority in support of this assertion, which failure flows from the fact that neither the 1989 original version of the ODMA, nor the 2006 amended version, can be read to provide that the unrecorded expiration of an oil and gas lease is a statutory savings event.

The Ohio DMA (both versions) instead expressly provides that if there is no “title transaction **that has been filed or recorded**” in the preceding 20 years, the mineral interest is abandoned. R.C. §5301.56(B)(1)(c)(i) (emphasis added). Thus, even assuming, *arguendo*, that the lapse of the 1984 oil and gas lease in 1989 was a “title transaction,” there was never any

filing or recordation of that “title transaction,” such that it may not act as a statutory savings event under either version of the DMA.

5. Delay Payments Under An Oil And Gas Lease Are Not “Title Transactions,” And, Even If They Are, They Were Not Recorded

The same is true with regard to the delay payments made under the 1984 lease. Even assuming, *arguendo*, that the mailing of a check from a lessee to a lessor could somehow be considered a “title transaction” as defined by R.C. 5301.47 – and the Respondents offer no authority in support of such a proposition – there is no argument or evidence that the delay payments (the alleged “title transactions”) were ever recorded. Accordingly the Petitioner Hans Corban respectfully requests this Court to hold that delay payments under an oil and gas lease are not “title transactions” as defined by R.C. 5301.47, and that, even if they are, they must have been recorded to constitute a saving event under either version of R.C. 5301.56.

III. CONCLUSION

In conclusion, the Petitioner Hans Corban respectfully requests that this Court, in the event it accepts jurisdiction herein, to hold that the 2006 amendment of R.C. 5301.56 may not retroactively divest the Petitioner of the title to the Mineral Interest under his property that vested in him prior to the effective date of the 2006 amendment, and that delay rental payments are not “title transactions,” and that, even if they are “title transactions,” they are not a statutory saving event under R.C. 5301.56 unless they were recorded.

Respectfully submitted:



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EXHIBITS

1. *Wellington Resource Group, LLC v. Beck Energy Corp.* (September 20, 2013), Case No. 2:12-CV-104
2. Proponent Testimony in Support of S.B. 223, with Model DMA attached
3. S.B. 223 "As Introduced"

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served upon the following,
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

WELLINGTON RESOURCE
GROUP LLC,

Plaintiff,

v.

BECK ENERGY CORPORATION,

Defendant.

Case No. 2:12-CV-104

JUDGE ALGENON L. MARBLEY

Magistrate Judge Elizabeth P. Deavers

OPINION & ORDER

I. INTRODUCTION

This matter is before the Court on Defendant and Third-Party Plaintiff Beck Energy Corporation's ("Beck") Renewed Motion to Dismiss (Doc. 76) against Intervenor-Plaintiff Transact Partners International, LLC's ("Transact") First Amended Complaint (Doc. 61). Pursuant to Fed. R. Civ. P. 12(b)(6), Beck moves to dismiss Transact's Second through Seventh Causes of Action. In addition, also before the Court is Plaintiff and Third-Party Defendant Wellington Resource Group's ("Wellington") Motion for Oral Argument on Beck's above-mentioned Motion to Dismiss (Doc. 98), as well as Transact's Motion for Leave to File Notice of Supplemental Authority Instanter (Doc. 139) regarding this same Motion to Dismiss. For the reasons stated below, Beck's Motion to Dismiss is hereby **GRANTED IN PART AND DENIED IN PART**; Wellington's Motion for Oral Argument is hereby **DENIED** as moot; and Transact's Motion for Leave to File Notice of Supplemental Authority Instanter is hereby **DENIED** as moot.

II. PROCEDURAL POSTURE

This case originated with a suit brought in diversity jurisdiction by Wellington against Beck, alleging breach of contract and unjust enrichment / quantum meruit. Shortly after the case began, Transact sought and was granted leave to intervene, and filed claims against both Wellington and Beck.

The parties have filed several rounds of amended pleadings, with the result that Beck now asserts counterclaims against Wellington, as well as third-party claims against individuals associated with Wellington, and Third-Party Defendants Michael Sahadi and Levencrest Consulting, Inc. Wellington, Levencrest, and the Third-Party Defendants have answered, while Beck has answered Wellington but moved to dismiss Transact's claims against it. In addition, Wellington sought and was granted leave to file a memorandum of law in opposition to Beck's motion to dismiss Transact's claims. Wellington also requested oral argument regarding Beck's motion, while Transact recently requested leave to add supplemental information relating to the briefing regarding the motion. Both of these motions are resolved herein, together with the underlying Motion to Dismiss. These motions have been amply briefed, and are ripe for review.¹

III. STATEMENT OF FACTS

Given the number of parties involved, as well as the voluminous filings, multiple competing versions of the events of this case have been presented to this Court. For the purposes of this Motion to Dismiss, however, this Court accepts as true the facts as pleaded by non-movant Transact in its First Amended Complaint (Doc. 61).

This story began, from Transact's point of view, in October 2010, when it was approached by representatives of Wellington, and shown the assets owned by Wellington's client, Beck. (*Transact's Amended Cmplt.*, Doc. 61 at ¶ 7). The "Beck Assets" included oil and gas leases, oil and gas wells, and related assets, in Monroe, Belmont, and Nobel Counties in Ohio. *Id.* at ¶ 8. Transact agreed to enter into a co-brokerage agreement with Wellington, whereby Transact would utilize its expertise and knowledge of industry contacts to find interested purchasers of the Beck Assets and put them in contact with Beck, and in return receive 2% of the total transaction price in compensation, if Transact was successful in

¹ Meanwhile, Intervenor Marcellus Shale Land Acquisition Group, LLC ("MSLAG"), sought and was granted leave to intervene, and in turn filed claims against Beck. Beck moved to dismiss, in a motion also pending before this Court (but not currently *sub judice*). Beck's Motion to Dismiss is resolved in a parallel Opinion and Order. Transact then filed cross-claims against MSLAG, which MSLAG moved to dismiss; MSLAG's motion awaits resolution by this Court.

