

ORIGINAL

IN THE SUPREME COURT OF OHIO

HANS MICHAEL CORBAN,

Petitioner,

Case No. 2014-0804

v.

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

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

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

Respondents.

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Facts	1
Argument	7
Conclusion	43
Certificate of Service	45
Appendix	46

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Back v. Ohio Fuel Gas Co.</i> (1953), 160 Ohio St. 81	31
<i>Bielat v. Bielat</i> , 87 Ohio St.3d 350, 353	17, 18, 20
<i>Binder v. Trinity</i> , 2012 U.S. Dist. LEXIS 76183	30, 31
<i>Chesapeake Exploration, L.L.C. v. Buell</i> , Case No. 2014-0067	1, 29
<i>Cline v. Ohio Bur. of Motor Vehicles</i> , 61 Ohio St. 3d 93, 97, 573 N.E.2d 77, 80 (1991)	24
<i>Dahlgren v. Brown Farm Properties</i> (Nov. 5, 2013), C. P. Ct. Carroll Cty., Case No. 13CVH27445	21-27
<i>Douce v. Donaldson</i> , 1978 Ohio App. LEXIS 8130 *3 (Ct. App. Wayne Cty.)	27
<i>Energetics v. Whitmill</i> , 442 Mich. 38, 497 N.W. 2d 497 (1993)	40
<i>Farnsworth v. Burkhardt</i> (July 16, 2013), Monroe Cty. Ct. C.P., Case No. 2012-133	11
<i>Harris v. Ohio Oil Co.</i> , 57 Ohio St. 118 (1987)	32-34
<i>Heifner v. Bradford</i> (1983), 4 Ohio St. 3d 49	7
<i>Kross v. Ruff</i> (September 13, 2013), Jefferson Cty. Ct. C. P., Case No. 12 CV 303	11
<i>Long v. Long</i> , 99 Ohio St. 330, 332-33, 124 N.E. 161, 162 (1919)	22
<i>Longbottom v. Mercy Hosp. Clermont</i> , 137 Ohio St. 3d 103, 109, 2013-Ohio-4068, 2013 Ohio LEXIS 2148, 2013 WL 5357099 (Ohio 2013)	18, 20
<i>Marty v. Dennis</i> (April 11, 2013), Monroe Cty. C.P. Ct., Case No. 2012-203	11, 12
<i>McCoy v. Richards</i> (D.C. Ind. 1984), 623 F. Supp. 1300, 1307-08	15

	Page
<i>McLaughlin v. CNX Gas Co.</i> , 2013 U.S. Dist. LEXIS 174698, 8-9 (N.D. Ohio Dec. 13, 2013)	31
<i>Minnich v. Guernsey Sav. & Loan Assn.</i> (1987), 36 Ohio App. 3d 54, 55	25
<i>Mixon v. One Newco, Inc.</i> , 863 F.2d 846, 849, 1989 U.S. App. LEXIS 362, 104 Oil & Gas Rep. 213 (11th Cir. Ga. 1989)	15
<i>Murray Energy Corp. v. City of Pepper Pike</i> , 2008-Ohio-2818, ¶ 23	25
<i>Nonamaker v. Amos</i> (1905), 73 Ohio St. 163	34
<i>Ohning v. Buckskin Coal Corp.</i> , 528 N.E.2d 493, 494-495, 1988 Ind. App. LEXIS 661 (Ind. Ct. App. 1988)	15
<i>Ricks v. Vap</i> , 2010 Neb. LEXIS 74, 784 N.W. 2d 432, 436	40, 41
<i>Rocket Oil & Gas Co. v. Donabar</i> , 2005 OK CIV APP 111, 50-53, 127 P.3d 625, 2005 Okla. Civ. App. LEXIS 99, 162 Oil & Gas Rep. 708 (Okla. Ct. App. 2005)	26
<i>Scamman v. Scamman</i> (C.P. Ct. Montgomery Cty., 1950), 90 N.E. 2d 617, 619	20
<i>Shannon v. Householder</i> (July 17, 2013), Jefferson Cty. Ct. C.P., Case No. 12 CV 226	11, 34
<i>Shump v. First Continental-Robinwood Assocs.</i> , 138 Ohio App. 3d 353, 360, 741 N.E. 2d 232, 237, 2000 Ohio App. LEXIS 6297, 11-12 (Ohio Ct. App., Montgomery County 2000)	37
<i>State, ex rel. Jordan v. Indus. Comm.</i> (2008), 120 Ohio St. 3d 412, 413	8
<i>State v. White</i> , 132 Ohio St. 3d 344, 352	22
<i>Stetter v. R.J. Corman Derailment Servs., L.L.C.</i> , 2010-Ohio-1029, 125 Ohio St. 3d 280, 286, 927 N.E.2d 1092, 1101	24
<i>Swartz v. Householder</i> (Ct. App. 7 th Dist.), 2014-Ohio-2359 ..	8, 10-12, 17, 19

	Page
<i>Texaco, Inc. v. Short</i> , 454 U.S. 516, 533-534 (U.S. 1982)	15-16, 26-27
<i>Walker v. Shondrick-Nau, Executrix of the Estate of Noon</i> (Ct. App. 7 th Dist.), 2014-Ohio-1499	19
<i>Wellington Resource Group, LLC v. Beck Energy Corp.</i> (September 20, 2013), Case No. 2:12-CV-104	30-31
<i>Wendt v. Dickerson</i> (February 21, 2013), Case No. 2012 CV 0135	19
<i>Wheeling & L.E. Ry. v. Toledo Railway & Terminal Co.</i> , 23 Ohio C.D. 303 (1907)	41
<i>Wheeling & L.E. Ry. v. Toledo Ry. & Terminal Co.</i> , 1907 WL 1179 (Ohio Cir. Ct. Nov. 9, 1907)	42
<i>Wheeling & L. E. R. Co. v. Toledo Ry. & Terminal Co.</i> , 81 Ohio St. 540, 91 N.E. 1143 (1910)	42
<i>Wheeling & L. E. R. Co. v. Toledo Ry. & Terminal Co.</i> , 81 Ohio St. 550, 91 N.E. 1143 (1910)	42
<i>Woodland Oil Co. v. Crawford</i> , 55 Ohio St. 161 (1896)	32

OTHERS:

16 Okla. St. §78	37
60 Ohio Jur. 3d Mines and Minerals § 8	34
Baldwin's Ohio Practice, Ohio Real Estate Law, § 15:7	34
Black's Law Dictionary (5 th Ed.).....	22
Conn. Gen. Stat. § 47-33q	14
MCLS § 554.291	36
OCGA § 44-5-168	15
ODMA S.B. 223	35

	Page
Oregon Rev. St. § 517.180	14
R.C. 1.48	17
R.C. 1.58	18, 20
R.C. 5301.47	1, 28-29, 42
R.C. 5301.56	1, 7-10, 12, 17, 21, 28-29, 35-36, 40, 42-43
Sub. H.B. 288	17

STATEMENT OF FACTS

I. Statement Of The Case

The Petitioner Hans Corban filed a quiet title action in the Harrison County Court of Common Pleas [Case No. CVH20130016], which action was removed to the U.S. District Court for the Southern District of Ohio by the Respondents Chesapeake Exploration, L.L.C., CHK Utica, L.L.C., Total E&P USA, Inc., and North American Coal Royalty Company.

The Parties filed a Stipulation of Facts and cross-motions for summary judgment in the Federal District Court, which has certified the following two questions of state law 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?

See Opinion and Order (Appendix Ex. 1).

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, such that Petitioner, Hans Corban, respectfully submits that this Court should hold (1) that the 2006 amendment of R.C. 5301.56 [“ODMA”] may not be retroactively applied to divest surface owners of title to the Mineral Interest under their property if that title had already vested in the surface owners 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 that, even if they are, they cannot be a “savings event” under R.C. 5301.56 unless they were “recorded.”

II. Stipulated Facts

Although the Federal District Court in this case has asked this Court to decide issues of Ohio law, so that it can then apply that law to the stipulated facts of this case, the Petitioner Hans Corban believes it may be helpful to the Court to set forth the Stipulated Facts in this case, but Petitioner will not attach copies of the exhibits referred to in the Stipulated Facts to his Brief herein (with the exception of the 1984 Lease, which is Appendix Ex. 15).

