

ORIGINAL

Case No. 2013-1730

# In The Supreme Court of Ohio

PHILLIP B. DODD, <i>et al.</i> ,	:	On Appeal from the Harrison County Court
	:	of Appeals, Seventh Appellate District
<i>Plaintiffs-Appellants,</i>	:	
	:	Court of Appeals Case No.: 12-HA-6
v.	:	
	:	
JOHN CROSKEY, <i>et al.</i> ,	:	
<i>Defendants-Appellees.</i>	:	

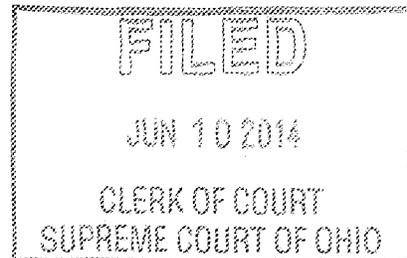
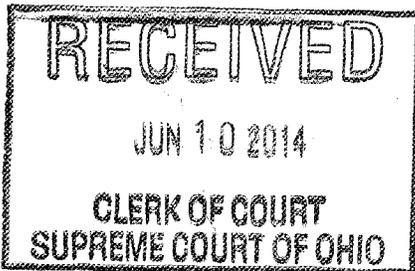
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**MERIT BRIEF OF APPELLEES KAREN A. CHANEY, PATTY HAUSMAN, LINDA C. BOYD AND TERRI HOCKER**

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## **I. STATEMENT OF THE CASE AND FACTS**

This case involves the preservation of mineral rights originally owned by Samuel A. Porter and his wife Blanche Long Porter (the “Porters”)<sup>1</sup>. Appellees are all the heirs of the Porters (hereinafter the “Porter Heirs”), including Karen A. Chaney, Patty Hausman, Linda C. Boyd and Terri Hocker.<sup>2</sup>

In 1947, the Porters conveyed a tract of land consisting of 148.105 acres to Consolidated Fuel Company (not Consolidated Coal Company) reserving all of the oil and gas mineral interest. The Warranty Deed recorded in Deed Book Vol. 121, pp. 381-382 of the Land Records of Harrison County, Ohio recorded on May 27, 1947 contains the following mineral reservation.

ALSO RESERVED unto Grantors, their heirs and assigns, all the oil and gas within and underlying said lands, together with all rights and privileges necessary to drill for, remove and market said oil and gas, so long as same does not interfere with coal stripping operations.

(Pl.’s Mot. Summ. J., 6/29/11, Ex. C).<sup>3</sup>

As part of the same transaction, the Porters also conveyed their undivided one-third interest in separate tracts of land to Consolidated Fuel Company recorded sequentially at Deed

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<sup>1</sup> Many facts stated in the Appellants’ Statement of the Case and Facts are not contained in the record and appear unsupported before this Court for the first time. Examples include the allegations that Mrs. Porter did not elect to take against the will of her husband upon his death, that Mr. Porter’s estate inventory did not list the mineral reservation and that certain events occurred at a pretrial conference on December 9, 2011. Rather than rebut all of this extraneous material, the Porter Heirs instead have limited their Statement of the Case and Facts only to facts supported by the record which are relevant to the issue presented.

<sup>2</sup> These Appellees are the daughters of Samuel A. Chaney and Nancy Gaiser Chaney. Samuel A. Chaney was the oldest child of W. Doyle Chaney and Mary Doris Porter Chaney. Mary Doris Porter Chaney was their grandmother and was the heir of two-tenths of Samuel A. Porter’s estate as stated in the Last Will and Testament of Samuel A. Porter. Mary Doris Porter Chaney died on August 22, 1992 and Samuel A. Chaney died on August 27, 2007. (Mot. Summ. J. of Chaney, Hausman, Boyd and Hocker, 8/15/11).

<sup>3</sup> An enumerated index was neither filed with the Ohio Supreme Court nor served on the parties.

Book Vol. 121, pgs. 383-384 of the Land Records of Harrison County, recorded on the same date. The Warranty Deed conveying this one-third interest contains the same reservation.<sup>4</sup> (*Id.*, Ex. D).

The property which is the subject of this litigation consists of approximately 127.84 acres and includes portions of the property originally owned by the Porters. This property was eventually owned by R. James Coffelt. By Survivorship Deed recorded August 5, 2009 at OR Book 180, pp. 2239-2242 with the Harrison County Recorder, Coffelt transferred the surface property to Appellants Phillip Dodd and Julie Bologna (hereinafter and collectively “Dodd/Bologna”). This deed contains the following exceptions and reservations:

Excepting and reserving unto Samuel A. Porter and Blanche Long Porter all of the oil and gas in Warranty Deed to Consolidated Fuel Company filed for record May 27, 1947 in Volume 121, p. 381, Deed Records for the 148.105 acre (Note: No further transfers).

Excepting a one-third interest in the oil and gas to Samuel A. Porter and Blanche Long Porter in the Warranty Deed filed for record May 27, 1947 in Volume 121, p. 383, Deed Records.

(*Id.*, Ex. B.)

The first exception refers to the sale by the Porters of the surface of one tract in which the Porters reserved all the oil and gas minerals. The second exception refers to the sale by the Porters of their one-third interest in the surface lands of separate tracts in which they also retained all of the oil and gas of their one-third interest.

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<sup>4</sup> Both the Common Pleas Court and the Court of Appeals incorrectly stated that the deed recorded at Vol. 121, Pg. 383 contained an error in referring to the one-third interest in the oil and gas as being owned by Samuel A. Porter and Blanche Porter instead of Emma Croskey. But Vol. 121, Pg. 383 was indeed the recordation of the transfer of the one-third undivided interest in the surface land from the Porters.

