ORIGINAL

IN THE SUPREME COURT OF OHIO

HANS MICHAEL CORBAN,

Petitioner,

v.

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

Respondents.

Case No. 2014-0804

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

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

APPENDIX TO BRIEF OF PETITIONER HANS MICHAEL CORBAN

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Hans Michael Corban,

Plaintiff,

v. **Case No. 2:13–cv–246**

Chesapeake Exploration, L.L.C. *et al.*, **Judge Michael H. Watson**

Defendants.

OPINION AND ORDER

This diversity action requires the Court to determine which parties are entitled to the oil, gas, and mineral rights that lie below about 164.5 acres of property located in Harrison County, Ohio ("the Property"). The parties have filed cross-motions for summary judgment. ECF Nos. 35, 36. In addition, Plaintiff filed a Motion for Leave to File Supplemental Authority, which Defendants do not oppose, and Defendants also move for leave to file supplemental authority. ECF Nos. 41, 43. For the following reasons, the Court **GRANTS** the parties' respective motions for leave to file supplemental authority, **DEFERS** final ruling on the summary judgment motions, **CERTIFIES** two questions of Ohio law to the Supreme Court of Ohio, and **STAYS** the proceedings pending the outcome of certification.

I. PROCEDURAL HISTORY

On February 12, 2013, Plaintiff Hans Michael Corbin ("Plaintiff") filed a complaint against Defendants Chesapeake Exploration, LLC ("Chesapeake"), CHK Utica, LLC ("CHK"), Total E&P USA, Inc. ("Total"), and North American Coal Royalty Company ("North American") in the Common Pleas Court of Harrison County, Ohio, seeking a declaratory judgment, to quiet title to the oil and gas rights under his surface estate, a permanent injunction, and alleging conversion. Defendants removed the case to federal court on March 15, 2013 on the basis of diversity jurisdiction. Defendants answered with counterclaims against Plaintiff seeking declaratory judgment and to quiet title in their favor. Countercls., ECF Nos. 6, 7. Plaintiff filed an Amended Complaint on June 13, 2013, adding Dale Pennsylvania Royalty, LP ("Dale Pennsylvania"), and Larchmont Resources, LLC ("Larchmont") as defendants as well as a claim for unjust enrichment. Discovery ensued, and Cross motions for summary judgment have been filed.

II. FACTS

Both Plaintiff and Defendants set forth the undisputed facts in their respective summary judgment motions. Given the facts, however, the parties dispute who is the legal owner of the oil, gas, and mineral rights beneath the Property.

In July of 1959, The North American Coal Corporation ("NACoal") conveyed the Property to Orelen H. Corban and Hans D. Corban, excepting all

oil, gas, and mineral rights (the "Mineral Rights")[1] to itself and its successors and assignees. The Property has been frequently transferred since 1962.

A. The Surface Rights

In 1962, Orelen Corban conveyed his interest in the Property to Carol Ann Corban by quit claim deed. Carol Corban and her husband then conveyed their interest in the Property to Hans D. Corban by quit claim deed in 1967. This transaction made Hans D. Corban the sole owner of the surface rights in the Property. In 1980, Hans D. Corban conveyed the Property to Gretchen A. Corban by quit claim deed. Gretchen Corban then conveyed the Property to Plaintiff Hans Michael Corban in 1999 via a quit claim deed that stated it was "subject to conditions, restrictions and easements if any, contained in prior instruments of record."

B. The Mineral Rights

As noted above, NACoal reserved its interest in the Mineral Rights in the 1959 transaction to Orelen and Hans D. Corban. In January 1974, NACoal entered into an oil and gas lease for a primary term of ten years with National Petroleum Corporation ("the 1974 lease"). The lease was recorded on February 6, 1974. American Exploration Company obtained a permit to drill for oil and gas on lands covered by the 1974 lease in April of 1974, and in May of 1975, National Petroleum Corporation assigned the lease to American Exploration

[1] The Court refers to mineral interests generally as "mineral interests" and to the specific mineral interests at issue in this case as "Mineral Rights."

Company. American Exploration Company then assigned the 1974 lease to C.E. Beck, acting for and on behalf of RSC Energy Corporation, in 1978. There was no production under the 1974 lease, and the Mineral Rights presumably reverted back to NACoal at the end of the lease in 1984.

NACoal then entered into a second oil and gas lease for a primary term of five years with C.E. Beck, and that lease was recorded in February 1984 (the 1984 lease"). RSC Energy Corp. obtained a permit to drill for oil and gas in January of 1985.[2] C.E. Beck thereafter assigned the 1984 lease to Carless Resources, Inc. which assignment was recorded in May of 1985. There was no production under the 1984 lease, but C.E. Beck or Carless Resources, Inc. paid the requisite delay rentals to NACoal throughout the primary term of the 1984 lease (i.e., in 1985, 1986, 1987, 1988). Following the expiration of the 1984 lease, the ownership of the oil and gas rights reverted back to Bellaire, formerly known as NACoal, in January 1989.

Bellaire then transferred the mineral estate to North American in 2008 by quit claim deed.

In January 2009, North American leased the oil and gas rights to Mountaineer Natural Gas Company ("Mountaineer"), which lease was recorded in 2010 ("the 2009 lease"). In May 2010, Mountaineer assigned the 2009 lease to Dale Property.

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[2] Defendants' motion for summary judgment states the date as January 1984, a year before the lease was recorded. The Court considers this likely a typographical error, but in any event, the date the permit was obtained is not material to the case.

A well was built in 2010, completed in 2011, and began production in June 2011 pursuant to the 2009 lease.

In October 2010, Dale Property assigned its interest in the 2009 lease to Ohio Buckeye Energy, L.L.C. ("Ohio Buckeye"), reserving a royalty interest. Dale Property then assigned its royalty interest to Dale Pennsylvania in 2011.

In October 2011, Ohio Buckeye transferred a portion of its interest in the 2009 lease to Larchmont, and it assigned other portions of its interest to CHK in 2012 and 2013.

In December 2011, Ohio Buckeye merged with Chesapeake, transferring its remaining interest in the 2009 lease to Chesapeake. Chesapeake transferred a portion of its interest in the 2009 lease to Total in 2011, which assignment was recorded in May 2012.

In sum, Plaintiff is the sole owner of the surface rights to the Property, and he also claims ownership of the Mineral Rights beneath the Property. Chesapeake is the record owner of the oil and gas rights beneath the Property, and CHK, Total, Dale Pennsylvania, Larchmont, and North American are lessees of those rights.

III. STANDARD OF REVIEW

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a), which provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The Court must grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Van Gorder v. Grand Trunk Western R.R., Inc.*, 509 F.3d 265, 268 (6th Cir. 2007).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing there is a genuine issue of material fact for trial, and the Court must refrain from making credibility determinations or weighing the evidence. *Matsushita Elec. Indus. Co.*, 475 U.S. 574, 587 (1986); *Pittman v. Cuyahoga Cnty. Dept. of Children and Family Servs.*, 640 F.3d 716, 723 (6th Cir. 2011). The Court disregards all evidence favorable to the moving party that the jury would not be required to believe. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. 2009).

IV. APPLICABLE LAW

In this diversity case, the Court must apply the substantive law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In doing so, this Court is bound by the decisions of the state's highest court. *Pennington v. State Farm*

Mut. Auto Ins. Co., 553 F.3d 447, 450 (6th Cir. 2009). If the state's highest court has not directly addressed the issue, however, this Court must predict how the state's highest court would resolve the matter. *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 624 (6th Cir. 2008). In that case, the decisions of the state's intermediate appellate courts are deemed authoritative, unless there is a strong showing that the state's highest court would reach a different result. *Id.*

V. ANALYSIS

The parties agree that this case is governed by the Ohio Dormant Mineral Act ("ODMA"), Ohio Revised Code § 5301.56. The ODMA, enacted in 1989, operates to return dormant, severed mineral interests to the surface land holder ("surface land holder") by placing a twenty-year limit on dormant mineral interests. In other words, when someone other than the surface land holder obtains the sub-surface mineral interests, that mineral interest holder ("mineral interest holder") is deemed to have abandoned the mineral interests if those interests lay dormant for twenty years, at which time they revert back to the surface land holder. The Ohio General Assembly amended the statute and changed the manner in which the mineral interests return to the surface land holder effective 2006.

Under either version of the ODMA, a twenty-year clock begins to run the moment that the mineral interests are acquired by someone other than the surface land holder. If twenty years run in which the interests are dormant and

there is no "savings event" under § 5301.56(B), the mineral interests vest in the manner prescribed by the statute. A § 5301.56(B) savings event restarts the twenty-year clock from the date of the event.

The 1989 ODMA does not specify when the preceding twenty-year period begins for purposes of calculating the abandonment clock, nor does it specify any method for vesting of the mineral interests in the surface land holder. That statute provided a three year grace period under which a mineral interest holder could maintain his interest. The three year grace period in this case expired on March 23, 1992.

In contrast, the 2006 ODMA specifically requires that notice be given by the surface land holder to the mineral interest holders of record before the mineral interests can vest in the surface land holder and states that it is the preceding twenty years from the date the surface land holder gives notice to the mineral interest holder that is at issue for abandonment. Ohio Rev. Code § 5301.56(B), (E) (2006). Once notice is given, the mineral interest holder has sixty days to either file a claim in the office of the county recorder to preserve the interest under § 5301.56(B)(3)(e) or file an affidavit identifying a savings event under § 5301.56(B)(3). If the mineral interest holder fails to file a claim to preserve the mineral interests or identify a savings event within sixty days, the mineral interests vest in the surface land holder upon memorialization of the abandonment in the county record. Ohio Rev. Code § 5301.56(H)(2).

The parties dispute both whether the 1989 or 2006 version of the ODMA governs this case and whether a savings event has occurred at all.

A. The Supreme Court of Ohio Should Determine Whether the 1989 Version or the 2006 Version of the ODMA Applies to Actions Brought After Enactment of the 2006 Amendments but Alleging that Rights Vested Prior to Enactment of the 2006 Amendments.[3]

Not surprisingly, the parties dispute which version of the ODMA applies to the instant case. Defendants argue the 2006 version applies because it was the law in effect at the time Plaintiff brought suit in 2013, and the Court must apply the law as it exists at the time of the claim. Because Plaintiff has not complied with the procedural requirements established in the 2006 amendments by providing the requisite notice,[4] Defendants argue his claim fails.

Plaintiff contends the Mineral Rights automatically vested in him in either 1992 or 2005 but in any event under the 1989 version of the ODMA. Because the Mineral Rights automatically vested in him on one of those dates, he contends the 2006 version of ODMA is inapplicable. Moreover, he argues the 2006 amendments cannot be applied retroactively to divest him of his property rights.

Defendants respond that the 2006 amendments are not retroactive because they are remedial in nature and that the legislature is free to condition

[3] The Court notes that which version of the ODMA applies is also at issue in *Chesapeake v. Buell.*

[4] Plaintiff does not argue that he has satisfied the procedural requirements established in the 2006 amendments.

the continued retention of even vested rights on affirmative steps established in the 2006 amendments.

The Supreme Court of Ohio has not directly addressed this issue. The decisions of the common pleas courts of Ohio are split on the issue of which version of the ODMA applies to claims brought after the amendments but claiming that rights vested prior to the amendments. On the one hand, *M&H Partnership v. Hines*, Case No. CVH-2012-0059, 9 (Harrison Cnty. Common Pls. Ct. Jan. 14, 2014) and *Dahlgren v. Brown Farm Properties, L.L.C.*, Case No. 13CVH27445 (Carroll Cnty. Common Pleas Ct. Nov. 5, 2013) hold that the 2006 ODMA controls a claim of abandonment that is first made after the 2006 amendments.

M&H Partnership based its holding in part on the Seventh District opinion *Dodd v. Crosky*, 2013 WL 5437365 (Ohio Ct. App. 7th Dist. Sept. 23, 2013). As noted below, the Seventh District has since changed course on this issue.

The *Dahlgren* court noted that as late as November 2013, neither that court nor the parties had found "any appellate decision that decides whether or when to apply the 1989 version of [ODMA] for an abandonment claim filed after the 2006 amendment," but it noted that the seventh district applied the 2006 version without discussion in *Dodd*.[5] *Dahlgren*, at 13–14. The *Dahlgren* court then discussed the history and purpose of the Ohio Marketable Title Act

[5] The Supreme Court of Ohio has permitted a discretionary appeal from *Dodd v. Croskey*, 138 Ohio St. 3d 1432 (2014), but that appeal does not seem to concern the issue of which version of the ODMA applies.

("OMTA"), of which the ODMA is a part, and held that unless a surface land holder implemented or enforced a claim of abandonment prior to the effective date of the 2006 amendments, the surface land holder must comply with the 2006 procedural requirements to enforce a claim of abandonment brought after 2006. This is so even when the surface land holder claims that the abandonment occurred prior to the 2006 amendments. *Id.* at 14.

Conversely, several other common pleas court decisions applied the 1989 ODMA in cases like this one. *See, e.g.*, *Shannon v. Householder*, Case No. 12CV226, at 6–7 (Jefferson Cnty. Common Pleas Ct. July 17, 2013); *Marty v. Winkler*, Case No. 2012-203, at 10 (Monroe Cnty. Common Pleas Ct. Apr. 11, 2013) (finding abandonment under both versions of the Act); *Walker v. Noon*, Case No. 2120098, at *3 (Noble Cnty. Common Pleas Ct. Mar. 20, 2013) ("Any discussion of R.C. 5301.56, effective June 30, 2006 is moot, because as of June 30, 2006, any interest of Defendant in the oil and gas had been abandoned."); *Wendt v. Dickerson*, Case No. 2012 CV 0135, at 16–17 (Tuscarawas Cnty. Common Pleas Ct. Feb. 21, 2013) (applying 1989 version).

The only appellate court to face the issue is the Seventh District. In *Dodd*, the Seventh District applied the 2006 version of the ODMA without discussion. 2013 WL 5437365. Just last month, though, it expressly considered the issue of whether the 1989 version or the 2006 version of the ODMA applies to claims brought after 2006 but alleging that rights vested under the 1989 version of the Act. *Walker v. Shondrick-Nau*, 2014 WL 1407942, at *5–6 (Ohio Ct. App. 7th

Dist. Apr. 3, 2014) (appeal from *Walker v. Noon*). The court concluded that the 2006 ODMA applies only prospectively and cannot have affected any right that was previously acquired under the 1989 ODMA. *Id.* at *6 (citing Ohio Rev. Code §§ 1.48, 1.58(A)(1)(2)). As such, it concluded the 1989 version applied. *Id.* at *9. Thus, the only appellate court to have considered the issue in similar circumstances decided that the 1989 version applies.

In addition to citing contrasting case law on the direct issue at hand, the parties cite Ohio statutes and cases concerning retroactivity generally. These principles, however, do not point to a clear result in this case. On the one hand, Defendants argue the 2006 ODMA is applied only prospectively because Plaintiff's suit was not filed until after the statute was amended. On the other hand, Plaintiff contends the Mineral Rights vested in him sometime prior to the amendments and that even prospective application of the amended statute would implicate retroactivity because it would divest him of his property rights. Because of that, the lack of controlling precedent from the Supreme Court of Ohio, the fact that the only Ohio appellate court to consider the issue has been internally inconsistent, and the split in common pleas court decisions, this Court finds the best course of action is to certify this important question of state law to the Supreme Court of Ohio. Rule 9.01(A) of the Practice Rules of the Supreme Court of Ohio allows a federal court to certify questions of Ohio law to the Supreme Court if the analysis may be determinative of the proceeding and there is no controlling precedent in the decisions of the Supreme Court of Ohio. Which

version of the ODMA applies in this case may be determinative of the outcome of the proceeding, because Plaintiff does not argue he has met the procedural requirements contained in the 2006 amendments. Further, there is no controlling precedent in the decisions of the Supreme Court of Ohio on this issue.

B. It is Not Necessary to Determine Whether the Assignment of an Oil and Gas Lease is a Title Transaction that Qualifies as a Savings Event under ODMA, and the Supreme Court of Ohio Should Determine Whether a Delay Rental Constitutes a Title Transaction.

Additionally, the parties dispute whether the Mineral Rights were the subject of savings events which preclude a finding of abandonment.

The parties agree that, assuming the 1989 version of ODMA applies,[6] § 5301.56(B)(1)(c)(i) provides the only potential basis for a savings event. Section 5301.56(B)(1)(c)(i) requires that "the mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located" within the preceding twenty years.

The ODMA does not define the term "title transaction." Nonetheless, the OMTA defines the term "title transaction" as "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

[6] Defendants argue that savings events occurred in the twenty-year period prior to 2006, but as Plaintiff concedes he has not met the procedural requirements under the 2006 amendments, it will be unnecessary to determine if a savings event occurred during that period if the Supreme Court of Ohio determines the 2006 version of ODMA applies. The Court therefore focuses its "savings event" analysis on the 1989 version of ODMA.

any court, as well as warranty deed, quit claim deed, or mortgage." Ohio Rev. Code § 5301.47(F). Although the OMTA definition of a title transaction is broad, for our purposes it is limited by the language of the ODMA, which requires that the mineral interest be the *subject of* a title transaction which has been filed or recorded in order for the title transaction to qualify as a "savings event." Ohio Rev. Code § 5301.56(B)(3)(a).

The parties disagree about whether the Mineral Rights were the subject of a title transaction. Defendants argue the Mineral Rights were the subject of several title transactions that qualified as savings events and preserved Defendants' interests. Specifically, Defendants argue that the execution of an oil and gas lease, assignment of an oil and gas lease, and unrecorded expiration of an oil and gas lease are title transactions that qualify as savings events under the ODMA. Defendants also argue that the payment of delay rentals during the primary term of an oil and gas lease is a title transaction that qualifies as a savings event.

Plaintiff argues that neither the execution of an oil and gas lease, nor the unrecorded expiration of an oil and gas lease, nor the assignment of an oil and gas lease constitute a title transaction that qualifies as a savings event. Plaintiff argues that no savings event occurred in the twenty years preceding the effective date of the ODMA, and when the grace period expired on March 22, 1992, the Mineral Rights automatically vested in him. Alternatively, Plaintiff argues that even if the recorded execution and assignment of oil and gas leases constitute

savings events, the mineral interest was leased to C.E. Beck on January 16, 1984, assigned to Carless Resources, Inc. on April 11, 1985, and the assignment was recorded on May 30, 1985. There were no further recorded leases or assignments until 2010. Plaintiff argues that even if the expiration of an oil and gas lease constitutes a title transaction, it does not constitute a savings event unless it is recorded. As the expiration of the 1984 lease in 1989 was not recorded, Plaintiff argues the expiration was not a savings event. Thus, Plaintiff argues the Mineral Rights vested in him on May 30, 2005 at the latest (twenty years from May 30, 1985).

The Court need not consider the contrasting arguments with respect to whether the assignment of an oil and gas lease constitutes a title transaction at this time, because even if the assignment of an oil and gas lease constitutes a title transaction, the Mineral Rights at issue in this case were assigned via a recorded assignment on May 30, 1985. Starting the twenty-year clock from the date of the recorded assignment would yield an abandonment date of May 30, 2005, before the amendments to the ODMA were enacted and before the Mineral Rights were next conveyed.

Accordingly, even if the recorded assignment of an oil and gas lease constitutes a title transaction which qualifies as a savings event, the May 30, 1985 recorded assignment would not preclude a finding of abandonment in this case. It is not necessary, therefore, to determine in this case whether the

recorded assignment of an oil and gas lease constitutes a title transaction which qualifies as a savings event under ODMA.

Rather, at issue is whether the payment of delay rentals during the primary term of an oil and gas lease constitutes a title transaction that qualifies as a savings event under the ODMA.

After the lease was assigned on May 30, 1985, C.E. Beck or Carless Resources, Inc. paid delay rentals in 1985, 1986, 1987, and 1988 in order to avoid early termination of the lease. The effect of those payments depends both on whether they are considered savings events and whether the recorded execution and unrecorded expiration of the 1985 lease are savings events.

If the recorded execution or subsequent assignment of the lease were savings events but neither the unrecorded expiration of the lease nor the delay rentals constitute savings events, then the abandonment clock would begin on May 30, 1985 at the latest and run on May 30, 2005, before the 2006 amendments.

On the other hand, if either the recorded execution or subsequent assignment were savings events and the delay rentals are also savings events, then the clock runs not from the recorded execution or assignment on May 30, 1985 but rather from the date of the last delay rental in 1988. Thus, even if the unrecorded expiration of the 1984 lease does not constitute a savings event, then as long as the delay rentals constitute savings events, there would be no abandonment until after the 2006 amendments were effective (i.e. any

abandonment after the 1988 delay rental would be in 2008). That means Plaintiff would have to follow the procedural requirements in the 2006 ODMA before vesting could occur. To make matters even more complicated, as the mineral estate was transferred again in 2008, there could possibly be no abandonment at all if the 2008 transfer occurred within the twenty-year clock from the date of the 1988 delay rental.

Defendants' argument that delay rentals constitute title transactions, and thus savings events, reads as follows:

> Each of the annual payments from the lessee to NACoal in 1985, 1986, 1987, and 1988 operated to restart the twenty-year abandonment period by precluding reversion of the mineral estate to NACoal during the primary term of the 1984 Lease. Had those payments not been made – and nothing obligated the lessee to make them – the primary term of the 1984 Lease would have terminated early, and fee simple determinable title to the oil and gas would have transferred back to NACoal. Instead, the primary term of the Lease was maintained each year by payment of delay rentals, and each such transaction necessarily "affect[ed] title to an interest in land" under the recorded 1984 Lease. Ohio R.C. § 5301.47.

Defs.' Mot. Summ. J. 17, ECF No. 36. Defendants further argue in their response in opposition to Plaintiff's motion for partial summary judgment that during the primary term of the 1985 lease, "[f]or five years, NACoal was actively collecting rent for the oil and gas under plaintiff's property, and thus maintaining its interest. It would be nonsensical to hold that NACoal had begun to 'abandon' its interest at any time before the termination of the lease and the return to NACoal of its oil and gas rights in 1989." Defs.' Resp. 19, ECF No. 38. Defendants provide no citation to any cases that have held that the payment of

delay rentals pursuant to an oil and gas lease constitute title transactions that qualify as savings events under ODMA. Indeed, they concede that no Ohio court has addressed the issue.

As noted, Plaintiff fails to address the argument at all.

Given the dearth of Ohio authority on this novel legal argument, the best course of action is to certify this question of Ohio law to the Supreme Court of Ohio. Rule 9.01(A) of the Practice Rules of the Supreme Court of Ohio allows a federal court to certify questions of Ohio law to the Supreme Court if the analysis may be determinative of the proceeding and there is no controlling precedent in the decisions of the Supreme Court of Ohio. As discussed above, depending on the Supreme Court of Ohio's conclusions regarding the recorded execution and unrecorded expiration of oil and gas leases, the analysis of whether delay rental payments constitute title transactions that qualify as savings events may be determinative of the proceeding. In addition, there is not only a lack of controlling precedent from the Supreme Court of Ohio but also a lack of any precedent from any Ohio court on this issue. The Court will therefore certify this question of Ohio law to the Supreme Court of Ohio.

C. The Supreme Court of Ohio Has Accepted for Review the Questions of Whether the Execution of or Expiration of an Oil and Gas Lease is a Title Transaction That Qualifies as a Savings Event Under ODMA.

As noted above, Defendants argue that both the recorded execution of an oil and gas lease and the unrecorded expiration of an oil and gas lease are title transactions that qualify as savings events under the ODMA. Plaintiff argues that

the recorded execution of an oil and gas lease is not a title transaction and that even if the expiration of such a lease is a title transaction, where the expiration is not recorded, it does not comport with the requirements of § 5301.56(B)(3)(a) to qualify as a "savings event."