1. This action involves a dispute over the ownership of the subsurface oil, gas, and other minerals underlying approximately 164.48 acres of real property located in Harrison County, Ohio (“the Property”), which Property is described in the Affidavit of Fact filed on April 30, 2009, and recorded at Vol. 179, page 1790, of the Harrison County Official Records. *See Ex. A.* [As noted above, Petitioner has not attached copies of the Exhibits to the Stipulated Facts.]
2. None of the language in this Stipulated Facts is intended to indicate or establish that any person or entity does or does not own the rights to the subsurface oil, gas, and other minerals underlying the Property, and the legal significance of any of the events and transactions described herein are being presented to this Court for resolution.
3. The Exhibits attached hereto are true and correct copies and are properly before this Court and need no further authentication.
4. On July 2, 1959, The North American Coal Corporation (a separate entity from the Defendant North American Coal Royalty Company) conveyed the Property to Orelen H. Corban and Hans D. Corban, reserving to itself, and its successors and assigns, the rights to the oil, gas, and other minerals underlying the Property. *See Ex. B.*
5. The North American Coal Corporation’s reservation of the rights to the oil, gas, and other minerals underlying the Property is a “Mineral Interest” within the meaning of the Ohio Dormant Mineral Rights Act.

6. On July 16, 1962, Orelen H. Corban conveyed his interest in the Property to Carol Ann Corban by Quit Claim deed filed on August 2, 1962, and recorded at Vol. 147, page 539, of the Harrison County Official Records. See Ex. C.
7. On August 25, 1967, Norman Sellevaag and Carol A. Sellevaag, husband and wife, formerly known as Carol A. Corban conveyed their interests in the Property to Hans D. Corban by Quit Claim deed filed on November 16, 1967, and recorded at Vol. 160, page 392, of the Harrison County Official Records. See Ex. D.
8. On April 14, 1980, Hans D. Corban conveyed his interest in the Property to Gretchen A. Corban by Quit Claim deed filed on July 1, 1980, and recorded at Vol. 201, page 310, of the Harrison County Official Records. See Ex. E.
9. On April 2, 1999, Gretchen A. Corban conveyed her interest in the Property to the Plaintiff Hans Michael Corban by Quit Claim deed that was subject to conditions, restrictions and easements if any, contained in prior instruments of record, filed on April 8, 1999, and recorded at Vol. 65, page 315, of the Harrison County Official Records. See Ex. F.
10. On or about January 30, 1974, The North American Coal Corporation entered into an oil and gas lease with National Petroleum Corporation for the oil and gas underlying the Property and other parcels not subject to this lawsuit ("1974 Lease"). The 1974 Lease was recorded on February 6, 1974 with the Harrison County Recorder at Vol. 53, Page 667. The 1974 Lease had a primary term of ten years. See Ex. G.
11. In or about April 1974, American Exploration Company applied for and obtained a permit to drill for oil and gas on lands covered by the 1974 Lease. See Ex. H.
12. On or about May 12, 1975, National Petroleum Corporation assigned the 1974 Lease to American Exploration Company. See Ex. I. The assignment was recorded on May 27, 1975 with the Harrison County Recorder at Vol. 55, Page 433.
13. On or about October 19, 1978, American Exploration Company assigned the 1974 Lease to C.E. Beck, acting for and on behalf of RSC Energy Corporation.

14. To date the parties have found no evidence that there was any actual production of oil, gas or other minerals from the Property pursuant to the 1974 Lease, or from any other lands covered by the 1974 Lease.
15. On or about January 16, 1984, The North American Coal Corporation entered into a new oil and gas lease with C.E. Beck, for the oil and gas underlying the Property and other parcels not subject to this lawsuit ("1984 Lease"). The 1984 Lease was recorded on February 6, 1984, with the Harrison County Recorder at Vol. 68, Page 597. The 1984 Lease had a primary term of five years. See Ex. J. [See Appendix Ex. 15.]
16. On or about January 26, 1984, RSC Energy Corp. obtained a permit to drill for oil and gas. See Ex. K.
17. On or about April 11, 1985, C.E. Beck assigned the 1984 Lease to Carless Resources, Inc. The assignment was recorded in Harrison County, Ohio, on May 30, 1985, Vol. 70, Page 317. See Ex. L.
18. The 1984 Lease provided that it would terminate, unless the lessee, on or before January 31, 1985, paid The North American Coal Corporation \$3,033.12 or drilled a well. Ex. J, ¶ 4. The 1984 Lease further provided: "In like manner and upon like payments or tenders, the commencement of a well may be further deferred for like periods of the same number of months successively during the term of this lease." *Id.* C.E. Beck or its assignee Carless Resources, Inc. made annual payments to North American Coal Corporation in the amount of \$3,033.12 in each of January 1985, 1986, 1987 and 1988. The oil and gas rights leased under the 1984 Lease reverted to The North American Coal Corporation on or about January 16, 1989.
19. To date the parties have found no evidence that there was any actual production of oil, gas, or other minerals, from the Property pursuant to the 1984 Lease, or from any other lands covered by the 1984 Lease.
20. On or about June 28, 1988, The North American Coal Corporation changed its name to Bellaire Corporation ("Bellaire"). A Certificate of Amendment regarding the name change was recorded in Harrison County, Ohio on July 7, 1992 in Vol. 240, Page 196. See Ex. M.

21. On or about November 24, 2008, Bellaire transferred its interest, if any, in the Property to Defendant North American Coal Royalty Company (“North American Royalty”) by a Quit Claim deed recorded in Harrison County, Ohio, on December 16, 2008, at Vol. 178, Page 1138. See Ex. N.
22. On or about January 28, 2009, North American Royalty executed a lease of the oil and gas rights underlying the Property and other parcels not subject to this lawsuit to Mountaineer Natural Gas Company (the “2009 Lease”). The 2009 Lease was recorded in Harrison County, Ohio, on May 5, 2010, at Vol. 183, Page 804. The 2009 Lease has a primary term of five years. See Ex. O.
23. On May 6, 2010, Mountaineer Natural Gas Company executed an Assignment of Oil and Gas Leases to Dale Property Services Penn, L.P. (“Dale Property”), which was recorded in Harrison County, Ohio on June 14, 2010 at Vol. 183, Page 2107. See Ex. P.
24. On or about October 5, 2010, Dale Property assigned its interest, if any, under the 2009 Lease, saving and excepting a 1.25% overriding royalty interest, to Ohio Buckeye Energy, L.L.C. (“Ohio Buckeye”), by assignment recorded in Harrison County, Ohio, on November 15, 2010, at Vol. 186, Page 96. See Ex. Q.
25. In December 2010 a well was drilled pursuant to the rights which the Defendants claim to have pursuant to the 2009 Lease. The well was completed in March 2011 and production from the well commenced in June 2011.
26. On or about June 13, 2011, Dale Property assigned the 1.25% overriding royalty interest in the Lease to Dale Pennsylvania Royalty, LP. The assignment was recorded on June 28, 2011 with the Harrison County Recorder at Vol. 189, Page 2267. See Ex. R.
27. On or about October 5, 2011, Ohio Buckeye transferred a portion of its interest, if any, in the Lease to Larchmont Resources, L.L.C. (“Larchmont”). The assignment was recorded on October 28, 2011, at Vol. 193, Page 271. See Ex. S.

28. Effective on or about November 1, 2011, Ohio Buckeye assigned a portion of its interest, if any, in the Lease to CHK Utica, L.L.C. (“CHK Utica”). The assignments were recorded in Harrison County, Ohio in 2012 and 2013.
29. On or about December 22, 2011, Ohio Buckeye merged with Chesapeake Exploration, L.L.C. (“Chesapeake Exploration”), thereby transferring Ohio Buckeye’s remaining interest in the Lease, if any, to Chesapeake Exploration. See Ex. T.
30. On or about December 30, 2011, Chesapeake Exploration transferred a portion of its interest, if any, in the Lease to TOTAL E&P USA, INC. (“TOTAL”). The assignment was recorded on May 4, 2012 at Vol. 197, Page 2350. See Ex. U.
31. Plaintiff Hans Michael Corban has not served any of the Defendants with notice under Ohio Rev. Code §5301.56(E)(1), as amended in 2006, of intent to declare the mineral interest in the Property abandoned, has not filed an affidavit of abandonment under Ohio Rev. Code §5301.56(E)(2) and has not caused the Harrison County Recorder to memorialize the record on which the severed mineral interest is based that the mineral interest has been abandoned.
32. To date the parties have found no evidence that, from July 2, 1959, until January 28, 2009, (a) the Defendants’ claimed Mineral Interest was used for underground storage, (b) a separate tax parcel was created for the Defendants’ claimed Mineral Interest, (c) any preservation claim was filed by the Defendants with regard to their claimed Mineral Interest, (d) any affidavit was filed with the county recorder relating to a drilling or mining permit issued with regard to the Defendants’ claimed Mineral Interest, or, (e) there was any actual production of the Defendants’ claimed Mineral Interest.

Having set forth the legal issues to be decided by this Court and the factual background, Petitioner will now address the legal issues being presented to this Court.