Dodd/Bologna gave notice by publication on November 27, 2010 of their intent to declare the mineral interest owned by the Porter Heirs abandoned.<sup>5</sup> (Pl.'s Mot. Summ. J., Ex. F, 6/29/11). On December 23, 2010 Appellee John William Croskey ("Croskey"), one of the Porter Heirs, timely filed a document entitled "Affidavit Preserving Minerals" with the Harrison County Recorder at OR book 186, pg. 1949-1956 in response to the Dodd notice. (*Id.*, Ex. I). Croskey filed this R.C. §5301.56(H)(1)(a) affidavit which stated the nature of the mineral interest claimed, the recording information upon which the claim is based, the identity of all the Porter Heirs, and that the holders did not intend to abandon, but instead preserve, their rights to the mineral interest. Notwithstanding the Affidavit of Preservation filed by Croskey, Dodd/Bologna nonetheless filed an Affidavit of Abandonment on December 27, 2010 with the Harrison County Recorder at OR Book 186, pgs. 2062-2068, claiming that the mineral interest owned by the Porter Heirs had been abandoned. (*Id.*, Ex. K)

On February 9, 2011, Dodd/Bologna filed an action to quiet title against the Porter Heirs in the Harrison County Court of Common Pleas, seeking a determination that the mineral interests owned by the Porter Heirs were abandoned. Various Motions for Summary Judgment were filed by the parties. By Judgment Entry filed October 29, 2012, the Harrison County Court of Common Pleas granted summary judgment in favor of the Porter Heirs on all of the four issues presented, including the claim presented in this appeal – that the mineral holders preserved their mineral interest by timely filing a claim of preservation pursuant to R.C. §5301.56(H)(1)(a) after Dodd/Bologna gave notice of intent to declare the mineral interest abandoned and that such

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<sup>5</sup> R.C. §5301.56(E)(1) requires service of the notice by certified mail or "if service cannot be completed to any holder, the owner shall publish notice . . ." The Porter Heirs asserted below that Dodd could reasonably have located the address of one or more of them, many of whom reside in Harrison County, and that notice by certified mail should have been made and that notice by publication was therefore not effective.

claim of preservation need not reference any qualifying preceding savings events (J., 10/29/12). In an opinion filed September 23, 2013, the Seventh District Court of Appeals affirmed the judgment of the trial court with respect to this issue (Opinion, 9/23/13).

Dodd/Bologna filed their Notice of Appeal to the Supreme Court of Ohio on November 4, 2013. On March 12, 2014 the Supreme Court of Ohio granted jurisdiction to hear this appeal.

## II. LAW AND ARGUMENT

### **Response to Proposition of Law:**

**A claim to preserve a mineral interest filed pursuant to Ohio R. C. §5301.56(H)(1)(a) and in response to an Ohio R. C. §5301.56(E) abandonment notice need not reference any prior qualifying savings event in order to preserve a holder's mineral interest rights.**

- (A) The Plain Language of R.C. §5301.56(H)(1)(a) Permits a Holder to Preserve a Mineral Interest By Filing a Claim After a Notice of Intent from the Surface Owner to Declare the Mineral Interest Abandoned Even in the Absence of Reference to a Prior Savings Event.

Ohio R.C. §5301.56, included as part of Ohio's Marketable Title Act (R.C. §§5301.47 through 5301.56) and commonly referred to as the Dormant Mineral Act ("DMA"), governs the preservation and abandonment of mineral interests which have been severed from the surface lands. The DMA provides generally that mineral interests may be preserved under various circumstances, including the timely filing by the mineral holder of a claim for preservation pursuant to R.C. §5301.56(H)(1)(a) and the occurrence of certain events (referred to as "Savings Events")<sup>6</sup> enumerated at R.C. §5301.56(B)(3). The DMA was originally enacted in 1989 and

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<sup>6</sup>"Savings events" include: (i) title transactions with respect to the mineral interests; (ii) actual production from the mineral interests or lands pooled or unitized with those interests; (iii) the usage of the mineral interests for underground storage; (iv) the issuance of a drilling permit to the holder of the mineral interests; (v) the creation of a separate tax listing for the mineral interests; and (vi) the filing of a claim by the holder of the mineral interests to preserve those interests (collectively, the "Savings Events"). Ohio R. C. § 5301.56(B)(3).

then substantially amended in 2006. The original 1989 statute included no explicit provision requiring that a mineral holder (“Holder”) be given notice of a claim of abandonment by the surface owner (“Surface Owner”). The 2006 amendments to the DMA (the “2006 Amendments”) adopted explicit procedures which required notice by the Surface Owner to a Holder and clarified a specific right of and mechanism for the Holder to preserve the mineral interest.

Pursuant to the 2006 amendments, in order for the Surface Owner to terminate mineral rights (and thus, allow mineral rights to vest in the Surface Owner), the Surface Owner must first notify each Holder of the Surface Owner’s intent to declare the interest abandoned by means of written notice by certified mail or publication as governed by R. C. §5301.5(E)(1) (the “Notice of Intent”).

Significantly, and most germane to this Appeal, the DMA’s 2006 amendments added a new procedure for the Holder to contest abandonment of mineral rights. Pursuant to the plain language of §5301.56(H)(1), there exists not one—but two—mechanisms whereby a Holder can assert that its mineral interest has not been abandoned. Specifically, Ohio R. C. §5301.56(H)(1) states that a Holder, such as the Porter Heirs, must “not later than sixty days after the date on which [the Notice of Intent] was served or published. . . file in the [recorder’s office] of each county where the land that is subject to the mineral interest in located **one of the following**:

(a) A claim to preserve the mineral interest in accordance with division (C) of [Ohio R. C. 5301.56];

(b) An affidavit that identifies [a Savings Event] that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of [Ohio R. C. 5301.56].”