The Court considered similar arguments in *Chesapeake Exploration, L.L.C. v. Buell*, Case No. 2:12–cv–916. In that case, the Court concluded that the issues could not be resolved through statutory interpretation. Moreover, the Court found that Ohio law is unsettled as to whether an oil and gas lease creates a fee simple determinable and gives the lessee ownership of the oil and gas estate or is merely a license and therefore not a title transaction because it does not convey title. The Court noted that two Supreme Court of Ohio cases have taken divergent views of the nature of oil and gas leases, but neither concerns whether a lease of severed subsurface mineral rights is a title transaction under the ODMA.[7] Because the context of the statute is important and no Ohio court has considered the nature of an oil and gas lease under the ODMA, the Court certified the questions to the Supreme Court of Ohio. The Supreme Court of Ohio accepted certification and thus will answer the following questions:

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

[7] See Opinion and Order 18–19, ECF No. 60, in Case No. 2:12–cv–916 (comparing *Harris v. Ohio Oil Co.*, 48 N.E. 502, 506 (Ohio 1897) *with Back v. Ohio Fuel Gas Co.*, 113 N.E.2d 865 (Ohio 1953)).

2. Is the expiration of a recorded lease and the reversion of the rights granted under that lease a title transaction that restarts the twenty-year forfeiture clock under the ODMA at the time of the reversion?

Decision, *Chesapeake Exploration, L.L.C. v. Buell*, Case No. 2014-0067 (Ohio 2014).

The answers to those questions will apply with equal force to the case *sub judice*.

VI. CERTIFICATION REQUIREMENTS

A. The Certified Questions

For the reasons set forth above, the undersigned certifies the following additional questions of state law to the Supreme Court of Ohio pursuant to Rule 9.01 of the Rules of Practice of the Supreme Court of Ohio:

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?

   AND

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?

B. The Information Required by Ohio State Supreme Court Rule § 9.02(A)

Because the Court is certifying two questions to the Supreme Court of Ohio, the Court provides the following information in accordance with Ohio State Supreme Court Rule § 9.02(A)–(E).

1. **Name of the case:** Please refer to the caption on page 1 of this order.

2. **Statement of facts:** Please refer to § II of this order for a full recitation of the pertinent facts.

3. **Name of each of the parties:**

   a. Plaintiffs: Hans Michael Corban.

   b. Defendants: Chesapeake Exploration, L.L.C.; CHK Utica, L.L.C.; Larchmont Resources, L.L.C.; Dale Pennsylvania Royalty, L.P.; North American Coal Royalty Company; and Total E&P USA, Inc..

4. **Names, Addresses, Telephone Numbers, and Attorney Registration Numbers of Counsel for Each Party:**

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5. **Designation of Moving Party:** Because neither side has sought certification, the Undersigned designates Plaintiff as the moving party.

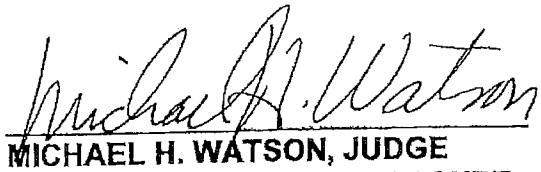
C. Instructions to the Clerk

In accordance with Rule 9.03(A) of the Rules of Practice of the Supreme Court of Ohio, the Clerk of the United States District Court for the Southern District of Ohio is hereby instructed to serve copies of this certification order upon counsel for the parties and to file this certification order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

VII. CONCLUSION

For the foregoing reasons, the parties motions for leave to file supplemental authorities are **GRANTED**. The Court **CERTIFIES** two questions of Ohio law to the Supreme Court of Ohio in accordance with Ohio State Supreme Court Rule § 9.01. Further, this case will be **STAYED** pending the outcome of the proceedings in the Supreme Court of Ohio. The Clerk shall terminate ECF Nos. 41 & 43.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

1988 Ohio Laws File 314

OHIO
1988 SESSION LAWS AND RESOLUTIONS
117th Ohio General Assembly

Additions are indicated by <<+ UPPERCASE +>>
Deletions by <<- Lowercase ->>
Changes in tabular material are not indicated.

File 314
Substitute Senate Bill Number 223
DORMANT MINERAL INTERESTS—GENERALLY

Eff. March 22, 1989.

AN ACT to amend sections 317.08, 317.18, 317.20, 317.201, and 5301.53, to enact new section 5301.56, and to repeal section 5301.56 of the Revised Code to provide a method for the termination of dormant mineral interests and the vesting of their title in surface owners, in the absence of certain occurrences within the preceding 20 years, including the filing by the holder of a mineral interest of a preserving claim.

Be it enacted by the General Assembly of the State of Ohio:

OH ST § 317.08

SECTION 1. That sections 317.08, 317.18, 317.20, 317.201, and 5301.53 be amended and new section 5301.56 of the Revised Code be enacted to read as follows:

Sec. 317.08. Except as provided in division (F) of this section, the county recorder shall keep five separate sets of records as follows:

(A) A record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements, and hereditaments; all notices<<-,->> as provided for in sections 5301.47 to 5301.56 of the Revised Code; all judgments or decrees in actions brought under section 5303.01 of the Revised Code; all declarations and bylaws as provided for in <<-sections 5311.01 to 5311.22->> <<+ CHAPTER 5311.+>> of the Revised Code; affidavits as provided for in section 5301.252 of the Revised Code; all certificates as provided for in section 5311.17 of the Revised Code; all articles dedicating archaeological preserves accepted by the director of the Ohio historical society under section 149.52 of the Revised Code; all articles dedicating nature preserves accepted by the director of natural resources under section 1517.05 of the Revised Code; all agreements for the registration of lands as archaeological or historic landmarks under section 149.51 or 149.55 of the Revised Code; <<-and->> all conveyances of conservation easements under section 5301.68 of the Revised Code<<+; AND ALL INSTRUMENTS OR ORDERS DESCRIBED IN DIVISION (B)(1)(C)(II) OF SECTION 5301.56 OF THE REVISED CODE;+>>

(B) A record of mortgages, in which shall be recorded:

(1) All mortgages, including amendments, supplements, modifications, and extensions <<-thereof->> <<+OF MORTGAGES +>>, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered;

(2) All executory installment contracts for the sale of land executed after September 29, 1961, which by <<-the->> <<+THEIR +>> terms <<- thereof->> are not required to be fully performed by one or more of the parties <<-thereto->> <<+TO THEM +>> within one year of the date of the contracts;

(3) All options to purchase real estate, including supplements, modifications, and amendments <<-thereof->> <<+OF THE OPTIONS+>>, but no such instrument shall be recorded if it does not state a specific day and year of expiration of its validity.

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(C) A record of powers of attorney;

(D) A record of plats, in which shall be recorded all plats and maps of town lots, of the subdivision thereof, and of other divisions or surveys of lands, and any center line survey of a highway located within the county, the plat of which shall be furnished by the director of transportation or county engineer<<+,+>> and all drawings as provided for in <<-sections 5311.01 to 5311.22->> <<+CHAPTER 5311.+>> of the Revised Code;

(E) A record of leases, in which shall be recorded all leases, memoranda of leases, and supplements, modifications, and amendments <<-thereof->> <<+ OF LEASES AND MEMORANDA OF LEASES+>>.

All instruments or memoranda of instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record. The recorder may index, keep, and record in one volume unemployment compensation liens, federal tax liens, personal tax liens, <<- mechanics->> <<+MECHANIC'S+>> liens, notices of liens, certificates of satisfaction or partial release of estate tax liens, discharges of recognizances, excise and franchise tax liens on corporations, and liens provided for in sections 1513.33, 1513.37, 5111.021, and 5311.18 of the Revised Code.

The recording of an option to purchase real estate, including any supplement, modification, and amendment <<-thereof->> <<+OF THE OPTION+>>, under this section shall serve as notice to any purchaser of an interest in the real estate covered by the option only during the period of the validity of the option as stated in the instrument.

(F) In lieu of keeping the five separate sets of records required in divisions (A) to (E) of this section and the records required in division (G) of this section, a county recorder may record all the instruments required to be recorded by this section in two separate sets of record books. One set shall be called the "official records" and shall contain the instruments listed in divisions (A), (B), (C), (E), and (G) of this section. The second set of records shall contain the instruments listed in division (D) of this section.

(G) Except as provided in division (F) of this section, the county recorder shall keep a separate set of records containing all corrupt activity lien notices filed with the recorder pursuant to section 2923.36 of the Revised Code.

OH ST § 317.18

Sec. 317.18. At the beginning of each day's business<<+,+>> the county recorder shall make and keep up general alphabetical indexes, direct and reverse, of all the names of both parties to all instruments <<- theretofore->> <<+PREVIOUSLY+>> received for record by him. The volume and page where <<+EACH+>> such instrument is recorded may be omitted until it is actually recorded if the file number is entered in place of the volume or page<<-, but such file number may be omitted from any index volume in use on April 21, 1896, if the form of the index volume is not adapted to entering the file number->>. The indexes shall show the kind of instrument, the range, township, and section or the survey number and number of acres, or the permanent parcel number provided for under section 319.28 of the Revised Code, or the lot and sublot number and the part thereof, all as the case requires, of each tract, parcel, or lot of land described in any such instrument <<-of writing->>. The name of each grantor shall be entered in the direct index under the appropriate letter, followed on the same line by the name of the grantee, or, if there is more than one grantee, by the name of the first grantee followed by "and others" or <<-their->> <<+ITS+>> equivalent. The name of each grantee shall be entered in the reverse index under the appropriate letter, followed on the same line by the name of the grantor, or, if there is more than one grantor, by the name of the first grantor followed by "and others" or <<-their->> <<+ITS+>> equivalent.

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

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

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

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

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

In all cases of instruments filed in accordance with <<-sections 5311.01 to 5311.22->> <<+CHAPTER 5311.+>> of the Revised Code, the name of each owner shall be entered in the direct index, under the appropriate letter, followed on the same line by the name of the condominium property, and the name of the condominium property shall be entered in the reverse index under the appropriate letter followed on the same line by the name of the owner of the property, or, if the instrument contains the names of more than one owner<<+,+>> there shall be entered the name of the first owner followed by "and others" or its equivalent.

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

OH ST § 317.20

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

(A) The name of the grantor;

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

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

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

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

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

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

OH ST § 317.201

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

(A) The name of each claimant;

(B) Next to the right, the name of each owner of title;

(C) The deed book number and page where the instrument containing the claim has been recorded;

(D) The type of claim asserted<<-; and on->><<+.+>>

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<<+ON+>> the opposite page on the corresponding line<<+,+>> a pertinent description of the property affected as appears in such notice <<+ SHALL BE ENTERED.+>>

OH ST § 5301.53

Sec. 5301.53. The provisions of sections 5301.47 to 5301.56 of the Revised Code<<-,->> shall not be applied <<+TO BAR OR EXTINGUISH ANY OF THE FOLLOWING:+>>

(A) <<-To bar any->> <<+ANY+>> lessor or his successor as reversioner of his right to possession on the expiration of any lease<<+,+>> or any lessee or his successor of his rights in and to any lease<<+, EXCEPT AS MAY BE PERMITTED UNDER SECTION 5301.56 OF THE REVISED CODE;+>>

(B) <<-To bar or extinguish any->> <<+ANY+>> easement or interest in the nature of an easement created or held for any railroad or public utility purpose;

(C) <<-To bar or extinguish any->> <<+ANY+>> easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use;

(D) <<-To bar or extinguish any->> <<+ANY+>> easement or interest in the nature of an easement, or any rights granted, excepted, or reserved by the instrument creating such easement or interest, including any rights for future use, if the existence of such easement or interest is evidenced by the location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of such facility is observable;

(E) <<-To bar or extinguish any->> <<+ANY+>> right, title, estate, or interest in coal, and any mining or other rights pertinent <<- thereto->> <<+TO+>> or exercisable in connection <<- therewith->> <<+WITH ANY RIGHT, TITLE, ESTATE, OR INTEREST IN COAL;+>>

(F) <<-To bar or extinguish any->> <<+ANY+>> mortgage recorded in conformity with section 1701.66 of the Revised Code;

(G) <<-To bar or extinguish any->> <<+ANY+>> right, title, or interest of the United States, <<-or->> of <<-the state of Ohio->> <<+THIS STATE+>>, or <<+OF+>> any political subdivision, body politic, or agency <<-thereof->> <<+OF THE UNITED STATES OR THIS STATE.+>>

OH ST § 5301.56

<<+SEC. 5301.56. (A) AS USED IN THIS SECTION:+>>

<<+(1) "HOLDER" MEANS THE RECORD HOLDER OF A MINERAL INTEREST, AND ANY PERSON WHO DERIVES HIS 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.+>>

<<+(B)(1) 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:+>>

<<+(A) 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;+>>

<<+(B) 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;+>>

<<+(C) WITHIN THE PRECEDING TWENTY YEARS, ONE OR MORE OF THE FOLLOWING HAS OCCURRED:+>>

<<+(I) 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;+>>

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<<+(II) 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, 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;+>>

<<+(III) THE MINERAL INTEREST HAS BEEN USED IN UNDERGROUND GAS STORAGE OPERATIONS BY THE HOLDER;+>>

<<+(IV) 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;+>>

<<+(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 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.+>>

(2) <<+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 SECTION.+>>

<<+(C)(1) A CLAIM TO PRESERVE A MINERAL INTEREST FROM BEING DEEMED ABANDONED UNDER DIVISION (B)(1) OF THIS SECTION MAY BE FILED FOR RECORD BY ITS HOLDER. SUBJECT TO DIVISION (C)(3) OF THIS SECTION, THE CLAIM SHALL BE FILED AND RECORDED IN ACCORDANCE WITH SECTIONS 317.18 TO 317.201 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, HIS 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 HIS 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)(1) OF THIS SECTION BY THE OCCURRENCE OF ANY OF THE CIRCUMSTANCES DESCRIBED IN DIVISION (B)(1)(C) 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.+>>

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Section 2. That existing sections 317.08, 317.18, 317.20, 317.201, and 5301.53 and section 5301.56 of the Revised Code are hereby repealed.

Approved December 21, 1988.

OH LEGIS 314

End of Document

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*** ARCHIVE MATERIAL ***

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 18, 2005 *
* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2005 *

TITLE 53. REAL PROPERTY
CHAPTER 5301. CONVEYANCES; ENCUMBRANCES
MARKETABLE TITLE ACT

ORC Ann. 5301.56 (2005)

§ 5301.56. Mineral interests in realty

(A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives his 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.

(B) (1) 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:

(a) 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*;

(b) 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*;

(c) Within the preceding twenty years, one or more of the following has occurred:

(i) 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;

(ii) 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, 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;

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

(iv) 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 [5301.25.2] of the Revised Code,* in the office of the county recorder of the county in which the lands are located;

(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 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.

(2) 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 section.

(C) (1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with *sections 317.18* to *317.201 [317.20.1]* 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, his 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 his 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)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(c) 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 [5301.33.2] of the Revised Code.*

HISTORY: 142 v S 223. Eff 3-22-89.

NOTES: *Not analogous to former 5301.56 (129 v 1040; 130 v 1247; 135 v S 267; 135 v H 1231) repealed 142 v S 223, eff 3-22-89.*

CROSS-REFERENCES TO RELATED STATUTES
Direct and reverse indexes, *RC § 317.18.*
Notice index, *RC § 317.20.1.*
Records to be kept by county recorder, *RC § 317.08.*
Sectional indexes, *RC § 317.20.*

TEXT DISCUSSION
Bar title tandards. *Ohio Real Estate* § 4.09
Marketable Title Act. *Ohio Real Estate* § 5.01

RESEARCH AIDS
Termination of mineral interests:
O-Jur3d: Mines § 5; O-Jur3d: Refer § 61

EXHIBIT B
(12 pages)

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
2013 JUL 16 PM 1:51
BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, OHIO

VIRGIL FARNSWORTH, *et al.*

Plaintiffs,

vs.

Case No. 2012-133

JAMES BURKHART, *et al.*

Defendants.

JUDGMENT ENTRY
(Incorporating Findings of Fact and Conclusions of Law)

This matter is before the Court for non-oral hearing on the following:

(1). Plaintiffs' Motion for Summary Judgment;

(2). Defendants Response to Plaintiffs' Motion for Summary Judgment;

(3). Reply in Support of Plaintiffs' Motion for Summary Judgment;

(4). Defendants' Motion for Summary Judgment;

(5). Memorandum in Opposition to Defendants' Motion for Summary Judgment;

(6). Defendants' Reply Memorandum in Support of Motion for Summary Judgment.

Based on the facts before the Court and the applicable law, the Court hereby makes the following findings and orders.

In their Motion, Plaintiffs seek an order granting Summary Judgment in their favor as follows:

(1). With respect to Plaintiffs' First Claim, by declaring that the Severed Mineral Interest, excepting coal, underlying that certain property more particularly described in the

Monroe County
Common Pleas
Court

Julie R. Selmon
Judge

FINAL APPEALABLE
ORDER

Original - Journal _____ Page _____
☞This Entry to be Filed with the Clerk of Courts

deed dated July 20, 1988, filed for recording July 26, 1988 in Volume 196, Page 497 of the Deed Records of Monroe County, Ohio (hereinafter referred to as the "Property") has become dormant and has vested in Plaintiffs, Virgil Farnsworth and Theresa Farnsworth, pursuant to former Ohio Revised Code § 5301.56, or, in the alternative, pursuant to current Ohio Revised Code

§ 5301.56;

(2). With respect to Plaintiff's Second Claim, by quieting title to the minerals underlying the Property, excepting coal, in favor of Plaintiffs, Virgil Farnsworth and Theresa Farnsworth, and against Defendants James Burkhart, Francis Burkhart, Judy Gallagher, Dale Burkhart, Mark Burkhart, Ellis Burkhart, and Gertrude Burkhart, Trustee of the Agreement of Trust of Glen A. Burkhart and Gertrude Burkhart; and

(3). With respect to Defendants' Counterclaim, by dismissing the Counterclaim with prejudice.

Defendants, on the other hand, seek Summary Judgment in their favor on the following legal basis:

1. The subject property and mineral interest were subject to a title transaction as referenced in R.C. § 5301.56 and under the Marketable Title Act.

2. Plaintiffs' property had been subject to actual production of natural gas for Plaintiffs' use and benefit originating from a well previously drilled on Plaintiffs' property.

3. Plaintiffs have failed to follow the required procedure under the Dormant Minerals Act, R.C. § 5301.56, and failed to wait at least thirty but not later than sixty days after serving their Notice of Abandonment before filing their Affidavit of Abandonment. During

the permissible statutory time frame, Defendants claim that they properly filed Claims to Preserve their Mineral Interests, protecting their interests.

The underlying facts of the within case are undisputed. They are set forth below.

On October 1, 1980, Veronica Burkhart, conveyed the within Property to Belcastro Construction Company, Frank Belcastro and Tracy Belcastro, partners (hereinafter "Belcastro"). The instrument reflecting this transaction is the Deed filed for record October 17, 1980 in Volume 178, Page 573 of the Deed Records of Monroe County, Ohio (hereinafter referred to as "the Reservation Deed"). The Reservation Deed contained the following reservation of oil, gas, coal and other minerals:

> Reserving to the Grantor, her heirs and assigns, all the oil, gas, coal and other minerals in and under said premises along with the right to enter and explore for the same, except that there shall be no strip mining of any type on said premises without the written consent of the Grantees. Grantor also conveys all her right of free gas to Grantee. (Hereinafter the "Severed Mineral Interest").

Belcastro owned the Property from October 16, 1980 to July 20, 1988. Plaintiffs acquired title to the Property by deed dated July 20, 1988, filed for recording July 26, 1988 in Volume 198, Page 497 of the Deed Records of Monroe County, Ohio.

Defendants are the heirs of Veronica A. Burkhart and are claiming title to the Severed Mineral Interest as reserved in the Reservation Deed.

One well, the Elmer Burkhart No. 1 Well (API No. 34111211140000), was drilled on the Property (hereinafter the "Well").

Plaintiffs, attempting to utilize both the prior version and current version of Ohio Revised Code § 5301.56, sought to have the Severed Mineral Interest, excepting coal,

abandoned and vested in the Plaintiffs as surface owners.

On February 23, 2012, in accordance with the Former DMA , Plaintiffs recorded an Affidavit of Facts Related to Title pursuant to Ohio Revised Code § 5301.252. In the Affidavit, Plaintiffs claim that none of the savings conditions identified in the former DMA at § 5301.56(B)(1) occurred in the twenty year period prior to June 30, 2006, the last day the Former DMA was in effect.

Plaintiffs also sought to invoke the amended statutory procedure detailed in the Current DMA . Pursuant to § 5301.56(E) of the Current DMA , on February 23, 2012, Plaintiffs served a Notice of Abandonment to all heirs of Veronica Burkhart who may have had a claim to the Severed Mineral Interest by certified mail, return receipt requested (hereinafter referred to as "Notice of Abandonment"). Thereafter, on April 23, 2012, Plaintiffs filed and recorded in Volume 218, Page 131 of the Official Records of Monroe County, Ohio an Affidavit of Abandonment (hereinafter referred to as "Affidavit of Abandonment").

On or about April 19, 2012, Defendants filed claims to preserve the Severed Mineral Interest in the Monroe County Recorder's Office, claiming to own the Severed Mineral Interest (hereinafter referred to as "Claims to Preserve").

On May 9, 2012, pursuant to R.C. § 5301.56(H)(2), Plaintiffs sent a letter to the Monroe County Recorder instructing her to note that the Severed Mineral Interest was abandoned pursuant to the Affidavit of Abandonment.

The status of the Severed Mineral Interest reserved in the Reservation Deed is the subject of this litigation.

Pursuant to Ohio Rule of Civil Procedure 56, Summary Judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor. *State ex rel. v. Davila v. City of E. Liverpool*, 7th Dist. No. 10CO16, 2011 Ohio 1347, ¶13 (March 14, 2001) (citing *Horton v. Harwick Chemical Corp.* , 73 Ohio St. 3d 679, 1995 Ohio 286 ¶3 of the syllabus (1995).

The non-moving party may not rest on unsupported allegations in the pleadings, but must present specific evidence that creates a genuine issue of material fact. *Albritton v. Neighborhood Centers Asso. for Child Dev.* , 12 Ohio St. 3d 210, 211 (1984); see also *Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64, 66 (1978). Moreover, the non-moving party may not avoid Summary Judgment solely by submitting a self-serving affidavit containing no more than bold contradictions of evidence offered by the moving party. *Wells Fargo Bank v. Blough*, 4th Dist. No. 08CA49, 2009 Ohio 3672, ¶18 (July 23, 2009) (quoting *Boulton v. Vadakin*, 4th Dist. No. 07CA26, 2008 Ohio 666, ¶20 (February 12, 2008).

The Former DMA as enacted on March 13, 1989, is set forth below in its entirety:

§5301.56 Mineral Interests in Realty.

(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.

(B)(1) 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:

(a) 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.

(b) 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.

(c) Within the preceding twenty years, one or more of the following has occurred:

(i) 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;

(ii) 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;

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

(iv) 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 [5301.25.2] of the Revised Code, in the office of the county recorder of the county in which the lands are located;

(v) A claim to preserve the mineral 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 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.

(B)(2) 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 section.

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 [317.20.1] 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, his rights in the mineral interest.

(C) (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.

(C)(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)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(c) of this section, including, but not limited to, successive filings of claims to preserve

mineral interests under division (C) of this section.