ARGUMENT

I. The 2006 Amendment Of R.C. 5301.56 May Not Retroactively Destroy Vested Rights

A. Introduction

This Court, in *Heifner v. Bradford* (1983), 4 Ohio St. 3d 49, found that title to a Mineral Interest was not extinguished, even though the chain of title regarding the surface rights did not mention or preserve the subsurface rights, because there was a separate chain of title vis-à-vis the subsurface rights. Accordingly, legislation intended to divest ownership of a Mineral Interest was introduced in Ohio in 1988¹, and the Proponents asserted that its very purpose was to vest ownership of the Mineral Interest in the surface owner *even when that interest was not extinguished by the Marketable Title Act*, because, pursuant to the holding in *Heifner*, the “Marketable Title Act is not generally effective as a means of eliminating severed mineral interests”:

It is apparent from the legislative history of the Ohio Marketable Title Act and subsequent interpretation by the courts and practitioners since its enactment that it was the general intent of the Act to apply to mineral interests except coal. [But] Simes and Taylor, in their Model [DMA] 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 title is formed.... 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 the severed mineral interest.... The Appellate Court reversed....

The Ohio Supreme Court overruled the Court of Appeals based upon a strict reading of the statute. Due to the obvious limitation in the [Marketable Title] 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.**

¹ See Appendix Ex. 14 for the version of the ODMA “As Introduced” in 1988.

See Proponent Testimony (Appendix Ex. 9, pp. 76-77). Thus, the very purpose of the Ohio DMA was to vest title to the Mineral Interest in the surface owner even though that Mineral Interest was not subject to divestment under the Marketable Title Act.

As will be shown below, the statute enacted by the Ohio General Assembly, R.C. 5301.56, entitled “Abandonment and Preservation of Mineral Interest,” which is commonly referred to as the Ohio Dormant Mineral Rights Act (“ODMA”), and which became effective on March 22, 1989, provided that surface owners are deemed to be the vested owner of the oil, gas, and other minerals, *i.e.*, the “Mineral Interest,” underlying their property unless certain events had occurred during the preceding twenty (20) years.²

Although this statute was amended in 2006 (Appendix Ex. 10) to eliminate the automatic vesting of the ownership of the Mineral Interest in the surface owner, and to create mechanisms by which vesting in the surface owner under the 2006 version could be defeated, this Court has repeatedly, and recently, held that statutory amendments may not retroactively destroy property rights that vested under the original, or unamended, version of the statute.

B. The 1989 Dormant Mineral Rights Act Is Self-Executing And Created Vested Rights

1. Vested Rights May Be Statutorily Created

This Court has recognized that “vested” rights may be statutorily created:

A “vested right” can “be created by common law or statute....”

State, ex rel. Jordan v. Indus. Comm. (2008), 120 Ohio St. 3d 412, 413. See also *Swartz v. Householder* (Ct. App. 7th Dist.), 2014-Ohio-2359, ¶29 (“[a] vested interest can be a property right created by statute....”).

² All references herein to the ODMA are to the 1989 version unless otherwise indicated. A copy of the legislation enacting the 1989 version of R.C. 5301.56 (1988 Ohio Laws File 314) is Appendix Ex. 2, and a clean copy of the 1989 version of R.C. § 5301.56 is Appendix Ex. 3.

2. **The DMA Vests Title To The Mineral Interest In The Surface Owner, After A Three year Grace Period, Unless Certain Statutory Savings Events Occurred**

The ODMA expressly provides that, unless certain events have occurred in the “preceding” twenty (20) years, ownership of a Mineral Interest “shall be deemed...vested in the owner of the surface”:

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

* * *

- (c) Within the preceding twenty years, one or more of the following have occurred:
 - (i) The mineral interest has been the subject of a **title transaction that has been filed or recorded....**,
 - (ii) There has been **actual production** or withdrawal of minerals from the land, **from lands covered by a lease** to which the mineral interest is subject....,
 - (iii) The mineral interest has been **used in underground gas storage operations....**,
 - (iv) A **drilling or mining permit** has been issued to the holder, provided that an affidavit that [sets forth various information] has been filed and recorded....,
 - (v) A **claim to preserve the interest has been filed** in accordance with Division (C) of this Section.
 - (vi) In the case of a separated mineral interest, a **separately listed tax parcel number has been created....**

See R.C. 5301.56.

3. **The DMA Provided For A Three Year Grace Period**

The easiest way for a person claiming a Mineral Interest to have prevented ownership thereof from vesting in the surface owner pursuant to the ODMA was to have simply filed a

claim to preserve that interest, and, in fact, the ODMA (R.C. 5301.56(B)(2)) expressly allowed persons claiming a Mineral Interest a three year grace period following its effective date in which to have done so (or to have undertaken some other statutory savings event):

A mineral interest shall not be deemed abandoned under Division (B)(1) of this section because none of the circumstances described in that Division apply, until three years from the effective date of this statute.

See also Swartz v. Householder (Ct. App. 7th Dist.), 2014-Ohio-2359, ¶13:

The statute provided the following grace period: “A mineral interest shall not be deemed abandoned...until three years from the effective date of the statute.” R.C. 5301.56(B)(2).

4. **The DMA Contemplates Successive Twenty Year Statutory Periods**

As shown above, the ODMA provides that if no statutory savings event occurred during the “preceding” twenty years, ownership of the Mineral Interest automatically vests in the surface owner. This twenty year time period is not static, such that it must be determined whether there was any twenty year period during which no statutory savings event occurred.

The conclusion that the DMA contemplates successive twenty year periods is mandated by the express statutory language that a Mineral Interest may be protected “indefinitely” by the “successive” filing of notices to preserve that interest:

A mineral interest may be preserved **indefinitely** from being deemed abandoned...by the occurrence of any of the circumstances described in Division (B)(1)(c) of this section, included, but not limited to, **successive** filings of claims to preserve mineral interests.... [Emphasis added.]

R.C. 5301.56(D)(1). If the DMA did not contemplate successive twenty year periods, it would not have provided for the “successive filings of claims to preserve mineral interests.”

Ohio courts have recognized that the DMA contemplates successive twenty year periods, which is sometimes referred to as a “rolling” twenty year period. For example, the Monroe County Court of Common Pleas has held that, when no statutory savings event occurred during the twenty years from 6/30/86 to 6/30/06 (the later date is the effective date of the 2006 amendment of the DMA), the mineral interest was abandoned:

This Court finds that the Defendants failed to satisfy any of the savings conditions set forth with the [1989 version of the] DMA from at least June 30, 1986 to June 30, 2006 (the last day the [1989 version of the] DMA was in effect).

Farnsworth v. Burkhardt (July 16, 2013), Monroe Cty. Ct. C.P., Case No. 2012-133 (Appendix Ex. 4). *See also Marty v. Dennis* (April 11, 2013), Monroe Cty. Ct. C.P., Case No. 2012-203 (Appendix Ex. 5) (p. 10):

[T]he Court finds that...during the twenty (20) year period immediately preceding every date in which the [1989] version of [the DMA] was effective, none of the savings events occurred....

The Jefferson County Court of Common Pleas has reached the same conclusion, and held that a “twenty year period of inactivity would have run, at the latest, on July 13, 1999.” *Shannon v. Householder* (July 17, 2013), Jefferson Cty. Ct. C.P., Case No. 12 CV 226 (Appendix Ex. 6) and *Swartz v. Householder* (July 17, 2013), Jefferson Cty. Ct. C.P., Case No. 12 CV 328 (Appendix Ex. 7) (affirmed at 2014-Ohio-2359). *See also Kross v. Ruff* (September 13, 2013), Jefferson Cty. Ct. C. P., Case No. 12 CV 303 (“the legislature intended for an event to occur every twenty (20) years”) (Appendix Ex. 8).

5. Vesting Under The ODMA Is Automatic Or Self-Executing

The plain language of the ODMA does not require any affirmative action for ownership of the Mineral Interest to be deemed vested in the surface owner, *i.e.*, the statute is self-executing

and automatically vests ownership of the mineral interest in the surface owner unless one of the statutory savings events that prevent such vesting has occurred:

Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies.... [Emphasis added.]

R.C. § 5301.56(B)(1). Ohio courts have held, therefore, that unless one of the statutory savings events occurred during the relevant preceding twenty year time period, ownership of the mineral interest is automatically vested in the surface owner, *i.e.*, that the 1989 ODMA is “self-executing”:

The 1989 DMA is the type of statute characterized by automatic lapsing and reversion to the surface owner known as a self-executing statute.

Swartz v. Householder (7th Dist.), 2014-Ohio-2359, ¶ 27. *See also Marty v. Dennis* (April 11, 2013), Monroe Cty. C.P. Ct., Case No. 2012-203 (Appendix Ex. 5):

By its very terms...the [1989] version of DMA is self-executing in the sense that nothing was required of the surface owner before the mineral interest was deemed abandoned....