(Emphasis added).

With the first option (§5301.56(H)(1)(a)), a Holder must file a preservation claim which includes the information enumerated in Ohio R. C. 5301.56(C)(1). According to §5301.56(C)(1), such a claim need only: (i) state the nature of the mineral interest and any recording information upon which the claim is based; (ii) comply with Ohio's recording statute; and (iii) indicate that the Holder intends to preserve the mineral interest. *Id.* This is precisely the option elected by the Porter Heirs. Dodd/Bologna provided the Notice of Intent by publication on November 27, 2010 of their intent to declare the mineral interests owned by the Porter Heirs abandoned. On December 23, 2010, less than 30 days thereafter, Croskey timely filed an Affidavit Preserving Minerals with the Harrison County Recorder in response to the Dodd/Bologna Notice of Intent.<sup>7</sup> The document filed by Croskey on December 23, 2010 was termed an "affidavit" because it was subscribed and sworn to by him. But it was clearly a claim to preserve under R.C. §5301.56(H)(1)(a), as the trial court held, and not an affidavit under (H)(1)(b) identifying a savings event described in (B)(3) of the DMA. The Croskey Affidavit Preserving Minerals complied in all respects with the requirements of R.C. §5301.56(C).

The second option—§5301.56(H)(1)(b)—permits the Holder to file an affidavit specifically identifying a prior Savings Event that occurred in the 20 years before service of the Notice of Intent. Despite these two unique options for the Holder to preserve its mineral rights, Dodd/Bologna rely only on §5301.56(H)(1)(b) which requires a reference to a Savings Event that occurred in the twenty year period preceding service of the Notice of Intent. Dodd/Bologna completely ignore R.C. §5301.56(H)(1)(a), the very statutory provision which explicitly supports the preservation of mineral rights upon which the Porter Heirs rely. Dodd/Bologna might have a plausible argument if this statute did not exist but indeed it does and it permits the preservation

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<sup>7</sup> Although the Affidavit of Preservation was filed by only one of the heirs, the statute explicitly provides that it preserves the rights of all holders in the same land. R.C. §5301.56(C)(2).

of the mineral interest by the filing of a claim without the added requirement of a prior Savings Event.

In support of this argument, Dodd/Bologna assert that because §5301.56(H)(1)(a) incorporates §5301.56(C), which in turn makes reference to §5301.56(B) (i.e., the statutory provision that sets forth the qualifying Savings Events), any preservation claim must also include reference to a Savings Event which occurred in the twenty year period prior to service of the Notice of Intent. This position defies both the plain language and the legislative intent of Ohio R. C. §5301.56(H). R.C. §5301.56(C) states what must be contained in a claim of preservation: the nature of the mineral interest claimed, any recording information upon which the claim is based, and a statement that the Holder does not intend to abandon, but instead to preserve, the Holder's rights in the mineral interest. In order to preserve the mineral interest, such a claim may be filed either within twenty years immediately preceding the Notice of Intent as a Savings Event, R.C. §5301.56(B)(3)(e) and referenced as such in an affidavit of preservation identifying it as a Savings Event pursuant to (H)(1)(b) or as a preservation claim filed within sixty days after service of the Notice of Intent pursuant to (H)(1)(a). In either event, the claim must contain the information required in §5301.56(C) but in the latter option there is no requirement for any reference to a prior Savings Event. R.C. §5301.56(H)(1)(a).

The main objective in interpreting any statute is to ascertain the legislative intent. *State v. Pariag*, 137 Ohio St. 3d 81, 2013-Ohio-4010, 998 N.E.2d 401. To determine legislative intent, a court must first consider the words used in a statute. *Id. citing State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242. When a statute's language is clear and unambiguous, a court must apply it as written. *Id.* Words of a statute are to be given their plain, ordinary and commonly understood meaning unless a contrary intention appears. *Sarmiento v.*

*Grange Mut. Cas. Co.*, 106 Ohio St. 3d 403, 2005-Ohio-5410, 835 N.E.2d 692 (2005). Moreover, statutes are construed as a whole and must be harmonized to give meaning to related provisions. *State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections*, 67 Ohio St.3d 597, 622 N.E.2d 329 (1993).

Based on the plain language of §5301.56(H)(1)(a), the legislature did not intend for a preservation claim filed pursuant to §5301.56(H)(1)(a) to reference a Savings Event that occurred prior to the Notice of Intent. First, there is no language in §5301.56(H)(1)(a) referencing or otherwise requiring a Holder to cite to a Savings Event. Instead, all that is required under such statutory provision is that a Holder file and record a claim that complies with §5301.56(C). And similarly, nothing in §5301.56(C) requires a Holder to reference a Savings Event. Rather, Ohio R. C. §5301.56(C) simply sets forth the necessary content and procedure for filing a preservation claim.

Conversely, §5301.56(H)(1)(b) does expressly require a reference to a Savings Event, and pursuant to it, a Holder must indicate a prior Savings Event in the affidavit filed in response to a Notice of Intent. Harmonizing these two statutory provisions, it is readily apparent that only one of the Holder's preservation options (§5301.56(H)(1)(b)) requires reference to a Savings Event.

Second, if the legislature had intended that a preservation claim under §5301.56(H)(1)(a) reference a Savings Event, it certainly could have done so. This is especially true considering that it *did* include such language in §5301.56(H)(1)(b). The legislature explicitly provided two separate options, to which the Court must give deference.