(D)(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 [5301.33.2] of the Revised Code.

This Court has previously held in reference to the Former DMA that it is "self-executing . . .". *Marty v. Dennis*, Monroe C.P. 2012-203 (2013) at 7. The Former DMA does not require the surface owner of the property to take any action before a mineral interest is deemed abandoned, except to show that the holder of the mineral interest did not satisfy any of the savings conditions identified in § 5301.56(B)(1)(c) of the Former DMA. *Id.*

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

The Court finds that there is no evidence during this twenty-year time period that there was actual production or withdrawal of minerals by the Holders of the Severed Mineral Interest (here the Defendants).

The Court finds that although gas from the Well was used for household purposes, Defendants have no rights to any such gas. More specifically, in the Reservation Deed, Veronica Burkhart, clearly conveyed the right to free gas to the grantees (Belcastro).

Meanwhile, the Court finds that Defendants have not been able to produce any evidence of commercial production of oil or gas from the Well from June 30, 1986 to June 30, 2006.

Moving on, pursuant to the Former DMA , a Severed Mineral Interest is preserved if, within the preceding twenty years, "the mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the County Recorder of the County in which the lands are located." Revised Code § 5301.56(B)(1)(c)(i) .

"Title Transaction," as defined in § 5301.47(F) of the former DMA 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 any warranty deed, quit claim deed, or a mortgage.

This Court has recently held, in *Eisenbarth v. Reusser*, Monroe County C.P. 2012-292 (2013), that a recitation of the original oil and gas reservation in subsequent transfers of the surface do not affect the Severed Mineral Interest and therefore do not constitute "title transactions" under ORC § 5301.56(B)(1)(c)(i) . The Court went on to find that since the Severed Mineral Interest was not deeded, transferred or otherwise conveyed in any of the following title transactions and as a result, title thereto was not affected. *Id.* at 8-9.

Consistent with the foregoing, this Court finds in the within case that the 1988 Deed transferred to Plaintiffs title to the surface estate. Belcastro owned no interest in the separate fee simple mineral estate. The 1988 Deed clearly states that the Severed Mineral Interest was reserved by a "former grantor" and was therefore not affected by the conveyance.

Accordingly, this Court finds that the 1988 Deed does not constitute a "title transaction" under the DMA .

Likewise, this Court finds that the Certificate of Transfer granted by the Monroe

Monroe County
Common Pleas
Court
- - -
Julie R. Selmon
Judge

County Probate Court does not qualify as a "title transaction" since under the express language of the DMA , a title transaction under the statute must be "recorded in the office of the County Recorder." In this case, the Defendants did not record the Certificate of Transfer in the Monroe County Recorder's Office until February 27, 2013, well beyond the time frame under the statute.

This Court further finds that the Severed Mineral Interest has also been abandoned pursuant to the current DMA . This Court has previously held, in *Marty, supra*, that the current DMA is "virtually identical to the previous version of the DMA " with the exception that a "Notice" requirement [ORC § 5301.56(E)] has been added, whereby the surface owner of the land subject to the Severed Mineral Interest may utilize a statutory process of abandonment. See *Marty* at p. 6.

The statutory process requires that the surface owner serve Notice of Abandonment, either by certified mail, return receipt requested, if possible, or by publication in the newspaper of record for the County in which the property is located, of the intent to abandon the mineral interest. R.C. § 5301.56(E).

Notice shall be served to the holders of the mineral interest, or their successors or assigns. R.C. § 5301.56(E). After thirty, but not more than sixty, days after the date of the Notice of Abandonment, the surface owner then shall file an Affidavit of Abandonment to put on the record his or her statement that none of the savings conditions outlined in § 5301.56(B) of the Current DMA occurred within the previous twenty years from the date of the Notice of Abandonment, and therefore the interest is "deemed abandoned." *Marty* at p. 7. The surface owner must wait more than sixty days from the date of the Notice of

Abandonment prior to recording a letter to the Recorder instructing the Recorder to note on the Reservation Deed that the mineral interest has been abandoned. R.C. § 5301.56(H).

In *Marty*, *supra*, this Court held that the Current DMA provides that a holder of a Severed Mineral Interest may file a claim to preserve after he or she receives the Notice of Abandonment, but the claim to preserve serves only to stop the statutory process of abandonment and a lawsuit must be filed. *Marty* at p. 11. In the lawsuit, the Severed Mineral Interest Holder still must be required to show why the Severed Mineral Interest has not been abandoned. This Court further held that a claim to preserve itself cannot be the basis for establishing that the mineral interest has not been abandoned. *Id.* The holder of the mineral interest must show the existence of one of the savings conditions under § 5301.56(B) of the Current DMA occurring prior to the date of the Notice of Abandonment.

Here, this Court finds that Defendants are unable to show the occurrence or existence of any of the savings conditions under § 5301.56(B) of the Current DMA prior to the date of the Notice of Abandonment.

Based on all of the foregoing, this Court finds that under both the former and current versions of the DMA , the Severed Mineral Interest has been abandoned and vested in Plaintiffs. The Court finds that there remain no genuine issues of material fact to be litigated. As such, Plaintiffs' Motion for Summary Judgment is granted. Defendants' Motion for Summary Judgment is denied.

The Court further finds that there is no just reason for delay, and that this "Judgment Entry Incorporating Findings of Fact and Conclusions of Law" is a final appealable order,

as defined under Civil Rule 54.

The costs of this proceeding are assessed to the Defendants. Judgment is hereby granted the Clerk of this Court to collect on her costs.

IT IS SO ORDERED.

Honorable Julie R. Selmon
Enter as of the date of filing

Copies to: James S. Huggins, Esquire and Kristopher O. Justice, Esquire
THEISEN BROCK

Mark W. Stubbins, Esquire
STUBBINS, WATSON & BRYAN CO., LPA

c: \ oil&gas decisions \
farnsworth-burkhartopinionanddecision
July 15, 2013 (3:42PM)Jay

Monroe County
Common Pleas
Court

Julie R. Selmon
Judge

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
2013 APR 11 PM 1:32
BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, OHIO

NEAL D. MARTY, *etal*,

Plaintiffs,

v.

Case No. 2012-203

LINDA DENNIS (WINKLER), *etal*,

Defendants.

JUDGMENT ENTRY

This matter is before the Court for non-oral hearing on the following motions:

(1). Plaintiffs' Motion for Summary Judgment;

(2). Defendants' Motion for Summary Judgment;

(3). Plaintiffs' Memorandum Contra to Defendants' Motion for Summary Judgment.

Based on the filings of the parties and the applicable law, the Court makes the following findings and orders.

The Court first notes that both parties acknowledge that there is no dispute as to the facts in this case.

Neal D. Marty and Diana L. Marty, Trustees under the Diana L. Marty Trust Agreement dated the 25th day of June 2010 (hereinafter "Plaintiffs") are the fee owners of 107.39 acres, more or less, situated in Adams Township, Monroe County, Ohio. The subject property is described as Tract I and Tract II in the deed conveying the property to Plaintiffs, dated June 25, 2010, filed July 30, 2010, and recorded in Volume 193, Page 509

Monroe County
Common Pleas
Court
- - -
Julie R. Selmon
Judge

FINAL APPEALABLE
ORDER

COPY

of the Official Records of Monroe County, Ohio.

That part of the Plaintiffs' property that is in Section 24 is approximately sixty-eight (68) acres. This property is contained in Tract II of the above-referenced deed. This sixty-eight (68) acre parcel, or Tract II, is the only parcel in the above-referenced deed that is in dispute in this case. The sixty-eight (68) acres shall hereinafter be referred to as the "Property."

Plaintiffs' predecessors in title, John J. Winkler and Mary M. Winkler, conveyed the Property to Carl W. Ambler and Alice Mae Ambler. The instrument reflecting this transaction is the deed dated August 24, 1949, filed August 25, 1949 and recorded in Volume 123, Page 186 of the Deed Records of Monroe County, Ohio (hereinafter the "Reservation Deed"). The Reservation Deed contained the following language:

> "Also excepting and reserving unto the grantors herein, their heirs and assigns, the one-half (1/2) of the oil and gas royalty, same being one-sixteenth (1/16) of all the oil and one-half (1/2) of all monies received from the sale of gas from the east half of the south east quarter of Section 24, Township 3 of Range 4, containing sixty-eight (68) acres."
> (Hereinafter the "Severed Mineral Interest").

Defendants in this case are the heirs of John J. Winkler and Mary M. Winkler and are claiming title to the Severed Mineral Interest as reserved in the Reservation Deed.

On February 3, 2012, the Plaintiffs filed an Affidavit with the Monroe County Recorder's Office declaring that the reserved royalty interest of the Defendants was abandoned and vested in the Plaintiffs. This Affidavit was filed pursuant to R.C. 5301.56 as it existed prior to its most recent amendment on June 30, 2006.

On February 9, 2012, the Plaintiffs published a notice in the *Monroe County Beacon* again declaring that the reserved royalty interest of the Defendants was abandoned and vested in the Plaintiffs. This publication was made pursuant to the current version of R.C. 5301.56.

On March 14, 2012, the Plaintiffs filed another Affidavit of Abandonment again declaring that the reserved royalty interest was abandoned and vested in the Plaintiffs. This second Affidavit was filed purportedly pursuant to the current version of R.C. 5301.56.

On April 5, 2012, the Defendants filed their Notice to Preserve Mineral Interests with the Monroe County Recorder.

As set forth above, there is no dispute as to the facts in this case. The Plaintiffs are asking the Court to declare that any royalty interest of the Defendants in the Property has been forfeited under the current version of R.C. 5301.56 as well as the version of the statute as it existed prior to its amendment in 2006. The Defendants assert that their purported interest is only the right to receive a royalty payment and is not a mineral interest that can be forfeited under R.C. 5301.56 and that even if it is such an interest subject to forfeiture, the interest has been preserved by the filing of Defendants' Notice to Preserve Mineral Interest.

Certain requirements must be met before the Court can find that a party is entitled to Summary Judgment as a matter of law.

Civil Rule 56(C) specifically provides that before Summary Judgment may be granted, it must be determined that:

(1). No issue as to any material fact remains to be litigated;

(2). The moving party is entitled to judgment as a matter of law; *and*

(3). It appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for Summary Judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. , 50 Ohio St. 2d 317 (1977).

The Dormant Minerals Act (" DMA "), as enacted on March 13, 1989, is set forth below in its entirety:

§5301.56 Mineral Interests in Realty.

(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.

(B)(1) 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:

(a) 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.

(b) 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.

(c) Within the preceding twenty years, one or more of the following has

occurred:

(i) 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;

(ii) 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;

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

(iv) 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 [5301.25.2] of the Revised Code, in the office of the county recorder of the county in which the lands are located;

(v) A claim to preserve the mineral 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 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.

(B)(2) 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 section.

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by

its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 [317.20.1] 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, his rights in the mineral interest.

(C) (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.

(C)(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)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(c) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

(D)(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 [5301.33.2] of the Revised Code.

HISTORY: 142 v S 223. Effective Date: 03-22-1989

The current version of the Dormant Minerals Act, amended effective June 30, 2006, is virtually identical to the previous version set forth above, with the exception that a

"notice" requirement (ORC §5301.56[E]) has been added, whereby the surface owner of the land subject to the Severed Mineral Interest may utilize a statutory process of abandonment. That process requires the surface owner to give notice, (by certified mail, if possible, or by publication) of the intent to have the mineral interest abandoned, to the "holder" of the mineral interest or each holder's successors or assignees "before the mineral interest becomes vested" in the surface owner. (ORC 5301.56[E]). The surface owner (after thirty, but not more than sixty days) then files an Affidavit of Abandonment putting on record the fact that none of the savings conditions outlined in ORC §5301.56(B) have occurred, and therefore the interest is deemed abandoned. The surface owner must then wait an additional thirty (but not more than sixty) days, and if nothing is filed under ORC §5301.56(H), the surface owner may send a letter to the recorder instructing him/her to note on the "Reservation Deed" that the interest has been abandoned.

By its very terms, and in comparison with the current version of the DMA , the previous version of the DMA was self-executing in the sense that nothing was required of the surface owner before the mineral interest was deemed abandoned, except to show that none of the savings conditions set forth in paragraphs/subparagraphs (B)(c)(i)(ii)(iii)(iv)(v)(vi) had occurred within "the preceding twenty years...". The only other qualifications to have the mineral interest deemed abandoned was that the mineral interest could not involve coal (B)(a) and was not a mineral interest "held by the United States, this state, or any political subdivision..." (B)(b). The previous version of the DMA also provided that no mineral interest could be deemed abandoned based upon the absence of the

savings conditions set forth in (B)(1) until three years from the effective date of the law (B)(2).

Defendants assert that the Severed Mineral Interest that is the subject of this action "is not a 'mineral interest' as contemplated by the statute and therefore the Plaintiffs have no right to ask the Court to declare the [abandonment] of this right under the Dormant Minerals Act."

This Court addressed the very issue of whether a royalty interest is subject to the provisions of the previous version of the Dormant Minerals Act in *Cyril T. Burkhart v. George A. Burkhart*, Monroe C.P. CVH 92-278. The Defendants in *Burkhart* argued that because the statute does not provide a definition of "mineral interest", the statute, if read as a whole, should preclude the abandonment of a royalty interest. This Court explicitly rejected that argument, holding "[t]he Court finds that the oil and gas rights, including the royalty interest, in and under the real estate described in Paragraph 1 of the Complaint [...] are owned by the Plaintiffs and that any interests of the Defendants have been abandoned pursuant to the Dormant Minerals Act (ORC 5301.56)." *Cyril T. Burkhart v. George A. Burkhart*, Monroe C.P. CVH 92-278 at 1.

In this case, Defendants claim that "there is clearly a difference between a right to receive a royalty payment and an actual mineral interest in property." Plaintiffs agree that there is a difference, however, a royalty interest remains an interest in realty until the minerals are removed from the ground and materialized as personal property. See 68 O.Jur 3d, Mines and Minerals, Section 8.

This Court finds that the issue of whether a royalty interest may be extinguished by the previous version of the DMA has been previously decided by this Court and that decision is favorable to Plaintiffs' position and contrary to Defendants' argument.

Additionally, the Court further finds that a royalty interest is subject to abandonment under the current version of the Ohio Revised Code §5301.56.

More specifically, the current version of the Dormant Minerals Act, added a definition of "Mineral Interest". ORC §5301.56(A)(3) provides:

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

This Court finds that the definition of a "Mineral Interest" includes an oil and gas royalty interest, as a royalty interest remains an interest in realty until the minerals are removed from the ground and materialized as personal property. See 68 O.Jur 3d, Mines and Minerals, Section 8.

Moreover, the *Buegel* Court noted that "[a]n oil and gas 'royalty' has been described as that fractional interest in the production of oil and gas that was created by the owner of land, either by reservation when the mineral lease was entered into, or by direct grant to a third person." See *Buegel v. Amos*, 1984 WL 7725 (7th District, 1984), citing 38 American Jurisprudence 2d 670, Gas and Oil, Section 189.

Because a royalty interest is a fractional interest of the oil and gas estate, this Court finds that such an interest falls within the definition of "Mineral Interest" outlined by ORC

§5301.56(A)(3).

In the present case, the Court finds that the undisputed facts of this case reflect that during the twenty (20) year period immediately preceding every date in which the previous version of ORC §5301.56 was effective, none of the savings conditions outlined by ORC §5301.56(B) [quoted above] occurred to keep the Severed Mineral Interest from being deemed abandoned. Defendants are unable to show any evidence to the contrary. The Severed Mineral was then deemed abandoned as of March 13, 1992, allowing for the three year grace period. Accordingly, the Court finds that the Defendants no longer have any right, title or interest in and to the mineral estate under Plaintiffs' property.

Furthermore, notwithstanding the above analysis, this Court further finds that the amended version of the DMA (effective after June 30, 2006) also operates to extinguish Defendants' interest. As outlined above, the amended version of Ohio Revised Code §5301.56 added a notice requirement. The amended version provides that the holder of a Severed Mineral Interest may file a claim at some point after he receives a notice of abandonment to stop the statutory process. See ORC §5301.56(H).

More specifically, Ohio Revised Code §5301.56(H)(1) provides:

> If a holder or a holder's successors or assigns 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.

Accordingly, this Court finds the if a severed interest holder files a notice under paragraph (H) above, the landowner's statutory remedy to abandon a Severed Mineral Interest has been exhausted, requiring the filing of a lawsuit. At that point, the severed interest holder must be required to show why the severed interest has not been abandoned. A preservation notice itself cannot be the basis for establishing that the mineral interest has not been abandoned. The holder must show the existence of one of the savings conditions under ORC §5301.56(B).

Again, the Court finds that Defendants in this case have not shown that existence of any of the savings conditions provided for in ORC §5301.56(B).

Accordingly, the Court finds that the Severed Mineral Interest in the within case is hereby deemed abandoned under the current version of the Dormant Minerals Act as well.

Based on all of the foregoing, the Court finds that no genuine issue of material fact exists in the within matter and Plaintiffs are entitled to judgment as a matter of law under both the prior and current version of the Dormant Minerals Act, Ohio Revised Code §5301.56.

Monroe County
Common Pleas
Court

Julie R. Selmon
Judge

Plaintiffs' Motion for Summary Judgment is granted. The Clerk shall note the same on both the Reservation Deed (Volume 123, Page 186, Deed Records of Monroe County, Ohio) and the Claim to Preserve (Monroe County, Ohio Official Records, Volume 217, Pages 263-265).

Costs assessed in full to the Defendants. Judgment granted the Clerk of Courts to collect on her costs.

IT IS SO ORDERED.

Hon. Julie R. Selmon
Dated: *Enter as of the date of filing*

Copies to: Craig E. Sweeney, Esquire
Stephen R. McCann, Esquire

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Monroe County
Common Pleas
Court

Julie R. Selmon
Judge

IN THE COURT OF COMMON PLEAS OF JEFFERSON COUNTY, OHIO

ERNEST SHANNON et al	:	JOURNAL ENTRY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OVERRULING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
Plaintiffs	:	
-vs-	:	
JAY HOUSEHOLDER SR et al	:	Case No. 12CV226
Defendants	:	

This case arises as a dispute over the ownership of the **mineral, oil, gas, etc rights** of certain real estate (hereinafter referred to as the "subject real estate"). The parties have entered into stipulations of fact which resolve the factual issues, and both the plaintiffs and defendants have filed motions for summary judgment. The Court, therefore, considers each parties motion in accordance with Civil Rule 56 and the standard required by said rule and the case law applicable thereto.

The parties stipulate that plaintiffs are the owners of the entire surface of the subject real estate of approximately 118 acres but dispute the ownership of the mineral, oil and gas rights.

Three issues are addressed by the parties in their motions for summary judgment as being dispositive of the issues of ownership of the **mineral, oil, gas, etc**. underlying the subject real estate, and the Court addresses each issue as follows:

Issue #1 is the interpretation and meaning of the following clause (hereinafter referred to as the reservation clause with limitations) which is included in plaintiffs' deed to the subject

real estate as conveyed to the plaintiffs from Elva Lawrence and Alma Lawrence by warranty deed recorded at Deed Volume 542, page 515 (dated April 9, 1976), to-wit:

> EXCEPTING AND RESERVING all the coal, oil and gas and other minerals in, on and under said premises, with all the mining rights necessary and incident thereto. And further the right to mine and remove the said coal and to make all the necessary openings and entries in doing so, with the further right to erect all ventilation and other necessary openings in mining and removing said coal therefrom, with the further right to erect and construct tipples and tracks and other structures on the land. And also the right to drill and operate for oil and gas on said premises, with all the rights necessary and incident thereto.
>
> These exceptions and reservations are limited to those property rights which have been excepted and reserved in Grantors' chain of title.

Issue #2 is the application of ORC§5301.56, the Dormant Minerals Act of 1989, as it existed prior to 2006 (hereinafter referred to as the "DMA of 1989"), and whether said DMA of 1989 was self-executing as to the abandonment of **mineral, oil, gas, etc. rights** which had been reserved under reservation clauses included in deeds conveying title to real estate.

Issue #3 is the application of ORC§5301.56, the Dormant Minerals Act of 2006, as it currently exists after having been amended by the legislation in 2006 (hereinafter referred to as the "DMA of 2006"). Said DMA of 2006 is very similar to the DMA of 1989 but includes <u>notification actions</u> to be taken by the surface owner of the real estate in order to effectuate the abandonment of dormant mineral rights.

Plaintiffs chain of title and the subject reservations contained therein are not at issue. For ease of analysis the plaintiffs refer to mineral rights in their chain of title in two manners, to-wit:

> (1) **the one-half "transferred mineral rights"** as relates to the conveyance from the Estate of J H Lawrence of a 1/4 interest to his daughter, Elva L Lawrence, and of a 1/4 interest to his daughter, Alma J Lawrence (Certificate of Transfer Volume 213, page 252, on August 9, 1946) and, thereafter, from Elva L

Lawrence and Alma J Lawrence to plaintiffs (Warranty Deed Volume 542, page 515, on August 9, 1976). Said Certificate of Transfer (Volume 213, page 252) contains no mineral reservation clause.

(2) **the one-half "reserved mineral interest"** as relates to the conveyances from the estate of J H Lawrence of a 1/4 interest to his daughter, Chellissa Swickard, (Certificate of Transfer Volume 213, page 252) and of a 1/4 interest to his daughter, Jetta Householder, (Certificate of Transfer Volume 213, page 252). The Certificate of Transfer contains no mineral reservation clause. However, the subsequent conveyance from Chellissa Swickard (Volume 349, page 384) to Elva Lawrence and Alma Lawrence, as well as the subsequent conveyance from the heirs of Jetta Householder (Volume 283, page 213 and Volume 283, page 209) to Elva Lawrence and Alma Lawrence do contain "coal, oil, gas and other minerals" reservations, to-wit:

EXCEPTING AND RESERVING all the coal, oil and gas and other minerals in, on and under said premises, with all the mining rights necessary and incident thereto. And further the right to mine and remove the said coal and to make all the necessary openings and entries in doing so, with the further right to erect all ventilation and other necessary openings in mining and removing said coal therefrom, with the further right to erect and construct tipples and tracks and other structures on the land. And also the right to drill and operate for oil and gas on said premises, with all the rights necessary and incident thereto.

As to Issue #1, the Court finds that the excepting and reserving clause with limitations contained in plaintiffs' deed from Elva L Lawrence and Alma J Lawrence (the grantors)(Deed Volume 542, page 515, dated April 9, 1976) is not effective to have reserved the mineral rights as to the referenced "one-half transferred rights". The Court finds that the language in said excepting and reserving clause is clear and unambiguous and clearly states that:

> These exceptions and reservations are limited to those property rights which have been excepted and reserved in Grantors' chain of title.

Thus, this limitation clause is clearly a part of and related to the claimed excepting and reserving clause. There were no mineral rights reservations contained within the grantors' chain of title when conveyed from the Estate of J. H. Lawrence to Elva L. Lawrence and Alma J. Lawrence, nor were there any conveyances of said mineral rights from Elva Lawrence and Alma

Lawrence prior to their conveyance to the plaintiffs on April 9, 1976. Therefore, by the clear wording of said conveyance there were no mineral rights reserved, as there were no property rights excepted and reserved within the chain of title when conveyed to the plaintiffs.

Plaintiffs are, therefore, found to be the owner of the "one-half transferred mineral rights".

As to Issue #2, the Court finds that the DMA of 1989 is applicable to the issue of the ownership of the "one-half reserved mineral interest", that by the clear wording of said DMA of 1989 (§5301.56(B)(1), as highlighted below) said statute was self-executing and that under the facts as stipulated in this case the excepting and reserving clause contained within plaintiffs' chain of title is not now effective having been abandoned by inaction as contemplated by said statute.

