ORIGINAL

In the Supreme Court of Ohio

HANS MICHAEL CORBAN, Petitioner, vs. CHESAPEAKE EXPLORATION, L.L.C., et al. Respondents.	))))))))))	Case No. 2014-0804 On Certified Questions from the United States District Court for the Southern District of Ohio, Eastern Division (Case No. 2:13-cv-00246)

BRIEF OF AMICI CURIAE GULFPORT ENERGY CORPORATION, PALOMA RESOURCES, LLC AND PROTÉGÉ ENERGY III LLC IN SUPPORT OF PETITIONER ADDRESSING CERTIFIED QUESTIONS OF STATE LAW

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Gulfport Energy Corporation ("Gulfport"), Paloma Resources, LLC ("Paloma") and Protégé Energy III LLC ("Protégé") (collectively, "Amici") are oil and gas exploration and production companies. Gulfport, Paloma and Protégé are focused on the acquisition and development of the Utica Shale formation in eastern Ohio. Gulfport currently has approximately 179,000 net acres under lease in the Utica. As of August 2, 2014, Gulfport has 167 horizontal wells producing, drilled, being drilled or permitted in Ohio, second among exploration and production companies operating in Ohio. Paloma has experience with basins nationwide and is actively seeking investment opportunities in the dry gas areas of the Appalachian Basin, including the Utica. Paloma has experience with basins nationwide and has made a substantial investment in purchasing oil and gas leases in the dry gas areas of the Appalachian Basin, including the Utica and Marcellus Shale in Ohio. Protégé II built a leasehold position and operated in Monroe County before selling that interest at year end 2012.

Amici have a clear economic interest in the answers to the questions certified by the United States District Court for the Southern District of Ohio, Eastern Division, in this case. Lessees of oil and gas rights may take their interest in these rights from the owners of the real estate; or from the holder of a mineral estate either reserved by the owner upon sale of the surface rights; or by severance of the mineral rights by the owner from the surface estate. Exploration and production companies have been making, and will continue to make, extensive investments based on their understanding of the operation of the Ohio Dormant Mineral Act, R.C. 5301.56 ("ODMA"), both before and after the effective date of the amendment to that statute on June 30, 2006. Simply, producers need to understand the "rules of the road" to avoid costly litigation triggered potentially leasing from the incorrect party.

Amici ask this Honorable Court to recognize that a monolithic oil and gas industry position simply does not exist with respect to the relationship of the 1989 ODMA and the current version of ODMA as amended in 2006 (and again in 2014). Oil and gas exploration companies deal with surface owners and mineral interest holders alike. It would be a mistake for the Court to conclude that the answers to the two Certified Questions will be "pro-development" or "anti-development". The answer can, and must, be "pro-clarity."

Some exploration and production companies have "placed their bets" on lessors claiming their interest in reserved or severed oil and gas rights, or "hedged their bets" by entering into leases with those tracing their interest in the oil and gas rights to both the surface owner and the holder of a recorded oil and gas interest. Nevertheless, Amici submit that the adverse economic impact will be momentous and pervasive if the Court answers the first question by stating that the 2006 version of the ODMA applies prior to its effective date. Such a ruling would effectively neuter the savings events of the ODMA, and would "undo" all abandonments prior to the 2006 amendment. This would cause a forfeiture of the surface owner's reversionary interest in the abandoned oil and gas rights absent notice as required under the 2006 version.

Similarly, Amici have a clear and direct interest in the answer to the second certified question whether the payment of delay rentals during the primary term of an oil and gas lease is the "subject of a title transaction" and thus a savings event under the ODMA. If an objective of the ODMA is to provide clear record notice to third parties, Amici submit that the fact that a recorded document mentions an event which may, or may not, take place, clearly is not notice that it *has or has not occurred.* The dearth of case law with respect to the premise that an unrecorded payment of a delay rental can constitute a title transaction is due to the weakness of this argument.

STATEMENT OF THE CASE AND FACTS

The United States District Court has certified two pure questions of law. The facts relevant to the determination of these questions are not in dispute.

A. History and Operation of the Ohio Dormant Mineral Act.

C. Keller, M. Altvater, J. Quay, "Ohio's Dormant Mineral Act: Addressing a Potential Title Problem Created by Severed Mineral Estates", Energy & Mineral Law Foundation Thirty-Fifth Annual Institute (2014), § XX.02[2], p. 4, summarizes the concerns which led to the 1989 ODMA:

> The Ohio State Bar Association Natural Resources Committee drafted the bill for Ohio's DMA. The bill was sponsored by the Ohio Farm Bureau. The main constituents of the Farm Bureau were farmers who often created severed mineral estates as informal estate planning tools. Parents holding title to a farm in fee simple would often reserve the mineral rights or a royalty interest when conveying the property to their children or a third-party. From the perspective of the Farm Bureau, the concept that a severed mineral interest could be *extinguished* by application of the [Marketable Title Act] ...was a real concern.
>
> At the same time, mineral interests that are truly dormant by reason of owners who may be deceased, "lost," or unknown creates title problems that must be addressed. Both surface owners and holders of severed mineral estates can readily agree that the public policy in Ohio is to encourage development of minerals in Ohio (citation omitted). If fee ownership of mineral interests cannot be determined with a degree of certainty, then the minerals cannot be developed as a practical matter.