Third, if §5301.56(H)(1)(a) were construed to require reference to a Savings Event, as Dodd advances, the significance of §5301.56(H)(1)(b) would be nullified. There would be a

complete redundancy within §5301.56(H)(1) because both provisions would require the same exact act: a post-Notice filing (either a claim or an affidavit) with specific reference to a Savings Event which occurred in the twenty years prior to the filing of the Notice of Intent.

Finally, R.C. §5301.56(H)(2) states the conditions under which the mineral interest vests in the Surface Owner in the event the Holder fails to respond or timely respond to the Notice of Intent. These events which disqualify a Holder are again stated in the disjunctive - failure to file or timely file a claim to preserve the mineral interest or failure to file or timely file an affidavit that identifies a Savings Event. R.C. §5301.56(H)(2) essentially reiterates the identical options in the converse; namely, the consequence to the Holder of failing to comply with at least one of the two options.

Dodd/Bologna note in passing two trial court cases which they assert support their position – *Devitis v. Draper* and *Marty v. Dennis*. Both of these opinions were issued from the Monroe County Court of Common Pleas and prior to the opinion in this case from the Seventh District Court of Appeals, the appellate district in which that trial court is located. The consequences expressed by Dodd/Bologna in not adhering to these two cases are frankly ludicrous – that a person with no relation to the property would somehow create a fictitious right by filing a claim of preservation or that a legitimate Holder would file a claim with a fictitious “Savings Event.” Certainly, Dodd/Bologna do not even suggest that any improper claim of preservation was filed in this case.

(B) The Interpretation of R.C. §5301.56(H)(1)(a) Advanced by the Porter Heirs is Supported by the General Rule that the Law Abhors a Forfeiture.

R.C. §5301.56(H)(1)(a) explicitly protects the right of a Holder to preserve the property interest by timely filing a preservation claim after receiving a Notice of Intent from the Surface Owner to declare the mineral interest abandoned. The statute further protects that right even if

there is no reference in the preservation claim to Savings Events in the past which may have independently preserved the claim. This statutory right is supported by the general rule that the law abhors a forfeiture. Ohio's DMA was intended to protect the property rights of Mineral Holders and not to create forfeitures of severed mineral interests. In fact, the law abhors forfeiture and such results should be avoided. *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 605 N.E.2d 368 (1992), quoted at *Sogg v. Surz*, 121 Ohio St.3d 449, 2009-Ohio-1526, 905 N.E.2d 187.

The procedures under the 2006 amendments to the DMA provide notice to the Holder of the mineral interest and allow the Holder to protect that interest against a claim of abandonment by a Surface Owner. It is these private property rights that are expressly protected by the Ohio Constitution's directive that "[p]rivate property shall ever be held inviolate[.]" Ohio Const., Art I §19. This concept is self-explanatory, but this Court has affirmed these property rights stating, "The right of private property is an *original* and *fundamental* right, existing anterior to the formation of government itself." *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115. (Emphasis added). "Ohio has always considered the right of property to be a fundamental right. (*Citations omitted*). There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Id.* at ¶38.

The Ohio Supreme Court long ago recognized that: (i) "[f]orfeitures . . . are not favored in law or in equity and statutory provisions therefore must be strictly construed;" and (ii) "[w]henever possible, such statutes must be construed to avoid a forfeiture of property. No forfeiture may be ordered unless the expression of the law is clear and the intent of the legislature manifest." *State ex rel. Lukens v. Indus. Comm. Of Ohio*, 143 Ohio St. 609, 611, 56

N.E.2d 216 (1944) (quoting *State ex rel. Cline v. Indus. Comm. Of Ohio*, 136 Ohio St. 33, 23 N.E.2d 636 (1939)); *State v. Lilloock*, 70 Ohio St. 2d 23, 26. 434 N.E. 2d 723 (1982) (superseded by statute on other grounds).

- (C) The Courts of Other States Which Have Enacted Statutes Similar to the Ohio DMA and the 2006 Amendments Have Held that the Holder Preserves the Mineral Interest Upon the Filing of a Preservation Claim After Receiving a Notice of Intent, Even in the Absence of a Prior Savings Event.

This is a case of first impression before this Court. But the courts of other states which have enacted statutes similar to the Ohio DMA and the 2006 Amendments have held that the Holder preserves the mineral interest upon the filing of a preservation claim after Notice of Intent, even in the absence of a prior Savings Event. At least one other State Court has addressed a nearly identical argument—that a preservation claim filed in response to an abandonment notice must reference some sort of savings event—and summarily rejected it.

In *Scully v. Overall*, 17 Kan. App.2d 582 (Ct. App. 1992), the Kansas Appellate Court held that a statement of claim filed in response to a notice of lapse **need not** be coupled with proof of “use” during the preceding twenty year period in order to preserve the Holder’s rights. By way of background, in Kansas, a mineral interest is deemed to have lapsed and thus reverts to the Surface Owner if such mineral interest is “unused” for a period of twenty years and the Holder does not file a statement of claim indicating “use” within that twenty year time period (or within a three year grace period). K.S.A. §55-1602. The Kansas statute further provides what constitutes “use”, such “use” being analogous to Ohio’s Savings Events. K.S.A. §55-1603. Mineral interests in Kansas are considered “used” where minerals are produced, operations for withdrawal, storage or injection are conducted, rentals or royalties are exchanged, mineral interests are pooled for production purposes, or taxes are paid. *Id.* Like Ohio, in Kansas, a

Surface Owner is also required to serve a “notice of lapse” on the Holder. K.S.A. §55-1605. In response to such notice, a Holder may, within sixty days, file a statement of claim to preserve the mineral interests. K.S.A. §55-1604.