The Court finds, therefore, that by virtue of the application of the DMA of 1989, the plaintiffs are the owner of the "one-half reserved mineral interest".

Said DMA of 1989 states, in pertinent part as follows:

> §5301.56(B)(1) 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:
>
> (a) 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.
>
> (b) 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.
>
> (c) Within the preceding twenty years, one or more of the following has occurred:
>
> > (i) 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;
>
> (ii) There as 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 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;
>
> (iii) The mineral interest has been used in underground gas storage operations by the holder.
>
> (iv) The drilling or mining permit has been issued to the holder, provide 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.
>
> (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 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.
>
> [Emphasis added]

Subsequent to the conveyance by Elva Lawrence and Alma Lawrence to the plaintiffs (dated April 9, 1976), on March 17, 1978, Elva L Lawrence and Alma J Lawrence executed an oil and gas lease as lessors to Beldon and Blake Corp (Lease Volume 54, page 710); however, no activity was ever commenced.

Also, subsequent to the conveyance by Elva Lawrence and Alma Lawrence to the plaintiffs (dated April 9, 1976), on July 12, 1979, a Certificate of Transfer was recorded from

Elva Lawrence to Alma Lawrence (Volume 588, page 284) purporting to transfer the subject real estate but also containing the same exception and reserving clause previously referenced.

Neither the mineral lease to Belden and Blake Corp, nor the Certificate of Transfer (Volume 588, page 284), are activities which under the statute prevent the abandonment of said mineral interests. No activities were ever commenced under said oil and gas lease. The Certificate of Transfer was executed subsequent to the conveyance of the subject real estate to the plaintiffs (therefore there was no interest to be transferred) and, further, the Certificate of Transfer specifically contained the same previously referenced excepting and reserving clause, so even had it been effective, it would not have been a title transaction of which the mineral interest had been the subject.

Further, even had the oil and gas lease (dated March 17, 1978) or the Certificate of Transfer (dated July 12, 1979) been considered as such a title transaction, the twenty year period of inactivity would have run, at the latest, on July 13, 1999, prior to the effective date of the DMA of 2006 and subsequent to the effective date of the DMA of 1989 which, including the three (3) year grace period, is March 22, 1992. Thus, the mineral rights vested in the surface owner on or before July 13, 1999.

Said statute (DMA of 1989) is found to be self-executing upon the happening of the actions stated therein and no action on behalf of the plaintiffs was necessary to effectuate the abandonment. None of the provisions listed in §5301.56(B)((1)(a)-(c) applies to the facts in this case.

Plaintiffs are, therefore, found to be the owner of the "one-half reserved mineral interest".

As to Issue #3, the Court finds that the issues in this case have been determined as stated in the findings under **Issue #1** and **Issue #2**, and that **Issue #3**, the DMA of 2006, is not applicable to this matter but rather the DMA of 1989 is determinative. Further, the Court finds that the DMA of 2006 is not retroactive but applies only prospectively in accordance with ORC§1.48 as the same was not "expressly made retroactive" as is required under said statute.

The Court finds, based upon the pleadings, all matters in the court file and affidavits timely filed in this action, that there is no genuine issue of material fact and, reasonable minds can come to but one conclusion even when viewing the evidence most favorably in favor of the defendant, and that conclusion is adverse to the defendant, and plaintiffs are entitled to judgment as a matter of law, and the Court hereby GRANTS summary judgment in favor of the plaintiffs.

The plaintiffs are found to be the owner of the mineral rights underlying the subject real estate, and title to the same shall be quieted in favor of the plaintiffs.

Further, based upon the above, the defendants' motion for summary judgment is hereby OVERRULED.

The Court is aware that this ruling has the effect of finding that many excepting and reserving clauses in current deeds actually may be of no effect, in that they do not except or reserve the mineral rights and, thus, surface land owners may actually also be owners of the mineral rights as regards minerals underlying the surface lands, not withstanding an exception or reservation of mineral clause included in the deed conveying the real estate to the surface owner; however, that is the clear intent of the legislators in their enactment of the DMA of 1989, as well as the DMA of 2006. The function of the Court in this matter is to interpret and

apply the law as enacted by the legislature as there was no challenge to the statute itself.

The plaintiffs shall prepare any documents necessary for recording and quieting plaintiffs' mineral interest.

THIS IS A FINAL APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

Judge David E Henderson

cc:

Clinton G Bailey Esq
Brandon Cogswell Esq

IN THE COURT OF COMMON PLEAS OF JEFFERSON COUNTY, OHIO

DAN L SWARTZ et al	:	JOURNAL ENTRY **GRANTING**
Plaintiffs	:	**PLAINTIFFS' MOTION**
	:	FOR SUMMARY JUDGMENT
-vs-	:	AND **OVERRULING DEFENDANTS'**
	:	**MOTION** FOR SUMMARY JUDGMENT
JAY HOUSEHOLDER SR et al	:	
	:	Case No. 12CV328
Defendants	:	

This case arises as a dispute over the ownership of the **mineral, oil, gas, etc rights** of certain real estate (hereinafter referred to as the "subject real estate"). The parties have entered into stipulations of fact which resolve the factual issues, and both the plaintiffs and defendants have filed motions for summary judgment. The Court, therefore, considers each parties motion in accordance with Civil Rule 56 and the standard required by said rule and the case law applicable thereto.

The parties stipulate that plaintiffs are the owners of the entire surface of the subject real estate of approximately 71.8 acres but dispute the ownership of the mineral, oil and gas rights.

The plaintiffs contend that they are the owner of the oil and gas (the "mineral interest") rights as they are the surface owner of the real estate and, that by virtue of ORC§5301.56, the Dormant Minerals Act of 1989 (hereinafter the "DMA of 1989"), they are vested with said mineral interest by operation of law.

The plaintiffs additionally contend that they are the owner of the mineral rights by virtue of ORC§5301.56, the Dormant Minerals Act of 2006 (hereinafter the "DMA of 2006").

The defendants contend that the DMA of 1989 did not divest them of the mineral interest and, secondly, that they had preserved their mineral interest in accordance with the DMA of 2006.

Two issues are addressed by the parties in their motions for summary judgment as being dispositive of the issues of ownership of the mineral interest underlying the subject real estate, and the Court addresses each issue as follows:

Issue #1 is the application of ORC§5301.56, the Dormant Minerals Act of 1989, as it existed prior to 2006 (hereinafter referred to as the DMA of 1989), and whether said DMA of 1989 was self-executing as to the abandonment of **mineral, oil, gas, etc. rights** which had been reserved under reservation clauses included in deeds conveying title to real estate.

Issue #2 is the application of ORC§5301.56, the Dormant Minerals Act of 2006, as it currently exists after having been amended by legislation in 2006 (hereinafter referred to as the DMA of 2006). Said DMA of 2006 is very similar to the DMA of 1989 but includes notification actions to be taken by the surface owner of the real estate in order to effectuate the abandonment of dormant mineral rights.

Plaintiffs chain of title and the subject reservations contained therein are not at issue.

The Court finds the following facts have been established by the parties stipulation and the documents which have been properly submitted by the parties:

As Regards the 1946 Reservation of the Mineral Interest:

On August 30, 1946, Elva L. Lawrence, Alma J. Lawrence, Chellissa Swickard, Walter Swickard, Jetta A. Householder, and Arthur L. Householder (the "reserving parties"), transferred the property to Cleve Landis and Marie Landis, husband and wife, by Warranty

Deed recorded September 12, 1946, at Volume 214, page 127, of the Official Records of Jefferson County, Ohio, reserving the mineral interest to themselves (the "reserving deed"). (See Stip., ¶3) The reserving deed conveyed the property with the following limitation:

> Excepting and reserving all minerals underlying said premises. This reservation of minerals includes coal, clay, oil, and gas, and any and all other minerals whether named herein or not, underlying the above described premises, together with all mineral rights incident to the mining and removing or developing said minerals.

(See Ex. B attached to plaintiff's Complaint)

Defendants claim to own the mineral interest as heirs of the reserving parties based upon the reserving deed (See Stip. ¶1; Ex.F; Answer ¶5). The reserving parties never conveyed the mineral interest to any of the defendants (nor to anyone else, for that matter) (See Stip. ¶10). Defendants are, however, the only living heirs of the reserving parties, and so it is believed that they are entitled to ownership of the mineral interest if it has not been abandoned by operation of law (See Stip. ¶¶4, 10). Plaintiffs are the fee owners of the property, which was conveyed to them by warranty deed without reservations recorded May 8, 2002, at Official Record Volume 486, page 873 (See Stip.¶1; Ex.B). If the mineral interest has vested in the surface owner of the property, it has vested in the plaintiffs (See Stip.¶1; See Ex. B).

As to Issue #1, the Court finds that the DMA of 1989 is applicable to the issue of the ownership of the mineral interest, that by the clear wording of said DMA of 1989 (§5301.56(B)(1), as highlighted below) said statute was self-executing and that under the facts as stipulated in this case the excepting and reserving clause contained within plaintiffs' chain of title is not now effective having been abandoned by inaction as contemplated by said statute.

The Court finds, therefore, that by virtue of the application of the DMA of 1989, the plaintiffs are the owner of the mineral interest.

Said DMA of 1989 states, in pertinent part as follows:

> §5301.56(B)(1) 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:
>
> (a) 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.
>
> (b) 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.
>
> (c) Within the preceding twenty years, one or more of the following has occurred:
>
> > (i) 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;
> >
> > (ii) There as 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 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;
> >
> > (iii) The mineral interest has been used in underground gas storage operations by the holder.
> >
> > (iv) The drilling or mining permit has been issued to the holder, provide 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.

> (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 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.
>
> [Emphasis added]

Subsequent to the conveyance by Elva Lawrence and Alma Lawrence to the plaintiffs' predecessor in title (to-wit: Cleve Landis and Maris Landis on August 30, 1946), and on March 17, 1978, Elva L Lawrence and Alma J Lawrence executed an oil and gas lease as lessors to Beldon and Blake Corp (Lease Volume 54, page 710) for a term of twenty (20) years; however, no activity was ever commenced.

Also, subsequent to the conveyance by Elva Lawrence and Alma Lawrence to the plaintiffs said predecessors in title on July 12, 1979, a Certificate of Transfer was recorded from Elva Lawrence to Alma Lawrence (Volume 588, page 284) purporting to transfer the subject real estate but also containing the same exception and reserving clause previously referenced.

Neither the mineral lease to Belden and Blake Corp, nor the Certificate of Transfer (Volume 588, page 284), are activities which under the statute prevent the abandonment of said mineral interests. No activities were ever commenced under said oil and gas lease. The Certificate of Transfer was executed subsequent to the conveyance of the subject real estate to the plaintiffs (therefore there was no interest to be transferred) and, further, the Certificate of Transfer specifically contained the same previously referenced excepting and reserving clause, so even had it been effective, it would not have been a title transaction of which the mineral interest had been the subject.

Further, even had the oil and gas lease (dated March 17, 1978) or the Certificate of Transfer (dated July 12, 1979) been considered as such a title transaction, the twenty year period of inactivity would have run, at the latest, on July 13, 1999, prior to the effective date of the DMA of 2006 and subsequent to the effective date of the DMA of 1989 which, including the three (3) year grace period, is March 22, 1992. Thus, the mineral rights vested in the surface owner on or before July 13, 1999.

Defendants contention that the twenty (20) year term of the lease caused a tolling of the twenty (20) year statutory period of inactivity contemplated by the DMA of 1989 is unpersuasive and not supported by any persuasive authority.

Said statute (DMA of 1989) is found to be self-executing upon the happening of the actions stated therein and no action on behalf of the plaintiffs was necessary to effectuate the abandonment. None of the provisions listed in §5301.56(B)((1)(a)-(c) applies to the facts in this case.

Plaintiffs are, therefore, found to be the owner of the mineral interest.

As to Issue #2, the Court finds that the issues in this case have been determined as stated in the findings under **Issue #1,** and that **Issue #2,** the DMA of 2006, is not applicable to this matter but rather the DMA of 1989 is determinative. Further, the Court finds that the DMA of 2006 is not retroactive but applies only prospectively in accordance with ORC§1.48 as the same was not "expressly made retroactive" as is required under said statute.

The Court finds, based upon the pleadings, all matters in the court file and affidavits timely filed in this action, that there is no genuine issue of material fact and, reasonable minds can come to but one conclusion even when viewing the evidence most favorably in favor of the

defendant, and that conclusion is adverse to the defendant, and plaintiffs are entitled to judgment as a matter of law, and the Court hereby GRANTS summary judgment in favor of the plaintiffs.

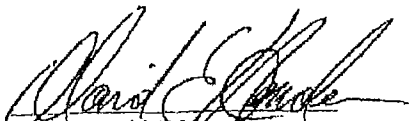
The plaintiffs as owners of the surface are found to be the owner of the mineral rights underlying the subject real estate, and title to the same shall be quieted in favor of the plaintiffs.

Further, based upon the above, the defendants' motion for summary judgment is hereby OVERRULED.

The Court is aware that this ruling has the effect of finding that, based upon the DMA of 1989, many excepting and reserving clauses in current deeds actually may be of no effect, in that they no longer except or reserve the mineral rights and, thus, surface land owners may actually also be owners of the mineral rights as regards minerals underlying the surface lands, not withstanding an exception or reservation of mineral clause included in the deed conveying the real estate to the surface owner; however, that is the clear intent of the legislators in their enactment of the DMA of 1989, as well as the DMA of 2006. The function of the Court in this matter is to interpret and apply the law as enacted by the legislature as there was no challenge to the statute itself.

The plaintiffs shall prepare any documents necessary for recording and quieting plaintiffs' mineral interest.

THIS IS A FINAL APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.



Judge David L. Henderson

cc:
Clinton G Bailey Esq
Brandon Cogswell Esq

IN THE COMMON PLEAS COURT OF JEFFERSON COUNTY, OHIO

FILED
COMMON PLEAS COURT
2013 SEP 13 A 11:10

MARK S. KROSS, ET AL	)	**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
Plaintiffs	)	
	)	
-vs-	)	Case No: 12-CV-303
JEAN YVONNE RUFF, SR, ET AL	)	
Defendants	)	**JOSEPH J. BRUZZESE, JR. JUDGE**

* * * * * * * *

FACTS

This case involves issues relating to the title to minerals under a 219.219 acre track of real estate in Wayne Township, Jefferson County, Ohio. Plaintiffs own the surface and claim all of the minerals. Defendants also claim one-half interest in the minerals. The facts are not in dispute. What is in dispute is the interpretation and application of the Dormant Mineral Act Statute, Ohio Revised Code §5301.56 and §5301.47.

On May 31, 2013, Plaintiffs filed "Plaintiffs' Motion for Summary Judgment" against all Defendants.

Plaintiffs own the surface through a series of transactions from November 2, 2002 through February 4, 2003. It is not necessary to track those transactions as it is conceded that Plaintiffs own the surface. Defendants claim an interest in one-half of the oil and gas rights through a 1924 reservation by the ancestors of Defendants. Defendants claim that interest by inheritance. That reservation reads:

> "Said grantors for themselves and their heirs and assigns do hereby except and reserve ½ interest in all oil and gas in and underlying said premises."

It is clear that there have been no recorded title transfers of the disputed interest since 1942 and there has been no exploration, production, or storage of oil and gas on the premise. There does exist a separate tax parcel for the disputed interest that was created at some time prior to February 29, 1960. That tax parcel remains of record today and while the taxes were in default for some period of time they are now paid in full.

On September 14, 2011, Plaintiffs published their notice pursuant to R.C.5301.56 seeking to reunite the outstanding one-half interest in the oil and gas with the other half interest and the surface. On November 14, 2011, Defendants recorded four (4) separate preservation claims. Plaintiffs claim that Defendants' filing date is one (1) day past the sixty (60) day grace period but November 13, 2011 was a Sunday and Defendants filed on the first business day thereafter. Their filing is timely.

On June 30, 2011, Jefferson County filed a tax lien foreclosure on the mineral interest which, by reason of payment, was dismissed on November 29, 2011.

The aborted mineral tax foreclosure has no bearing on this case. Had the foreclosure been completed through sale it would have constituted a transfer within the applicable twenty (20) year period but that did not happen. At oral hearing, Defendant argued that a forfeiture would have defeated the auditor's lien on the mineral interest. Actually that is not the case. If the mineral interest reverts to the surface owner it will do so subject to any liens the same as it would have with any other transfer. Finally, Defendant claims *Lis Pendis* with respect to the foreclosure action. *Lis Pendis* is nothing more than notice of an interest but it is not a listed savings event in the marketable title act or the dormant mineral act. Perhaps it should be but it is not. For all of these reasons the aborted tax foreclosure is irrelevant to this case.

MARKETABLE TITLE

Plaintiff claims the benefit of the Marketable Title Act beginning at R.C.5301.47. The parties have argued over whether a certain deed recorded in 1973 at Volume 512 Page 249 or the

deed recorded on May 14, 1957 is the "root of title" defined at R.C.5301.47(E). It is actually irrelevant. The 1957 deed recites the exception and therefore does not convey the interest that Plaintiff now claims. The 1973 Deed does not recite the exception but the affidavits to preserve claims filed on November 14, 2011 are clearly within forty (40) years of that deed and likely qualify as a R.C.5301.52 notice.

Under the Dormant Mineral Act of 1989 and 2006 a Mineral Interest is deemed abandoned and vests in the owner of the surface unless one of six saving conditions have occurred. Ohio Revised Code §5301.56 voids outstanding mineral interest and vests those interest in the surface owner unless "within the preceding twenty (20) years, one or more of the following occurred:

> .....
> "vi" 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."

There is a separate tax parcel number for Defendant's interest but it was created outside the twenty (20) year window. The focus then is upon the words "has been." Those are the same words used in the other savings events as follows:

"(i) the mineral interest has been the subject of a title transaction....;

(ii) There has been actual production....;

(iii) The mineral interest has been used in underground storage operations by the holder;

(iv) A drilling or mining permit has been issued to the holder...

(v) A claim to preserve the interest has been filed...

(vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created..."

Defendants claim that "has been" means that once the tax parcel has been created the savings event has been satisfied forever without the creation of a new tax parcel every twenty

(20) years. That would seem to make some sense. On the other hand, Defendant's interpretation of the word "has been" would render irrelevant the "preceding twenty (20) years" window of R.C.5301.56 so long as a savings event had occurred at any time prior to that. In other words, once a savings event has occurred it will always be true that it "has been" for all subsequent years. While that interpretation might make sense with respect to a separate tax parcel, it does not make sense that once a title transaction has occurred it becomes a savings event forever. Nor does it make sense that once there was actual production at some point that this savings event has now occurred for all time. Similarly, it does not make sense that once the mineral interest has been used for underground storage at some time that this savings event would remain valid for all time. The same can be said of a drilling permit that was issued at some time but has not been used in the past twenty (20) years. Would the fact that a drilling permit was issued at some point in time remain a savings event for all time. If these interpretations are correct, then there is no point in having the twenty (20) year window set forth at R.C.5301.56(B)(1)(c).

The Court is then faced with a construction dilemma. Does the Court interpret the words "has been" consistently through all savings events making perfect sense in five but perhaps less sense in the sixth, or does the Court give one meaning to the words "has been" in the first five options and a different meaning to the words "has been" in the sixth.

While creating a new tax parcel number every twenty (20) years does not make a lot of sense to the Court it might make sense to the legislature. It would appear that the legislature intended to require an event rather than a state of being every twenty (20) years. If it was the intent of the legislature for an event to have occurred every twenty (20) years rather than the mere existence of a state of being then Plaintiff's interpretation is correct. Had the legislature intended that the existence of a separate tax parcel during the twenty (20) year period qualify as a savings event then it would have used some form of the word "exist" rather than "created". In the

end it is the Court's duty to interpret the statute as written and intended as the legislature rather than as the Court would have written it.

For all of the reasons set forth above the Court concludes that the legislature intended for an event to occur every twenty (20) years as a savings event and that no event described in the six savings events of the statute has occurred within the past twenty (20) years. The previous outstanding mineral interest is now vested in Plaintiffs as the surface owner under Ohio Revised Code §5301.56. Plaintiff's Motion for Summary Judgment is sustained.

HONORABLE JOSEPH J. BRUZZESE, JR

Copies:

Attorney Steven J. Shrock
Attorney John C. Alberti
Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNIFORM DORMANT MINERAL INTERESTS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

Approved and Recommended for Enactment
in All the States

At its

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

With Prefatory Note and Comments

UNIFORM DORMANT MINERAL INTERESTS ACT

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

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

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
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UNIFORM DORMANT MINERAL INTERESTS ACT

PREFATORY NOTE

Nature of Mineral Interests

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

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

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

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

Potential Problems Relating to Dormant Mineral Interests

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

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

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

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

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

Approaches to the Dormant Mineral Problem

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

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

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

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

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

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

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

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

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

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

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

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

Draft Statute

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

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

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

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

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

UNIFORM DORMANT MINERAL INTERESTS ACT

SECTION 1. STATEMENT OF POLICY.

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

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

COMMENT

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

SECTION 2. DEFINITIONS.

As used in this [Act]:

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

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

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

COMMENT

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

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

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

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

SECTION 3. EXCLUSIONS.

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

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

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

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

COMMENT

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

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

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

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

SECTION 4. TERMINATION OF DORMANT MINERAL INTEREST.

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

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

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

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

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

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

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

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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

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

SECTION 5. PRESERVATION OF MINERAL INTEREST BY NOTICE.

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

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

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

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

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

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

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

COMMENT

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

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

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

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

SECTION 6. LATE RECORDING BY MINERAL OWNER.

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

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

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

COMMENT

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

SECTION 7. EFFECT OF TERMINATION.

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

COMMENT

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

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

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

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

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

SECTION 8. SAVINGS AND TRANSITIONAL PROVISIONS.

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

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

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

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

COMMENT

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

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

SECTION 10. SHORT TITLE.

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

SECTION 11. SEVERABILITY CLAUSE.

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

SECTION 12. EFFECTIVE DATE.

This [Act] takes effect _____.

SECTION 13. REPEALS.

The following acts and parts of acts are repealed:

(1) _____.

(2) _____.

(3) _____.