Amendments to the ODMA were adopted effective June 30, 2006. Of direct impact on the determination of the certified questions in this case, the amendment included a new subsection (E), which for the first time created affirmative steps a surface owner must take before the abandoned mineral interest can vest in the surface owner. First, the surface owner must provide notice to each holder of the mineral interest or each holder's successors by certified mail or by publication if service cannot be so completed; second, not less than thirty or more than sixty days after the date of completion of service or publication, the surface owner must file

an affidavit of abandonment containing specific descriptions (set forth in R.C. 5301.56(G)) identifying the surface lands subject to the mineral interest; volume and page number of the recorded instrument on which the mineral interest is based; a statement that the mineral interest has been abandoned; and the facts constituting abandonment and that notice was served or published as required.

The second change of direct impact appears in R.C. 5301.56(H)(1), where it is stated that, if the mineral interest holder claims the interest has not been abandoned, the holder must within sixty days of service or publication of the notice from the surface owner either: (a) file a claim with the county recorder to preserve the mineral interest complying with 5301.56(C); or (b) file an affidavit with the county recorder that identifies any saving event included in 5301.56(B)(3).

B. Litigation Has Been Spawned by the 2006 Amendment to the ODMA.

If it was the drafter's intent to provide clarity through the notice provisions of the 2006 amendment to the ODMA, that intent clearly has not been realized. Primary sources of litigation have included the issue raised by the first certified question—whether the 1989 ODMA was self-executing and required no affirmative action by the surface owner to "perfect" the reversionary interest prior to the effective date of the amendment on June 30, 2006. Another litigation trigger has proven to be when a mineral interest "has been the subject of a title transaction that has been filed or recorded" in the office of the county recorder. Variants of that issue include whether the recordation of a lease, the expiration of a lease, and the second certified question in this case, whether payment of delay rentals during the primary term of a lease, constitutes such filed or recorded title transactions.

With respect to reversion of the mineral interest by operation of ODMA prior to the effective date of the 2006 amendment, the Seventh District Court of Appeals for Harrison County has ruled that the claim of interest by a holder of a mineral interest is an alternative

procedural vehicle to an affidavit that a savings event occurred within the twenty years preceding the surface owner's notice to avoid abandonment:

> In reading 5301.56(H) it can be concluded that it provides two means through which a mineral interest holder can assert that the mineral interest is not abandoned. Subsection (1)(b) deals with the acts listed in R.C. 5301.56(B)(3) that occurred within the 20 years immediately preceding the notice of the surface owners' intent to have the interests deemed abandoned. R.C. 5301.56(B)(3)(e) specifically provides for the filing of a claim to preserve the mineral interest that meets the requirements in R.C. 5301.56(C). Thus, R.C. 5301.56(H)(1)(b) addresses past events that render the interest not abandoned.
>
> R.C. 5301.56(H)(1)(a), on the other hand, allows for a present act by the mineral interest holder that prevents the interest from being determined to be abandoned. As stated above, that section states the mineral interest holder may file a claim to preserve the mineral interest in accordance with R.C. 5301.56(C) within 60 days after the date of notice.

Dodd v. Croskey, 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶¶ 27, 28 ("*Dodd*"); *appeal accepted, Dodd v. Croskey,* Case No. 2013-1730.

That holding puts a laser focus on the fundamental flaw in the position argued by Respondents in this proceeding. A newly authorized present day claim, asserted to retrieve a holder's mineral interest pursuant to R.C. 5301.56(H)(1)(a) even though the mineral interest holder is not required to verify by affidavit that a savings event had occurred in the preceding twenty years, *works a forfeiture of the surface owner's mineral interest that already had vested by operation of the 1989 ODMA.* Such a forfeiture cannot be sustained under Ohio's Constitution or express provisions of the Ohio Revised Code dealing with the permissible effects of amending legislation.

In the District Court's Opinion and Order on May 16, 2014 in *Corban v. Chesapeake Exploration, L.L.C. el al.,* S.D. Ohio No. 2:13-cv-246 certifying the two questions to this Court, Judge Michael H. Watson noted that this Court, in its Decision in *Chesapeake Exploration, L.L.C. v. Buell,* Case No. 2014-0067 (Decision, March 26, 2014; oral arguments heard and case

submitted on August 20, 2014) ("*Buell*") had already accepted certification of two questions related to Question No. 2 certified in this proceeding. The questions certified in *Buell* are:

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)?

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?

Note that the District Court did not certify in *Buell* a question whether the ODMA applied to vest abandoned mineral rights in the surface owner. Instead, the District Court recognized that the 1989 ODMA "does not specify any method for vesting of the mineral rights in the land owner, and thus, if no savings event occurs, the interest in the mineral rights held is deemed abandoned and vests automatically in the land owner upon the twentieth year. *That statute requires no further action by the land owner.*" (*Buell*, Decision, p. 7).

This Court's answers to the certified questions accepted in *Buell* will clearly involve an analysis parallel to that necessary to answer Certified Question No. 2 in this case. Specifically, if the expiration of an oil and gas lease occurs and that event is not separately recorded and thus does not constitute a title transaction, then it would appear also to be true that the unrecorded payment of a delay rental that, if made, would postpone the expiration of an oil and gas lease is not a title transaction.

Amici note that in Petitioner's Preliminary Memorandum, its Argument at Section II(B)(1) contends that a lease is not an interest in land conveyed by deed (See Petitioner's Preliminary Memorandum at p. 5-6). We submit that the Court's answer to Certified Question No. 2 turns on a far more limited issue—whether there is a public record of a delay rental payment. Amici's Argument regarding the second Certified Question herein is that unrecorded delay rental payments do not constitute title transactions for purposes of the ODMA.

The Ohio Revised Code expressly requires the recordation of oil and gas leases, as well as the releases of oil and gas leases, in the county where such land is situated. Until such a lease is filed of record, it is not valid unless the lessee is in actual and open possession. *See* R.C. 5301.09.