“presenting a ready, willing and able purchaser, and [if] such purchaser in fact complete[d] the purchase of [the Beck Assets].” *Id.* at ¶¶ 8-12. Before entering into the co-brokerage agreement, Transact asked Wellington to reduce its agreement with Beck to writing; Wellington represented that it had done so in late January 2011 (though Wellington and Beck in fact executed their written contract on February 28, 2011). *Id.* at ¶¶ 10-11. Under the terms of this contract, Wellington agreed to provide Beck “with prospective purchasers for oil and gas leases to which Beck possessed the oil and gas rights.” *Id.* at ¶ 11 (quoting Wellington’s Amended Complaint, Doc. 31, at ¶ 18). Transact and Wellington executed their co-brokerage agreement on January 31, 2011. *Id.* at ¶ 11.

In April 2011, Brian Reilly, principal of Transact, spoke with several oil and gas industry contacts regarding the Beck Assets, including representatives of XTO Energy, Inc. (“XTO”). *Id.* at ¶ 13. Mr. Reilly also marketed the Beck Assets to Eclipse Energy (“Eclipse”), which led to a meeting between Beck principal, Raymond Beck, and Eclipse. *Id.* at ¶ 14. During this time, Mr. Reilly explained his role to Mr. Beck, and made himself available to Mr. Beck via phone and email. *Id.* at ¶¶ 16-19.

Ultimately, no deal was reached between Beck and Eclipse, but in June 2011, Mr. Reilly again contacted representatives of XTO, at which time XTO expressed its interest in the Beck Assets. *Id.* at ¶ 20. A phone conference was held in July 2011 between representatives of XTO and Wellington, which led to several more meetings and telephone conferences between Mr. Beck and representatives of Wellington and XTO. *Id.* at ¶¶ 20-21.

In August and September 2011, Mr. Reilly sought information from Wellington concerning the Beck-XTO negotiations, at which time he was informed that Mr. Beck had requested that all communications run through Wellington. *Id.* at ¶ 22. Several weeks later, Wellington informed Transact that it too had been shut out of the Beck-XTO negotiations. *Id.* at ¶ 23. In November 2011, Beck and XTO executed a purchase and sale agreement for the Beck Assets, and in December Beck executed two

Assignments and Bills of Sale, conveying the Beck oil and gas leases and related properties. The purchase price paid by XTO was \$84,961,346.00. *Id.* at ¶¶ 24-26.

In January 2012, when Transact inquired as to when Beck would pay Wellington, and thus Wellington would pay Transact its 2%, Mr. Reilly was informed that Wellington would not pay. *Id.* at ¶ 28. Mr. Reilly spoke to Wellington's attorney, who informed him that Wellington did not consider Transact's claims to be "valid," and invited Transact instead to demand a "nominal sum" in payment. *Id.*

Wellington commenced this action against Beck on February 1, 2012 (Doc. 1). Transact moved to intervene on March 14 (Doc. 9), and filed its Third Party Complaint on July 23 (Doc. 46), and its Amended Complaint on September 25, 2012 (Doc. 61). One month later, Beck filed the present motion to dismiss Counts Two through Seven of Transact's Amended Complaint (Doc. 76).

IV. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows for a case to be dismissed for "failure to state a claim upon which relief can be granted." Such a motion "is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations." *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005). Thus, the Court must construe the complaint in the light most favorable to the non-moving party. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008). The Court is not required, however, to accept as true mere legal conclusions unsupported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). Although liberal, Rule 12(b)(6) requires more than bare assertions of legal conclusions. *Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993) (citation omitted). Rather, the complaint must "give the defendant fair notice of what the claim is, and the grounds upon which it rests." *Nader v. Blackwell*, 545 F.3d 459, 470 (6th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). In short, a complaint's factual allegations "must be enough to raise a right to relief about the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

V. ANALYSIS

Beck raises two objections to Transact's claims. First, Beck moves to dismiss Transact's causes of actions against it arising from breach of contract, on the grounds that no contract existed between Beck and Transact. (*Beck's Motion to Dismiss*, Doc. 76 at 8-10). Second, Beck asserts that, regarding all of Transact's claims, Transact cannot recover either in law or equity, because oil and gas leases fall under the meaning of "real estate" as defined in the Ohio Revised Code, compensation for the brokering of which requires a person or entity to be a licensed "real estate broker" within the meaning of O.R.C. § 4735.01(A). (Doc. 76 at 10-14). Because Transact failed to plead and prove that it is a licensed real estate broker, Beck argues, O.R.C. § 4735.21 bars recovery of unpaid fees. (Doc. 76 at 15-19).

Because federal jurisdiction in this case is premised on diversity, the Court applies Ohio substantive law. *Savedoff v. Access Grp., Inc.*, 524 F.3d 754, 762 (6th Cir. 2008). In resolving issues under Ohio law, the Court "look[s] to the final decisions of [Ohio's] highest court, and, if there are no decisions directly on point," this Court must make "an *Erie* guess to determine how that court, if presented with the issue, would resolve it." *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355, 358-59 (6th Cir. 2013) (referencing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). In this undertaking, "intermediate state appellate courts' decisions are also viewed as persuasive unless it is shown that the state's highest court would decide the issue differently." *Id.* at 359 (internal quotation omitted).

A. Breach of Contract Claims

A claim for breach of contract under Ohio law requires that a claimant prove: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage or loss to the plaintiff. *Savedoff*, 524 F.3d at 762. Proof of all of the essential elements of a contract is required in order to maintain a breach of contract claim. *Kostelnik v. Helper*, 770 N.E.2d 58, 61 (Ohio 2002).