In *Scully*, the Surface Owner published and filed a notice of lapse of mineral interest claiming that no minerals from the property in dispute were used for twenty years, and that ownership of such minerals should revert to the Surface Owner. 17 Kan.App.2d at 583. One week later, and within the sixty day statutory deadline for filing, the Holder filed a statement of claim indicating its preservation of mineral interest in the appropriate county recorder’s office. *Id.* Nevertheless, the Surface Owner subsequently filed a petition to quiet title and argued that the Holder’s statement of claim failed to preserve the mineral interest where it did not reference any prior “use” (analogous to a Savings Event under Ohio) of the mineral interest. *Id.* at 585. Specifically, the Surface Owner argued that when a Holder files a statement of claim in response to a lapse notice, the statement of claim “must be coupled with proof that the mineral interest was in fact ‘used’ during the twenty year period in order to preserve [the Holder’s] rights.” *Id.*

The Kansas Appellate Court rejected the Surface Owner’s argument. *Id.* at 586-587. In reaching this conclusion, the Court stated that, based upon the clear and unambiguous language of the statute, a statement of claim is not required to provide proof of use when filed in response to a notice lapse. 17 Kan.App.2d at 586. The Kansas Appellate Court also explained the following:

The Kansas Mineral Lapse Act [the “Act”] equitably balances the interests of the [Surface Owner] and [the Holder]. The Act required the [Surface Owner] to make reasonable efforts to identify and contact the owners of the lapsed interest. If the [Holder] responds, the interest is no longer forgotten, the name and address of the [Holder] is identified and the purposes of the Act are served. If the [Holder] fails to respond, the [Surface Owner] can perfect title to the interest in a subsequent quiet title action. The interest then becomes marketable because it is vested in a new, identified, owner.

*Id.* at 587.

Several other states have passed dormant mineral acts similar to Ohio requiring the Surface Owner to give notice to the Holder of the pending abandonment of the mineral interest and allowing the Holder to preserve the mineral right after such notice by filing a statement of claim without reference to any prior savings event. For example, in North Dakota, any mineral interest that is unused for twenty years is deemed abandoned unless the Holder records a statement of claim prior to the expiration of such twenty year period (or within the two year grace period). N.D.C.C. §38-18.1-04. Pursuant to N.D.C.C. §38-18.1-04, the statement of claim must: (i) be recorded by the Holder prior to the end of the twenty year period; (ii) contain the name and address of the Holder and a legal description of the land where the mineral interest is located; and (iii) be recorded in the county where the mineral interest is located. If no such statement of claim is filed, the Surface Owner must give notice of the pending abandonment of the mineral interest to the Holder whereupon a Holder may then file a statement of claim in response to the notice of the pending lapse to preserve the mineral interest within sixty days of the notice. N.D.C.C. §38-18.1-04. Such statement of claim must comport with the requirements of N.D.C.C. §38-18.1-04.

The North Dakota Supreme Court had the opportunity to review the requirements of N.D.C.C. §38-18.1-04 in *Larson v. Norheim*, 830 N.W.2d 85 (2013). In *Larson*, the Holder never filed a statement of claim prior to the expiration of the twenty year time period. The Surface Owner then filed a notice of lapse on May 9, 2007. In response to such published notice, the Holder recorded a statement of claim within sixty days of the publication of Surface Owner's notice of lapse. The statement of claim complied with the requirements set forth in N.D.C.C. §38-18.1-04 in that it included a legal description of the property and identified the type of

mineral interest involved. *Id.*, at 89. The statement of claim also identified the owners of the mineral interest. *Id.* The North Dakota Supreme Court determined that the statement of claim complied with all statutory requirements and sufficiently preserved the Holder's mineral interest. *Id.* at 90. Thus, even though N.D.C.C. §38-18.1-04 referenced a twenty year period similar to Ohio R. C. §5301.56(B)(3), the North Dakota Supreme Court still found that a statement of claim filed after the twenty year period, but within the sixty day time period after notice of lapse, was sufficient for preserving a mineral interest. In reaching its holding, the Court explained the following:

Section 38-18.1-02 states that a mineral interest is deemed to be abandoned if it is unused for twenty years, unless a statement of claim is recorded. [The] statute also says title in the abandoned mineral vests in the [S]urface [O]wner on the date of abandonment and a mineral interest is not abandoned if a statement of claim is recorded[.] The title to the mineral interest vests in the [S]urface [O]wner only if the mineral interest is abandoned. [. . .] N.D.C.C. Section 38-18.1-05 states that failure to record a statement of claim within twenty years will not cause a mineral interest to be extinguished if the [Holder] [. . .] record[s] a statement of claim within sixty days after the first publication of the notice of lapse. When those statutory provisions are read together, they unambiguously provide that a mineral interest does not automatically vest in the [S]urface [O]wner upon the publication of the first notice of lapse and the [Holder's] interest does not become a reversionary interest. [Rather], a mineral interest vests in the [S]urface [O]wner when it is abandoned and it is not abandoned if a statement of claim is recorded within sixty days of the publication of the notice of lapse.

*Id.* at 91.

Oregon, likewise, has enacted a dormant mineral act whereby the surface owner may extinguish a Holder's mineral interest after thirty years of non-use by publishing and mailing notice of such lapse. O.R.S. §517.180(4). Such extinguishment will not occur, however, where the Holder has filed a statement of claim within the preceding thirty years, where property taxes have been paid on the interest or where the mineral interest was acquired within the previous thirty year period. O.R.S. §517.180(1). Similar to Ohio, after receipt of a Surface Owner's

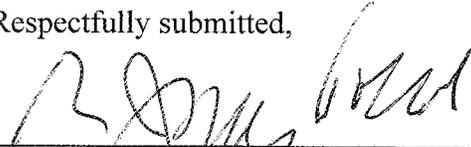
notice to file a statement of claim, the Holder is afforded an additional period of time to file a statement of claim. Nothing in the pertinent Oregon statutes requires a Holder to reference any sort of prior Savings Event in the statement of claim. *See* O.R.S. §517.180(3).