(126th General Assembly)
(Substitute House Bill Number 288)

AN ACT

To amend sections 317.08, 1509.35, 1509.38, and 5301.56 of the Revised Code to revise the statute governing the vesting of abandoned mineral rights and to allow the chairperson of the Oil and Gas Commission to appoint temporary members to the Commission from the Technical Advisory Council on Oil and Gas when a quorum of the Commission cannot be obtained.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 317.08, 1509.35, 1509.38, and 5301.56 of the Revised Code be amended to read as follows:

Sec. 317.08. (A) Except as provided in divisions (C) and (D) of this section, the county recorder shall keep six separate sets of records as follows:

(1) A record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements, and hereditaments; all notices as provided in sections 5301.47 to 5301.56 of the Revised Code; all judgments or decrees in actions brought under section 5303.01 of the Revised Code; all declarations and bylaws, and all amendments to declarations and bylaws, as provided in Chapter 5311. of the Revised Code; affidavits as provided in ~~section~~ sections 5301.252 and 5301.56 of the Revised Code; all certificates as provided in section 5311.17 of the Revised Code; all articles dedicating archaeological preserves accepted by the director of the Ohio historical society under section 149.52 of the Revised Code; all articles dedicating nature preserves accepted by the director of natural resources under section 1517.05 of the Revised Code; all agreements for the registration of lands as archaeological or historic landmarks under section 149.51 or 149.55 of the Revised Code; all conveyances of conservation easements and agricultural easements under section 5301.68 of the Revised Code; all instruments extinguishing agricultural easements under section 901.21 or 5301.691 of the Revised Code or pursuant to terms of such an easement granted to a

charitable organization under section 5301.68 of the Revised Code; all instruments or orders described in division (B)~~(1)(c)(ii)~~(2)(b) of section 5301.56 of the Revised Code; all no further action letters issued under section 122.654 or 3746.11 of the Revised Code; all covenants not to sue issued under section 3746.12 of the Revised Code, including all covenants not to sue issued pursuant to section 122.654 of the Revised Code; any restrictions on the use of property contained in a no further action letter issued under section 122.654 of the Revised Code, any restrictions on the use of property identified pursuant to division (C)(3)(a) of section 3746.10 of the Revised Code, and any restrictions on the use of property contained in a deed or other instrument as provided in division (E) or (F) of section 3737.882 of the Revised Code; any easement executed or granted under section 3734.22, 3734.24, 3734.25, or 3734.26 of the Revised Code; any environmental covenant entered into in accordance with sections 5301.80 to 5301.92 of the Revised Code; all memoranda of trust, as described in division (A) of section 5301.255 of the Revised Code, that describe specific real property; and all agreements entered into under division (A) of section 1521.26 of the Revised Code;

(2) A record of mortgages, in which shall be recorded all of the following:

(a) All mortgages, including amendments, supplements, modifications, and extensions of mortgages, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered;

(b) All executory installment contracts for the sale of land executed after September 29, 1961, that by their terms are not required to be fully performed by one or more of the parties to them within one year of the date of the contracts;

(c) All options to purchase real estate, including supplements, modifications, and amendments of the options, but no option of that nature shall be recorded if it does not state a specific day and year of expiration of its validity;

(d) Any tax certificate sold under section 5721.33 of the Revised Code, or memorandum of it, that is presented for filing of record.

(3) A record of powers of attorney, including all memoranda of trust, as described in division (A) of section 5301.255 of the Revised Code, that do not describe specific real property;

(4) A record of plats, in which shall be recorded all plats and maps of town lots, of the subdivision of town lots, and of other divisions or surveys of lands, any center line survey of a highway located within the county, the

plat of which shall be furnished by the director of transportation or county engineer, and all drawings and amendments to drawings, as provided in Chapter 5311. of the Revised Code;

(5) A record of leases, in which shall be recorded all leases, memoranda of leases, and supplements, modifications, and amendments of leases and memoranda of leases;

(6) A record of declarations executed pursuant to section 2133.02 of the Revised Code and durable powers of attorney for health care executed pursuant to section 1337.12 of the Revised Code.

(B) All instruments or memoranda of instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record. The recorder may index, keep, and record in one volume unemployment compensation liens, internal revenue tax liens and other liens in favor of the United States as described in division (A) of section 317.09 of the Revised Code, personal tax liens, mechanic's liens, agricultural product liens, notices of liens, certificates of satisfaction or partial release of estate tax liens, discharges of recognizances, excise and franchise tax liens on corporations, broker's liens, and liens provided for in sections 1513.33, 1513.37, 3752.13, 5111.022, and 5311.18 of the Revised Code.

The recording of an option to purchase real estate, including any supplement, modification, and amendment of the option, under this section shall serve as notice to any purchaser of an interest in the real estate covered by the option only during the period of the validity of the option as stated in the option.

(C) In lieu of keeping the six separate sets of records required in divisions (A)(1) to (6) of this section and the records required in division (D) of this section, a county recorder may record all the instruments required to be recorded by this section in two separate sets of record books. One set shall be called the "official records" and shall contain the instruments listed in divisions (A)(1), (2), (3), (5), and (6) and (D) of this section. The second set of records shall contain the instruments listed in division (A)(4) of this section.

(D) Except as provided in division (C) of this section, the county recorder shall keep a separate set of records containing all corrupt activity lien notices filed with the recorder pursuant to section 2923.36 of the Revised Code and a separate set of records containing all medicaid fraud lien notices filed with the recorder pursuant to section 2933.75 of the Revised Code.

Sec. 1509.35. (A) There is hereby created an oil and gas commission consisting of five members appointed by the governor. Terms of office shall

be for five years, commencing on the fifteenth day of October and ending on the fourteenth day of October, except that the terms of the first five members of the board shall be for one, two, three, four, and five years, respectively, as designated by the governor at the time of the appointment. Each member shall hold office from the date of appointment until the end of the term for which the member was appointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall hold office for the remainder of such term. Any member shall continue in office subsequent to the expiration date of the member's term until a successor takes office, or until a period of sixty days has elapsed, whichever occurs first. Each vacancy occurring on the commission shall be filled by appointment within sixty days after the vacancy occurs. One of the appointees to the commission shall be a person who, by reason of the person's previous vocation, employment, or affiliations, can be classed as a representative of a major petroleum company. One of the appointees to the commission shall be a person who, by reason of the person's previous vocation, employment, or affiliations, can be classed as a representative of the public. One of the appointees to the commission shall be a person who, by reason of the person's previous training and experience, can be classed as a representative of independent petroleum operators. One of the appointees to the commission shall be a person who, by reason of the person's previous training and experience, can be classed as one learned and experienced in oil and gas law. One of the appointees to the commission shall be a person who, by reason of the person's previous training and experience, can be classed as one learned and experienced in geology. Not more than three members shall be members of the same political party. This division does not apply to temporary members appointed under division (C) of this section.

(B) Three members constitute a quorum and no action of the commission is valid unless it has the concurrence of at least ~~three members~~ a majority of the members voting on that action. The commission shall keep a record of its proceedings.

(C) If the chairperson of the commission determines that a quorum cannot be obtained for the purpose of considering a matter that will be before the commission because of vacancies or recusal of its members, the chairperson may contact the technical advisory council on oil and gas created in section 1509.38 of the Revised Code and request a list of members of the council who may serve as temporary members of the commission. Using the list provided by the council, the chairperson may appoint temporary members to the commission. The appointment of

temporary members shall be for only the matter for which a quorum cannot be obtained. The number of temporary members appointed by the chairperson shall not exceed the number that is necessary to obtain a quorum for the matter. A temporary member of the commission has the same authority, rights, and obligations as a member of the commission, including the right to compensation and other expenses as provided in this section. The authority, rights, and obligations of a temporary member cease when the temporary member's service on the commission ends.

(D) Each member shall be paid an amount fixed pursuant to division (J) of section 124.15 of the Revised Code per diem when actually engaged in the performance of work as a member and when engaged in travel necessary in connection with such work. In addition to such compensation each member shall be reimbursed for all traveling, hotel, and other expenses necessarily incurred in the performance of work as a member.

(E) The commission shall select from among its members a chairperson, a vice-chairperson, and a secretary. These officers shall serve for terms of one year.

(F) The governor may remove any member of the commission from office for inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance.

(G) The commission, in accordance with Chapter 119. of the Revised Code, shall adopt rules to govern its procedure.

Sec. 1509.38. There is hereby created in the division of mineral resources management a technical advisory council on oil and gas, which shall consist of eight members to be appointed by the governor with the advice and consent of the senate. Three members shall be independent oil or gas producers, operators, or their representatives, operating and producing primarily in this state, three members shall be oil or gas producers, operators, or their representatives having substantial oil and gas producing operations in this state and at least one other state, one member shall represent the public, and one member shall represent persons having landowners' royalty interests in oil and gas production. All members shall be residents of this state, and all members, except the members representing the public and persons having landowners' royalty interests, shall have at least five years of practical or technical experience in oil or gas drilling and production. Not more than one member may represent any one company, producer, or operator.

Terms of office shall be for three years, commencing on the first day of February and ending on the thirty-first day of January. Each member shall hold office from the date of appointment until the end of the term for which

the member was appointed. A vacancy in the office of a member shall be filled by the governor, with the advice and consent of the senate. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall hold office for the remainder of that term. Any member shall continue in office subsequent to the expiration date of the member's term until the member's successor takes office, or until a period of sixty days has elapsed, whichever occurs first.

The council shall select from among its members a chairperson, a vice-chairperson, and a secretary. All members are entitled to their actual and necessary expenses incurred in the performance of their duties as members, payable from the appropriations for the division.

The governor may remove any member for inefficiency, neglect of duty, or malfeasance in office.

The council shall hold at least one regular meeting in each quarter of a calendar year and shall keep a record of its proceedings. Special meetings may be called by the chairperson and shall be called by the chairperson upon receipt of a written request signed by two or more members of the council. A written notice of the time and place of each meeting shall be sent to each member of the council. Five members constitute a quorum, and no action of the council is valid unless five members concur.

The council, when requested by the chief of the division of mineral resources management, shall consult with and advise the chief and perform other duties that may be lawfully delegated to it by the chief. The council may participate in hearings held by the chief under this chapter and has powers of approval as provided in sections 1509.24 and 1509.25 of the Revised Code. The council shall conduct the activities required, and exercise the authority granted, under Chapter 1510. of the Revised Code.

The council, upon receiving a request from the chairperson of the oil and gas commission under division (C) of section 1509.35 of the Revised Code, immediately shall prepare and provide to the chairperson a list of its members who may serve as temporary members of the oil and gas commission as provided in that division.

Sec. 5301.56. (A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives ~~his~~ 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)~~(1)~~ 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~~ 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:

~~(a)~~(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.

~~(b)~~(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~~;~~.

~~(c)~~(3) Within the ~~preceding~~ 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:

~~(i)~~(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~~;~~.

~~(ii)~~(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~~;~~.

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

~~(iv)~~(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~~;~~.

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

~~(vi)~~(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.

~~(2) 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 section.~~

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)~~(1)~~ of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with division (H) of this section and sections 317.18 to 317.201 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, ~~his~~ 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 ~~his~~ 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)~~(1)~~ of this section by the occurrence of

any of the circumstances described in division (B)~~(1)(e)~~(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 cause the county recorder of each applicable county to memorialize the record on which the severed mineral interest is based with the following: "This mineral interest abandoned pursuant to affidavit of abandonment recorded in volume ....., page ....."

Immediately after the county recorder memorializes the record, 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.

A county recorder who uses microfilm as provided under section 9.01 of the Revised Code may require the memorial "This mineral interest abandoned pursuant to affidavit of abandonment recorded in volume ....., page ....." to be located on the affidavit of abandonment instead of the record on which the severed mineral interest is based, and the affidavit may be recorded under section 317.08 of the Revised Code.

SECTION 2. That existing sections 317.08, 1509.35, 1509.38, and 5301.56 of the Revised Code are hereby repealed.

_____

Speaker _____ *of the House of Representatives.*

_____

President _____ *of the Senate.*

Passed _____, 20____

Approved _____, 20____

_____

Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

_____

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the ____ day of _____, A. D. 20____.

_____

Secretary of State.

File No. _____ Effective Date _____

FILED
COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
2013 FEB 21 PM 4 33
DEANNA H. STEPHEN
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

TUSCARAWAS COUNTY, OHIO

GENERAL TRIAL DIVISION

CHRISTOPHER WENDT, et al.,	:	CASE NO. 2012 CV 02 0135
PLAINTIFFS	:	JUDGE EDWARD EMMETT O'FARRELL
	:	
	:	JUDGMENT ENTRY - ORAL HEARING CONDUCTED ON 1/7/2013 PERTAINING TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED 12/3/2012 AND THE DICKERSON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS FILED 12/17/2012- MOTIONS CONSIDERED - PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT GRANTED, IN PART, AS IT PERTAINS TO COUNT ONE (DECLARATORY JUDGMENT), COUNT TWO (QUIET TITLE), AND COUNT THREE (INJUNCTION), AND OVERRULED, IN PART, AS IT PERTAINS TO REMAINING CLAIMS ALLEGED IN PLAINTIFFS' COMPLAINT - DICKERSON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS OVERRULED-ORDERS ENTERED
JUDITH DICKERSON, et al.,	:	
DEFENDANTS	:	

This matter was further considered by Edward Emmett O'Farrell, Judge, Court of Common Pleas, Tuscarawas County, Ohio, General Trial Division, on 1/7/2013 on the Court's regular Oral hearing motion docket relative to the following:

- **Plaintiffs' Motion for Summary Judgment** filed 12/3/2012
- **Appendix to Plaintiffs' Motion for Summary Judgment** filed 12/3/2012
- The Dickerson Defendants' **Motion for Summary Judgment Against Plaintiffs** filed on 12/17/2012
- **Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment** filed on 1/4/2013
- The Dickerson Defendants' **Reply to Plaintiffs' Motion for Summary Judgment** filed on 1/4/2013
- **Defendants' Notice of Supplemental Authority** filed on 1/9/2013
- 1/7/2013 **Oral Hearing**

Plaintiffs were represented in the Courtroom by **David Butz**, **Nathan Vaughan**, and **Matthew W. Onest**, Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., Attorneys at Law, Canton, Ohio. Defendants Judith A. Dickerson, Mary Louise Foster, Elaine F. Harris, Celia M. Dickerson, Richard H. Dickerson, Robert J. Dickerson, Raymond Dickerson, Constance Clark, Deborah Snelson, Misty Engstrom, Ronald K. Dickerson, Barbara K. Dickerson, John L. Dickerson, Wanda Dickerson, (collectively referred to as the "Dickerson Defendants") were represented in the Courtroom by **Paul B. Hervey** and **Jillian Daisher**, Fitzpatrick, Zimmerman & Rose Co., L.P.A., Attorneys at Law, New Philadelphia, Ohio.

The Court

FINDS that Plaintiffs Christopher Wendt and Veronica Wendt filed a Complaint against the Dickerson Defendants and Chesapeake Exploration, LLC. Count One of Plaintiffs' Complaint for **Declaratory Judgment** alleges that Plaintiffs are entitled to a declaration regarding their ownership of certain mineral rights. Count Two of Plaintiffs' Complaint alleges a cause of action for **Quiet Title** and requests that this Court quiet title to the mineral rights of real estate owned by Plaintiffs. Count Three of Plaintiffs' Complaint alleges a cause of action for **Injunction** and requests an injunction prohibiting Defendants from interfering, objecting or otherwise preventing Plaintiffs from leasing, conveying, or transferring their rights to the oil and gas underlying the real estate, or from taking any action under any existing leases. Count Four of Plaintiffs' Complaint alleges a cause of action for **Slander of Title**. Count Five of Plaintiffs' Complaint alleges a cause of action for **Unjust Enrichment - Quantum Meruit**. Count Six of Plaintiffs' Complaint alleges a cause of action for **Trespass**. Count Seven of Plaintiffs' Complaint alleges a cause of action for **Negligence / Negligence *Per Se***. Count Eight of Plaintiffs' Complaint alleges a cause of action for **Potential Interference with Business Relationships**. Count Nine of Plaintiffs' Complaint alleges a cause of action for **Constructive Trust**.

FINDS that Plaintiffs' dismissed their claims against Defendant Chesapeake Exploration, L.L.C. only, as provided in the Parties' Stipulated Dismissal Entry filed on 1/8/2013.

FINDS that the Dickerson Defendants filed a Counterclaim against Plaintiffs Christopher and Veronica Wendt, which alleges two Counterclaims for Slander of Title and Intentional Interference with Business Relationships.

FINDS that Plaintiffs request summary judgment in their favor against the Dickerson Defendants under Civ. R. 56. Plaintiffs argue that there is no genuine issue as to any material fact as to the application of the 1989 Ohio Dormant Mineral Act, which extinguished the Dickerson Defendants' mineral reservation, and that Plaintiffs are entitled to judgment as a matter of law. Plaintiffs argue that the Dickerson Defendants' mineral interests were abandoned under the Dormant Mineral Act as of 1992. Plaintiffs argue that since the Defendants abandoned their mineral interests, Plaintiffs are entitled to declaratory judgment. Plaintiffs argue that they are also entitled to summary judgment on their claims for Quiet Title, Injunction, Slander of Title, Unjust Enrichment, Intentional Interference with Business Relationships, and Constructive Trust, based upon the application of the 1989 Dormant Mineral Act.

FINDS that the Dickerson Defendants request summary judgment in their favor under Civ. R. 56. The Dickerson Defendants argue that they are the rightful owners of the mineral rights that are the subject of this dispute. The Dickerson Defendants argue that Plaintiffs knew that they did not own the mineral rights when they purchased the property. The Dickerson Defendants do not seek summary judgment on their slander and intentional interference claims; however, they ask the Court

to issue 1) a declaration and determination that the Dickerson Defendants are the rightful holder of fee simple title to the mineral rights on the Property, and that the Plaintiffs be declared to have no estate, right, title or interest in the mineral rights; 2) a judgment forever enjoining the Plaintiffs from claiming any estate, right, title or interest in mineral rights on the property; and 3) an order to the Harrison County Recorder striking the Plaintiffs' Affidavit of Abandonment from the Deed Records of Harrison County.

FINDS that under Civ. R. 56(C) , a summary judgment may be granted if (1) no genuine issue exists as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) "it appears that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the Motion for Summary Judgment is made, that conclusion is adverse to the non-moving party." *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Likewise, Civ. R. 56(C) provides that summary judgment shall not be rendered if it appears from the evidence that there is a genuine issue of fact that remains to be litigated.

FINDS that the moving party has the burden of showing that no genuine issue exists as to any material fact. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The moving party requesting a summary judgment must inform the trial court of the basis for its motion and identify portions of the record demonstrating the lack of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662

N.E.2d 264 (1996). If the moving party satisfies this initial burden, the nonmoving party then has a reciprocal burden to set forth specific facts that show that there is a genuine issue for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997). If the nonmoving party does not respond in this way, summary judgment, if appropriate, shall be entered against the nonmoving party. *Vahila*, at 429.

FINDS that the Court may not weigh the evidence, assess the credibility of the parties or choose among reasonable inferences when determining whether to grant summary judgment. *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 121, 413 N.E.2d 1187 (1980). The Court must construe the evidence in a light most favorable to the nonmoving party and resolve any doubts in favor of the nonmoving party. *See Morris v. Ohio Casualty Ins. Co.*, 35 Ohio St.3d 45, 47, 517 N.E.2d 904 (1988).

FINDS that Civ. R. 56(C) provides, in pertinent part, that "[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule." Unauthenticated documents that are not sworn, certified, or authenticated by an affidavit have no evidentiary value, and a trial court may not consider them in ruling on a motion for summary

judgment. *Sparks v. Erie County Board of County Commissioners*, 6th Dist. No. E-97-007, unreported, 1998 WL 15929, *7 (Jan. 16, 1998).

FINDS that the determination of the issues in this case depend upon whether the 1989 or the 2006 amended version of R.C. 5301.56 is applicable to the relevant facts of this case.

FINDS that the former version of R.C. 5301.56, which became effective on March 22, 1989, provided that:

> "(A) As used in this section:
>
> (1) 'Holder' means the record holder of a mineral interest, and any person who derives his 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.
>
> (B)(1) 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:
>
> (a) 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.
>
> (b) 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.
>
> (c) Within the preceding twenty years, one or more of the following has occurred:

(I) 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;

(ii) 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, 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.

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

(iv) 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.

(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 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.

(2) 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 section.

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 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, his 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 his 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)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(c) 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."

FINDS that the amended version of R.C. 5301.56, which became effective on June 30, 2006, contains additional provisions that were not in the former version. R.C. 5301.56 now requires the owner of the surface of the lands subject to the interest to take affirmative action before the mineral interest can be vested in the owner of the surface.

FINDS that the amended version of R.C. 5301.56(E) provides that:

(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.

FINDS that under the amended version of R.C. 5301.56(H)(1), a holder or a holder's successors or assignees may protect their mineral interest by filing a claim to preserve the mineral interest or an affidavit within 60 days after the date that the owner of the surface lands served or published the notice required under R.C. 5301.56(E). *See* R.C. 5301.56(H)(1)(a)-(b).

FINDS that R.C. 1.58(A)(1) and (2) provides that "[t]he reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section: (1) Affect the prior operation of the statute or any prior action taken thereunder;" or "(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder. . . ."

FINDS that a change in the law that deals with substantive rights does not affect such rights even though no action or proceeding has been commenced, unless the amending or repealing act expressly

provides that the rights are affected. *O'Mara v. Alberto-Culver Co.*, 6 Ohio Misc. 132, 133, 215 N.E.2d 735 (Ohio Com. Pl. 1966).

FINDS that "[a] 'vested right' can 'be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right.'" *State ex rel. Jordan v. Indus. Comm.*, 120 Ohio St.3d 412, 413, 900 N.E.2d 150 (2008), quoting *Washington Cty. Taxpayers Assn. v. Peppel*, 78 Ohio App.3d 146, 155, 604 N.E.2d 181 (1992).

FINDS that an exception or reservation in favor of a third person, who is not a party to a deed, is void. *Kirk v. Conrad*, 3d Dist. No. 1266, 1931 WL 2566, 9 Ohio Law Abs. 717, *2 (Feb. 17, 1931).

FINDS that the words "subject to" are generally interpreted to "mean 'limited by,' or 'subservient or subordinate to' and connote a limitation on a grantor's warranty rather than a reservation of rights." *Stracka v. Peterson*, 377 N.W.2d 580, 582-83 (N.D., 1985).

FINDS that in *Riddel v. Layman*, the Fifth District Court of Appeals found that a title transaction, as required under the former version of R.C. 5301.56, must have occurred within the preceding twenty years from the enactment of the statute, which occurred on March 22, 1989, in order to satisfy the second requirement of the statute which requires a filing or recording of the title transaction. *Riddel v. Layman*, 5th Dist. No. 94 CA 114, 1995 WL 498812, *3.

FINDS that R.C. 5303.01 provides, in relevant part, that: "An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest. Such action may be brought also by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

FINDS that R.C. 5303.01 further provides that "[t]he clerk of the court shall cause to be recorded in the deed records of each county in which any part of the real property lies, a certified copy of the judgment or decree determining the interests of the parties. The usual fees of the clerk and recorder shall be taxed as part of the costs of the case."

FINDS that the complainant has the burden of proof as to all issues in a quiet title action, and he must prove title in himself if the answer denies his title or the defendant adversely claims title. *Ochsenbine v. Cadiz*, 166 Ohio App.3d 719, 2005-Ohio-6781, 853 N.E.2d 314, ¶13, citing *Duramax, Inc. v. Geauga Cty. Bd. of Commrs.*, 106 Ohio App.3d 795, 798, 667 N.E.2d 420 (1995).

FINDS that a party seeking a permanent injunction must show by clear and convincing evidence that the injunction is necessary to prevent irreparable harm and that he or she does not have an adequate remedy at law. *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267-268, 747 N.E.2d

268 (1st Dist.. 2000). A permanent injunction is only issued after a party has demonstrated a right to relief under the applicable substantive law. *Proctor & Gamble Co.*, at 267.

FINDS that slander of title is a tort action that may be brought against a person who has falsely and maliciously defamed the property, either real or personal, of another, and thereby caused him or her special pecuniary damage or loss. *Green v. Lemarr*, 139 Ohio App.3d 414, 430, 744 N.E.2d 212 (2d Dist., 2000), citing *Buehrer v. Provident Mut. Life Ins. Co. of Philadelphia*, 37 Ohio App. 250, 256, 174 N.E. 597, 599 (1930). "To prevail, a claimant must prove '(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages.'" *Green*, at 430-431, citing *Colquhoun v. Webber*, 684 A.2d 405, 409 (Me. 1996). "The malice need not be that of a personal hatred, and an act will be deemed malicious if made in reckless or wanton disregard of the rights of another." *Consun Food Industries, Inc. v. Fowkes*, 81 Ohio App.3d 63, 72, 610 N.E.2d 463 (9th Dist. 1991), citing *Childers v. Commerce Mtge. Invests.*, 63 Ohio App.3d 389, 579 N.E.2d 219.