For its part, Transact insists that it never intended to assert a breach of contract claim against Beck. (*Transact's Opp. to Beck's Motion to Dismiss*, Doc. 85 at 5). If so, it is difficult to understand

what Transact intended when it incorporated into its Complaint not only the factual allegations found in Wellington's Amended Complaint, but also all five Counts asserted by Wellington against Beck – including, presumably, Counts I, II, and V of Wellington's Amended Complaint, each for breach of contract. (See Doc. 61 at ¶ 47) (“Transact is entitled to assert its own rights with regard to all of the causes of action asserted against Beck in Wellington's Amended Complaint”). To the extent that Transact asserts claims against Beck under the doctrines of unjust enrichment and quantum meruit, such claims sound in equity, not contract, and are not challenged by Beck in this portion of its Motion to Dismiss. But as Beck correctly points out, Transact has offered no allegations that a contract ever existed between it and Beck. Without a contract, there can be no breach. *Shampton v. Springboro*, 786 N.E.2d 883, 887 (Ohio 2003). As such, Counts III, IV, and VII of Transact's Amended Complaint are hereby **DISMISSED**.

B. Real Estate Claims

The bulk of Beck's argument challenges the ability of Transact to recover, either in law or equity, on the grounds that Transact is not a licensed real estate broker in Ohio. Beck's argument proceeds, at core, in four steps: (1) oil and gas leases are included within the meaning of “real estate” as defined by O.R.C. § 4735.01(B)²; (2) any person that sells, purchases, lists, offers, or negotiates the sale of “real estate” for a commission is a “real estate broker” under O.R.C. §§ 4735.01(A)³ & 4725.01(H)⁴; (3) a “real

² § 4735.01(B) provides that “[r]eal estate” includes leaseholds as well as any and every interest or estate in land situated in this state, whether corporeal or incorporeal, whether freehold or nonfreehold, and the improvements on the land, but does not include cemetery interment rights.”

³ § 4735.01(A) provides, in relevant part, that “[r]eal estate broker” includes any person, partnership, association, limited liability company, limited liability partnership, or corporation, foreign or domestic, who for another, . . . , and who for a fee, commission, or other valuable consideration, or with the intention, or in the expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration . . . (1) Sells, exchanges, purchases, rents, or leases, or negotiates the sale, exchange, purchase, rental, or leasing of any real estate; (2) Offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of any real estate; (3) Lists, or offers, attempts, or agrees to list, or auctions, or offers, attempts, or agrees to auction, any real estate;”

⁴ § 4735.01(H) provides that “[a]ny person, partnership, association, limited liability company, limited liability partnership, or corporation, who, for another, in consideration of compensation, by fee, commission, salary, or otherwise, or with the intention, in the expectation, or upon the promise of receiving or collecting a fee, does, or offers, attempts, or agrees to engage in, any single act or transaction contained in the definition of a real estate

estate broker” must be licensed in Ohio, pursuant to O.R.C. § 4735.02(A)⁵; and (4) no right of action can accrue to, and no compensation can be collected by, real estate brokers who are unlicensed, under O.R.C. § 4735.21(A)⁶. (Doc. 76 at 10-15). Accordingly, Beck concludes, Transact cannot recover.

The Court does not agree. Oil and gas leases are not “real estate” under Ohio law. Beck’s tidy argumentation, focused as it is on statutory language, ignores the fact that, in *practice*, oil and gas leases have not historically been considered interests in land in Ohio. A thorough survey of Ohio case law leaves this Court convinced that the Ohio Supreme Court, if given the occasion to rule on this issue today, would so hold.

In its previous review and analysis of these cases, this Court reasoned that, in Ohio, “oil and gas leases . . . are not leases as that term is traditionally used”; instead, “Ohio courts appear to recognize that such leases create a license to enter upon the land for the purpose of exploring and drilling for oil and gas.” *In re Frederick Petroleum Corp.*, 98 B.R. 762, 766 (S.D. Ohio 1989). In *Frederick*, this Court considered the application of the bankruptcy laws, specifically 11 U.S.C. § 365(a), to oil and gas leases in Ohio. Because § 365(a) deals with “leases of real property,” the Court was required to determine the nature of oil and gas leases in Ohio. After conceding that “the exact nature of a lessee’s interest under an oil and gas lease has not be clearly established in Ohio,” 98 B.R. at 763, the Court undertook a thorough examination of Ohio case law, allowing it to conclude that “an oil and gas lease is regarded under Ohio law as being more than a mere rental of the land for a specified term such as would be involved in a traditional lease.” *Id.* at 766.

broker, whether an act is an incidental part of a transaction, or the entire transaction, shall be constituted a real estate broker or real estate salesperson under this chapter.”

⁵ § 4735.02(A) provides, in relevant part, that “Except [when an out-of-state broker partners with a broker licensed in Ohio], no person, partnership, association, limited liability company, limited liability partnership, or corporation shall act as a real estate broker or real estate salesperson, or advertise or assume to act as such, without first being licensed as provided in this chapter.”

⁶ § 4735.21(A) provides, in relevant part, that “[n]o right of action shall accrue to any person, partnership, association, or corporation for the collection of compensation for the performance of the acts mentioned in section 4735.01 of the Revised Code, without alleging and proving that such person, partnership, association, or corporation was licensed as a real estate broker or foreign real estate dealer.”

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 (1898), an agreement giving the lessee “the sole right to produce [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. While in *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129-30 (1897), the Ohio Supreme Court found that a lease “grant[ing] . . . for the purpose and with the exclusive right of drilling, . . . all that certain track of land,” was “more than a mere license”; rather, it was “a lease of the land for the purpose and period therein, and the lessee has a vested right to the possession of the land to the extent reasonably necessary.”