R.C. 5301.252(A) permits the filing of an affidavit with the county recorder in the county where real estate is situated "that shall be evidence of the facts stated, insofar as such facts affect title to real estate." The affidavit may relate to "the happening of any condition or event that may create or terminate an estate or interest." *See* R.C. 5301.252(B)(3). A delay rental payment can prevent the expiration or termination of an oil and gas lease during its primary term.

While Amici contend that an oil and gas lease, the expiration of an oil and gas lease, and delay rental payments are not title transactions unless recorded, we respectfully submit that this honorable Court need not and should not determine the specific nature of the interest conveyed by an oil and gas lease to answer Certified Question No. 2. The only question to be answered is one of statutory interpretation, i.e., whether a delay rental payment can qualify as a title transaction affecting the mineral interest under R.C. 5301.56, and the effect of recordation of an affidavit that such a payment has been made as permitted under R.C. 5301.252.

The determination of the nature of interest conveyed by an oil and gas lease should await a fully developed factual record on appeal from one of the Courts of Appeals, and briefing of applicable law in Ohio and the majority rule in states with more fully developed jurisprudence on oil and gas law.

ARGUMENT

Certified Question of State Law No. 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?"

A. The 1989 ODMA is self-implementing. By operation of this statute a severed or reserved mineral estate has been abandoned and reunited with the surface estate when no savings event established in R.C. 5301.56(B)(2) occurred within twenty years plus the three year grace period after the effective date of the Act.

1. The plain language of the 1989 ODMA requires no statutory construction. The non-occurrence of any of the savings events established in R.C. 5301.56(B)(3) constitutes an abandonment of the mineral estate and reversion to the surface estate by operation of law.

It is the law of this state that, when a statute is ambiguous, the courts may engage in statutory interpretation. *See* R.C. 1.49. With respect to its self-executing nature upon the non-occurrence of a savings event, the 1989 ODMA was and is unambiguous and should be applied according to this plain language. Ohio trial courts have confirmed this rationale, as has the Seventh District, the United States Supreme Court and courts in other state that have considered the automatic vesting nature of similarly worded dormant mineral statutes.

R.C. 5301.56(B) was enacted on March 22, 1989. It provided that oil and gas rights severed from the ownership of the surface rights *shall be deemed abandoned and vested* in the owner of the surface, unless, within the preceding twenty years: (1) the interest was the subject of a title transaction filed or recorded in the office of the county recorder, (2) a claim to preserve the interest was filed, (3) a separately listed tax parcel number was created for the mineral interest, (4) actual production occurred during that time period, (5) the interest was used for underground gas storage, or (6) a permit relating to oil and gas was issued and filed. (R.C. 5301.56(B)(1)(c). In addition to these savings events, the 1989 ODMA permitted mineral owners to file a preservation notice, meeting the affidavit requirements of the Ohio Marketable Title Act (see

R.C. 5301.52), stating the nature of the mineral interest claimed and that the holder of the interest did not intend to abandon the mineral interest. (*See* R.C. 5301.56(C)(1)). The 1989 ODMA included a three-year grace period during which the holder whose mineral interest otherwise was deemed abandoned under the Act could preserve that interest by performing one of the listed savings events. By virtue of this statutory grace period, the earliest date upon which a mineral interest could be deemed abandoned automatically by operation of the 1989 Dormant Mineral Act was March 22, 1992.

When none of the savings events had occurred prior to the expiration of the grace period, including a preservation notice, the 1989 Dormant Mineral Act explicitly declared what had happened by operation of law: the rights were deemed abandoned and ownership thereof had vested in the owner of the surface. R.C. 5301.56(B)(1). Consequently, the 1989 Dormant Mineral Act was self-executing.

a) Recent Ohio trial and appellate decisions hold that the 1989 ODMA is self-executing.

Respondents contend that this language is ambiguous and that it does not support vesting of mineral rights by operation of the law itself. This position is untenable. The only Ohio Court of Appeals to consider the self-executing nature of the 1989 ODMA and all but two Ohio trial courts have each upheld the automatic vesting nature of the 1989 ODMA. Additionally, as shall be discussed subsequently, the U.S. Supreme Court and other state supreme courts have found very similar statutes to be self-executing and unambiguous.

Over the past two years, Ohio trial court decisions have been nearly unanimous in holding that the 1989 ODMA vests by operation of law mineral interest deemed abandoned for failure of the mineral interest holder to take any action constituting use of the mineral interest in the preceding twenty years (or the three year grace period after its effective date). These include *Marty v. Dennis*, Monroe County C.P. No. 2012-203 (April 11, 2013); *Farnsworth v. Burkhart,*

Monroe C.P. No. 2012-133 (July 16, 2013); *Tribett v. Shepherd,* Belmont C.P. No. 12CV180 (July 22, 2013), *appeal pending,* 7th Dist. Belmont County No. 13-BE-0022; *Taylor v. Crosby,* Belmont C.P. No. 11CV422 (Sept. 16, 2013), *appeal pending*, 7th Dist. Belmont No. 13-BE-0032; *Wendt v. Dickerson,* Tuscarawas C.P. No. 2012-CV-020135 (February 21, 2013), *appeal pending,* 5th Dist. Tuscarawas No. 2014-AP-01-003; *Schucht v. Bedway Land and Minerals Company,* Harrison C.P. No. 2012-CVH-10 (April 21, 2014), *appeal pending,* 7th Dist. Harrison No. 14 HA-0010; *Myers v. Bedway Land and Minerals Company,* Harrison C.P. No. 2012-CVH-120 (April 30, 2014), *appeal pending,* 7th Dist. Harrison No. 14-HA-0013.