FINDS that "[t]o prevail on a claim for unjust enrichment, a plaintiff must establish the following three elements: '(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Rogers v. National City Corp.*, 8th Dist. No. 91103, 2009-Ohio-2708, ¶27, quoting *Miller v. Key Bank N.A.*, 8th Dist. No. 86327, 2006-Ohio-1725, ¶43.

FINDS that "[u]nder Ohio law, 'to establish a claim for tortious interference with a business relationship, a party must show: (1) a business relationship or contract; (2) the wrongdoer's knowledge of the relationship or contract; (3) the wrongdoer's intentional and improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship; (4) a lack of privilege; and (5) resulting damages.'" *Pasqualetti v. Kia Motors America, Inc.*, 663 F.Supp.2d 586, 602 (N.D. Ohio, 2009), citing *Bowshier v. Chrysler Financial Corp.*, 144 F.Supp.2d 919, 926 (S.D. Ohio, 2001).

FINDS that a constructive trust is an appropriate remedy when it is against the principles of equity that the property be retained by a certain person even though the property was acquired without fraud. *Ferguson v. Owens*, 9 Ohio St.3d 223, 226, 459 N.E.2d 1293 (1984), citing 53 Ohio Jurisprudence 2d (1962) 578-579, Trusts, Section 88; and V Scott on Trusts (3 Ed. 1967) 3412, Section 462.

FINDS that John R. Dickerson and Marjorie I. Dickerson executed a warranty deed on 12/17/1952, which transferred the property that is the subject of this dispute to Pittsburgh Consolidation Coal Company. The warranty deed provided that it was "RESERVING unto the Grantors herein, their heirs and assigns, all of the oil and gas as contained in and underlying the aforedescribed premises, together with the right to drill for, operate, produce and market the same, and to do all things necessary or incidental thereto, provided, however, that the drilling, operating, producing and marketing thereof shall be conducted in such a manner that same will not interfere with the mining

operations, strip or otherwise, in any vein or seam of coal underlying said premises hereafter conducted by the Grantee herein, its successors or assigns." (Plaintiff's Exhibit B).

FINDS that there is no evidence in the record to suggest that the subject mineral interest was the subject of a title transaction that was filed or recorded in the office of the Harrison County Recorder within the twenty years prior to 3/22/1992.

FINDS, upon review, that there is no evidence in the record to suggest that there was any production of oil and gas on the subject property, on other lands covered by a lease to which the mineral interest was subject, or from lands pooled, unitized, or included in unit operations, under R.C. 1509.26 to 1509.28, in which the subject mineral interest is participating within the twenty years prior to 3/22/1992.

FINDS that there is no evidence in the record to suggest that the subject mineral interest was used in underground gas storage operations by John R. Dickerson, Marjorie I. Dickerson, or by any of their heirs or assigns within the twenty years prior to 3/22/1992.

FINDS that there is no evidence in the record to suggest that a drilling or mining permit was issued to John R. Dickerson, Marjorie I. Dickerson, or to any of their heirs or assigns within the twenty years prior to 3/22/1992.

FINDS that there is no evidence in the record to suggest that a claim to preserve the subject mineral interest was filed in accordance with R.C. 5301.56© by John R. Dickerson, Marjorie I. Dickerson, or by any of their heirs or assigns within twenty years prior to 3/22/1992.

FINDS that there is no evidence in the record that a separately listed tax parcel number was created for the subject mineral interest in Harrison County's tax list or the Harrison County Treasurer's duplicate tax list within twenty years prior to 3/22/1992.

FINDS, therefore, that under the former version of R.C. 5301.56(B)(1) and (2), any mineral interest that John R. Dickerson, Marjorie I. Dickerson, or any of their heirs or assigns, had in the subject property was deemed abandoned and vested in the owner of the surface of the subject property, as of 3/22/1992.

FINDS that Defendant John L. Dickerson filed an Affidavit for Transfer of Real Estate Inherited with the Harrison County Recorder on 2/28/2011 indicating that the Dickerson Defendants had inherited from John R. Dickerson, in the portions set forth in the Affidavit, an "undivided one-half interest in all oil and gas contained in and underlying the hereinafter described premises, together with the right to drill for, operate, produce and market the same, and to do all things necessary or incidental thereto." (Plaintiff's Exhibit F).

FINDS that Defendant John L. Dickerson also filed an Affidavit for Transfer of Real Estate Inherited with the Harrison County Recorder on 2/28/2011 indicating that the Dickerson Defendants had inherited from Marjorie I. Dickerson, in the portions set forth in the Affidavit, an "undivided one-half interest in all oil and gas contained in and underlying the hereinafter described premises, together with the right to drill for, operate, produce and market the same, and to do all things necessary or incidental thereto." (Plaintiff's Exhibit G).

FINDS, however, that neither John R. Dickerson or Marjorie I. Dickerson, nor any of their heirs or assigns had any mineral interests in the subject property after 3/22/1992.

FINDS that the Plaintiffs were not required to comply with the provisions contained in the amended version of R.C. 5301.56(E) before their mineral interests in the subject property became vested because the mineral interest became vested in the owner of the surface of the lands on 3/22/1992.

FINDS that the Survivorship Deed transferring the subject real estate from Neil D. Porter, Trustee, to Christopher P. Wendt and Veronica M. Wendt, which was executed on 4/21/2006, provided that the transfer was subject to a "Reservation by John R. Dickerson and Marjorie I. Dickerson, their heirs and assigns for all of the oil and gas with the right to drill for in Warranty Deed filed for record December 17, 1952 in Volume 133, page 69, Deed Records." (Plaintiff's Exhibit A).

FINDS that neither the 4/21/2006 nor any previous deed executed after 3/22/1992, which transferred the property at issue "subject to" the Dickersons' mineral interests, created or preserved the Dickersons' mineral interest.

FINDS that there are no genuine issues of material fact remaining regarding Count One of Plaintiffs' Complaint for Declaratory Judgment, and Plaintiffs are entitled to judgment as a matter of law on that count.

FINDS that Plaintiffs are entitled to a judicial declaration as follows:

(a) The Plaintiffs are the true and rightful owners of all the mineral rights underlying the subject real estate;

(b) The Dickerson Defendants have no interest in the subject real estate, no oil and gas reservation, and no mineral rights under the subject real estate;

(c) The Dickerson Defendants did not have any right, title, or interest to any of the minerals under the subject real estate at the time that they entered into the lease agreement with Chesapeake Exploration, LLC; and

(d) The Affidavits and oil and gas leases received by Chesapeake Exploration, LLC, and memorialized by the memorandum of leases attached to the Plaintiffs' Complaint are null and void, *ab initio*, of no effect, and convey no mineral rights underlying the subject real estate.

FINDS that there are no genuine issues of material fact remaining regarding Count Two of Plaintiffs' Complaint for Quiet Title, and Plaintiffs are entitled to judgment as a matter of law on that count.

FINDS that the mineral rights underlying the subject real estate should be quieted in favor of Plaintiffs because they are the sole owners of the mineral rights underlying the subject real estate.

FINDS that counsel for Plaintiffs should provide the Court with a Journal Entry with the legal description of the subject property herein quieted, which is sufficient for recording in the office of the Harrison County Recorder.

FINDS that there are no genuine issues of material fact remaining regarding Count Three of Plaintiffs' Complaint for Injunction, and Plaintiffs are entitled to judgment as a matter of law on that count.

FINDS that the Dickerson Defendants should be enjoined from interfering, objecting or otherwise preventing Plaintiffs from leasing, conveying, or transferring their rights to the oil and gas underlying the subject real estate, or from taking any action under any existing leases.

FINDS that genuine issues of material fact remain regarding Count Four (Slander of Title), Count Five (Unjust Enrichment - Quantum Meruit), Count Six (Trespass), Count Seven (Negligence /

Negligence *Per Se*), Count Eight (Potential Interference with Business Relationships) and Count Nine (Constructive Trust) of Plaintiffs' Complaint.

FINDS that Plaintiffs' Motion for Summary Judgment does not request summary judgment on the Dickerson Defendants' Counterclaim and the Dickerson Defendants do not request summary judgment on either of the claims contained in their Counterclaim, and therefore, the Court does not address herein whether either party is entitled to judgment as a matter of law on the Dickerson Defendants' Counterclaim.

FINDS that the Dickerson Defendants' are not entitled to any declaratory relief, as requested in their motion for summary judgment, as a matter of law.

FINDS that **Plaintiffs' Motion for Summary Judgment** should be **Granted, in part,** as it pertains to Count One (**Declaratory Judgment**), Count Two (**Quiet Title**), and Count Three (**Injunction**) of Plaintiffs' Complaint, and **Overruled, in part,** as it pertains to Count Four (**Slander of Title**), Count Five (**Unjust Enrichment - Quantum Meruit**), Count Six (**Trespass**), Count Seven (**Negligence / Negligence *Per Se***), Count Eight (**Potential Interference with Business Relationships**) and Count Nine (**Constructive Trust**) of Plaintiffs' Complaint.

FINDS that the Dickerson Defendants' **Motion for Summary Judgment Against Plaintiffs** should be **Overruled.**

It is therefore

ORDERED that Plaintiffs' **Motion for Summary Judgment** is **Granted, in part,** as it pertains to Count One (**Declaratory Judgment**), Count Two (**Quiet Title**), and Count Three (**Injunction**) of Plaintiffs' Complaint, and **Overruled, in part,** as it pertains to Count Four (**Slander of Title**), Count Five (**Unjust Enrichment - Quantum Meruit**), Count Six (**Trespass**), Count Seven (**Negligence** / ***Negligence Per Se***), Count Eight (**Potential Interference with Business Relationships**) and Count Nine (**Constructive Trust**) of Plaintiffs' Complaint.

ORDERED that the Dickerson Defendants' **Motion for Summary Judgment Against Plaintiffs** is **Overruled.**

ORDERED that the Court declares that:

(a) The Plaintiffs are the true and rightful owners of all the mineral rights underlying the subject real estate;

(b) The Dickerson Defendants have no interest in the subject real estate, no oil and gas reservation, and no mineral rights under the subject real estate;

(c) The Dickerson Defendants did not have any right, title, or interest to any of the minerals under the subject real estate at the time that they entered into the lease agreement with Chesapeake Exploration, LLC; and

(d) The Affidavits and oil and gas leases received by Chesapeake Exploration, LLC, and memorialized by the memorandum of leases attached to the Plaintiffs' Complaint are null and void, *ab initio*, of no effect, and convey no mineral rights underlying the subject real estate.

ORDERED that the mineral rights underlying the subject real estate are quieted in favor of Plaintiffs because they are the sole owners of the mineral rights underlying the subject real estate.

ORDERED that counsel for Plaintiffs shall provide the Court with a Journal Entry with the legal description of the subject property herein quieted, which is sufficient for recording in the office of the Harrison County Recorder.

ORDERED that the Dickerson Defendants are enjoined from interfering, objecting or otherwise preventing Plaintiffs from leasing, conveying, or transferring their rights to the oil and gas underlying the subject real estate, or from taking any action under any existing leases.

Edward Emmett O'Farrell, Judge

2/21/2013

Date

cc: Court Administrator's Office
Court Mediator, Andrea L. Fischer-Immke
Attys. David E. Butz, Nathan D. Vaughan, and Matthew W. Onest
Attys. Paul Hervey and Jilliann A. Daisher
Court

EXHIBIT 12

FILED

2013 NOV -5 AM 11:01

CARROLL COMMON PLEAS
WILLIAM R. WOHLWEND

IN THE COURT OF COMMON PLEAS
FOR CARROLL COUNTY

JOURNAL 234 PAGE 8

RONALD EDWARD DAHLGREN, et al.	)	
	)	Case No. 13CVH27445
Plaintiffs	)	
	)	Judge Richard M. Markus
v.	)	(Serving By Assignment)
	)	
BROWN FARM PROPERTIES, L.L.C. et al.	)	FINAL OPINION AND
	)	JUDGMENT
Defendants	)	

FACTUAL AND PROCEDURAL HISTORY

On February 11, 2013, eight plaintiffs filed this case to quiet title for oil and gas rights they inherited from their mother or grandmother. Three defendant landowners contend that Ohio's Dormant Mineral Act deemed that the family abandoned those rights which then merged into the landowners' surface titles. The fourth defendant is a developer that holds the plaintiffs' leases for those oil and gas rights. Each defendant filed an Answer with a Crossclaim or a Counterclaim. The defendant developer supported the plaintiffs' claims.

Ohio adopted its Dormant Mineral Act as part of its Marketable Title Act on March 22, 1989, and added significant procedural provisions by an amendment on June 30, 2006. The parties agree that either the 1989 version or the 2006 version of Ohio's Dormant Minerals Act governs their dispute. No one asserted or sought to enforce an abandonment claim while the 1989 version was in effect. This Court concludes that the 2006 version controls and denies the landowners' abandonment claim, so the plaintiffs retain those rights.

On August 5, 2013, all parties jointly filed "Stipulations of Fact" which provide:

> Certain parties have recently amended their pleadings so that the only claims remaining in this action by any party sound in declaratory relief or quiet title and involve the issue of whether the Defendants have ownership of the oil and gas minerals underlying their respective properties. The parties agree and stipulate to the following facts and request that the issue of the ownership of the subject minerals be finally decided by the Court based upon the stipulated facts without the need of any trial.

Those factual stipulations provide the basis for this Court's decision.

On September 16, 1949, Carl E. Dahlgren and Leora Perry Dahlgren (husband and wife) conveyed 225.59 acres in Carroll County to William Lewis Dunlap, with a deed that provided:

> Excepting and reserving to Leora Perry Dahlgren all the oil and gas underlying said premises together with rights of way for pipe lines and ingress and egress to any drilling operations thereon and for the removal of said minerals from said property.

By that deed, the Dahlgrens severed the subsurface title for oil and gas from the surface title for that property. See *Gill v. Fletcher* (1906), 74 Ohio St. 295, paragraphs 1-3 of the syllabus.

Leora Dahlgren did not convey her retained mineral rights to anyone before her death on March 13, 1977. Her will and resulting probate court orders vested her mineral rights in her three children. They are the lawful successors to Leora Dahlgren's reserved rights, pursuant to probate court Certificates of Transfer which her daughter mistakenly filed with the Carroll County Probate Court rather than the Carroll County Recorder's Office. The Carroll County Probate Court issued a Certificate of Transfer for those oil and gas rights to those children on May 3, 1978.

Those reserved rights were not the subject of any title transaction that anyone recorded in

the Carroll County Recorder's Office between March 22, 1969 (twenty years before the effective date for the 1989 version of the Dormant Minerals Act) and September 17, 2009 (the date when one of the plaintiffs first recorded an oil and gas lease to a developer).

There was no drilling at, production from, or storage of oil or gas on that property or any property pooled with it before July 5, 2012. The severed oil and gas title was not separated from the surface title on tax lists for the Carroll County Auditor or the Carroll County Treasurer. No one filed a claim in the Carroll County Recorder's Office for oil or gas ownership on the relevant properties before one of the plaintiffs filed that claim on April 12, 2012.

The three defendant landowners are the lawful successors to William Dunlap's rights for the relevant properties, pursuant to duly recorded chains of title. In each of their chains of title the deeds are expressly subject to the oil and gas reservation set forth in the deed recorded at Volume 121, Page 300, which is the 1949 Dahlgren deed.

Two of the three landowner defendants first acquired their interests in the relevant properties after the 2006 amendment to Ohio's Dormant Mineral Act, so they did not and could not have asserted any abandonment claim before that amendment. The remaining landowner defendant acquired his interest in relevant property by deeds in 1999 and 2002.

None of the defendant landowners nor any of their respective predecessors in interests ever asserted any abandonment for the relevant mineral rights in any court proceeding before these landowner defendants filed their pleadings in this case.

In 2009, each of the plaintiffs leased their oil and gas interests for the relevant properties to a developer who recorded those leases in the Carroll County Recorder's Office in 2009 or 2010, and who later assigned those leases to the defendant developer.

In March of 2012, one of the defendant landowners sent the plaintiffs and the leaseholder developer a "Notice of Owner's Intent to Declare the Abandonment of Mineral Interest (Ohio Revised Code 5301.56)" for part of the relevant properties. There is no evidence that before then any of the defendant landowners or any of their predecessors in interest ever asserted to any of the plaintiffs or to any public official that any owner of those mineral interests had abandoned them.

Within 60 days after the landowners sent them a "Notice of Owner's Intent to Declare the Abandonment of Mineral Interest," five of the eight plaintiffs filed claims for their relevant mineral interests in the Carroll County Recorders' Office.

On September 3, 2013, the plaintiffs filed their Brief in Support of Request for Judgment. On October 18, 2013, the three defendant landowners filed their Motion for Judgment and Supporting Brief, and the defendant developer filed its Responsive Brief in Support of Plaintiffs' Request for Judgment. On November 1, 2013, the plaintiffs filed their Responsive Brief. The case is now ripe for this Court's decision.

THE UNDERLYING MARKETABLE TITLE ACT

In 1961 Ohio joined a widespread title reform movement when it enacted its Marketable Title Act as R.C. 5301.47-5301.56. In the Prefatory Note for a later proposed Uniform Marketable Title Act, the National Conference of Commissioners on Uniform State Laws explained the general purpose for those laws:

> The basic idea of the Marketable Title Act is to codify the venerable New England tradition of conducting title searches back not to the original creation of title, but for a reasonable period only. The Model Act is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that he need search no further back in the record. Provisions for rerecording and for protection of persons using or occupying land are designed to prevent the

> possibility of fraudulent use of the marketable record title rules to oust true owners of property.
>
> The most controversial issue with respect to marketable-title legislation is whether or not an exception should be made for mineral rights. This [Uniform] Act follows the Model Act in making no such exception. Any major exception largely defeats the purpose of marketable title legislation, by forcing the title examiner to search back for an indefinite period for claims falling under the exception.

As originally enacted, Ohio's Marketable Title Act governed all interests in land including severed mineral interests. It relies on a chain of title with a "root" record no more than 40 years old. It included R.C. 5301.47 ("Definitions"), 5301.48 ("Unbroken chain of recorded title"), 5301.49 ("Record marketable title; exceptions"); 5301.50 ("Prior interests"), 5301.51 ("Preservation of interest"); 5301.52 ("Contents of notice"); 5301.53 ("Certain rights not barred"); 5301.54 ("Effect of changes in law"), 5301.55 ("Liberal construction"), and R.C. 5301.56 ("Three year extension"). Between 1963 and 1989, the legislature adopted various amendments to those sections, which are not relevant here.

Effective March 22, 1989, the legislature repealed and rewrote R.C. 5301.56 to create Ohio's Dormant Minerals Act. Effective June 30, 2006, the legislature amended R.C. 5301.56 by adding procedures for a surface landowner to claim that a mineral rights holder has abandoned those rights and for the mineral rights holder to challenge that claim.

In their context, it is clear that the legislature has always intended that the Marketable Title Act (R.C. 4301.47-5301.55) and the Dormant Minerals Act (R.C. 5301.56) are integrated title laws which should be read together whenever they were in effect.

Thus, R.C. 5301.47 provides definitions that apply to R.C. 5301.47 to 5301.56 inclusive; and R.C. 5301.54 restricts the effect of all those sections on other statutory provisions. More

significantly, R.C. 5301.55 directs:

> Sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 5301.48 of the Revised Code, subject only to such limitations as appear in section 5301.49 of the Revised Code.

The purpose of the Marketable Title Act is to, "simplify and facilitate land title transactions by allowing persons to rely on a record chain of title." *Collins v. Moran*, 2004-Ohio-1381 (7th Dist.), ¶20, quoting *Semachko v. Hopko* (1973), 35 Ohio App.2d 205; see also *Pinkney v. Southwick Investments, L.L.C.*, 2005-Ohio-4167 (8th Dist.) at ¶31.

Both the Marketable Title Act and its Dormant Minerals Act component support reliance on public documents rather than private communications for title transfers. For some purposes, the Marketable title Act permits reliance on public documents outside the county recorder's office.

R.C. 5301.47 defines reliable public records that document title interests and transfers:

> As used in sections 5301.47 to 5301.56, inclusive of the Revised Code:
>
> * * * *
>
> (B) "Records" includes probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situate.
>
> (C) "Recording," when applied to the official public records of the probate or other court, includes filing.
>
> * * * *
>
> (F) "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 warranty deed, quit claim deed, or mortgage.

R.C. 5301.48 defines the holder of an "unbroken chain of title" for an interest in real property and therefore a "marketable title" for that interest to include (a) a person for whom those public records show an unbroken chain of title for that interest which extends back for at least forty years; or (b) a person for whom those public records show an unbroken chain of title for an interest that a document created within the preceding forty years. If the documents in that chain of title specifically identify a recorded document that created an interest in that property, the act preserves that interest. R.C. 5301.49(A). All interests created before an unbroken chain of title that extends back at least forty years which are not otherwise preserved by the act are "null and void" [R.C. 5301.50] and "extinguished" [R.C. 5301.49(D)].

Subject to specified exceptions, the holder of an interest with an unbroken chain of title for at least forty years need not demonstrate (a) the creation of that interest more than forty years earlier, or (b) the termination of any purported limitation on that interest more than forty years earlier. The forty years are measured back from "the time the marketability is being determined" [R.C. 5301.47(E) and R.C. 5301.51(B)]; or "is to be determined" [R.C. 5301.48]

R.C. 5301.51 and 5301.52 permit the holder to preserve an otherwise unprotected interest by recording a prescribed notice. Before the 2006 amendment that created the Dormant Minerals Act, the legislature repeatedly revised R.C. 5301.56 to provide additional three year grace periods during which the prescribed notice could preserve that interest, which it ultimately extended to December 31, 1976 [more than 15 years after the act's effective date].

TWO VERSIONS OF THE DORMANT MINERALS ACT

Following the adoption of Marketable Title Acts, many states added special rules for the termination of mineral rights, including temporary lease interests and permanent fee simple

ownership. Here again, the National Conference of Commissioners on Uniform State Laws explains that history in the Prefatory Note for its Uniform Dormant Interests Act, which the Conference approved in 1986 and the A.B.A. approved on February 16, 1987:

> Transactions involving mineral interests may take several different forms. A *lease* permits the lessee to enter the land and remove minerals for a specified period of time; . . . . A fee title or other interests in minerals may be created by *severance*.
>
> A severance of mineral interests occurs where all or a portion of mineral interests are owned apart from the ownership of the surface. A severance may occur in one of two ways. First, a surface owner who also owns a mineral interest may *reserve* all or a portion of the mineral interest upon transfer of the surface. In the deed conveying the surface of the land to the buyer, the seller reserves a mineral interest in some or all of the minerals beneath the surface. . . .
>
> Second, a person who owns both the surface of the land and a mineral interest may *convey* all or a portion of the mineral interest to another person. . . . . Severed mineral interests may be owned in the same manner as the surface of the land, that is, in fee simple.
>
> Dormant mineral interests in general, and severed mineral interests in particular, may present difficulties if the owner of the interest is missing or unknown. Under the common law, a fee simple interest in land cannot be extinguished or abandoned by nonuse, and it is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals. Thus, it is possible that the only document appearing in the public record may be the document initially creating the mineral interest. Subsequent mineral owners, such as the heirs of the original mineral owner, may be unconcerned about an apparently valueless mineral interest and may not even be aware of it; hence their interests may not appear of record. If mineral owners are missing or unknown, it may create problems for anyone interested in exploring or mining, because it may be difficult or impossible to obtain rights to develop the minerals. An exploration or mining company may be liable to the missing or unknown owners if exploration or mining proceeds without proper leases. Surface owners are also concerned with the ownership of the minerals beneath their property. A mineral interest includes the right of reasonable entry on the surface for purposes of mineral extraction; this can effectively preclude development of the surface and constitutes a significant impairment of marketability.