More recently, however, the Ohio Supreme Court again considered the status of oil and gas leases, while deciding whether such leases must be recorded under Ohio law, and found that a grant of “all the oil and gas in and under” a tract of land, as well as “the right and privilege of operating upon said premises . . . for the obtaining of such oil and gas,” was *not* a grant of real property. *Back v. Ohio Fuel Gas Co.*, 113 N.E.2d 865, 866-67 (Ohio 1953). The court held that

[p]ossession of oil and gas, having as they do a migratory character, can be acquired only by severing them from the land under which they lie, and in effect the instrument of conveyance in the instant case is no more than a license to effect such severance. The very sale of oil and gas, separate and apart from the real estate surface, constitutes, in law, a constructive severance such as occurs in the case of sale of standing timber or growing crops.

Id. at 867.

Given this Court's conclusion in *Frederick*, and the Ohio Supreme Court's decision in *Back*, it remains only for the Court to survey more recent cases to determine whether Ohio law has changed in the years since. It 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.

Three cases demand the Court's attention. First, in *Colucy v. D&H Coal Co.*, 186 N.E.2d 767 (Ohio Ct. Common Pleas 1961), the Court of Common Pleas for Tuscarawas County was asked to determine whether the plaintiff was a "real estate broker" under Ohio law. The agreement between the parties granted to the plaintiff the "sole and exclusive right to acquire . . . all mineral rights, including rights to coal, oil and gas, and/or the land wherein and whereon such minerals may be situate." *Id.* at 770. Because the plaintiff was empowered to acquire interests in land, including non-liquid mineral rights and the land itself – property not at issue here – the court concluded that the plaintiff was a real estate agent. *Id.* at 771.

Relying solely on *Colucy*, the Northern District of Ohio, in a case also involving classification as a real estate broker, announced that the definition of "real estate" in Ohio "has been held to include mineral rights, specifically rights to coal, oil and gas." *Binder v. Trinity OG Land Dev. & Exploration, LLC*, No. 4:11-CV-02621, 2012 WL 1970239, at *3 (N.D. Ohio May 31, 2012) (quotation omitted). With respect to our sister court, this Court is unconvinced. The decision in *Binder* does not evince a thorough exploration of the case law, as this Court undertook in *Frederick*, as the issue in *Binder* did not require resolution of the question of whether oil and gas leases are real estate. Instead, the court based its holding on the fact that the plaintiff was acting as a "real estate broker," not a mere "finder." The court

cited only in passing the Ohio trial court case, the relevance of which applies only to “brokers” empowered to acquire land as well as coal, oil, and gas rights, an issue not relevant here.

Finally, in *Maverick Oil & Gas, Inc. v. Barberton City School Dist. Bd. Of Ed.*, 872 N.E.2d 322 (Ohio App. 2007), the Ninth District Court of Appeals considered the status of an oil and gas lease on property owned by the Barberton City Schools. The lessee sought an injunction to prevent the school district from restricting its access to an oil well on the property, and the court found that the school district’s grantor held the property subject to the oil and gas lease, and therefore the school board, as grantee, likewise took the property subject to that lease. *Id.* at 327. The court noted that an oil and gas lease, while “governed by contract law,” also “creates a limited property right, such that the lessee has the right to possess the land to the extent reasonably necessary to perform the terms of the lease on his part.” *Id.* (citing *Harris*, 57 Ohio St. at 129-130). While the Court takes this statement as persuasive authority, this Court does not believe, given the weight of authority discussed above, that the Ohio Supreme Court would agree. See *Allen v. Andersen Windows, Inc.*, 913 F. Supp. 2d 490, 499 (S.D. Ohio 2012) (“A court should not disregard the decisions of intermediate appellate state courts unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.”). Relying solely on *Harris*, a decision from 1897, the court in *Maverick* did not attempt to reconcile the early Ohio cases in conflict with that opinion, nor did it consider the impact of *Back* on the continuing validity of *Harris*.

Moreover, this Court’s conclusion here accords both with recent legislative action in Ohio, as well as the law of other jurisdictions with more substantial bodies of oil and gas law.⁷

The Ohio legislature is currently considering H.B. 493,⁸ introduced in last year, which would give the Chief of the Ohio Division of Oil and Gas Resources Management (the “Division”) authority to

⁷ See *El Camino Res. Ltd. v. Huntington Nat. Bank*, 712 F.3d 917, 922 (6th Cir. 2013) (a federal court sitting in diversity “must ascertain the state law from all available data, which [also] includes . . . cases from other jurisdictions, and secondary sources.”)

⁸ See *Wade v. Bethesda Hospital*, 337 F. Supp. 671, 674 (S.D. Ohio 1971) (taking judicial notice, on a motion to dismiss, of proposed bills in the Ohio legislature, for the purpose of determining the current scope of authority of an Ohio judge.)

regulate “land professionals” – that is, persons engaged in negotiating business agreements for exploration or development of oil and gas, and negotiating the acquisition of mineral rights for oil and gas. H.B. 493 §§ 1509.31(A)(1), (2). Such land professionals would, under the proposed law, be required to register with the Division. *Id.* § 1509.31(B). While this does not end the inquiry, it does provide persuasive evidence that persons engaged in negotiating the purchase and sale of oil and gas rights do not currently fall under the ambit of the real estate laws.

In addition, this Court also finds persuasive the decisions of other states with a more extensive history of oil and gas production. In Oklahoma, for example, an oil and gas lease merely “constitutes a right to search for and capture [oil and gas],” not an interest in real property. *Halliburton Oil Producing Co. v. Grothaus*, 981 P.2d 1244, 1251 (Ok. 1998). *See also Pauline Oil & Gas Co. v. Fischer*, 90 P.2d 411, 412 (1939) (the interest conveyed by an oil and gas lease is not real estate within the meaning of § 706, which gives a judgment creditor a lien upon the real estate belonging to the judgment debtor); *State v. Shamblin*, 90 P.2d 1053, 1055 (1939) (oil and gas mining leases are chattels real and therefore personal property). Many other oil-and-gas-producing states have come to a similar conclusion. *See, e.g., 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.”), *Ingram v. Ingram*, 521 P.2d 254, 257 (Kan. 1974) (under Kansas law, “an oil and gas lease leasehold interest is personal property,” and “merely conveys a license to enter upon the land and explore for such minerals.”); *see also Backar v. Western States Producing Co.*, 547 F.2d 876, 881-82 (5th Cir. 1999) (Under New York law, but not under Texas law, oil and gas leases are personal property); *compare Salvex, Inc. v. Lewis*, 546 So. 2d 1309, 1313 (La. Ct. App. 1989) *writ denied*, 551 So. 2d 1323 (La. 1989) (cataloging Louisiana’s long debate over the status of oil and gas leases, eventually resolved by action of the state legislature classifying oil and gas leases as an interest in real property).