6. **The Ohio General Assembly Rejected The Uniform DMA Act’s Requirement That The Surface Owner Take Action To Implement The Rights Created By That Statute**

In this regard, it should be noted that, attached to the Proponent Testimony proffered in support of the original enactment of the ODMA in 1988 (Appendix Ex. 9), was a copy of the Uniform DMA Act, which expressly required the surface owner to take affirmative action to “implement” the rights created by the legislation. Specifically, Section 4 of the Uniform Act mandates that the surface owner must file “an action to terminate a dormant mineral interest,” and, in Section 6(b), allows the owner of mineral rights that are “dormant” under the Uniform

Act to revive those dormant rights by paying the surface owner's expenses and attorney fees that were incurred in the action to terminate that dormant interest (Appendix pp. 88 and 95):

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 the payment into court for the benefit of the surface owner of the real property the litigation expenses....

As shown above, however, the Ohio General Assembly, in enacting the ODMA, rejected the requirement in the Model DMA that the surface owner take affirmative action for vesting to occur, and did not include any provisions requiring the surface owner to do anything whatsoever for ownership of the mineral interest to vest.

7. **Other States' DMAs Do Require The Surface Owner To Take Action To Implement The Rights Created By Their DMAs**

It should also be noted that other states, in enacting their respective DMAs, did incorporate provisions, similar to those in the Uniform DMA, that required the surface owner to take affirmative action to "implement" the rights created by the DMA, and that also allowed a dormant mineral interest to be revived. The Connecticut DMA, for example, requires the surface owner to file an action, and allows a late notice of intent to preserve the mineral interest:

(a) The owner of the fee simple title to any real property subject to a dormant mineral interest in any other person or entity may maintain an action to terminate such dormant mineral interest.... The action shall be brought in the manner of and requires the same notice as an action to quiet title to real property....

(b) In an action to terminate a mineral interest pursuant to sections..., the court, upon application of any person alleging to be an owner of a mineral interest in the land described in the complaint shall permit such person to record a **late notice** of intent to preserve such mineral interest...upon payment to the plaintiff of such litigation expenses as the court may award.... [Emphasis added.]

Conn. Gen. Stat. § 47-33q.

Similarly, the Oregon DMA mandates that the surface owner must take affirmative action, *i.e.*, publish a notice, to implement the rights created by the statute, and also allows the owner of a dormant mineral interest to revive it:

(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.

* * *

(8) If the owner of the land...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. [Emphasis added.]

Oregon Rev. St. § 517.180. The 1989 ODMA, as shown above, contains no such provisions.

8. **The DMAs Of Other States, Like Ohio's, Do Not Require A Surface Owner To Take Any Action To Implement The Rights Created By The DMA, And The Failure To Require Any Such Action Does Not Render Those DMAs "Deficient"**

The Respondents argued in the Federal District Court that the fact that the ODMA did not require the surface owner to take any action for title to the Mineral Interest to vest somehow rendered it deficient: "The [2006] amendments thus corrected deficiencies in the 1985 version of the statute, which did not include 'any express provision for its implementation.'" Respondents' Motion in the Federal District Court, p. 8. Simply stated, the fact that the Respondents believe that the surface owner *should* have been required to take affirmative action does not mean the absence of any such requirement renders the statute deficient, as shown by the fact that many

states, like Ohio, have rejected any requirement that the surface owner take any action to “implement” the rights created by their respective DMAs.

Ohio is not alone in providing for automatic or self-executing vesting. For example, the Georgia DMA (OCGA § 44-5-168), like the Indiana DMA at issue in the *Texaco* case, is “self-executing” and does not require the surface owner to take any affirmative action:

§ 44-5-168 **eschews affirmative acts** and contains a built-in, statutory notice to the mineral rights owner that he will lose his rights through nonuse.... The **self-executing** feature of this statute is similar to the Indiana Dormant Mineral Interests Act, which the United States Supreme Court found to provide sufficient notice to mineral owners that their property rights would extinguish after twenty years' nonuse.

Mixon v. One Newco, Inc., 863 F.2d 846, 849, 1989 U.S. App. LEXIS 362, 104 Oil & Gas Rep. 213 (applying Georgia law) (11th Cir. Ga. 1989). Similarly, in *McCoy v. Richards* (D.C. Ind. 1984), 623 F. Supp. 1300, 1307-08, the court expressly stated that the surface owner was not required to do anything to implement the rights created by the Indiana DMA:

Nothing in the statute requires the party to whom the interest will revert to take any other action to effectuate the lapse. [Emphasis added.]

See also *Ohning v. Buckskin Coal Corp.*, 528 N.E.2d 493, 494-495, 1988 Ind. App. LEXIS 661 (Ind. Ct. App. 1988):

When Buckskin's interest **automatically lapsed** in 1973, the landowners were under no duty to notify anyone of their reversionary interest; their titles to the minerals underlying their properties cannot be clouded by a failure to give notice when such notice is simply not required. [Emphasis added.]

The ODMA, therefore, is not somehow legally “deficient” because it did not require the surface owner to take any affirmative action for ownership of the Mineral Interest to vest in the

surface owner. In fact, as will be discussed below, the U.S. Supreme Court has approved of self-executing DMAs.

9. **The U.S. Supreme Court Has Recognized The Automatic (“Self-Executing”) Nature Of DMAs And Has Held That Such Automatic Vesting Of Ownership Of The Mineral Interest In The Surface Owner Is Constitutional**

The U.S. Supreme Court has addressed Indiana’s DMA, which it described as “self-executing,” and held that it was not statutorily, nor constitutionally, required that the surface owner take any action in order for ownership of the Mineral Interest to automatically vest in the surface owner. The Court held that Indiana’s two year grace period was sufficient to allow those claiming mineral interests to take action to protect that interest, that Indiana’s citizens are presumed to be aware of Indiana’s laws, and that, if any legal action was commenced to resolve any dispute whether the Mineral Interest had automatically vested in the surface owner, the person claiming the Mineral Interest would be entitled to show that one of the statutory savings events had occurred, *i.e.*, that ownership of the Mineral Interest did not vest in the surface owner:

We have concluded that appellants may be presumed to have had knowledge of the terms of the Dormant Mineral Interests Act.... The question then presented is whether, given that knowledge, appellants had a constitutional right to be advised -- presumably by the surface owner -- that their 20-year period of nonuse was about to expire.

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

Texaco, Inc. v. Short, 454 U.S. 516, 533-534 (U.S. 1982) (emphasis added).

The same is true with regard to the ODMA – although title to the Mineral Interest automatically vests in the surface owner if certain things had not occurred in the preceding twenty years, the prior owner of the Mineral Interest may contest, in a court of law, a surface owner’s claim that title to the Mineral Interest automatically vested in the surface owner pursuant to the terms of the statute, *i.e.*, may contest the surface owner’s position that no savings event had occurred in the preceding twenty years:

[T]he United States Supreme Court’s holding in *Texaco*... emphasized the difference between the self-executing feature of the dormant mineral act and subsequent judicial determination that a lapse did indeed occur.

Swartz v. Householder (Ct. App. 7th Dist.), 2014-Ohio-2359, ¶24.

10. Summary

In sum, pursuant to the original ODMA, if none of the savings events set forth in the ODMA occurred in the preceding twenty years, title to the Mineral Interest is vested in the surface owner.

C. **The 2006 Amendment Of The DMA May Not Retroactively Destroy Property Rights That Vested Under The Original Version Of The Statute**

1. Statutory Amendments May Not Retroactively Destroy Vested Rights

Although R.C. 5301.56 was amended in 2006 by Sub. H.B. 288 (Appendix Ex. 10), there is no language in Sub. H.B. 288 that gives any indication that it was to have any retroactive effect, such that, pursuant to R.C. 1.48, it may not be applied retroactively:

Because R.C. 1.48 establishes a presumption that statutes are prospective in operation, our inquiry into whether a statute may be applied retrospectively continues **only** after a threshold finding that the General Assembly **expressly intended** the statute to apply retrospectively.

Bielat v. Bielat, 87 Ohio St.3d 350, 353.

Moreover, pursuant to R.C. 1.58, even if the General Assembly had expressly indicated that the 2006 amendment applied retrospectively, any such retroactive application may not “affect any right...previously acquired” under the prior version of the statute:

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

In fact, as recognized by this Court, the Ohio Constitution forbids statutes from retroactively destroying vested rights:

[A] retroactive statute is substantive—and therefore unconstitutionally retroactive—if it impairs vested rights....

Bielat, 87 Ohio St.3d at p. 354.

Even more recently, this Court, in *Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St. 3d 103, 109, 2013-Ohio-4068, 2013 Ohio LEXIS 2148, 2013 WL 5357099 (Ohio 2013), addressed the issue of whether the prospective amendment of a statute may retroactively destroy rights that vested under the original version of the statute, and held that statutory amendments that are ostensibly prospective in operation nonetheless violate the Ohio Constitution’s prohibition of retroactive laws if that prospective operation would retroactively destroy rights that vested under the original statute prior to its amendment:

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.

Not surprisingly, therefore, the lower courts have recognized that a **vested** right to a Mineral Interest acquired under the ODMA prior to the effective date of the 2006 amendment may not be retroactively destroyed:

In our recent *Walker* case...[w]e concluded that the 1989 DMA can still be used after the 2006 DMA amendments because the prior statute was self-executing and the lapsed right automatically vested in the surface owner.