In contrast, only two Common Pleas Court decisions have reached the opposite conclusion holding that the 2006 amendment supersedes the 1989 ODMA even if no savings event occurred during the preceding twenty years plus (if applicable) the three year grace period: *Dahlgren v. Brown Farm Properties, LLC*, Carroll C.P. No. 13CVH2744 (Nov. 5, 2013), *appeal pending,* 7th Dist. Carroll No. 2013-CA-0896; *M&H Partnership v. Hines,* Harrison C.P. No. CVH-2012-0050, *appeal pending*, 7th Dist. Harrison No. 2014-HA-0004.

More importantly, the only Ohio Court of Appeals to have considered whether the 1989 ODMA is self-executing is the Seventh District. That court held that the 1989 Act is self-executing and that mineral interests that were deemed abandoned without any additional affirmative act or notice by the surface owner because no savings event occurred during the preceding twenty years, vested by operation of ODMA. *See Walker v. Shondrick-Nau,* 7th Dist. Noble No. 13-No-402, 2014-Ohio 2359, *appeal pending,* No. 2014-0803; *See also Swartz v. Householder,* 7th Dist. Jefferson No. 13-JE-24. In *Walker,* the Court of Appeals held that the 1989 ODMA controlled even though the mineral owner had filed a claim of preservation of the mineral interest timely after the filing by the surface owner of a notice of abandonment in

compliance with R.C. 5301.56(H) as added in 2006. The court ruled that by virtue of the effective date of the 1989 version of R.C. 5301.56, on March 22, 1992, the mineral interest was *deemed abandoned and vested* in the surface owner at that time. It noted that the mineral interest was not the subject of any title transactions that would trigger the title transaction savings event and that the holder did not allege any other savings events. *Id.* at ¶41. After listing several trial court decisions in the Seventh District that supported vesting by operation of the 1989 ODMA, the court rejected the analysis of the trial court in the *Dahlgren v. Brown Farm Properties* decision stating:

> One trial court in our District has found to the contrary. [citing *Dahlgren*]. The trial court in *Dahlgren* found no merit to the "automatic vesting" theory. Instead, it classified the mineral rights under the 1989 version as "inchoate" rights. By definition, "inchoate" means not completely formed or developed yet." Merriam-Webster Online Dictionary. This definition is in direct contrast to the definition of "vested" which means that something "so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." *Jordan v. Indus. Comm.,* 120 Ohio St.3d at ¶9, quoting *Harden*, 101 Ohio St.3d at ¶9. Thus, the Dahlgren court's characterization of the mineral rights under the 1989 version is contrary to the statute itself, which states that the mineral rights are "vested."

Id. at ¶43.

More recently, on June 2, 2014 the Seventh District Court of Appeals issued its opinion in *Swartz, supra.* The court confirmed its recent holding in *Walker, supra*, that the 1989 ODMA "was self-executing and the lapsed rights automatically vested in the surface owner." *Swartz, supra*, at ¶28. It concluded that "[t]he current DMA thus eliminated the automatic vesting after June 30, 2006, but did not erase previously vested interests (merely because a suit had not yet been filed to formalize the reverter)" *Id.* at ¶35. And it criticized the analysis of the trial court's decision in *Dahlgren*:

> [i]t is as if Dahlgren construed the amendments to be a type of implied statute of limitations for asserting rights granted under the 1989 DMA. Essentially,

> Dahlgren found that a vested right was eliminated by a non-retrospective statutory amendment (an amendment with no grace period unlike the 1989 DMA.)

Id. at ¶37. And the court concluded that *Dahlgren's* finding of an "inchoate" right "is contrary to the plain language of the statute" even though the statute "expressly stated that the right vested upon the lack of a savings event within the pertinent time period." *Id.* at ¶38. This honorable Court should adopt the sound analysis of the Court of Appeals on this issue, supported by the other authorities outlined herein.

b) The United States Supreme Court and other state Supreme Courts have ruled that similar mineral lapse statutes are self-executing.

These two Seventh District opinions are consistent with the analysis of the Indiana Supreme Court in *Short v. Texaco*, 273 Ind. 518, 406 N.E.2d 625 (1980), *aff'd. sub nom., Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L. Ed.2d 738 (1982), and with the U. S. Supreme Court in *Texaco v. Short,* which affirmed the Indiana Supreme Court, and the Michigan Supreme Court in *Van Slooten v. Larsen,* 410 Mich. 21, 299 N.W.2d 675 (1978), *appeal dismissed sub nom., Craig v. Bickel,* 455 U.S. 901, 102 S.Ct. 1242, 71 L. Ed.2d 440 (1982). In this regard the Indiana Supreme Court noted that its statute "does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs." *Short v. Texaco,* 273 Ind. at 522, 406 N.E.2d 625. Elaborating, it stated:

> The Act under question does not provide for any adjudicatory process by a court or administrative agency. The absence of such a provision is not, we think, invalidating. The Act simply spells out the conditions which when existing mandate the extinguishment of an interest. If a court should be called upon to determine whether such conditions arose in a particular case so as to have effected the loss of an interest, the owner of such interest would be entitled to notice and an opportunity to be heard. Prior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two year opportunity to prevent those conditions from occurring by filing a statement of claim [citation omitted]. That procedure is both simple and inexpensive.

Id. at 523. The Michigan Supreme Court explained its parallel reasoning in *Van Slooten:*

> Contrary to defendants' arguments, the [Michigan dormant mineral] act does not create any evidentiary presumption. None of the provisions of the act purport to be concerned with the owner's intent to abandon [citation omitted]. Rather, the act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least each 20 years.