In essence, this Court reaffirms its prior conclusion in *Frederick*, where it stated that “Ohio courts, if given the opportunity to do so, would characterize the property interests involved [here] as being

like or similar to the interest recognized under Oklahoma law,” and common to many oil-producing states, and hold that oil and gas leases are not a grant of real property. 98 B.R. at 766. Accordingly, the Court declines to dismiss Counts II, V, and VI of Transact’s Amended Complaint (Doc. 61).

VI. CONCLUSION

For the foregoing reasons, Beck’s Motion to Dismiss (Doc. 76) is hereby **GRANTED IN PART AND DENIED IN PART**. As a result of this Order, Wellington’s Motion for Oral Argument and Transact’s Motion for Leave to File Notice of Supplemental Authority Instanter (Doc. 98, Doc. 139) are **MOOT** and, accordingly, **DISMISSED**.

IT IS SO ORDERED.

/s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: September 20, 2013

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNIFORM DORMANT MINERAL INTERESTS ACT

Drafted by the

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

and by it

**Approved and Recommended for Enactment
in All the States**

At its

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

With Prefatory Note and Comments

UNIFORM DORMANT MINERAL INTERESTS ACT

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

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

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UNIFORM DORMANT MINERAL INTERESTS ACT

PREFATORY NOTE

Nature of Mineral Interests

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

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

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

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

Potential Problems Relating to Dormant Mineral Interests

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

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

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

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

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

Approaches to the Dormant Mineral Problem

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

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

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

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

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

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

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

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

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

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

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

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

Draft Statute

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

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

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

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

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

UNIFORM DORMANT MINERAL INTERESTS ACT

SECTION 1. STATEMENT OF POLICY.

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

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

COMMENT

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

SECTION 2. DEFINITIONS.

As used in this [Act]:

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

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

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

COMMENT

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

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

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

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

SECTION 3. EXCLUSIONS.

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

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

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

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

COMMENT

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

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

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

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

SECTION 4. TERMINATION OF DORMANT MINERAL INTEREST.

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

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

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

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

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

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

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

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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

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

SECTION 5. PRESERVATION OF MINERAL INTEREST BY NOTICE.

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

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

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

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

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

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

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

COMMENT

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

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

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

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

SECTION 6. LATE RECORDING BY MINERAL OWNER.

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

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

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

COMMENT

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

SECTION 7. EFFECT OF TERMINATION.

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

COMMENT

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

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

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

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

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

SECTION 8. SAVINGS AND TRANSITIONAL PROVISIONS.

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

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

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

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

COMMENT

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

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

SECTION 10. SHORT TITLE.

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

SECTION 11. SEVERABILITY CLAUSE.

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

SECTION 12. EFFECTIVE DATE.

This [Act] takes effect _____.

SECTION 13. REPEALS.

The following acts and parts of acts are repealed:

- (1) _____.
- (2) _____.
- (3) _____.

As Introduced	1.4
117th General Assembly	1.6
Regular Session	S. B. No. 223 1.7
1987-1988	1.8
MESSRS. CUPP-SCHAFRATH-NETTLE	1.10
	1.11

A B I L L

To amend sections 317.18, 317.20, 317.201, and	1.14
5301.53, to enact new section 5301.56, and to	1.15
repeal section 5301.56 of the Revised Code to	1.16
provide a method for the termination of dormant	
mineral estates and the vesting of their title in	1.17
the surface owners, in the absence of certain	1.18
occurrences within the preceding 20 years,	1.19
including the filing by the holder of the mineral	1.20
interest of a notice of claim.	

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:	1.23
Section 1. That sections 317.18, 317.20, 317.201, and	1.25
5301.53 be amended and new section 5301.56 of the Revised Code be	1.26
enacted to read as follows:	1.27
Sec. 317.18. At the beginning of each day's business the	1.30
county recorder shall make and keep up general alphabetical	1.31
indexes, direct and reverse, of all the names of both parties to	1.33
all instruments theretofore received for record by him. The	1.34
volume and page where such instrument is recorded may be omitted	1.35
until it is actually recorded if the file number is entered in	1.36
place of the volume or page, but such file number may be omitted	2.1
from any index volume in use on April 21, 1896, if the form of	2.3
the index volume is not adapted to entering the file number. The	2.5
indexes shall show the kind of instrument, the range, township,	2.7
and section or the survey number and number of acres, or the	2.8
permanent parcel number provided for under section 319.28 of the	2.9
Revised Code, or the lot and subplot number and the part thereof,	2.10
all as the case requires, of each tract, parcel, or lot of land	2.12
described in any such instrument of writing. The name of each	2.13

grantor shall be entered in the direct index under the appropriate letter, followed on the same line by the name of the grantee, or, if there is more than one grantee, by the name of the first grantee followed by "and others" or their equivalent. The name of each grantee shall be entered in the reverse index under the appropriate letter, followed on the same line by the name of the grantor, or, if there is more than one grantor, by the name of the first grantor followed by "and others" or their equivalent.