In summary, the Courts in these states have upheld statutes, as in Ohio, that provide the right of a Holder to preserve the mineral interest by filing a claim after receiving notice of intent to declare abandonment from the Surface Owners, even in circumstances where there has been no prior qualifying Savings Event.

### **III. CONCLUSION**

For the foregoing reasons, Appellees respectfully urge this Court to affirm the judgment of the Seventh District Court of Appeals that a claim to preserve a mineral interest filed pursuant to Ohio R. C. §5301.56(H)(1)(a) and in response to an Ohio R. C. §5301.56(E) abandonment notice need not reference any prior qualifying savings event in order to preserve a holder's mineral interest rights.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing **Brief of Appellees Karen A. Chaney, Patty Hausman, Linda**

**C. Boyd and Terri Hocker** was served via regular mail this 9<sup>th</sup> day of June 2014 upon the following:

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K.S.A. 55-1602

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**C**

West's Kansas Statutes Annotated Currentness

Chapter 55. Oil and Gas

▣ Article 16. Miscellaneous Provisions

▣ Mineral Interests; Lapsing and Reversion

→ → **55-1602. Same; lapse and reversion, when**

An interest in coal, oil, gas or other minerals, if unused for a period of 20 years, shall lapse, unless a statement of claim is filed in accordance with K.S.A. 55-1604, and the ownership shall revert to the current surface owner.

CREDIT(S)

Laws 1983, ch. 185, § 2.

Statutes are current through laws effective July 1, 2014, including Chapters 4, 23, 27, 60, 73, 74, 75 and 87 of the 2014 Regular Session of the Kansas Legislature.

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West's Kansas Statutes Annotated Currentness

Chapter 55. Oil and Gas

▣ Article 16. Miscellaneous Provisions

▣ Mineral Interests; Lapsing and Reversion

→ → **55-1603. Same; use of mineral interest defined**

(a) A mineral interest shall be considered to be used when:

(1) There are any minerals produced under the interest;

(2) operations are being conducted on the interest for injection, withdrawal, storage or disposal of water, gas or other fluid substances;

(3) rentals or royalties are being paid by the owner of the interest for the purpose of delaying or enjoying the use or exercise of the mineral rights;

(4) the use or exercise of the mineral rights is being carried out on a tract with which the mineral interest may be unitized or pooled for production purposes;

(5) in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of the mineral interests; or

(6) taxes are paid on the mineral interest by its owner.

(b) Any use pursuant to or authorized by the instrument creating the mineral interest shall be effective to continue in force all rights granted by the instrument.

## CREDIT(S)

Laws 1983, ch. 185, § 3.

Statutes are current through laws effective July 1, 2014, including Chapters 4, 23, 27, 60, 73, 74, 75 and 87 of the 2014 Regular Session of the Kansas Legislature.

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West's Kansas Statutes Annotated Currentness

Chapter 55. Oil and Gas

▣ Article 16. Miscellaneous Provisions

▣ Mineral Interests; Lapsing and Reversion

→ → **55-1604. Same; statement of claim, contents; filing, when and where; effect of failure to file**

(a) A statement of claim may be filed by the owner of a mineral interest prior to the end of the twenty-year period specified by K.S.A. 55-1602 or within three years after the effective date of this act, whichever is later. The statement shall contain the name and address of the owner of the mineral interest and a description of the land on or under which the mineral interest is located. The statement of claim shall be filed in the office of the register of deeds of the county in which the land is located. Upon the filing of the statement of claim within the time provided, it shall be considered that the mineral interest was being used on the date the statement of claim was filed.

(b) Failure to file a statement of claim within the time prescribed by subsection (a) shall not cause a mineral interest to be extinguished if the owner of the mineral interest filed the statement of claim within 60 days after (1) publication of notice as prescribed by K.S.A. 55-1605, if such notice is published or (2) within 60 days after receiving actual knowledge that the mineral interest had lapsed, if such notice is not published.

CREDIT(S)

Laws 1983, ch. 185, § 4.

Statutes are current through laws effective July 1, 2014, including Chapters 4, 23, 27, 60, 73, 74, 75 and 87 of the 2014 Regular Session of the Kansas Legislature.

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West's Kansas Statutes Annotated Currentness

Chapter 55. Oil and Gas

▣ Article 16. Miscellaneous Provisions

▣ Mineral Interests; Lapsing and Reversion

→ → **55-1605. Same; notice of lapse by succeeding owner; contents; prima facie evidence, when**

Upon the lapse of a mineral interest under K.S.A. 55-1602, any person who will succeed to the ownership of the interest shall give notice of the lapse of the mineral interest by publishing notice of the lapse in a newspaper of general circulation in the county in which the land subject to the mineral interest is located, and, if the address of the owner of the mineral interest is shown of record or can be determined upon reasonable inquiry, by mailing a copy of the notice by restricted mail to the owner of the mineral interest within 10 days after publication. The notice shall state the name of the owner of the mineral interest, as shown of record; a description of the land subject to the mineral interest; and the name of the person giving the notice. If a copy of the notice, together with an affidavit of its publication and service, is promptly filed in the office of the register of deeds of the county where land subject to the interest is located, the record of the filing shall be prima facie evidence in any legal proceedings that the notice was given.