Van Slooten, supra, at 50, 51.

It is this same "rule of substantive law" that was established by the General Assembly in enacting the 1989 ODMA to provide vesting as a matter of law upon the non-occurrence of a savings event for the preceding twenty years. This analysis points out the deficiencies in Respondents' Preliminary Memorandum (commencing at p. 9) to the effect that the 1989 ODMA's language does not support "automatic vesting." The law established steps to preserve the mineral rights. It did not need to specify "automatic vesting". Quite simply, the legislative language of the 1989 ODMA was abundantly clear that, if none of the savings events listed therein had occurred for a twenty-year period, the mineral interest was deemed abandoned by operation of the statute and was reunited with the surface estate.

Respondents confuse the self-executing statutory right—the vesting of the mineral interest in the surface owner upon non-occurrence of a savings event for twenty years—with a subsequent judicial determination that a particular lapse did in fact occur:

> It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause—including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard—must be provided.

Texaco v. Short, 454 U.S. at 534, 102 S.Ct. 781.

Amici note a subtle semantic "sleight of hand" both by Respondents in this proceeding and by litigants in other pending appellate proceedings where the issue of whether mineral interests "deemed abandoned and vested" in the surface owner is raised. Specifically,

proponents of this view claim that the reversion of mineral interests to the surface owner upon the non-occurrence of a savings event under the ODMA prior to the effective date of the 2006 amendment of R.C. 5301.56(B)(1) is a "forfeiture" that is "abhorred" in Ohio jurisprudence. But "abandonment" and "forfeiture" are not synonyms. According to Black's Law Dictionary (9th Ed. 2009), abandonment is defined as:

> Abandonment, n. (1809) 1. The relinquishing of a right or interest with the intention of never reclaiming it. In the context of contracts for the sale of land, courts sometimes use the term *abandonment* as if it were synonymous with *rescission*, but the two should be distinguished. An abandonment is merely one party's acceptance of a situation that a nonperforming party has caused. But a rescission due to a material breach is a termination or discharge of the contract for all purposes. 2. *Property.* The relinquishing of or departing from a homestead, etc., with the present, definite, and permanent intention of never returning or regaining possession.

Contrast the definition of forfeiture as it applies to an estate in Black's Law Dictionary:

> Forfeiture, n.(14c) 1. The divestiture of property without compensation. 2. The loss of a right, privilege or property because of a crime, breach of obligation, or neglect of duty. ... 4. A destruction or deprivation of some estate or right because of the failure to perform some contractual obligation or condition.

In the specific context of gas and oil leases, the character of forfeiture as distinct from abandonment is clear in R.C. 5301.332, "Forfeiture and cancellation of natural gas and oil leases."

> (A)(1) Whenever leases of natural gas and oil lands recorded under section 5301.09 of the Revised Code upon which there are no producing or drilling oil or gas wells *become forfeited for failure of the lessee or the lessee's successors or assigns to abide by specifically described covenants provided for in the lease* or because the term of the lease has expired, the lessor or the lessor's successors or assigns may file for record an affidavit of forfeiture with the county recorder after service notice...to the lessee or the lessor's successors or assigns. . . of the lessor's intent to declare the lease forfeited.

(Emphasis added). The 1989 ODMA did not work a forfeiture upon the non-occurrence of a savings event within twenty years plus the three year grace period. Instead, it creates a substantive statutory surrogate for proof of intentional abandonment to advance state policy

promoting development of oil and gas resources by returning mineral interests unused for the statutory period of time to the surface owner, thereby freeing those unused mineral interests for development.

2. The General Assembly addressed a legitimate state interest in establishing limitations on the duration of a severed mineral estate to promote efficient and timely development of oil and gas resources in Ohio.

The ODMA, both before and after the 2006 amendment, addressed a legitimate state interest – fostering the efficient development of Ohio's natural resources. Over the decades prior to ODMA's enactment in 1989, many mineral interests were severed by reservation or transfer to third parties. In the years that followed, severed mineral interest would often inconspicuously pass to unidentified parties, making the task of determining mineral ownership difficult, if not impossible. As a result, the development of oil and gas--not just as to tracts directly affected by a mineral severance but for all additional tracts necessary to meet the minimum acreage for spacing units--was inhibited The General Assembly, along with many other state legislatures facing similar circumstances, instituted dormant mineral or mineral lapse statutes to address these issues and reunite the mineral interest with the surface estate in the absence of use or claim of possession by the mineral interest holder.

Other state supreme courts have considered similar statutes that establish a statutory presumption of abandonment in the event of non-use by the mineral interest holder, held the mineral lapse statutes constitutional and rationally related to a legitimate state interest. *See Short v. Texaco*; and *Van Slooten v. Larsen.*

In *Short v. Texaco,* the Indiana Supreme Court held that its Mineral Lapse Act, Ind. Code §§ 32-5-11-1 through 32-5-11-8, is constitutional. The Indiana statute is similar to the ODMA. It provides for reversion of the mineral interest upon the expiration of twenty years without use (actual production, payment of rents, royalties or taxes, or the filing of a claim in the dormant

mineral interest record in the county recorder's office) subject to a two year grace period from the effective date of the statute.

The Indiana Supreme Court specifically discussed the legitimate state interest served by the Mineral Lapse Act:

> The purposes of this Act . . . are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the states and does not unconstitutionally impair the obligation of contracts.

Short v. Texaco, 273 Ind. at 526.