As to notices of claims filed in accordance with sections 5301.51 and, 5301.52, AND 5301.56 of the Revised Code there shall be entered in the reverse index under the appropriate letter the name of each claimant, followed on the same line by the name of the present owner of title against whom the claim is asserted, if the notice contains the name of the present owner; or, if the notice contains the names of more than one such owner, there shall be entered the name of the first owner followed by "and others" or their equivalent.

In all cases of deeds, mortgages, or other instruments of writing made by any sheriff, master commissioner, marshal, auditor, executor, administrator, trustee, or other officer, for the sale, conveyance, or encumbrance of any lands, tenements, or hereditaments, and recorded in the recorder's office, the recorder shall index the parties to such instrument under their appropriate letters, respectively, as follows:

(A) The names of the persons represented by such officer as owners of the lands, tenements, or hereditaments described in any such instruments;

(B) The official designation of the officer by whom such instrument of writing was made;

(C) The individual names of the officers by whom such instrument of writing was made.

In all cases of instruments filed in accordance with sections 5311.01 to 5311.22 of the Revised Code, the name of each owner shall be entered in the direct index, under the appropriate

letter, followed on the same line by the name of the condominium 3.16
 property, and the name of the condominium property shall be 3.17
 entered in the reverse index under the appropriate letter
 followed on the same line by the name of the owner of the 3.18
 property, or, if the instrument contains the names of more than 3.19
 one owner there shall be entered the name of the first owner 3.20
 followed by "and others" or its equivalent. 3.21

Any general alphabetical index commenced--after-June-7, 3.22
 1911, shall be COMMENCED in conformity to this section, and 3.23
 whenever, in the opinion of the board of county commissioners, it 3.25
 becomes necessary to transcribe, on account of its worn out or 3.26
 incomplete condition, any volume of such AN index now in use, 3.29
 such volume shall be revised and transcribed to conform with this 3.30
 section; except that in counties having a sectional index in 3.31
 conformity with section 317.20 of the Revised Code, such 3.33
 transcript shall be only a copy of the original. 3.34

Sec. 317.20. When, in the opinion of the board of county 3.36
 commissioners sectional indexes are needed, and it so directs, in 4.1
 addition to the alphabetical indexes provided for in section 4.2
 317.18 of the Revised Code, the board may provide for making, in 4.3
 books prepared for that purpose, sectional indexes to the records 4.4
 of all real estate in the county, beginning with some designated 4.5
 year and continuing through such period of years as it specified, 4.6
 by placing under the heads of the original surveyed sections or 4.7
 surveys, or parts of a section or survey, squares, subdivisions, 4.8
 or the permanent parcel numbers provided for under section 319.28 4.10
 of the Revised Code, or lots, on the left-hand page, or on the 4.12
 upper portion of such page of the index book, the following: 4.13

(A) The name of the grantor; 4.14

(B) Next to the right, the name of the grantee; 4.16

(C) The number and page of the record where the instrument 4.18
 is found recorded; 4.19

(D) The character of the instrument, to be followed by a 4.21
 pertinent description of the property conveyed by the deed, 4.22
 lease, or assignment of lease;

(E) On the opposite page, or on the lower portion of the same page, beginning at the bottom, in like manner, all the mortgages, liens, notices as provided for in sections 5301.51 and, 5301.52, AND 5301.56 of the Revised Code, or other encumbrances affecting such real estate.

The compensation for the services rendered under this section shall be paid from the general revenue fund of the county, and no additional levy shall be made in consequence of such services. In the event that the board decides to have such sectional index made it shall advertise for three consecutive weeks in one newspaper of general circulation in the county for sealed proposals to do such work as provided in this section, and shall let the work to the lowest and best bidder, and shall require him to give bond for the faithful performance of the contract, in such sum as the board fixes, and such work shall be done to the acceptance of the bureau of supervision and inspection of public offices upon allowance by such board. The board may reject any and all bids for the work, provided that no more than five cents shall be paid for each entry of each tract or lot of land.

When brought up and completed, the county recorder shall keep up the indexes described in this section.

Sec. 317.201. The county recorder shall maintain a book to be known as the "Notice Index." Separate pages of the book shall be headed by the original survey sections or surveys, or parts of a section or survey, squares, subdivisions, or the permanent parcel numbers provided for under section 319.28 of the Revised Code, or lots. In this book there shall be entered the notices for preservation of claims presented for recording in conformity with sections 5301.51 and, 5301.52, AND 5301.56 of the Revised Code. In designated columns there shall be entered on the left-hand page:

- (A) The name of each claimant;
- (B) Next to the right, the name of each owner of title;

(C) The deed book number and page where the instrument containing the claim has been recorded;	5.27 5.28
(D) The type of claim asserted; and on the opposite page on the corresponding line a pertinent description of the property affected as appears in such notice.	5.30 5.31 5.32
Sec. 5301.53. The provisions of sections 5301.47 to 5301.56 of the Revised Code, shall not be applied TO BAR OR EXTINGUISH ANY OF THE FOLLOWING:	5.35 6.1 6.2
(A) To-bar-any ANY lessor or his successor as reversioner of his right to possession on the expiration of any lease or any lessee or his successor of his rights in and to any lease, EXCEPT AS MAY BE PERMITTED UNDER SECTION 5301.56 OF THE REVISED CODE;	6.4 6.5 6.7 6.8
(B) To--bar-or-extinguish-any ANY easement or interest in the nature of an easement created or held for any railroad or public utility purpose;	6.10 6.11 6.12
(C) To--bar-or-extinguish-any ANY easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use;	6.14 6.15 6.17
(D) To--bar-or-extinguish-any ANY easement or interest in the nature of an easement, or any rights granted, excepted, or reserved by the instrument creating such easement or interest, including any rights for future use, if the existence of such easement or interest is evidenced by the location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of such facility is observable;	6.19 6.20 6.21 6.22 6.23 6.26 6.27 6.28
(E) To-bar-or-extinguish-any ANY right, title, estate, or interest in coal, and any mining or other rights pertinent thereto or exercisable in connection therewith;	6.30 6.31 6.32
(F) To--bar--or--extinguish--any ANY mortgage recorded in conformity with section 1701.66 of the Revised Code;	6.33 6.34
(G) To-bar-or-extinguish-any ANY right, title, or interest of the United States, or of the state-of-Ohio THIS STATE, or any political subdivision, body politic, or agency thereof.	6.36 7.2 7.3