* * * *

An extensive body of legal literature demonstrates the need for an effective means

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

* * * *

Nonuse. A number of statutes have made *nonuse* of a mineral interest for a term of years, e.g., 20 years, the basis for termination of the mineral interest. Such a statute in effect makes nonuse for the prescribed period conclusive evidence of intent to abandon. The nonuse scheme has advantages and disadvantages. Its major attraction is that it enables extinguishment of dormant interests solely on the basis of nonuse; proof of intent to abandon is unnecessary. Its major drawbacks are that it requires resort to facts outside the record and it requires a judicial proceeding to determine the fact of nonuse. It also precludes long-term holding of mineral rights for such purposes as future development, future price increases that will make development feasible, or assurance by a conservation organization or subdivider that the mineral rights will not be exploited.

The nonuse concept should be incorporated in any dormant mineral statute. . . . .

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

* * * *

Constitutionality. Constitutional issues have been raised concerning retroactive application of a dormant mineral statute to existing mineral interests. The leading case, *Texaco v. Short*, 454 U.S. 516 (1982), held the Indiana dormant mineral statute constitutional by a narrow 5-4 margin. The Indiana statute provides that a

> mineral right lapses if it is not used for a period of 20 years and no reservation of rights is recorded during that time. No prior notice to the mineral owner is required. The statute includes a two-year grace period after enactment during which notices of preservation of the mineral interest may be recorded.
>
> A combination nonuse/recording scheme thus satisfies federal due process requirements. Whether such a scheme would satisfy the due process requirements of the various states is not clear. Comparable dormant mineral legislation has been voided by several state courts for failure to satisfy state due process requirements. Uniform legislation, if it is to succeed in all states where it is enacted, will need to be clearly constitutional under various state standards. This means that some sort of prior notice to the mineral owner is most likely necessary.

For Ohio, both the 1989 version and the 2006 version of the Dormant Minerals Act create statutory conditions when the owner of subsurface minerals rights is "deemed" to have abandoned those rights. Both versions designate those conditions by excluding circumstances when the owner is not deemed to have abandoned them. In the 1989 version, R.C. 5301.56(B)(1) designated conditions that denied or disqualified a statutory claim that a mineral rights owner abandoned those rights:

> (B)(1) 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:
>
> (a) 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.
>
> (b) 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.
>
> (c) Within the preceding twenty years, one or more of the following has occurred:
>
> (i) 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.

(ii) 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.

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

(iv) 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.

(v) A claim to preserve the mineral 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 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.

The 1989 version provided a three year grace period after its effective date for any of the disqualifying conditions (including the filing of a mineral rights claim) to preclude abandonment. R.C. 5301.56(B)(2).

The 2006 version designates the same conditions that deny or disqualify a statutory claim that the owner of subsurface mineral rights abandoned those rights. 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.

For the 2006 version, the Act provides procedures for a surface owner to regain severed subsurface mineral rights in the absence of those specified circumstances. To terminate any subsurface rights the surface owner must notify each subsurface holder that he or she intends to declare that interest abandoned [R.C. 5301.56 (E)(1)] and within thirty days thereafter must file an affidavit of abandonment with the applicable county recorder [R.C. 5301.56 (E)(2)]. The notice must identify the allegedly abandoned subsurface rights and assert the statutorily defined inactivity [R.C. 5301.56 (F)]. The affidavit of abandonment must confirm the notice and allege the statutorily defined abandonment [R.C. 5301.56 (G)].

The 2006 version provides procedures for the subsurface owner to oppose the surface owner's notice by filing within sixty days thereafter a claim to preserve those rights [R.C. 5301.56 (H)(1)(a)] or an affidavit that disputes the statutorily defined abandonment. [R.C. 5301.56 (H)(1)(b)] If the subsurface holder fails to file either of those documents within that time, the recorder shall memorialize those events and thereby vest the surface owner with that subsurface holder's rights. [R.C. 5301.56 (H)(2)]

By contrast, the 1989 version of Ohio Dormant Mineral Act did not include any provision for the surface owner to notify the holder of any subsurface mineral rights about an abandonment claim before or after the alleged abandonment, or to file anything with the country recorder or anywhere else. It provided no procedure for the holder of subsurface rights to contest their alleged abandonment, and no procedure for anyone to record the abandonment anywhere.

The 2006 version for R.C. 5301.56(B)(3) permits the surface owner to send the holder of any subsurface mineral rights an abandonment notice whenever none of the statutorily defined

disqualifying events occurred within twenty years preceding that notice. The 1989 version of R.C. 5301.56(B)(1)(c) provided for its application unless: "Within the preceding twenty years one or more of the following has occurred," without specifying the event from which it measures the preceding twenty years. In lieu of the 1989 version's three year grace period after the statute's effective date for the mineral rights holder to establish h any of the disqualifying events (including a filed claim), the 2006 version permits the mineral rights holder to file that claim within 60 days after the surface owner notifies him of the claimed abandonment.

Nothing in either the 1989 version or the 2006 version denies that the Marketable Title Act (R.C. 5301.47-5301.55) remains applicable to mineral rights, at least to the extent that the Dormant Minerals Act does not expressly provide differently.

In this case, the surface landowners assert (a) that the 1989 version established the claimed abandonment automatically when none of the disqualifying events occurred within twenty years preceding its effective date or the three year grace period; and (b) that the abandonment was complete before the 2006 amendment required different procedures to assert or confirm it.

By contrast, the holders of the reserved mineral rights and the developer who holds their leases contend (a) that the 2006 version controls the abandonment procedures here because the landowners first asserted any abandonment after 2006, (b) that the landowners have not complied with the procedures required by the 2006 amendment because they never filed the required abandonment affidavit which permitted them to contest that claim, and (c) that the 2006 version precludes abandonment because disqualifying events occurred after 2006.

Counsel have not cited any appellate decision that decides whether or when to apply the

1989 version of R.C. 5301.56 for an abandonment claim filed after the 2006 amendment. But see *Dodd v. Croskey*, 7th Dist. No. 12HA6, 2013-Ohio-4257 (Sept. 23, 2013)(applying the 2006 version to events that arose before its enactment without discussion of that choice). This court has found none.

After careful consideration, this Court agrees with the holders of the subsurface mineral rights. Without any contrary statutory language, this Court concludes that the 1989 version impliedly required implementation before it finally settled the parties' rights, at least by a recorded abandonment claim that permitted the adverse party to challenge its validity, if not by an appropriate court proceeding to confirm that abandonment. Circumstances that support a claimed right do not by themselves provide a completed remedy. Absent any implementation or enforcement of claimed abandonment rights before the 2006 amendment, the landowner defendants must comply with the procedures which the 2006 amendment requires.

First, the surface owners' interpretation of the 1989 version conflicts with "the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 5301.48 of the Revised Code." R.C. 5301.55. The county recorder's records would not reveal some disqualifying conditions that prevent statutory abandonment. See R.C. 5301.56(B)(3)(c)("The mineral interest has been used in underground gas storage operations by the holder"); 5301.56(B)(3)(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"). A title examiner might well find the recorded Dahlgren deed with its reservation of mineral rights, without any record that shows whether the Dahlgrens or their

descendents preserved or abandoned those rights.

Second, interested parties could dispute compliance with disqualifying conditions, without filing anything in the recorder's office. Hence, reliance on the recorder's records to establish or avoid abandonment requires at least a recorded document if not judicial confirmation.

Third, "[f]orfeitures are not favored by the law. The law requires that we favor individual property rights when interpreting forfeiture statutes." *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 534, quoted at *Sogg v. Zurz*, 2009-Ohio-1526, 121 Ohio St.3d 449, ¶9; see also *State v. Lilliock* (1982), 70 Ohio St.2d 23, 25; *Dodd v. Croskey, supra,* at ¶35.

Fourth, the Dormant Minerals Act employs considerably less conclusive language than the Marketable Title Act to terminate title interests. The Marketable Title Act establishes that the unprotected rights are "null and void" or "extinguished," while the Dormant Minerals Act provides that they are "deemed abandoned." Compare R.C. 5301.50 and R.C. 5301.49(D) with R.C. 5301.56(B)(1). The less conclusive language in the Dormant Minerals Act strongly suggests that it provides standards but does not resolve the issue. Compare *Blatt v. Hamilton County Bd. of Revision*, 2009-Ohio-5260, 123 Ohio St.3d , ¶22; *In Re Washington*, 2004-Ohio-6981, 10th Dist. No. 04AP429, ¶23.

Fifth, the landowners' interpretation of these provisions creates the anomaly that mineral rights are deemed abandoned when the owner has a statutorily preserved record marketable title. In this case, for example, the plaintiffs have a record marketable record title from the probate court's Certificate of Transfer less than forty years earlier, pursuant to R.C. 5301.47(A) and R.C.

5301.48; which the defendant landowners' own deeds have preserved pursuant to R.C. 5301.49 and R.C. 5301.51. See See *Toth v. Berks Title Ins. Co.* (1983), 6 Ohio St.3d 338, syllabus; *Heifner v. Bradford* (1983), 4 Ohio St. 3d 49, syllabus.

Sixth, this Court doubts that statutory abandonment is constitutionally enforceable without giving the adverse party an opportunity to dispute the relevant claims. In *Texaco v. Short* (1982), 54 U.S. 516, the federal Supreme Court ruled that Indiana's Dormant Minerals Act satisfied federal constitutional protections when a mineral owner lost his rights in specified circumstances without giving that owner advance notice. But the same opinion stated at 533-34:

> 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. (underlining emphasis added)

Without advance notice and an opportunity to be heard, statutory abandonment may violate Art. I, Sec. 19 of the Ohio Constitution ("Private property shall ever be held inviolate"), even if it does not violate federal constitutional provisions. However, we need not determine whether statutory abandonment without prior notice satisfies that provision of the Ohio Constitution where other considerations reach the same result without addressing that concern.

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

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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. Courts should construe statutes in the manner that best confirms their constitutionality. *Mahoning Education Association of Developmental Disabilities v. State Employment Relations Board*, 2013-Ohio-4654, ¶19; *State v. Carnes*, 2007-Ohio-604, ¶ (7th Dist.)

For the purposes of this decision, the court accepts the defendant landowners' argument that the 1989 version of Ohio's Dormant Mineral Act deemed the plaintiffs' mineral rights abandoned if none of the disqualifying conditions existed within twenty years before March 22, 1989 (the act's effective date) or before March 22, 1992 (the statutory grace period). See *Riddel v. Layman*, 5th Dist. No. 94CA114 (July 10, 1995). However, at most the absence of those conditions created an inchoate right; it could not and did not transfer ownership without judicial confirmation or at least an opportunity for the disowned party to contest their absence or the effect of their absence.

arbitrary and unsupportable assumption that their failure to develop those minerals meant that they deliberately abandoned them forever. Could the legislature deem that a surface property owner abandoned his title if he failed to develop an empty lot for some arbitrary interval? The federal Supreme Court's decision in *Texaco v. Short, supra*, may answer: "Yes." But the property owner must have an opportunity to dispute that result.

NO ABANDONMENT UNDER THE CURRENT LAW

Each of the plaintiffs leased his or her oil and gas interests for the relevant properties to a developer who recorded those leases in the Carroll County Recorder's Office in 2009 or 2010. Those recorded leases are "title transactions" that preclude any deemed abandonment for the plaintiffs' mineral interests pursuant to the 2006 version of R.C. 5301.56(B)(3)(a).

Within 60 days after a landowner sent them a "Notice of Owner's Intent to Declare the Abandonment of Mineral Interest," five of the eight plaintiffs filed statutorily sufficient claims for their relevant mineral interests in the Carroll County Recorders' Office. Those recorded claims preclude any deemed abandonment for their interests and the interests of all the remaining plaintiffs pursuant to the 2006 version of R.C. 5301.56(B)(3)(e) and 5301.56(C)(2).

Two of the landowner defendants never complied with R.C. 5301.56(E)(1) by sending or publishing notice to "each holder" of the allegedly abandoned mineral interests. None of the defendant landowners ever complied with R.C. 5301.56(E)(2) by filing an "affidavit of abandonment" in the Carroll County Recorder's office. Without those notices or affidavits, those landowners failed to invoke the abandonment procedures which the 2006 version requires to assert an abandonment claim.

In this case, the following plaintiffs hold mineral rights for the relevant properties: Ronald Edward Dahlgren, Elsa Anne Lyle, Helen Mary Dahlgren, Martha Perry Dahlgren, Cynthia Ann Crowder, Daniel Carl Dahlgren, Charles Stephen Dahlgren, and Diane Ellen Pullins. The parties have not asked this Court to determine which plaintiff owns any allocated interest in those rights for each relevant property, and this judgment shall not serve that purpose.

In this case, the following defendants own the relevant properties: Brown Farm Properties, LLC, Brian L. Wagner, and Thomas Beadnell.

In this case, Chesapeake Exploration, LLC is the current holder of assigned leases and the defendant developer for the plaintiffs' oil and gas ownership on the relevant properties.

This Court determines and declares that each of the eight plaintiffs retains his or her respective interest in oil and gas located on or recovered from the properties designated in the Complaint and its attachments.

This Court quiets ownership and title to those mineral rights in the plaintiffs and not in the surface landowner defendants.

This Court determines and declares that each of the landowner defendants retains his or its surface ownership for those properties.

This Court determines and declares that the defendant developer retains its rights as the holder of recorded and assigned leases to those oil and gas rights.

Within sixty days after this Court files its judgment with the Clerk of the Carroll County Common Pleas Court and any subsequent appeals from that judgment are exhausted, each of the plaintiffs or their counsel shall file a copy of this Final Opinion and Judgment in the Carroll

County Recorder's Office, together with a claim that satisfies R.C. 5301.56(C)(1).

The plaintiffs shall recover the costs of this case, not including attorney fees or litigation expenses.

Richard M. Markus

Judge Richard M. Markus, Retired Judge Recalled to Service pursuant to Ohio Constitution, Art. IV, §6(C) and R.C. 141.16 and assigned to the Carroll County Common Pleas Court for this matter.

THE CLERK SHALL MAIL TIME STAMPED COPIES OF THIS FINAL OPINION AND JUDGMENT TO ALL COUNSEL AND THE ASSIGNED VISITING JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

WELLINGTON RESOURCE GROUP LLC,	:	
	:	**Case No. 2:12-CV-104**
Plaintiff,	:	
	:	**JUDGE ALGENON L. MARBLEY**
v.	:	
	:	
BECK ENERGY CORPORATION,	:	**Magistrate Judge Elizabeth P. Deavers**
	:	
Defendant.	:	

OPINION & ORDER

I. INTRODUCTION

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

II. PROCEDURAL POSTURE

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

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

III. STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

IV. STANDARD OF REVIEW

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

V. ANALYSIS

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

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

A. Breach of Contract Claims

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

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

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

B. Real Estate Claims

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

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

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

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

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

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

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

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

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

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

Indeed, from the earliest cases on this issue, Ohio courts have treated oil and gas leases as different from an interest in real property. In *Ohio Oil Co. v. Toledo, Findley & Springfield RR Co.*, 2 Ohio C.D. 505 (C.C. Ohio 1889), for example, the Circuit Court of Ohio, applying Ohio law, held that oil and gas leases "[are] not a right in the land as such, but a right to enter upon the land." Similarly, in *Herrington v. Wood*, 3 Ohio C.D. 475 (C.C. Ohio 1892), the court explained that an oil and gas lease "is not strictly a lease, but a license coupled with a conditional grant, conveying the grantor's interest in the gas well, conditioned that gas and oil is found in paying quantities." *See also Miller v. Vandergrift*, 20 Ohio C.D. 730 (C.C. Ohio 1892) ("It is sufficient to say that we regard [oil and gas leases] as not leases in the ordinary acceptation of the term, but as a sale of the oil and gas under certain stipulations and provisions embodied under the contract."). As this Court explained, in these early cases, courts generally "distinguished between instruments which purported to convey title to the land containing the oil and gas and those which merely granted the right to explore for and produce oil and gas." *Frederick*, 98 B.R. at 764. Thus, in *Detlor v. Holland*, 57 Ohio St. 492, 505 (1898), an agreement giving the lessee "the sole right to produce [oil and gas]" from a tract of land was not a lease, but merely a grant of an exclusive right to produce during the term. While in *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129-30 (1897), the Ohio Supreme Court found that a lease "grant[ing] . . . for the purpose and with the exclusive right of drilling, . . . all that certain track of land," was "more than a mere license"; rather, it was "a lease of the land for the purpose and period therein, and the lessee has a vested right to the possession of the land to the extent reasonably necessary."

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

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

Id. at 867.

Given this Court's conclusion in *Frederick*, and the Ohio Supreme Court's decision in *Back*, it remains only for the Court to survey more recent cases to determine whether Ohio law has changed in the years since. It is this Court's opinion that the Ohio Supreme Court would still hold that oil and gas leases are not part of the real estate in Ohio.

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

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

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

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

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

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

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

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

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

In addition, this Court also finds persuasive the decisions of other states with a more extensive history of oil and gas production. In Oklahoma, for example, an oil and gas lease merely "constitutes a right to search for and capture [oil and gas]," not an interest in real property. *Halliburton Oil Producing Co. v. Grothaus*, 981 P.2d 1244, 1251 (Ok. 1998). *See also Pauline Oil & Gas Co. v. Fischer*, 90 P.2d 411, 412 (1939) (the interest conveyed by an oil and gas lease is not real estate within the meaning of § 706, which gives a judgment creditor a lien upon the real estate belonging to the judgment debtor); *State v. Shamblin*, 90 P.2d 1053, 1055 (1939) (oil and gas mining leases are chattels real and therefore personal property). Many other oil-and-gas-producing states have come to a similar conclusion. *See, e.g., Bd. of County Cmr's of Johnson County v. Greenhaw*, 734 P.2d 1125, 1128 (Kan. 1987) ("A leasehold estate, except an oil and gas lease, is real estate under Kansas law."), *Ingram v. Ingram*, 521 P.2d 254, 257 (Kan. 1974) (under Kansas law, "an oil and gas lease leasehold interest is personal property," and "merely conveys a license to enter upon the land and explore for such minerals."); *see also Backar v. Western States Producing Co.*, 547 F.2d 876, 881-82 (5th Cir. 1999) (Under New York law, but not under Texas law, oil and gas leases are personal property); *compare Salvex, Inc. v. Lewis*, 546 So. 2d 1309, 1313 (La. Ct. App. 1989) *writ denied*, 551 So. 2d 1323 (La. 1989) (cataloging Louisiana's long debate over the status of oil and gas leases, eventually resolved by action of the state legislature classifying oil and gas leases as an interest in real property).

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

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

VI. CONCLUSION

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

IT IS SO ORDERED.

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

DATED: September 20, 2013

As Introduced 1.4

117th General Assembly 1.6

Regular Session S. B. No. 223 1.7

1987-1988 1.8

MESSRS. CUPP-SCHAFRATH-NETTLE 1.10

1.11

A B I L L 1.12

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

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO: 1.23

Section 1. That sections 317.18, 317.20, 317.201, and 1.25
5301.53 be amended and new section 5301.56 of the Revised Code be 1.26
enacted to read as follows: 1.27

Sec. 317.18. At the beginning of each day's business the 1.30
county recorder shall make and keep up general alphabetical 1.31
indexes, direct and reverse, of all the names of both parties to 1.33
all instruments theretofore received for record by him. The 1.34
volume and page where such instrument is recorded may be omitted 1.35
until it is actually recorded if the file number is entered in 1.36
place of the volume or page~~, but such file number may be omitted~~ 2.1
~~from any index volume in use on April 21, 1896, if the form of~~ 2.3
~~the index volume is not adapted to entering the file number.~~ The 2.5
indexes shall show the kind of instrument, the range, township, 2.7
and section or the survey number and number of acres, or the 2.8
permanent parcel number provided for under section 319.28 of the 2.9
Revised Code, or the lot and sublot number and the part thereof, 2.10
all as the case requires, of each tract, parcel, or lot of land 2.12
described in any such instrument of writing. The name of each 2.13

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

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

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

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

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

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

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

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

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

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

(A) The name of the grantor; 4.14

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

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

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

(E) On the opposite page, or on the lower portion of the 4.23
same page, beginning at the bottom, in like manner, all the 4.24
mortgages, liens, notices as provided for in sections 5301.51 4.25
and, 5301.52, AND 5301.56 of the Revised Code, or other 4.27
encumbrances affecting such real estate. 4.29

The compensation for the services rendered under this 4.30
section shall be paid from the general revenue fund of the 4.31
county, and no additional levy shall be made in consequence of 4.32
such services. In the event that the board decides to have such 4.33
sectional index made it shall advertise for three consecutive 4.34
weeks in one newspaper of general circulation in the county for 4.35
sealed proposals to do such work as provided in this section, and 4.36
shall let the work to the lowest and best bidder, and shall 5.1
require him to give bond for the faithful performance of the 5.2
contract, in such sum as the board fixes, and such work shall be 5.3
done to the acceptance of the bureau of supervision and 5.4
inspection of public offices upon allowance by such board. The 5.5
board may reject any and all bids for the work, provided that no 5.6
more than five cents shall be paid for each entry of each tract 5.7
or lot of land. 5.8

When brought up and completed, the county recorder shall 5.9
keep up the indexes described in this section. 5.10

Sec. 317.201. The county recorder shall maintain a book to 5.11
be known as the "Notice Index." Separate pages of the book shall 5.12
be headed by the original survey sections or surveys, or parts of 5.14
a section or survey, squares, subdivisions, or the permanent 5.15
parcel numbers provided for under section 319.28 of the Revised 5.16
Code, or lots. In this book there shall be entered the notices 5.17
for preservation of claims presented for recording in conformity 5.18
with sections 5301.51 and, 5301.52, AND 5301.56 of the Revised 5.20
Code. In designated columns there shall be entered on the left- 5.21
hand page:

(A) The name of each claimant; 5.23

(B) Next to the right, the name of each owner of title; 5.25

(C) The deed book number and page where the instrument 5.27
containing the claim has been recorded; 5.28

(D) The type of claim asserted; and on the opposite page 5.30
on the corresponding line a pertinent description of the property 5.31
affected as appears in such notice. 5.32

Sec. 5301.53. The provisions of sections 5301.47 to 5.35
5301.56 of the Revised Code~~,~~ shall not be applied TO BAR OR 6.1
EXTINGUISH ANY OF THE FOLLOWING: 6.2

(A) ~~To bar any~~ ANY lessor or his successor as reversioner 6.4
of his right to possession on the expiration of any lease or any 6.5
lessee or his successor of his rights in and to any lease, EXCEPT 6.7
AS MAY BE PERMITTED UNDER SECTION 5301.56 OF THE REVISED CODE; 6.8

(B) ~~To bar or extinguish any~~ ANY easement or interest in 6.10
the nature of an easement created or held for any railroad or 6.11
public utility purpose; 6.12

(C) ~~To bar or extinguish any~~ ANY easement or interest in 6.14
the nature of an easement, the existence of which is clearly 6.15
observable by physical evidence of its use; 6.17

(D) ~~To bar or extinguish any~~ ANY easement or interest in 6.19
the nature of an easement, or any rights granted, excepted, or 6.20
reserved by the instrument creating such easement or interest, 6.21
including any rights for future use, if the existence of such 6.22
easement or interest is evidenced by the location beneath, upon, 6.23
or above any part of the land described in such instrument of any 6.26
pipe, valve, road, wire, cable, conduit, duct, sewer, track,
pole, tower, or other physical facility and whether or not the 6.27
existence of such facility is observable; 6.28

(E) ~~To bar or extinguish any~~ ANY right, title, estate, or 6.30
interest in coal, and any mining or other rights pertinent 6.31
thereto or exercisable in connection therewith; 6.32

(F) ~~To bar or extinguish any~~ ANY mortgage recorded in 6.33
conformity with section 1701.66 of the Revised Code; 6.34

(G) ~~To bar or extinguish any~~ ANY right, title, or interest 6.36
of the United States, or of ~~the state of Ohio~~ THIS STATE, or any 7.2
political subdivision, body politic, or agency thereof. 7.3

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

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

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

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

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

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

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

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

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

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

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

NO MINERAL INTEREST SHALL BE DEEMED ABANDONED UPON THE 8.14
BASIS OF FAILURE OF COMPLIANCE WITH DIVISION (B) OF THIS SECTION 8.16
PRIOR TO THREE YEARS FROM THE EFFECTIVE DATE OF THIS SECTION. 8.17

(C) A CLAIM TO PRESERVE A MINERAL INTEREST FROM BEING 8.19
DEEMED ABANDONED UNDER DIVISION (B) OF THIS SECTION MAY BE FILED 8.21
FOR RECORD BY THE HOLDER WITH THE COUNTY RECORDER OF THE COUNTY 8.22
IN WHICH THE LAND IS LOCATED. THE CLAIM SHALL CONSIST OF A 8.23
NOTICE, VERIFIED UNDER OATH, OF THE NATURE OF THE INTEREST
CLAIMED, A DESCRIPTION OF THE LAND, THE VOLUME AND PAGE OF ANY 8.24
RECORDED INSTRUMENT ON WHICH IT IS BASED, THE NAME AND ADDRESS OF 8.26
THE HOLDER, AND THAT HE DOES NOT INTEND TO ABANDON BUT TO
PRESERVE HIS RIGHTS. SUCH CLAIM PRESERVES THE RIGHTS OF ALL 8.27
HOLDERS OF A MINERAL INTEREST IN THE SAME LAND. ANY HOLDER OF AN 8.29
INTEREST FOR USE IN UNDERGROUND GAS STORAGE OPERATIONS MAY
PRESERVE HIS INTEREST, AND THOSE OF ANY LESSOR THEREOF, BY A 8.30
SINGLE CLAIM, DEFINING THE BOUNDARIES OF THE STORAGE FIELD OR 8.31
POOL AND ITS FORMATIONS, WITHOUT DESCRIBING EACH SEPARATE 8.32
INTEREST CLAIMED. SUCH A CLAIM ALSO ESTABLISHES PRIMA-FACIE 8.33
EVIDENCE OF THE USE OF SUCH INTEREST IN UNDERGROUND GAS STORAGE 8.34
OPERATIONS. 8.35

(D) A CLAIM FILED UNDER DIVISION (C) OF THIS SECTION SHALL 9.2
BE RECORDED AS PROVIDED IN SECTIONS 317.18 TO 317.201 AND 5301.52 9.3
OF THE REVISED CODE.