In affirming the judgment of the Indiana Supreme Court, the U.S. Supreme Court concurred that the abandonment by operation of the Mineral Lapse Act as structured was reasonably related to a proper state interest:

> Each of the actions required by the State to avoid an abandonment of a mineral estate furthers a legitimate state goal. Certainly the State may encourage owners of mineral interests to develop the potential of those interests; similarly, the fiscal interest in collecting property taxes is manifest. The requirement that a mineral owner file a public statement of claim furthers both of these goals by facilitating the identification and location of mineral owners, from whom developers may acquire operating rights and from whom the county may collect taxes. *The State surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State.*

Texaco v. Short, 454 U.S. at 529-530, 102 S.Ct. 781 (emphasis added).

In *Van Slooten v. Larsen,* the Michigan Supreme Court found that state's dormant mineral act (Mich. Comp. Laws § 554.291 *et seq.*) was constitutional. That state law deemed

abandoned (and vested in the owners of the surface estate) the severed oil and gas interests that the mineral interest holder had not developed for a twenty year period and when no claim of interest was filed during that time, subject to a three year grace period from its effective date in which the interest holder could record a claim of interest. The Court concluded that the dormant mineral act did not unconstitutionally impair contract obligation and did not deprive mineral interest holders of property without due process of law. It concluded that there was a reasonable relationship between the remedy (i.e., abandonment and reversion to the surface owner) and the public purpose sought to be achieved, noting that upon severance of surface and mineral estates, ownership of the mineral interest can become fractionalized over time. These rights may be owned by "a number of people who are not familiar with the property, the owner of the surface estate or even each other; and absent actual possession of the severed mineral estate, possession of the surface estate cannot establish adverse possession of the oil and gas rights." *Van Slooten,* 410 Mich. at 44-45, 299 N.W.2d 675.

> Therefore, the dormant mineral act was passed to reduce the likelihood that the presence of unknown or unlocatable owners or fractionalized ownership of severed interests would unnecessarily hinder or prevent the development of these resources by requiring an owner to do certain specified acts indicating ownership or record a claim of interest every 20 years. It places no undue burden upon owners. Without such a requirement, knowledge of ownership could be lost in time. Potential resources go undeveloped in the absence of viable ownership.
>
> The recording provision of the act provides a simple method by which owners of undeveloped severed mineral interests can preserve them.

Id. at 46-47. The Court also concluded that a reasonable relationship existed between the purpose of the statute and the provision vesting title in the owner of the surface estate upon the failure of the mineral interest holder to do any of the statute's required acts to preserve that interest with no requirement that the surface owner must take any action. It noted that potential developers and owners of other severed interests are more likely to locate the surface owner than

the owners of the abandoned interest, thereby putting all in a position to begin the preparatory steps necessary for development. *Id.* at 49.

As previously noted, the Seventh District Court of Appeals recently analyzed a Carroll County Common Pleas Court decision in *Dahlgren v. Brown Farm Properties,* ("*Dahlgren*"). *See Swartz v. Householder.* In *Swartz* the Seventh District Court of Appeals stated:

> To some, the result reached by the trial court in *Dahlgren* may seem fair, equitable and practical under a theory that it is the initial forfeiture that should be abhorred by law rather than the later forfeiture of a property right obtained by forfeiture in the first place. However, legislatures around the country found such initial abandonment and unification with the surface to be important to the state, and the United States Supreme Court agreed that the state has such legitimate interests.

Swartz, 2014-Ohio-2359 at ¶36.

To conclude this point: the ODMA, both before and after the 2006 amendment, consistently has been based upon a legitimate state interest in fostering the efficient development of oil and gas resources in Ohio. It was determined by the General Assembly in 1989 that requiring the holder of a mineral interest to indicate in some way that the mineral interest is not being abandoned is a rational and reasonable means of serving this legitimate state interest. Qualifying saving events include the recordation of a title transaction to which the mineral interest is a subject as provided in R.C. 5301.56(B)(1)(c)(1) of the 1989 version (renumbered 5301.56(b)(3)(a) by the 2006 amendment), and the other listed savings events, including a claim to preserve the interest—which can be repeated indefinitely by repeated filing of claims to preserve. *See* R.C. 5301.56(D)(1).

3. The holder of a mineral estate reasonably is required to take notice of enacted laws which affect his interest.

Respondents state in their Preliminary Memorandum that any interpretation of the ODMA omitting a process for notification of the mineral interest owner would be simply

inequitable, akin to entering a default against a defendant with no notice of suit. (Respondents' Preliminary Memorandum, p. 4). However, Courts that have considered this procedural due process argument have reached a different conclusion. Specifically, consider the following discussion in *Swartz:*

> The 1989 DMA is the type of statute characterized by automatic lapsing and reversion to the surface owner known as a self-executing statute. *See Texaco* 454 U.S. 516. The United States Supreme Court stated that the Indiana DMA was self-executing as it provided the mineral interest shall be extinguished and that the ownership shall revest upon the non-occurrence of savings events within the pertinent time period. *Id.* (and stating that notice to avoid automatic abandonment besides the two-year grace period was not required and the only required notice involved the ability to prove a savings event in fact occurred in the pertinent period).

2014-Ohio-2359 at ¶27. The reference to *Texaco* is apt. The U.S. Supreme Court addressed the notice issue thus:

> The first question raised is simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law that a mineral interest that has not been used for 20 years will be deemed to be abandoned. The answer to this question is no different from that posed for any legislative action affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case the 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property [footnote omitted].
>
> It is also settled that the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which the Court shows the greatest deference to the judgment of state legislatures [citation omitted].