Sec. 5301.56. (A) AS USED IN THIS SECTION: 7.5

(1) "HOLDER" INCLUDES NOT ONLY THE RECORD HOLDER OF A 7.7
MINERAL INTEREST, BUT ALSO ANY PERSON WHO DERIVES HIS RIGHTS 7.8
FROM, OR A COMMON SOURCE WITH, THE RECORD HOLDER AND WHOSE CLAIM 7.10
DOES NOT INDICATE, EXPRESSLY OR BY CLEAR IMPLICATION, THAT IT IS 7.11
ADVERSE TO THE INTEREST OF THE RECORD HOLDER.

(2) "DRILLING OR MINING PERMIT" MEANS A PERMIT ISSUED 7.13
UNDER CHAPTER 1509., 1513., OR 1514. OF THE REVISED CODE TO THE 7.15
HOLDER TO DRILL AN OIL OR GAS WELL OR MINE OTHER MINERALS. 7.16

(B) ANY MINERAL INTEREST HELD BY ANY PERSON OTHER THAN THE 7.19
OWNER OF THE SURFACE OF THE LANDS SHALL BE DEEMED ABANDONED AND 7.20
VESTED IN THE OWNER OF THE SURFACE, IF NEITHER OF THE FOLLOWING 7.21
IS TRUE:

(1) THE MINERAL INTEREST IS ONE IN COAL, OR MINING OR 7.23
OTHER RIGHTS PERTINENT THERETO, AS DESCRIBED IN DIVISION (E) OF 7.24
SECTION 5301.53 OF THE REVISED CODE; 7.25

(2) WITHIN THE PRECEDING TWENTY YEARS, ONE OR MORE OF THE 7.27
FOLLOWING HAS OCCURRED: 7.28

(a) THE INTEREST HAS BEEN CONVEYED, LEASED, TRANSFERRED, 7.30
OR MORTGAGED BY AN INSTRUMENT FILED OR RECORDED IN THE RECORDER'S 7.31
OFFICE OF THE COUNTY IN WHICH THE LANDS ARE LOCATED; 7.32

(b) THERE HAS BEEN ACTUAL PRODUCTION OR WITHDRAWAL OF 7.34
MINERALS BY THE HOLDER FROM THE LANDS, FROM LANDS COVERED BY A 7.35
LEASE TO WHICH SUCH INTEREST IS SUBJECT, OR, IN THE CASE OF OIL 7.36
OR GAS, FROM LANDS POOLED, UNITIZED, OR INCLUDED IN UNIT 8.1
OPERATIONS, UNDER SECTIONS 1509.26 TO 1509.28 OF THE REVISED 8.2
CODE, IN WHICH THE INTEREST IS PARTICIPATING; 8.3

(c) THE INTEREST HAS BEEN USED IN UNDERGROUND GAS STORAGE 8.6
OPERATIONS BY THE HOLDER;

(d) A DRILLING OR MINING PERMIT HAS BEEN ISSUED TO THE 8.8
HOLDER; 8.9

(e) A CLAIM TO PRESERVE THE INTEREST HAS BEEN FILED UNDER 8.12
DIVISION (C) OF THIS SECTION.

NO MINERAL INTEREST SHALL BE DEEMED ABANDONED UPON THE BASIS OF FAILURE OF COMPLIANCE WITH DIVISION (B) OF THIS SECTION PRIOR TO THREE YEARS FROM THE EFFECTIVE DATE OF THIS SECTION.

(C) A CLAIM TO PRESERVE A MINERAL INTEREST FROM BEING DEEMED ABANDONED UNDER DIVISION (B) OF THIS SECTION MAY BE FILED FOR RECORD BY THE HOLDER WITH THE COUNTY RECORDER OF THE COUNTY IN WHICH THE LAND IS LOCATED. THE CLAIM SHALL CONSIST OF A NOTICE, VERIFIED UNDER OATH, OF THE NATURE OF THE INTEREST CLAIMED, A DESCRIPTION OF THE LAND, THE VOLUME AND PAGE OF ANY RECORDED INSTRUMENT ON WHICH IT IS BASED, THE NAME AND ADDRESS OF THE HOLDER, AND THAT HE DOES NOT INTEND TO ABANDON BUT TO PRESERVE HIS RIGHTS. SUCH CLAIM PRESERVES THE RIGHTS OF ALL HOLDERS OF A MINERAL INTEREST IN THE SAME LAND. ANY HOLDER OF AN INTEREST FOR USE IN UNDERGROUND GAS STORAGE OPERATIONS MAY PRESERVE HIS INTEREST, AND THOSE OF ANY LESSOR THEREOF, BY A SINGLE CLAIM, DEFINING THE BOUNDARIES OF THE STORAGE FIELD OR POOL AND ITS FORMATIONS, WITHOUT DESCRIBING EACH SEPARATE INTEREST CLAIMED. SUCH A CLAIM ALSO ESTABLISHES PRIMA-FACIE EVIDENCE OF THE USE OF SUCH INTEREST IN UNDERGROUND GAS STORAGE OPERATIONS.

(D) A CLAIM FILED UNDER DIVISION (C) OF THIS SECTION SHALL BE RECORDED AS PROVIDED IN SECTIONS 317.18 TO 317.201 AND 5301.52 OF THE REVISED CODE.