Swartz v. Householder (Ct. App. 7th Dist.), 2014-Ohio-2359, ¶ 28 (citing *Walker v. Shondrick-Nau, Executrix of the Estate of Noon* (Ct. App. 7th Dist.), 2014-Ohio-1499. See also *Wendt v. Dickerson* (February 21, 2013), Case No. 2012 CV 0135 (Appendix Ex. 11):

Any discussion of [the 2006 amendment of the DMA] is moot, because as of June 30, 2006 [its effective date], any interest of Defendant in the oil and gas had [already] been abandoned.

Accordingly, a surface owner's vested title to the Mineral Interest under his or her property that is acquired prior to the effective date of the 2006 amendment of the DMA may not be retroactively destroyed by that amended version.

2. **A Surface Owner Was Not Required To Seek Judicial Confirmation Of The Statutory Abandonment Prior To The 2006 Amendment Of The DMA**

The Respondents also argued in the Federal District Court that the Petitioner, despite the lack of any such requirement in the ODMA, had to seek judicial confirmation of the statutory abandonment of the mineral interest prior to the 2006 amendment of the DMA. Ohio law, however, provides that the failure to exercise a statutorily created vested right prior to the

amendment of the statute intended to divest that right is irrelevant, because the right was “vested”:

A failure to exercise a vested right before the passage of a subsequent statute, which seeks to divest it, in no way affects or lessens that right.

Scamman v. Scamman (C.P. Ct. Montgomery Cty., 1950), 90 N.E. 2d 617, 619.

As noted above, this is statutory law as well:

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. Similarly, as was also discussed above, the Ohio Constitution forbids legislation from retroactively destroying vested rights. *See Bielat, supra*, and *Longbottom, supra*. Thus, the vested rights acquired by a surface owner under the 1989 ODMA need not have been judicially confirmed prior to the 2006 amendment of the ODMA, and may not be retroactively destroyed by the 2006 amendment of that statute.

3. **If Ownership Of The Surface And The Mineral Interest Was Vested In The Same Person At The Time Of The 2006 Amendment, The ODMA, Pursuant To Its Express Language, Does Not Have Any Application Whatsoever**

The Respondents nonetheless argue that the Petitioner was required to comply with the 2006 amended version of the DMA because this action was commenced after its effective date. In making this argument, however, they implicitly assume that ownership of the Mineral Interest had not already vested in the Petitioner. If, however, the Petitioner’s argument is correct, such that ownership of a Mineral Interest did automatically “vest” in him prior to the 2006 amendment,³ then the ODMA would have no application whatsoever herein because, by its

³ The issue whether the facts show that the Mineral Interest vested in the Petitioner prior to the effective date of the 2006 amendment is not before this Court.

express terms, it only applies when “the mineral interest [is] held by any person other than the owner of the surface of the lands.” *See* R.C. ¶ 5301.56(B).

Simply stated, if the Petitioner is correct and ownership of the mineral interest vested in him prior to the 2006 amendment, then the amended ODMA would have no application herein – even though this action was commenced after its effective date – because, in both 2006, and at the time this action was commenced, ownership of the surface of the lands and Mineral Interest was no longer separated. In this light, it can be seen that, if ownership of the Mineral Interest vested in the Petitioner prior to the 2006 amendment, then, because the ODMA only applies when different entities own the surface and the mineral rights, it would not apply to the property at issue herein.

D. The Analysis In *Dahlgren v. Brown Farm Properties* Should Be Rejected

Despite this unambiguous statutory language, constitutional provisions, and clear case law, the Respondents have relied upon a Common Pleas Court opinion which concluded that the rights granted to a surface owner under the original ODMA were merely “inchoate,” *i.e.*, were not “vested”:

[A]t most the absence of those conditions [, *i.e.*, the absence of a statutory savings event,] created an inchoate right...[in the surface owner].

Dahlgren v. Brown Farm Properties (Nov. 5, 2013), C. P. Ct. Carroll Cty., Case No. 13CVH27445 (Appendix Ex. 12). The conclusion that the rights created by the 1989 Ohio DMA, which are expressly described as “vested,” are instead merely “inchoate,” is simply incorrect, as shown above and as will be discussed below.

1. **Inchoate Rights Are Incomplete And Exist In The Abstract**

Ohio courts have defined “inchoate” rights as rights which are incomplete, *i.e.*, rights that exist in the abstract, but which take effect only if some other action is taken or some other event occurs:

Inchoate.... Imperfect; partial, unfinished; begun, but not completed....

Black’s Law Dictionary (5th Ed.) *See also State v. White*, 132 Ohio St. 3d 344, 352 (“A right, not absolute but dependent upon its existence upon the action or inaction of another, is not basic or vested....”) (citations omitted). Thus, for example, the statutory right of dower is “inchoate,” *i.e.*, incomplete, because it takes effect only if the other spouse dies first:

Inchoate right is [defined] by Bouvier—“that which is not yet completed or finished”—and the author states that, “During the husband’s life, a wife has an inchoate right of dower,” citing 2 Blackstone, 130. It is, in short, merely the beginning of a right that does not ripen unless the one possessing such right in the property of another shall survive.

Long v. Long, 99 Ohio St. 330, 332-33, 124 N.E. 161, 162 (1919).

In the context of the 1989 version of the ODMA, neither the Respondents, nor the court in *Dahlgren*, have identified any other occurrence upon which the vesting of the ownership of the subsurface oil, gas, and other minerals, in the surface owner depends. In fact, as will be discussed below, the Respondents and the *Dahlgren* court both complain that the ODMA did not require any affirmative action for vesting to occur. Thus, the Respondents’ argument, and the *Dahlgren* court’s conclusion, that the rights created by the 1989 ODMA, contrary to its express language, were merely “inchoate” and were not “vested,” should be rejected by this Court.

2. **The *Dahlgren* Court Implicitly Recognized That The Rights Created By The DMA Are “Vested”**

The *Dahlgren* court implicitly recognized that the rights created by the 1989 ODMA were “vested,” because it, like the Respondents herein, acknowledged (or, more accurately, complained) that the surface owner was not required by the 1989 ODMA to do anything to “implement” that right:

The critical difference between the 1989 version and the 2006 amended version of the Dormant Minerals Act is the presence in the 2006 version and the absence in the 1989 version of any express provision for its implementation.

Dahlgren, pp. 11-12. This is exactly the point – because the surface owner was not required to do anything under the 1989 ODMA for ownership to vest in him or her, the right is “vested” not “inchoate.”

3. **The *Dahlgren* Court Did Not Believe The Express Provisions Of The ODMA Constituted Sound Public Policy, And Improperly Added Provisions To The ODMA**

The *Dahlgren* court, apparently, did not think that automatic vesting, as provided for in the 1989 ODMA, constituted sound public policy, and, therefore, judicially created an “implied” statutory requirement that the surface owner must have done something additional to “implement” the vested rights created by the statute:

Without any contrary statutory language, this Court concludes that the 1989 version impliedly required implementation before it finally settled the parties’ rights....

Dahlgren, p. 14.

It is well-settled, however, that courts are to apply the plain and express language of a statute, and may not add words thereto, or subtract words therefrom, on the basis of what they think the public policy ought to be:

Legislative intent must be determined from the language of the statute itself.... In determining intent, it is the duty of the court to give effect to the words used, **not to delete words used or insert words not used**.... [Emphasis added.]

Cline v. Ohio Bur. of Motor Vehicles, 61 Ohio St. 3d 93, 97, 573 N.E.2d 77, 80 (1991) (citations omitted). See also *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 2010-Ohio-1029, 125 Ohio St. 3d 280, 286, 927 N.E.2d 1092, 1101 (citations omitted):

It is not the role of the courts “to establish legislative policies or to second-guess the General Assembly’s policy choices. ‘[T]he General Assembly is responsible for weighing [policy] concerns and making policy decisions; we are charged with evaluating the constitutionality of their choices.’”

Thus, the *Dahlgren* court erred by judicially amending the 1989 ODMA to add an “implied” requirement that a surface owner take affirmative action for vesting to occur.

4. **The Dahlgren Court Failed To Recognize That The Ohio DMA Was Intended To Terminate Mineral Interests That Were Not Subject To Termination By The Marketable Title Act**

The *Dahlgren* court also tried to justify its decision on other grounds as well, and indicated that the surface owner’s argument that the Mineral Interest automatically vested in the surface owner conflicted with the public policy goal of “allowing persons to rely on a record chain of title,” and would mean that some Mineral Interests which would not be deemed abandoned by the Marketable Title Act would nonetheless be deemed abandoned under the ODMA, *i.e.*, would create “the anomaly that mineral rights are deemed abandoned [under the ODMA] when the owner has a statutorily preserved record marketable title.” *Dahlgren*, pp. 14-15. It is apparent, therefore, that the *Dahlgren* court failed to understand that, as shown above, *the very reason* the ODMA was originally enacted was to do just that, *i.e.*, extinguish mineral interests even when they were not subject to divestment under the Marketable Title Act.