Texaco v. Short, 454 U.S. at 532, 102 S.Ct. 781. Similarly, the Michigan Supreme Court in *Van Slooten* opined that due process requires notice and an opportunity for hearing at a meaningful time and in a meaningful manner and that the necessity for hearing requires a balancing of the competing interests at stake.

> However, considering the interests encompassed by this act, the risks of wrongful deprivation are minimal. The act does not deprive owners of productive interests of their property without a hearing [footnote omitted] but only applies to severed interests which have not been worked, as defined in the act, or recorded for over 20 years. Therefore, since the owner has not been in actual possession of the interest for over 20 years, the risks of financial or other harm from the interim deprivation are minimal. Moreover, a post-deprivation due process hearing would not necessarily give the owner an opportunity to claim the interest, record it and preserve it but would only address the issue of whether the elements of abandonment had been proven. Balancing the minimal protection afforded by requiring a pre-deprivation hearing against countervailing considerations [footnote omitted] the legislative determination not to require a pre-deprivation hearing did not deprive defendants of property without due process of law.

Van Slooten, 410 Mich. at 54, 55, 299 N.W.2d 675. The Michigan Supreme Court concluded that, since a hearing was not constitutionally required prior to vesting, "...we do not accept defendant's claim that the absence of any provision in the statute for notice of such a hearing renders it constitutionally infirm." *Id.* at 55.

This Court should reject the Respondents' contention that notice to the mineral interest holder prior to vesting is akin to an unnoticed entry of default judgment for the sound reasons found in the authorities discussed above.

4. Respondents improperly conflate the substantive property right that reverts by operation of the 1989 ODMA, when a holder of the mineral estate abandons that estate, with the adjudicatory remedy of a quiet title action pursuant to R.C. 5303.01.

Earlier in this Brief, Amici made reference to the distinction drawn by the U.S. Supreme Court in *Texaco v. Short* between the creation of a self-executing statutory right to reunification of the mineral and surface interests in the surface owner, and the determination by judicial process whether the conditions had been satisfied under the terms of Indiana's similar dormant mineral legislation. *See Texaco v. Short,* 454 U.S. at 534, 102 S.Ct. 781. Similarly, the Michigan Supreme Court discussed that the self-implementing feature in *Van Slooten,* determining that a post-vesting judicial determination that the statutory requirements for the

reunification of the mineral interest with the surface estate had been met, would provide the mineral interest holder with an appropriate due process of law to protect his interest. *See Van Slooten,* 410 Mich. at 54, 55, 299 N.W.2d 675.

Amici respectfully submit that care must be taken in this proceeding not to conflate the substantive right created in the 1989 ODMA with the judicial mechanism for enforcing that right, R.C. 5303.01 "Action to quiet title." It is no deficiency of the ODMA that it does not replicate or incorporate a separate notice and hearing procedure.

B. The 2006 amendment to the ODMA cannot be applied retroactively to "claw back" the mineral estate which the mineral estate holder had abandoned and which had vested in the owner of the surface estate prior to the effective date of the amendment.

1. Article II, § 28 of the Ohio Constitution and R.C. 1.58 protect the surface estate owner's vested mineral estate property right from retroactive invalidation or the attachment of new conditions or obligations upon the exercise of such vested right.

Article II, Section 28 of the Ohio Constitution provides:

> The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts, but may, by general laws, authorize courts to carry into effect upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Under the clear guidance of the Ohio Constitution and of the Ohio Revised Code, the 2006 amendment to the ODMA is not a remedial statute. Such an interpretation would fundamentally impair a substantive property right already vested in the surface owner. The intent for retroactive application of the 2006 amendment to the ODMA was not clearly stated in the enacting legislation, which thus must apply only prospectively.

In *Walker,* the court expressly rejected the mineral interest holder's contention that the 2006 amendments could be applied to divest the previously abandoned interest that had vested

by operation of the 1989 ODMA. First, the Seventh District Court of Appeals noted R.C. 1.48, which establishes that "a statute is presumed to be prospective in its operation *unless expressly made retrospective"* (emphasis added) in holding that the 2006 amendments applied only prospectively because it contained no such expression of legislative intent (2014-Ohio-1499 at ¶36). And the court cited R.C. 1.58(A)(1) and (2) which prohibits amendments of a statute from affecting the "prior operation of the statute or any prior action taken thereunder;" or "any validation cure, right, privilege, obligation, or liability previously acquired, accrued, accorded or incurred thereunder" (*Id.* at ¶36). The court concluded that "although R.C. 5301.56 was amended in 2006, this amendment would not have affected any 'validation, cure, right, privilege, obligation, or liability previously acquired'" (*Id.* at ¶37).

This honorable Court has considered retroactive application of statutes in the context of oil and gas royalties. *See Burtner-Morgan-Stephens Co. v. Wilson,* 63 Ohio St.3d 257, 586 N.E.2d 1062 (1992). The Court held that subsequently enacted R.C. 1509.26 and 1509.27 (allowing voluntary pooling agreements and mandatory pooling orders) could not be applied to defeat the language of a 1949 recorded oil and gas lease with regard to the payment of royalties generated by a producing well: "In our view, such retroactive application clearly violated Section 28, Article II of the Ohio Constitution by impairing an obligation of contract. *See Kiser v. Coleman* (1986) 28 Ohio St.3d 259..." *Id.* at 260.

This Court has revisited its retroactivity analysis more recently in another context in *Longbottom v. Mercy Hospital Clermont,* 137 Ohio St.3d 103, 2013-Ohio-4068, 988 N.E.2d 419. It reaffirmed prior decisions describing the two-step test the Court applies to determine whether a law violates Article II, Section 28 of the Ohio Constitution:

> [W]e must first "determine whether the General Assembly expressly intended the statute to apply retroactively [*Bielat,* Ohio St.3d] at 353. . . If so, we must

> determine whether "the statute is substantive, rendering it "*unconstitutionally* retroactive, as opposed to merely remedial". (Emphasis sic.) Id. A substantive statute is one that "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.