(E) A MINERAL INTEREST MAY BE PRESERVED INDEFINITELY FROM THE PRESUMPTION OF ABANDONMENT UNDER THIS SECTION BY OCCURRENCE OF ANY OF THE EVENTS DESCRIBED IN DIVISION (B)(2) OF THIS SECTION, INCLUDING SUCCESSIVE FILINGS OF CLAIMS UNDER DIVISION (C) OF THIS SECTION. THE FILING OF A CLAIM UNDER DIVISION (C) OF THIS SECTION DOES NOT AFFECT THE RIGHT OF A LESSOR OF AN OIL OR GAS LEASE TO OBTAIN ITS FORFEITURE UNDER SECTION 5301.332 OF THE REVISED CODE.

(F) THIS SECTION DOES NOT APPLY TO ANY MINERAL INTEREST HELD BY ANY GOVERNMENTAL ENTITY.

c is not included in (B)(2)

Section 2. That existing sections 317.18, 317.20, 317.201, 9.17
and 5301.53 and section 5301.56 of the Revised Code are hereby 9.18
repealed. 9.19

S.B. 223
(As Introduced)

Sens. Cupp, Schafrath, Nettle

Provides that, in the absence of certain specified occurrences within the preceding 20-year period, including failure to file a written notice of claim in subsurface minerals, a mineral estate (other than in coal) is considered abandoned and the title vests in the surface owner.

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Background

When a person buys an interest in land, the Marketable Title Act (sections 5301.47 to 5301.56 of the Revised Code) makes it unnecessary for the most part to do a title search back further than the date that is known as the effective date of the root of title. This is so because the Act generally cuts off interests existing prior to the effective date of the root of title, unless those interests have been preserved by the recording of a preserving notice as provided in the Act.

The "root of title" is the conveyance, in the seller's chain of title, that was most recently recorded as of the date 40 years before the date on which marketability is determined. The "effective date of the root of title" is the date on which was recorded the conveyance that is the root of title.

Current section 5301.56 provides that regardless of when the Marketable Title Act's 40-year period expires, for the purpose of recording a preserving notice of a claim in the right, title, estate or interest in and to subsurface minerals, with the exception of coal, such period shall not be considered to expire until after December 31, 1976. The bill would repeal this section because it no longer applies to conveyances of interests in minerals and would replace it with guidelines for determining when an interest in a mineral estate (other than coal) has become dormant and the interest would vest in the owner of the surface land.

CONTENT AND OPERATION

The bill would not change existing law concerning marketable title to or the filing of preserving notices for an interest in surface land. Under the bill, any mineral interest held (see COMMENT 1) by any person

EXHIBIT 3

other than the owner of the surface land, would be deemed abandoned and would vest in the owner of the surface land if neither of the following applies (sec. 5301.56(B)):

(1) The mineral interest is one in coal, or mining or other rights pertinent to or exercisable in connection with the mining;

(2) Within the preceding 20 years, one or more of the following has occurred:

(a) 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;

(b) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which such interest is subject, or, in the case of oil or gas, from lands pooled, utilized, or included in unit operations in which the interest is participating;

(c) The interest has been used in underground gas storage operations by the holder;

(d) A drilling or mining permit has been issued to the holder (see COMMENT 2);

(e) A claim to preserve the interest has been filed in compliance with the provisions of the bill.

No mineral interest would be considered abandoned based on failure to comply with this provision prior to three years from the effective date of this section (sec. 5301.56(B)).

A claim to preserve a mineral interest from being deemed abandoned could be filed for record with the county recorder of the county in which the land is located. It would consist of a notice, verified under oath, of the nature of the interest claimed, a description of the land, the volume and page of any recorded instrument on which it is based, the name and address of the holder, and a statement that the holder does not intend to abandon but to preserve his rights. The claim would preserve the rights of all holders of a mineral interest in the same land. Any holder of an interest for use in underground gas storage operations could preserve his interest, and those of any lessor, by a single claim, defining the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. This claim also would establish prima-facie evidence of the use of such interest in underground gas storage operations. (Sec. 5301.56(C).)

A claim filed pursuant to the procedure described above also would have to be recorded as provided in sections 317.18 to 317.201 (governing indexes maintained by a county recorder) (see COMMENT 3) and 5301.52 (contents of notice claiming to preserve an interest in land) of the Revised Code (sec. 5301.56(D)). A mineral interest could be preserved indefinitely from the bill's presumption of abandonment by the continuing occurrence of any of the items listed in the bill (the mineral is coal or the events listed occurred within the preceding 20 years). Indefinite preservation also could be accomplished by successive filings of claims to preserve a mineral interest by the method provided by the bill. (Sec. 5301.56(C).)

The filing of a claim to preserve a mineral interest from being deemed abandoned as provided by the bill would not affect the right of a lessor of an oil or gas lease to obtain a forfeiture pursuant to section 5301.332 (provides basis and procedure for forfeiture and cancellation of natural gas and oil land leases) (sec. 5301.56(E)). The bill specifies that its provisions would not apply to any mineral interest held by a governmental entity (sec. 5301.56(F)).

COMMENT

(1) Section 5301.56(A)(1) defines a holder as including not only the record holder of a mineral interest, but also any person who derives his rights from, or a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

(2) A drilling or mining permit is a permit issued under Chapter 1509., 1513., or 1514. (Oil and Gas, Coal Surface Mining, and Other Surface Mining, respectively) of the Revised Code to the holder to drill an oil or gas well or mine other minerals (sec. 5301.56(A)(2)).

(3) Sections 317.18 to 317.201 of the Revised Code set forth guidelines to be followed by a county recorder in maintaining the records of all real estate located in the county. For example, section 317.19 requires that a daily register of deeds and a daily register of mortgages be kept. The county recorder also is responsible for maintaining an alphabetical index, both direct and reverse, of the names of both parties to all instruments affecting county real estate (sec. 317.18). In addition, section 317.201 provides that every notice of preservation of claims filed in the recorder's office be logged in a record book called a "Notice Index."

ACTION	DATE	JOURNAL ENTRY
Introduced	05-28-87	p. 404