## CREDIT(S)

Laws 1983, ch. 185, § 5.

Statutes are current through laws effective July 1, 2014, including Chapters 4, 23, 27, 60, 73, 74, 75 and 87 of the 2014 Regular Session of the Kansas Legislature.

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West's North Dakota Century Code Annotated Currentness

Title 38. Mining and Gas and Oil Production

Chapter 38-18.1. Termination of Mineral Interest

→ → § 38-18.1-04. Statement of claim--Recording--Time

The statement of claim provided for in section 38-18.1-02 must:

1. Be recorded by the owner of the mineral interest or the owner's representative prior to the end of the twenty-year period set forth in section 38-18.1-02. A joint tenant, but not a tenant in common, may record a claim on behalf of oneself and other joint tenants.
2. Contain the name and address of the owner of the mineral interest, and a legal description of the land on, or under which, the mineral interest is located as well as the type of mineral interest involved.
3. Be recorded in the office of the recorder in the county in which the mineral interest is located.

The mineral interest is deemed to be in use at the date of recording, if the recording is made within the time provided by this section. A statement of claim filed after July 31, 2009, by a person other than the owner of record of the mineral interest 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.

## CREDIT(S)

S.L. 1983, ch. 413, § 4; S.L. 2001, ch. 120, § 1; S.L. 2009, ch. 317, § 2, eff. Aug. 1, 2009.

Current through the 2013 Regular Session of the 63rd Legislative Assembly

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OH Const. Art. I, § 19

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**C**

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs &amp; Annos)

▣ Article I. Bill of Rights (Refs &amp; Annos)

→ → **O Const I Sec. 19 Eminent domain**

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

Current through Files 1 to 95 and Statewide Issue 1 of the 130th GA (2013-2014).

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West's Oregon Revised Statutes Annotated Currentness  
 Title 43. Mineral Resources  
 Chapter 517. Mining and Mining Claims (Refs & Annos)  
 Extinguishing Dormant Mineral Interest  
 → → **517.180. Procedure for extinguishing interest**

(1) An owner of land in which another person holds a mineral interest, may extinguish the holder's interest by publishing notice and submitting an affidavit of publication for recording as described in subsections (4) to (9) of this section, unless:

(a) Within the last 30 years, the holder of the mineral interest has submitted a statement of claim for recording in the manner set out in subsection (3) of this section; or

(b) The holder of the mineral interest acquired the mineral interest within the previous 30 years.

(2) For the purposes of this section:

(a) "Mineral interest" includes any interest that is created by an instrument transferring, either by grant, assignment, reservation or otherwise, an interest of any kind in coal, oil, gas or other minerals and geothermal resources, except an interest vested in the United States, the State of Oregon or a political subdivision of the State of Oregon. A mineral interest does not include an interest in sand or gravel.

(b) "Owner of land" includes a vested fee simple owner or a contract purchaser.

(3) The statement of claim referred to in subsection (1) of this section shall be submitted for recording in the office of the clerk of the county in which the land affected by the mineral interest is located and shall contain:

(a) The name and address of the holder of the mineral interest as that name is shown in the instrument that created the original mineral interest; and

(b) The name and address of the current holder of the mineral interest.

(4) To extinguish the mineral interest held by another person, and acquire ownership of that interest, the owner of the land shall publish notice of the lapse of the mineral interest at least once each week for three consecutive weeks in a newspaper of general circulation in the county in which the lands affected by the mineral interest are

located. If the address of the mineral interest holder is known or can be determined by due diligence, the notice shall also be mailed by the owner of the land to the holder of the mineral interest before the first publication.

(5) The notice required in subsection (4) of this section shall include:

(a) The name of the holder of the mineral interest, as shown of record;

(b) A reference to the instrument creating the original mineral interest, including where it is recorded;

(c) A description of the lands affected by the mineral interest;

(d) The name and address of the person giving the notice;

(e) The date of first publication of the notice; and

(f) A statement that the holder of the mineral interest must submit a statement of claim to the county clerk within 60 days after the date of the last publication or the mineral interest of the holder may be extinguished.

(6) A copy of the notice and an affidavit of publication of the notice, as described in subsection (7) of this section, shall be submitted to the county clerk within 15 days after the date of the last publication of the notice in the office of the clerk of the county where the lands affected by the mineral interest are located.

(7) The affidavit of publication shall contain either:

(a) A statement that a copy of the notice was mailed to the holder of the mineral interest and the address to which it was mailed; or

(b) If no copy of the notice was mailed, a detailed description, including dates, of the efforts made to determine with due diligence the address of the holder of the mineral interest.

(8) If the owner of the land affected by the mineral interest gives notice as required in subsection (4) of this section and submits a copy of the notice and the affidavit of publication for recording as required by subsection (6) of this section, the mineral interest of the holder shall be extinguished and become the property of the owner of the lands, unless the holder of the mineral interest submits a statement of claim to the county clerk within 60 days after the date of the last publication of the notice.

(9) Upon receipt, the clerk of the county shall record a statement of claim or a notice and affidavit of publication of notice in the Mineral and Mining Record. When possible, the clerk shall also indicate by marginal notation on

the instrument creating the original mineral interest the recording of the statement of claim or notice and affidavit of publication of notice. The clerk of the county shall record a statement of claim by cross-referencing in the Mineral and Mining Record the name of the current holder of the mineral interest and the name of the original holder of the mineral interest as set out in the statement of claim.

(10) The provisions of this section may not be waived at any time.

#### CREDIT(S)

Laws 1983, c. 421, § 2; Laws 1997, c. 819, § 10; Laws 1999, c. 654, § 31.