The *Dahlgren*, p. 14, court also indicated that allowing vesting under the 1989 ODMA would conflict with the legislative purpose of the Marketable Title Act of “simplifying... land title transactions by allowing persons to rely on a record chain of title.” In fact, however, the purpose of the Marketable Title Act is to extinguish certain interests due to the lapse of time to improve the marketability of title – not merely to make title searches easier:

The purpose of the MTA is to improve marketability of title by extinguishing certain outstanding claims due to a lapse of time.

Murray Energy Corp. v. City of Pepper Pike, 2008-Ohio-2818, ¶ 23 (citing *Minnich v. Guernsey Sav. & Loan Assn.* (1987), 36 Ohio App. 3d 54, 55). Thus, the *Dahlgren* court’s conclusion that allowing vesting under the 1989 ODMA would somehow frustrate the purpose of the Marketable Title Act should be rejected.

5. **The Dahlgren Court Erroneously Held That Advance Notice That A Mineral Interest Was Subject To Statutory Abandonment Is Constitutionally Required**

The *Dahlgren* court was also confused regarding the issue of constitutionality. It first correctly noted that the U.S. Supreme Court had held that the subsurface owner was entitled to notice of, and an opportunity to participate in, any legal action filed by a surface owner seeking a judicial declaration of statutory abandonment:

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

Id., at pp. 16-17. The *Dahlgren* court then, however, mistakenly indicated that the U.S. Supreme Court had also held that the subsurface owner was entitled to advance notice that its mineral interest was subject to statutory abandonment:

Without **advance notice and** an opportunity to be heard, statutory abandonment may [be unconstitutional]. [Emphasis added.]

Dahlgren, p. 16.

The U.S. Supreme Court, in *Texaco v. Short* (1982), 54 U.S. 516, as discussed above, held that there were two issues: (1) was the subsurface owner entitled to advance notice that the DMA applied and would extinguish its rights, and (2) was the owner of the subsurface oil, gas, and other minerals, entitled to contest, in a court of law, whether statutory abandonment had actually occurred. As was explained in *Rocket Oil & Gas Co. v. Donabar*, 2005 OK CIV APP 111, 50-53, 127 P.3d 625, 2005 Okla. Civ. App. LEXIS 99, 162 Oil & Gas Rep. 708 (Okla. Ct. App. 2005), the U.S. Supreme Court held that the owner of the Mineral Interest was presumed to know the law of the state, and, therefore, was *not* entitled to advance notice from the surface owner that the DMA applied and extinguished his or her rights, but was entitled to notice of, and an opportunity to contest, any action filed in a court of law seeking judicial confirmation of the statutory abandonment:

Defendant argues that application of the Act denies them procedural due process in violation of U.S. Const. amend. XIV, § 1, and Okla. Const. art. II, § 7, **claiming that to receive full protection, the Act should require notice that their interest is going to be extinguished....**

***Defendant [argues] that the State of Oklahoma should have required some form of notification...that [its] interest is about to be extinguished. **Considering notice by the State and notice by the surface owner as two different "notice" issues**, the Court in *Texaco* held, as to first issue, that "it is well established that persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property" and "the 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms." 454 U.S. at 532, 102 S. Ct. at 793.

Concerning the pre-lapse notice by surface owners, the Court in *Texaco* held, "[their] claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run." 454 U.S. at 536, 102 S. Ct. at 796. Based thereon, we find Defendant's due process argument similarly unpersuasive.

The *Dahlgren* court, therefore, was incorrect in its assertion that the U.S. Supreme Court held in the *Texaco* case that the owners of subsurface rights are constitutionally entitled to advance notice that title to the Mineral Interest would automatically vest in the surface owner.

In fact, the Respondents in the instant case have conceded that the U.S. Supreme Court, in *Texaco*, did not require, as erroneously held by the *Dahlgren* court, that they were entitled to advance notice that their mineral interest was subject to statutory abandonment:

[Respondents] do not argue, as did the mineral owners in *Texaco*, that they were entitled to advance notice...that the twenty-year DMA period was about to expire.

Respondents' Memorandum Contra Summary Judgment filed in the Federal District Court, p. 10.

6. The Dahlgren Court Also Misconstrued The Word "Abandoned"

The *Dahlgren* court also placed great weight on the fact that the Ohio Marketable Title Act uses the words "null and void," while the DMA uses the word "abandoned." There is no basis for such a distinction, because abandoned rights are null and void. *See e.g. Douce v. Donaldson*, 1978 Ohio App. LEXIS 8130 *3 (Ct. App. Wayne Cty.) ("the plaintiffs prayed for a declaration that the lease...be declared abandoned, null and void"). Further, the 1989 Ohio DMA did not just indicate that the subsurface owner's rights were "abandoned" – it expressly specified that the subsurface rights "vested" in the surface owner. There is nothing ambiguous about this language.

E. Summary

In sum, Petitioner respectfully submits that, in response to the first certified question, this Court should hold that, if title to a Mineral Interest automatically vested in a surface owner under the 1989 ODMA and prior to its amendment in 2006, then the 2006 amendment has no application and may not retroactively divest the surface owner of his or her vested title to the Mineral Interest.

II. 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, Even If They Are, They Are Not “Savings Events” Under Either Version Of R.C. 5301.56 Unless They Were “Recorded”

A. Introduction

Although the Respondents herein argued that a 1984 oil and gas lease (Appendix Ex. 15), and its 1985 assignment, both of which were recorded, were “title transactions,” that argument, if correct, would not defeat the Petitioner’s claim that title to the Mineral Interest vested in him under the original version of the ODMA, because there was still a twenty year period (1984-2004 or 1985-2005) after the recordation of the execution and assignment of the 1984 lease 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.

In the instant case, it is stipulated that the lessee under the 1984 oil and gas lease undertook no production activity, such that it would have automatically lapsed after one year, but that the lessee forestalled the expiration of the 1984 oil and gas lease until 1989 by making annual delay payments 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.”

As noted by the Federal District Court in this case, the issue whether the expiration of an oil and gas lease constitutes a “title transaction,” *i.e.*, a statutory savings event under 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 authority discussing whether delay payments are “title transactions,” it is helpful to first discuss the larger issue whether oil and gas leases, or their expiration, can be considered “title transactions.” 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.”

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

1. R.C. 5301.47 Makes No Reference To Oil And Gas Leases

A “title transaction” is defined by R.C. 5301.47(F), and refers to transactions affecting “title” to an “*interest in land*” by “*will or descent*” or 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 while an oil and gas lease may give the

lessee title to any oil and gas actually removed from the land, it does not create “*an interest in real property*,” *i.e.*, that an oil and gas lease is not a “title transaction” because it does not affect “*title to an interest in land*”:

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 (Appendix Ex. 13).

The Respondents, however, relied upon a decision from the U.S. District Court for the Northern District of Ohio, which was based upon that court’s prior holding in *Binder v. Trinity*, 2012 U.S. Dist. LEXIS 76183, and which rejected the Southern District’s analysis in *Wellington*. But, in so doing, the Northern District failed to recognize that the Ohio definition of a “title transaction” requires the transaction to affect title to “land,” not title to “oil and gas” or to a “Mineral Interest”:

Moreover, Plaintiff’s reliance on *Wellington Resource Group LLC v. Beck Energy Corp.*, 2013 U.S. Dist. LEXIS 134838, 2013 WL 5311412 (S.D. Ohio Sept. 20, 2013) also does little to assist Plaintiff’s arguments. In *Wellington*, the district court concluded: “In essence, this Court reaffirms its prior conclusion in *Frederick*, where it stated that ‘Ohio courts, if given the opportunity to do so, would characterize the property interests involved [here] as being like or similar to the interest recognized under Oklahoma law,’ and common to many oil-producing states, and hold that oil and gas leases are not a grant of real property.” 2013 U.S. Dist. LEXIS 134838, [WL] at *7. Plaintiff again incorrectly assumes that an actual transfer of real property is required under the ODMA when the plain language of the statute requires far less.

Even if this Court were to agree with the analysis in *Wellington* and ignore the contrary conclusion reached by a member of this District in *Binder v. Trinity OG Land Development and Exploration*, 2012 U.S. Dist. LEXIS 76183, 2012 WL 1970239, at *3 (N.D. Ohio May 31, 2012), it would not aid Plaintiff's claim. Even if Defendant's property interests through the lease are something less than a grant of real property, those interests quite clearly still **affect title to the mineral rights in the property.**

McLaughlin v. CNX Gas Co., 2013 U.S. Dist. LEXIS 174698, 8-9 (N.D. Ohio Dec. 13, 2013).