(E) A MINERAL INTEREST MAY BE PRESERVED INDEFINITELY FROM 9.6
THE PRESUMPTION OF ABANDONMENT UNDER THIS SECTION BY OCCURRENCE 9.7
OF ANY OF THE EVENTS DESCRIBED IN DIVISION (B)(2) OF THIS 9.8 C is not included in (B)(2)
SECTION, INCLUDING SUCCESSIVE FILINGS OF CLAIMS UNDER DIVISION 9.9
(C) OF THIS SECTION. THE FILING OF A CLAIM UNDER DIVISION (C) OF 9.10
THIS SECTION DOES NOT AFFECT THE RIGHT OF A LESSOR OF AN OIL OR 9.11
GAS LEASE TO OBTAIN ITS FORFEITURE UNDER SECTION 5301.332 OF THE 9.12
REVISED CODE.

(F) THIS SECTION DOES NOT APPLY TO ANY MINERAL INTEREST 9.14
HELD BY ANY GOVERNMENTAL ENTITY. 9.15

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

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S.B. 223
(As Introduced)

Sens. Cupp, Schafrath, Nettle

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

Background

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

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

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

CONTENT AND OPERATION

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

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

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

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

(a) The interest has been conveyed, leased, transferred, or mortgaged by an instrument filed or recorded in the recorder's office of the county in which the lands are located;

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

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

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

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

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

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

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

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

COMMENT

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

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

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

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

ASB0223-I/tjc/nsg

OIL AND GAS LEASE

Agreement, made and entered into the 16th day of January, 1984, by and between

at 12800 Shaker Boulevard, Cleveland, Ohio 44120 hereinafter called lessor (whether one or more), and E. E. Beck

at 32 National Transit Building, Oil City, Pennsylvania 16301 hereinafter called lessee:

1. Witnesseth: That lessor, for and in consideration of Ten and More Dollars cash in hand paid, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of lessee to be paid, kept and performed, 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 situate in the Township of Archer County of Harrison State of Ohio, described as follows, to wit:

See Exhibit "A", attached hereto and made a part hereof, for a description of the premises leased herein.

of Section ____, Township ____, Range ____, and containing 3,033.12 acres, more or less, and including all lands and interests therein, contiguous or appurtenant to said described land and owned or claimed by lessor, whether or not specifically described above.

2. It is agreed that this lease shall remain in force for a primary term of ~~Ten (10)~~ Five (5) years from this date and if lessee shall commence to drill within said primary term or any extension thereof, lessee shall have the right to continue drilling to completion with reasonable diligence, said term shall extend as long thereafter as oil and gas, or either of them is or can be produced by lessee from said land or from a communitized unit as hereinafter provided.

3. In consideration of the premises lessee covenants and agrees:

To deliver to the credit of lessor, free of cost, into tank reservoirs or into the pipe line to which lessee may connect wells on said land, the equal one-eighth (1/8) part of all oil produced and saved from the leased premises.

To pay lessor one-eighth (1/8) of the gross proceeds at the wellhead, payable quarterly, for the gas from each well where gas is found, while the same is being used off the premises, and if used in the manufacture of gasoline a royalty of one-eighth (1/8), payable monthly at the prevailing market rate for gas at the wellhead. Where such gas is not sold or used for a period of one year, and there is no producing gas or oil well on said land or on a communitized unit, as hereinafter provided, including said land, lessee may pay or tender as royalty the sum of One Dollar ($1.00) multiplied by the number of acres subject to this lease at the end of each such one year period, payable annually at the end of each such year during which gas is not sold or used, and while such royalty is so paid or tendered this lease shall be held as a producing property under the above paragraph setting forth the primary term hereof.

To pay lessor for gas produced from any oil well and used off the premises or in the manufacture of gasoline or any other product a royalty of one-eighth (1/8) of the proceeds, payable monthly at the prevailing market rate at the wellhead.

Lessor agrees to pay one-eighth (1/8) of any and all taxes levied or assessed upon the production of oil or gas from said land, and lessee is hereby authorized to pay such taxes and assessments on behalf of lessor and to deduct the amount so paid from any monies payable to lessor hereunder.

4. If no well be commenced on said land on or before the 31st day of January, 1985, this lease shall terminate as to both parties, unless lessee shall on or before that date pay or tender to lessor or lessor's credit in the at the address above Bank at ____ or its successors, as lessor's agent, which shall continue as the depository regardless of changes in ownership of said land, the sum of Three Thousand Thirty-Three and 12/100 dollars which shall operate as a rental and cover the privilege of deferring the commencement of a well for 12 months from said date. The payment herein referred to may be made in currency, draft, or check at the option of lessee and the depositing of such currency, draft or check in any postoffice, with sufficient postage and properly addressed to lessor, or said bank, on or before said last mentioned date, shall be deemed payment as herein 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. It is understood and agreed that the consideration first recited herein, the down payment, covers not only the privilege granted to the date when said first rental is payable as aforesaid, but also lessee's option of extending that period as aforesaid and any and all other rights conferred. Any payment or tender which is omitted or is erroneous in whole or in part as to parties, amounts, or depositories shall nevertheless be sufficient to extend the time within which operations for drilling may be commenced in the same manner as though a proper payment had been made; provided, however, Lessee shall correct such error within thirty (30) days after Lessee has received written notice thereof from Lessor.

5. If during the primary term of this lease and prior to the discovery of oil or gas, lessee shall drill a dry hole or holes on this land or land communitized therewith, or, if during the primary term of this lease production on this land or on land communitized therewith shall cease from any cause, this lease shall not terminate provided, within 12 months from the expiration of the last rental period for which rental has been paid or before the next ensuing rental paying date, whichever occurs later in time, operations for the drilling of a well shall be commenced or lessee tenders the payment of rentals in the manner and amount hereinbefore provided.

6. If lessor owns a less interest in the above described oil and gas estate land than the entire undivided fee simple estate therein, then the royalties and rentals herein provided for shall be paid to lessor only in the proportion which lessor's interest bears to the whole and undivided fee.

7. Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for lessee's operation thereon except water from the wells of lessor. When requested by lessor, lessee shall bury lessee's pipe line below plow depth. No well shall be drilled nearer than 200 feet to the house or barn now on said premises without written consent of lessor. Lessee shall pay for damages caused by lessee's operations to growing crops on said land. Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

8. For the purpose of oil and/or gas development and production under this lease, lessor does hereby grant to lessee the right to pool or communitize said premises, or any part thereof, with other land to comprise an oil development unit of not more than approximately ~~three hundred (300)~~ One hundred Sixty (160) acres and/or a gas development unit of not more than approximately ~~twenty (320)~~ Six hundred (600) acres but lessee shall in no event be required to drill more than one well on said unit. Each unit may be created by lessee's recording in the Register Of Deeds Office within the county or counties in which said unit is situated, an instrument identifying the unit so created. If such oil or gas well shall not be drilled on the premises herein leased it shall nevertheless be deemed to be upon the leased premises within the meaning of all the covenants, expressed or implied, in this lease, and lessor shall participate in the one-eighth (1/8) royalty from such oil and/or gas development unit only in the proportion that the number of acres owned by lessor within the limitations of such development unit bears to the total number of acres included therein. At the option of lessee, a diagonal well spacing pattern may be followed.

9. Notwithstanding anything to the contrary herein contained or implied by law, all present and future rules and regulations of any governmental agency pertaining to well spacing, drilling or production units, use of material and equipment or otherwise shall be binding on the parties hereto with like effect as though incorporated herein at length.

10. If the estate of either party hereto is assigned — and the privilege of assigning in whole or in part is expressly allowed — the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on lessee until 30 days after lessee has been furnished with a written transfer or assignment or a true copy thereof, and rentals shall be adjusted in accordance with such change of ownership or assignment at the next succeeding rental anniversary after receipt by lessee of evidence satisfactory to lessee of such change of ownership or assignment. It is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such defaults shall not operate to defeat or affect this lease insofar as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payments of said rentals.

11. Whenever any well or wells on said lands shall be used by lessee for the injection of water brine or other fluids produced from lands other than said leased premises for disposal as a conservation measure, lessee shall pay to lessor the sum of One Hundred Dollars ($100.00) per year for each well so used in addition to all other considerations specified in this lease. The injection of water, brine, or other fluids into subsurface strata shall be made only into strata below those furnishing domestic fresh water and lessee agrees to protect adequately lessor's fresh water supply from injury as a result of any of its operations.

12. If the leased premises are now or shall hereafter be owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each separate owner bears to the entire leased acreage. Provided, however, if the leased premises consist of two or more non-abutting tracts, this paragraph shall apply separately to each non-abutting tract, and further provided that if a portion of the leased premises is hereafter consolidated with other lands for the purpose of operating the consolidated tract as one lease, this paragraph shall be inoperative as to such portion so consolidated. There shall be no obligation on the part of the lessee to offset wells on separate tracts into which the land covered by this lease may be hereafter divided by sale, devise, or otherwise, or to furnish separate measuring or receiving tanks.

13. Lessor hereby ~~covenants and agrees to defend the title to said lands herein described and~~ agrees that lessee shall have the right at any time to redeem for lessor, by payments, any mortgage, taxes or other liens on the above described lands, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof, and the undersigned lessors for themselves and their heirs, successors, and assigns, hereby surrender and release all rights of dower and homestead in the premises herein described, insofar as said right of dower and homestead may in any way affect the purposes for which this lease is made as recited herein.

14. Lessee may at any time surrender this lease as to all or any part of the lands covered thereby, by delivering or mailing a release thereof to lessor, if the lease is not recorded, or by placing a release thereof of record in the proper county, if the lease is recorded; and if surrendered only as to a part of said lands, any delay rentals or acreage payments which may thereafter be payable hereunder shall be reduced proportionately.

15. Lessee shall have the exclusive right to use any stratum or strata underlying the premises for the storage of gas or liquids and may, for such purpose, reopen and restore to operation any and all abandoned wells on the premises and may drill new wells thereon for the purpose of injecting and storing gas or liquids in such stratum or strata and withdrawing such gas or liquids therefrom. If Lessee intends to use the premises for such purpose or determines that it is so using the premises, Lessee may deliver to Lessor or have recorded in the county or counties in which this lease is recorded a declaration that the premises are being used, or from a specified date will be used for gas or liquid storage, and thereafter Lessee shall have the exclusive right to use the premises for such gas or liquid storage until such time as Lessee may deliver to Lessor or have recorded in such county or counties a surrender of the right granted to Lessee by this paragraph or until Lessee shall intentionally abandon the right to use the premises for such storage. During the period or periods that Lessee shall utilize the premises for the storage of gas or liquids, the royalties herein provided to be paid to Lessor shall accrue and become payable only on such gas and liquids as shall have been taken from such premises by Lessee over and above the amount thereof which Lessee theretofore shall have stored in such stratum or strata. For and during the period or periods that Lessee uses said premises for such storage, Lessee shall pay to Lessor a minimum royalty of One Dollar ($1.00) per acre per year on the number of acres covered by this lease, such payment to be made not later than sixty (60) days from and after the end of each twelve-month period during which the premises are utilized for storage. Lessee is expressly granted the right to use so much of the surface of the premises as is reasonably necessary in the exercise of the rights granted to Lessee by this paragraph. The rights granted to Lessee by this paragraph shall continue in force for the period of time hereinabove specified, but this lease, insofar as it grants to Lessee the right to prospect, explore and produce oil and gas from stratum or strata other than those employed in such storage, shall not be continued in force solely by the storage of oil or liquid as provided in this paragraph.

16. For additional terms and conditions see ADDENDUM, attached hereto and made a part hereof.

IN TESTIMONY WHEREOF WE SIGN, This the 16th day of January, 1984

Signed and Acknowledged in the Presence of:

Robert E. Uhler

Andrew S. Good

Robert E. Uhler

Andrew S. Good

THE NORTH AMERICAN COAL CORPORATION

BY: Otes Bennett, Jr., Chairman and Chief Executive Officer

BY: Thomas A. Koza, Secretary

C. E. Beck, Lessee

CORPORATION ACKNOWLEDGEMENT

STATE OF OHIO
COUNTY OF CUYAHOGA } S.S.

On this, the 26th day of January, 19 84, before me a Notary Public, the undersigned officer, personally appeared Otes Bennett, Jr. and Thomas A. Koza, who acknowledged themselves to be the Chairman and Chief Executive Officer and Secretary of The North American Coal Corporation, a corporation, and that they as such officers, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by themselves as Chairman and Chief Executive Officer and Secretary.

SEAL
My commission expires:

Shirley Reisenbaum
Notary Public
SHIRLEY REISENBAUM, NOTARY PUBLIC
My Commission Expires March 8, 1988

STATE OF PENNSYLVANIA
COUNTY OF VENANGO } SS.

ACKNOWLEDGMENT TO THE LEASE

On this 26th day of January, A.D., 19 84, before me, the undersigned, a Notary Public in and for said county, in the State aforesaid, personally appeared C. E. Beck

to me known as the person described in and who executed the foregoing instrument and acknowledged that he had executed the same as his free act and deed.

M. JAMES HITCHCOCK, Notary Public
Oil City, Venango Co., Pa.
My Commission Expires October 24, 1988

Notary Public
Acting in County, State

This form was prepared by E. E. Beck, 32 National Transit Building, Oil City, Pa. 16301

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Exhibit "A"

Attached to and made a part of that certain Oil and Gas Lease by and between THE NORTH AMERICAN COAL CORPORATION, Lessor, and C. E. Beck, Lessee, dated January 16, 1984, covering the following described lands, to wit:

Archer Township, Harrison County, State of Ohio

Tract No.	Acres	Grantor	Date	Vol.	Pg.	Pres. Surface Ow.
1	19.98	Merle T Bolitho	9-13-43	113	167	M & L Tabacchi
2	128.98	"	"	"	"	"
3	50.00	"	8-18-43	"	96	"
4	26.28	"	"	"	"	"
5	19.64	"	"	"	"	"
6	158.42	"	"	"	97	D Green & H.Por
7	95.85	"	"	"	"	J C & Helen Car
8	77.00	"	"	"	"	D Green & H.Por
9	15.00	"	"	"	"	"
10	60.00	Otway T. Dunlap	4-14.45	116	395	Nacco
11	13.32	Clarence C Fay	7-30-48	124	523	"
12	102.53	Laura E Freshwater	5-3-43	112	438	"
13	32.76	"	"	"	"	"
14	50.00	"	6-28-43	"	585	Geo Valesko
15	60.00	Ralph E Galbraith	8-24-44	115	168	"
16	71.80	Jesse S Hall	6-19-43	112	539	O H & H D Corb
17	27.28	"	"	"	"	Nacco
18	56.47	Ray V Strausbaugh	9-7-43	113	468	O H & H D Corb
19	0.50	"	"	"	"	"
20	35.71	Cleve Hines	5-23-42	110	531	O H & H D Corb
21	23.46	Oakley A Hennis	10-14-43	113	480	Oakley A Henni
22	20.39	B Frank Thompson	7-2-43	112	620	Nacco
23	34.54	Frank Wright	4-30-46	119	520	"
24	165.29	Robt J Montgomery	11-25-41	110	20	"
25	123.39	Junius Galbraith	12-31-41	110	51	"
26	86.43	J R Thompson etal	10-9-43	113	454	William Campbe
27	9.93	"	"	"	"	"
28	70.21	Cleve Hines	5-23-42	110	531	William Galbre
29	107.18	"	"	"	"	Nacco
30	79.00	Frank Montgomery	7-6-42	"	629	"
31	5.19	J R Thompson etal	8-17-43	113	85	Jewett Sportsm
32	8.32	"	"	"	"	Farmers Club
33	95.70	"	"	"	"	"
34	15.00	John C Arbaugh	6-16-42	111	23	"
35	52.64	"	"	"	"	"
36	90.21	"	"	"	"	Clarence Sedo:
37	77.13	C F Thompson	"	"	134	Nacco
38	55.38	"	"	"	"	"
39	13.54	"	"	"	"	"
40	110.00	"	"	"	"	"
41	61.90	Jacob F Mattern	4-26-45	116	402	Frank E Dosso
42	8.96	Frank Montgomery	7-6-42	110	629	Nacco
43	4.56	"	"	"	"	"
44	33.96	J R Thompson	8-17-43	113	85	"
45	82.00	J M Thompson	8-6-43	111	136	"
46	19.03	Pgh. Con. Coal	4-30-48	123	504	Jay C Carson
47	50.00	"	"	"	"	"
48	67.75	"	"	"	"	"
49	65.00	John G Worley	7-21-44	115	50	"
50	27.25	"	"	"	"	Nacco
51	132.00	Pgh. Con. Coal	4-30-48	123	504	Edwin E Mills
52	55.99	Asbury Freshwater	"	"	147	Max Edwards
53	40.00	Pgh. Con. Coal	4-30-48	"	504	Nacco
54	36.18	"	"	"	"	"

3,033.12 Acres Total

signed for identification this 16th day of January, 1984:

THE NORTH AMERICAN COAL CORPORATION

BY: Otes Bennett, Jr., Chairman and Chief Executive Officer

BY: Thomas A. Koza, Secretary

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C. E. Beck, Lessee

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AMENDMENT

Attached to and made a part of that certain Oil and Gas Lease by and between THE NORTH AMERICAN COAL CORPORATION, Lessor, and O. H. Berk, Lessee, dated January 16, 1984, and effective January 21, 1984, covering lands situate in Archer Township, Harrison County, Ohio of this:

16. Notwithstanding any other provision of this lease to the contrary, each gas well or drilling well will account the payment of delay rentals only as to the 160 acres allocated to each such gas well or drilling well, and 40 acres to each oil well, and rentals must be paid on the remaining acreage covered hereby in order that lessee's rights hereunder continue in effect as to such remaining acreage. Production of oil or gas on a portion of the leased premises or lands unitized therewith will extend this lease beyond its primary term only as to such portions of the leased premises as may be included in a producing unit or units, provided, however, this lease shall not terminate if actual drilling operations are being conducted on the leased premises or lands unitized therewith, and such operations shall continue to maintain this lease in force and effect beyond its primary term as long as actual drilling operations are being conducted with no cessation of more than ninety (90) consecutive days from the completion of one well and the commencement of drilling of another well.

17. Location of drillsites shall be determined by the mutual consent of the parties hereto; however, such consent shall not be unreasonably withheld by Lessor.

~~18. It is the intent of this document to lease to Lessee all oil and gas mineral rights in Archer Township, Harrison County, Ohio, which rights are owned by Lessor at the date of execution of this lease, whether or not included on Exhibit "A", attached hereto and made a part hereof. It is understood by the parties hereto that the Lessor owns no surface rights on any of the described premises.~~

18. Notwithstanding any other provision of this lease to the contrary, it is specifically understood and agreed by Lessee that Lessor owns no surface rights on any of the above described properties and that Lessor grants to Lessee all of the foregoing rights and privileges only to the extent that Lessor owns and has the right to grant the same.

19. Lessee warrants that it will comply with any and all restrictions, servitudes and other encumbrances of record applicable to the oil and gas hereby leased.

Lessee further warrants that it will indemnify and hold harmless Lessor, its past and present directors, officers, employees, agents, affiliates, successors and assigns from and against any and all claims, demands, actions, causes of action, suits, liability, loss or damage, including the expense of defending the same, arising from or in any way relating to Lessee's failure to comply with any and all such restrictions, servitudes and encumbrances.

Signed for identification this 16th day of January, 1984.

THE NORTH AMERICAN COAL CORPORATION

BY: Otto Bennett, Jr., Chairman and Chief Executive Officer

BY: Thomas A. Kosa, Secretary

O. H. Berk, Lessee

37088

LABAN G. BLACKBURN
Harrison Co. Recorder
Received FEB 6 1984
at 10:24 o'clock A.M.
Recorded FEB 6 1984

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served upon the following, via regular U.S. mail, postage prepaid, this 2nd day of September, 2014:

Jeffery D. Ubersax
Dean C. Williams
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190

and

Charles H. Bean
THORNBURG & BEAN
113 W. Main Street
P. O. Box 96
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Attorneys for Chesapeake Exploration, L.L.C., CHK Utica, L.L.C., Total E&P USA, Inc., and Dale Pennsylvania Royalty, LP

Steven J. Shrock
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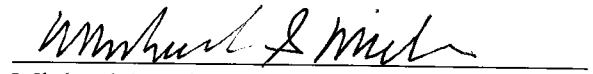
Co-Counsel for Plaintiff



Michael S. Miller (0009398)
Attorney for Petitioner Hans Michael Corban