Current with emergency legislation through Ch. 121 of the 2014 Reg. Sess. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.

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Effective: January 30, 2014

Baldwin's Ohio Revised Code Annotated Currentness

Title LIII. Real Property

▣ Chapter 5301. Conveyances; Encumbrances (Refs &amp; Annos)

▣ Termination of Dormant Mineral Interests

→ → **5301.56 Abandonment and preservation of mineral interests**

(A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives the person's rights from, or has 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) "Drilling or mining permit" means a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code to the holder to drill an oil or gas well or to mine other minerals.

(3) "Mineral interest" means a fee interest in at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided or undivided.

(4) "Mineral" means gas, oil, coal, coalbed methane gas, other gaseous, liquid, and solid hydrocarbons, sand, gravel, clay, shale, gypsum, halite, limestone, dolomite, sandstone, other stone, metalliferous or nonmetalliferous ore, or another material or substance of commercial value that is excavated in a solid state from natural deposits on or in the earth.

(5) "Owner of the surface of the lands subject to the interest" includes the owner's successors and assignees.

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

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

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

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

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

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

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

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

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

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

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be recorded in accordance with division (H) of this section and sections 317.18 to 317.20 and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:

(a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;

(b) Otherwise complies with section 5301.52 of the Revised Code;

(c) States that the holder does not intend to abandon, but instead to preserve, the holder's rights in the mineral interest.

(2) A claim that complies with division (C)(1) of this section or, if applicable, divisions (C)(1) and (3) of this section preserves the rights of all holders of a mineral interest in the same lands.

(3) Any holder of an interest for use in underground gas storage operations may preserve the holder's interest, and those of any lessor of the interest, by a single claim, that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. The claim is prima-facie evidence of the use of each separate interest in underground gas storage operations.

(D)(1) A mineral interest may be preserved indefinitely from being deemed abandoned under division (B) of this section by the occurrence of any of the circumstances described in division (B)(3) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

(2) The filing of a claim to preserve a mineral interest 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.

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

(1) Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned. If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located. The notice shall contain all of the information specified in division (F) of this section.

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

(F) The notice required under division (E)(1) of this section shall contain all of the following:

(1) The name of each holder and the holder's successors and assignees, as applicable;

(2) A description of the surface of the land that is subject to the mineral interest. The description shall include the volume and page number of the recorded deed or other recorded instrument under which the owner of the

surface of the lands claims title or otherwise satisfies the requirements established in division (A)(3) of section 5301.52 of the Revised Code.

(3) A description of the mineral interest to be abandoned. The description shall include the volume and page number of the recorded instrument on which the mineral interest is based.

(4) A statement attesting that nothing specified in division (B)(3) of this section has occurred within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section;

(5) A statement of the intent of the owner of the surface of the lands subject to the mineral interest to file in the office of the county recorder an affidavit of abandonment at least thirty, but not later than sixty days after the date on which notice is served or published, as applicable.

(G) An affidavit of abandonment shall contain all of the following:

(1) A statement that the person filing the affidavit is the owner of the surface of the lands subject to the interest;

(2) The volume and page number of the recorded instrument on which the mineral interest is based;

(3) A statement that the mineral interest has been abandoned pursuant to division (B) of this section;

(4) A recitation of the facts constituting the abandonment;

(5) A statement that notice was served on each holder or each holder's successors or assignees or published in accordance with division (E) of this section.

(H)(1) If a holder or a holder's successors or assignees claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned, the holder or the holder's successors or assignees, not later than sixty days after the date on which the notice was served or published, as applicable, shall file in the office of the county recorder of each county where the land that is subject to the mineral interest is located one of the following:

(a) A claim to preserve the mineral interest in accordance with division (C) of this section;

(b) An affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section.

The holder or the holder's successors or assignees shall notify the person who served or published the notice under division (E) of this section of the filing under this division.

(2) If a holder or a holder's successors or assignees who claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned fails to file a claim to preserve the mineral interest, files such a claim more than sixty days after the date on which the notice was served or published under division (E) of this section, fails to file an affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section, or files such an affidavit more than sixty days after the date on which the notice was served or published under that division, the owner of the surface of the lands subject to the interest who is seeking to have the interest deemed abandoned and vested in the owner shall file in the office of the county recorder of each county where the land that is subject to the mineral interest is located a notice of failure to file. The notice shall contain all of the following:

- (a) A statement that the person filing the notice is the owner of the surface of the lands subject to the mineral interest;
- (b) A description of the surface of the land that is subject to the mineral interest;
- (c) The statement: "This mineral interest abandoned pursuant to affidavit of abandonment recorded in volume ....., page ....."

Immediately after the notice of failure to file a mineral interest is recorded, the mineral interest shall vest in the owner of the surface of the lands formerly subject to the interest, and the record of the mineral interest shall cease to be notice to the public of the existence of the mineral interest or of any rights under it. In addition, the record shall not be received as evidence in any court in this state on behalf of the former holder or the former holder's successors or assignees against the owner of the surface of the lands formerly subject to the interest. However, the abandonment and vesting of a mineral interest pursuant to divisions (E) to (I) of this section only shall be effective as to the property of the owner that filed the affidavit of abandonment under division (E) of this section.

(I) For purposes of a recording under this section, a county recorder shall charge the fee established under section 317.32 of the Revised Code.

#### CREDIT(S)

(2013 H 72, eff. 1-30-14; 2006 H 288, eff. 6-30-06; 1988 S 223, eff. 3-22-89)

Current through Files 1 to 95 and Statewide Issue 1 of the 130th GA (2013-2014).

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