The Northern District in *McLaughlin*, therefore, incorrectly held that a transfer that affected title to the "mineral rights" was the same as a transfer that affected title to the "land," a conclusion which the Southern District, after an exhaustive review of Ohio law, has rejected:

Ohio courts have treated oil and gas leases as different from an interest in real property....

Wellington, supra. In fact, in *Wellington*, the court considered, and rejected, the abbreviated analysis of the Northern District in the *Binder* decision:

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 U.S. Dist. LEXIS 76183, 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*.**

Wellington Res. Group LLC v. Beck Energy Corp., 2013 U.S. Dist. LEXIS 134838, 21-22 (S.D. Ohio Sept. 20, 2013). Accordingly, the Respondents' reliance upon the holding in *McLaughlin* is misplaced.

The Respondents also attempted to distinguish the instant case from the facts in *Wellington*, and the Ohio cases it relied upon, such as *Back v. Ohio Fuel Gas Co.* (1953), 160 Ohio St. 81, by arguing that a contract that leases only the oil and gas under the property creates

a “license” to come onto the real property, while a contract that leases the land, for the purpose of exploring for oil, gas and other minerals, is, not surprisingly, a lease of the land. But, regardless whether the contract is described as a “lease” or a “license,” the fact is, as argued above, that it does not affect “title” to “land.” Further, as will be shown below, the 1984 Lease in the instant case did not lease the “land” to the Respondents – it only granted them the right to come onto the property to engage in conduct necessary to explore and drill for oil, gas, and other minerals.

The Respondents argued that the 1984 Lease in the instant case leased the actual land, not just the oil and gas rights:

The 1984 Lease thus provided that the lessor “by these presents does grant, demise, lease and let unto lessee, exclusively, for the purpose of prospecting and exploring by geophysical and other methods, drilling, mining, operating for and producing oil and gas...all that certain tract of land....

Respondents’ Memo. in the Federal District Court, p. 16. The Respondents then argue that, in *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161 (1896), and *Harris v. Ohio Oil Co.*, 57 Ohio St. 118 (1987), this Court held that a contract that leased the land, for the purpose of exploring and drilling for oil, gas, and other minerals, was more than a mere license:

The documents in *Woodland Oil* and *Harris* specifically “granted, demised and *let the lands* described to the lessee.... The document in *Back*, by contrast, purported to convey only the “oil and gas in and under” the lands – not the lands themselves....

Respondents’ Memo. in the Federal District Court, pp. 15-16.

In the instant case, however, the 1984 Lease did not lease the land to the Respondents, it merely granted them the right, *i.e.*, a license, to go onto the land to do the things necessary to explore and drill for oil, as shown by the language which the Respondents conveniently omitted from their quotation of the language of the 1984 Lease:

The lessor...has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto lessee, exclusively, for the purposes of prospecting and exploring by geophysical and other methods, drilling, mining, operating for and producing oil and gas **and of laying pipelines, building and maintaining roadways and of building tanks, power stations and structures thereon to produce, treat, save, care for and remove said production**, all that certain tract of land....

See 1984 Lease, Appendix Ex. 15. Thus, the 1984 Lease did not lease the land to the Respondents, it merely gave them a license to come onto the land to take **only** those actions necessary to explore and drill for any oil, gas, or other minerals under the property.

This conclusion is supported by the fact, which the Respondents also fail to mention, that, in *Harris*, the finding that the contract was a lease of the land, with the right to explore for oil thereon, rather than merely the grant of a license to come onto the property to explore and drill, was supported by the fact that the lessee not only actually took possession of the land, it actually produced oil and gas:

By the terms of the lease in this case, the lessor for a valuable consideration granted, demised and let the lands described to the lessee, for the purpose and with the exclusive right of drilling and operating for petroleum oil and gas, for five years, and as much longer as oil and gas are found in paying quantities. In this case, as in the case of *Crawford v. Woodland Oil Company*, 55 Ohio St., 161, it is the land that is granted demised, and let for the limited purpose and period named in the lease. An instrument in such form is more than a mere license; it is a lease of the land for the purpose and period limited therein, and the lessee has a vested right to the possession of the land to the extent reasonably necessary to perform the terms of the instrument on his part.

In this case, **possession was delivered to the lessee** and operations commenced, wells drilled, and oil produced in paying quantities, and in such cases it cannot be doubted that the lessee has a vested, though limited, estate in the lands for the purposes named in the lease. *Venture Oil Company v. Fritts*, 152 Pa. St., 451. [Emphasis added.]

Harris v. Ohio Oil Co., 57 Ohio St. 118, 129-130, 48 N.E. 502, 1897 Ohio LEXIS 127 (Ohio 1897). In the instant case, on the other hand, the Respondents never took “possession” of the land pursuant to the 1984 Lease, and never actually conducted any production activities on that land.

It should also be noted that Ohio law provides that the oil and gas that is removed is personal, not real, property. *See e.g.* 60 Ohio Jur. 3d Mines and Minerals § 8 (“when oil and gas are produced on the surface, they became...personal property”) (*citing Nonamaker v. Amos* (1905), 73 Ohio St. 163). Thus, even if an oil and gas lease may create some sort of ownership interest, *i.e.*, title, in the lessee in any oil and gas (personal property) that is ultimately removed from the real property, it does not give the lessee “title to an interest in land,” and should not be characterized as a “title transaction.”

The Respondents nonetheless argue that oil and gas leases are “title transactions” because an oil and gas lease “convey[s] ownership of the oil and gas estate.” Respondents’ Motion in the Federal District Court, p. 14. Thus, the Respondents implicitly acknowledge that an oil and gas lease creates an interest in the “oil and gas,” not the land, which, as shown above, is personal property, not real property. *See also* p. 15:

Because the [1984] lease and related assignments are conveyances of the **oil and gas estate**, the mineral interest was the subject of a recorded title transaction.... [Emphasis added.]

The Respondents, therefore, simply fail to acknowledge that the Ohio statutory definition of “title transaction” does not include oil and gas leases:

[T]he mineral lease [was not an] activit[y] which under the statute prevented the abandonment of said mineral interests.

Shannon v. Householder (July 17, 2013), Jefferson Cty., C.P. Ct., Case No. 12 CV 328 (Appendix Ex. 6). *See also* Baldwin’s Ohio Practice, Ohio Real Estate Law, § 15:7:

A list of those instruments set forth in R.C. 5301.47(F) that qualify as “title transactions” does not include a lease for an oil and gas or other minerals....

Accordingly, the Respondents’ argument that oil and gas leases are “title transactions” should be rejected.

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

In evaluating what effect, if any, the mere existence of an oil and gas lease should have, 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) ODMA, and the Ohio legislation “As Introduced,” expressly identified the mere execution of an oil and gas lease as a statutory savings event.

The Model DMA, § 4, provides that a Mineral Interest is “dormant” if it is “unused,” and that “any of the following actions...constitutes use of the entire mineral interest”:

- (3) Recordation of an instrument that...leases the interest.

See Appendix Ex. 9, p. 89 (Proponent Testimony with Uniform DMA attached). Similarly, the ODMA, “As Introduced,” provided that “any mineral interest...shall be deemed abandoned and vested in the owner of the surface if neither of the following is true....”:

- (2) Within the preceding twenty years...:

- (a) The interest has been...leased....

See ODMA (S.B. 223) and the version of § 5301.56 “As Introduced” (Appendix Ex. 14). Thus, the ODMA “As Introduced,” and the Model DMA, both expressly provided that the mere execution of an oil and gas lease was a statutory savings event.

Not surprisingly, therefore, some of the DMAs enacted by other states expressly provide, consistent with the Model DMA, that the mere 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, rejected the language in the Model DMA and the ODMA “As Introduced” by its proponents to the effect 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 Ohio statute.

3. The Respondents’ Position Would Render Parts Of The ODMA Meaningless

If, as the Respondents contend, the mere execution of an oil and gas lease was a statutory savings event, that would render the statutory reference to “actual production” superfluous and deprive it of any meaning or effect – if the mere existence of an oil and gas lease is a statutory savings event in and of itself, as the Respondents contend, there would be no need to specify that there must be “actual production” pursuant to such a lease for it to be a savings event, because the mere existence of the lease would be sufficient. Thus, to interpret the ODMA to provide that a mere lease, unaccompanied by “actual production,” was a statutory savings event, would

violate the rule of statutory construction that statutes should be construed in a way that gives meaning to each and every word used by the General Assembly:

There is a presumption that every word in the statute is designed to have legal effect, and every part of the statute must be regarded where practicable so as to give effect to every part of it. *See Richards v. Market Exchange Bank Co.* (1910), 81 Ohio St. 348, 363, 90 N.E. 1000, 1003.

Shump v. First Continental-Robinwood Assocs., 138 Ohio App. 3d 353, 360, 741 N.E. 2d 232, 237, 2000 Ohio App. LEXIS 6297, 11-12 (Ohio Ct. App., Montgomery County 2000).

4. **Some States' Statutory Definition Of A "Title Transaction" Expressly Include Leases**

Some of the DMAs enacted by other states, on the other hand, instead of listing in the text of the DMA (like the model DMA) the types of transactions that constitute a statutory savings event, simply state that a "title transaction" is a statutory savings event, and then, like the Ohio legislation, provide a separate statutory definition of "title transaction." Importantly, however, some of these other states, unlike Ohio, then 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," on the other hand, as shown above, does not define any "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," and this Court should hold that there must

have been “actual production” under an oil and gas lease for it to be a statutory savings event, as specified by the General Assembly.

5. **The General Assembly Could Not Have Assumed That “Title Transactions” Included Oil And Gas Leases**

The Respondents turn this argument on its head and assert that the fact that version of the ODMA “As Introduced” expressly referred to leases shows that the General Assembly intended for leases to be statutory savings events, and that the General Assembly then intended for the phrase “title transaction” to simply stand as a shorthand substitute for the list of transactions set forth in the “As Introduced” version that will serve as statutory savings events, and, therefore, intended for that phrase to include leases:

The legislation thus simply replaced a specific enumeration of various types of title transactions with a single general term, “title transactions,” that encompasses leases, mortgages, conveyances, and other transfers; it in no way eliminated leases from the scope of this provision.

Respondents’ Memo. in the Federal District Court, p. 11.

This argument not only ignores the simple fact that the statutory definition of “title transaction” makes no reference whatsoever to leases of any kind, let alone oil and gas leases, it also ignores the commentary in support of the Uniform Dormant Mineral Interests Act, which noted that the issue whether oil and gas leases created title to real estate varied from state to state:

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.

See Appendix Ex. 9 (Uniform Dormant Mineral Interests Act, Prefatory Note) (App., p. 81).

Given this uncertainty, it is not plausible that the General Assembly, if it truly intended for oil and gas leases to qualify as statutory savings events under the ODMA, would have eliminated

the specific reference thereto that was contained in the version of the ODMA as introduced. This is especially true given that there was no Ohio case law in effect at the time of the enactment of the original DMA that held that oil and gas leases are “title transactions.” Thus, there is no basis for the Respondents’ assertion that the General Assembly, in deleting the reference to oil and gas leases from the “As Introduced” version of the ODMA, assumed and intended that oil and gas leases constituted “title transactions.”

C. 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 nothing else was recorded prior to the effective date of the 2006 amendment of the ODMA.⁴ 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 in 2006.

The Respondents, therefore, have argued that the critical date is not the date that they recorded the lease or the assignment, it is the date that the 1984 lease 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.

⁴ The Parties stipulated that no other statutory savings event occurred during this time period. See ¶ 32 of the Stipulated Facts set forth above.

Respondents' Motion for Summary Judgment in the Federal District Court, p. 17. The Respondents have thus far failed to proffer any Ohio legal authority in support of this assertion, which failure flows from the fact that neither the 1989 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 ODMA (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 and is vested in the surface owner. 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,” it is undisputed 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.

The Respondents do refer this Court to a Michigan case, *Energetics v. Whitmill*, 442 Mich. 38, 497 N.W. 2d 497 (1993), which held that the lapse of an oil and gas lease was a “transfer” of the mineral interest, which was statutorily defined as a savings event by the Michigan DMA:

The [*Whitmill*] court found...that when the lease expired, the oil and gas interest had been “transferred” within the meaning of the Michigan statute.

Ricks v. Vap, 2010 Neb. LEXIS 74, 784 N.W. 2d 432, 436. This decision, of course, is based upon the language of the Michigan DMA which, as noted above, includes the execution of a lease, in and of itself, as a statutory savings event.

Accordingly, the Supreme Court of Nebraska, in construing its own DMA, recently refused to follow the holding in that Michigan case because of differences in the language of the Nebraska and Michigan DMAs:

The [*Whitmill*] court found, however, that when the lease expired, the oil and gas interest had been “transferred” within the meaning of the Michigan statute.

But the Michigan court's reasoning was grounded in the unique language of the Michigan statute.... In other words, the *Whitmill* court's reasoning regarding whether the mineral interest had been “transferred” is inapplicable under Nebraska's statute.

Ricks, 784 N.W. 2d, at p. 436.

Similarly, in *Wheeling & L.E. Ry. v. Toledo Railway & Terminal Co.*, 23 Ohio C.D. 303 (1907), the court recognized that when Ohio has a law that is similar to the law of another state, the decisions of the courts of that other state may be instructive as to the proper construction of the Ohio statute, *unless the phraseology of the Ohio law is different*, which is an indication that a *different result* was intended:

It is said that the Ohio legislators have adopted the legislation of the older state and that the phraseology of the Pennsylvania statute had received interpretation by the courts of that state which was presumably adopted with the enactment of our statute.

Before considering this contention, but assuming the general correctness of the principle claimed, which is recognized by the courts of Ohio in numerous cases, let us examine the phrase as used in the Ohio statute, comparing it with the one of Pennsylvania, in an effort to ascertain whether or not they are equivalent.

* * *

In the Pennsylvania statute the word “practicable” is qualified by the adverb ““reasonably”; not so in the Ohio enactment....

It is not an unfamiliar principle of statutory construction, and one which appeals to our common intelligence, that where one act is copied or amended with any material change of phraseology, the inference is to be drawn that the change was intended. The case of *Bloom v. Richards*, 2 Ohio St. 387, 388.402, is an instance. Judge Thurman in that case used these words: “It is a general presumption that every word in a statute was inserted for some purpose”; and again, “When a considerable change is made in the

phraseology of a former law, the inference is reasonable that a change of meaning was also intended.”

Wheeling & L.E. Ry. v. Toledo Ry. & Terminal Co., 1907 WL 1179 (Ohio Cir. Ct. Nov. 9, 1907) *aff'd sub nom. Wheeling & L. E. R. Co. v. Toledo Ry. & Terminal Co.*, 81 Ohio St. 540, 91 N.E. 1143 (1910) and *aff'd sub nom. Wheeling & L. E. R. Co. v. Toledo Ry. & Terminal Co.*, 81 Ohio St. 550, 91 N.E. 1143 (1910). Thus, the fact that the language of the Ohio DMA differs from that of the Michigan DMA and the Uniform DMA shows that a different result, not the same result, was intended.

D. Delay Payments Under An Oil And Gas Lease Are Not “Title Transactions,” And, Even If They Are, They Must Have Been Recorded To Be A Savings Event

The same is true with regard to the delay payments made under the 1984 lease. Even assuming, *arguendo*, that the private act of 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 have offered no authority in support of such a proposition – it is undisputed that the delay payments (the alleged “title transactions”) were never publicly recorded. Accordingly, the Petitioner Hans Corban respectfully requests this Court, in response to the second certified question, 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 to hold (1) that the 2006 amendment of R.C. 5301.56 may not retroactively divest surface owners of the title to the Mineral Interest under their property if that title vested in the surface owners prior to the effective date of the 2006 amendment, and (2) 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.

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EXHIBITS

	<u>App. Page</u>
1. Opinion and Order of Federal District Court	1
2. Legislation enacting the 1989 version of R.C. 5301.56 (1988 Ohio Laws File 314).....	24
3. Clean copy of 1989 version of R.C. § 5301.56	30
4. <i>Farnsworth v. Burkhart</i> (July 16, 2013), Monroe Cty. Ct. C.P., Case No. 2012-133	32
5. <i>Marty v. Dennis</i> (April 11, 2013), Monroe Cty. C.P. Ct., Case No. 2012-203	44
6. <i>Shannon v. Householder</i> (July 17, 2013), Jefferson Cty. Ct. C.P., Case No. 12 CV 226	56
7. <i>Swartz v. Householder</i> (July 17, 2013), Jefferson Cty. Ct. C.P., Case No. 12 CV 328	64
8. <i>Kross v. Ruff</i> (September 13, 2013), Jefferson Cty. Ct. C. P., Case No. 12 CV 303	71
9. Proponent Testimony proffered in support of the original enactment of the ODMA in 1988, with attached copy of the Uniform DMA Act (Ex. 14 is the ODMA “As Introduced” by its proponents)	76
10. Sub. H.B. 288 (Legislation amending R.C. § 5301.56, Eff. June 30, 2006)	99
11. <i>Wendt v. Dickerson</i> (February 21, 2013), Case No. 2012 CV 0135	112
12. <i>Dahlgren v. Brown Farm Properties</i> (Nov. 5, 2013), C. P. Ct. Carroll Cty., Case No. 13CVH27445	135
13. <i>Wellington Resource Group, LLC v. Beck Energy Corp.</i> (September 20, 2013), Case No. 2:12-CV-104	155
14. ODMA (S.B. 223) “As Introduced” in 1988 by its proponents (with LSC analysis)	167
15. 1984 Lease	178