2013-Ohio-4068, ¶22. It went on to note that "laws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws." *Id.* at ¶23.

Applying the first prong of the test, there was no expression of legislative intent that the amendment should be applied retroactively. That should end the analysis, as the Seventh District Court of Appeals concluded in *Walker, supra.* However, it also is abundantly clear that the 2006 amendment was *not* "merely remedial." Rather, the application of the 2006 amendments to "impose new or additional burdens, duties or obligations" prior to vesting of the surface owner's reunited interest in the mineral estate is clearly in derogation of a previously vested property right. In *Longbottom*, this Court reaffirmed prior rulings and authorities that prohibit the application of "laws *which commenced on the date of enactment and which operated in future, but which, in doing so divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws*" *Longbottom*, 2013-Ohio-4068, at ¶24. (emphasis added).

Regardless of the precise characterization of a mineral interest, undeniably it is a property right. As noted in the preceding discussion of other cases interpreting dormant mineral acts, these self-executing dormant mineral lapse statutes establish a rule of substantive law that the transfer of such rights occurs without prior notice or adjudication beyond the notice of the enactment of the laws themselves. Lapse occurs automatically upon the non-use and failure of the mineral interest holder to establish a savings event during the pertinent statutory period.

The 2006 amendment of the ODMA would therefore be an unconstitutionally retroactive law to the extent that it impairs property rights already vested by operation of law or retroactively imposes new burdens on the continuing possession and use of the vested right.

2. While the 1989 ODMA provided a three-year grace period in which holders of a mineral estate could establish a savings event to prevent abandonment and reverter, the 2006 amendment to the ODMA provided no analogous grace period for the surface rights owner. Such a grace period could have prevented unconstitutional retroactive deprivation of the vested mineral rights by operation of 5301.56(H)(1)(a).

Some litigants contend that the filing by any mineral interest holder of a "claim to preserve mineral interest" (pursuant to Division (H)(1)(a) of the 2006 version of the ODMA after receipt of newly required notice from a surface owner under R.C. 5301.56(E) "[b]efore a mineral interest becomes vested under division (B) of this section") is effective to nullify any already vested property interest of the surface owner for a mineral interest that had been "deemed abandoned" by the non-occurrence of any savings event prior the June 30, 2006 *unless* the surface owner had taken affirmative action to enforce that vested right *before* the 2006 amendment became effective on June 30, 1986. As previously discussed, in *Dodd, supra,* 2013-Ohio 2013 ¶28, the 7th District Court of Appeals accepted such a "post lapse" claim as an equally effective alternative to filing an affidavit of a savings event prior to lapse.

As the *Swartz* decision noted, when the 1989 ODMA was enacted, it included a three year grace period so that mineral interests as to which no savings event had occurred in the preceding twenty years could nonetheless be protected for three years after the effective date on March 22, 1989 by filing a claim to preserve the interest. *See Swartz*, 2014-Ohio-2359, at ¶37.

If the General Assembly had sought that the 2006 amendment should be a remedial statute applying only to procedures going forward and leaving unaffected substantive rights already granted under the original ODMA, it could have done so. An analogous grace period

after the effective date of the 2006 amendment on June 30, 2006 could have been included in the amendment. During this grace period a surface owner might have been required to submit a notice of intent to declare a mineral interest abandoned under R.C. 5301.56(E) provided that such notice could not be defeated by a "post-lapse" claim of interest, but only could be defeated by an affidavit of any mineral interest holder submitted under R.C. 5301.56(H)(1)(b) describing any "pre-lapse" savings event. This would have provided adequate notice to all, and the opportunity for a quiet title action by either contending party pursuant to R.C. 5303.01. However, no such grace period was included in the amendment.

The result is that a claim to preserve a mineral interest filed by a mineral holder after the lapse of twenty years without identifying any savings event prior to the effective date of the 2006 amendments would defeat any quiet title action under R.C. 5303.10 by the surface owner. This alone demonstrates an unconstitutional retroactive divestiture of the substantive mineral interest that had previously vested by operation of the 1989 ODMA.

Certified Question of State Law No. 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?"

A. The unrecorded payment of delay rentals under a recorded oil and gas lease is not a title transaction and does not constitute a savings event under either the 1989 ODMA or the 2006 amendment thereto.

1. R.C. 5301.09 requires the recordation of all oil and gas leases and similarly requires a lessee to record a release of record, in the county where the surface estate is located upon expiration or forfeiture of a lease. If such recordation does not take place, neither a lease nor the expiration of a lease can possibly be the subject of a title transaction "that has been filed or recorded" and thus cannot be a savings event.

Certified question No. 2 has to do with only a specific subset of the savings events outlined in R.C. 5301.56(B)(3)(a) of the current ODMA (renumbered from prior 5301.56(B)(1)(c)(i) in the 1989 ODMA and modified to include reference to new Division (E)):

> (B) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if the requirements established in division (E) of this section are satisfied and none of the following applies:
>
> * * *
>
> (3) Within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section, one or more of the following has occurred:
>
> (a) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.

Amici suggest that there is a cohesive means of dealing with all permutations of a title transaction to which a mineral interest may be subject: record the transaction.

In our view, R.C. 5301.09 is responsive to the issue of lease initiation and termination or expiration. This statute provides:

> Leases of natural gas and oil lands to be recorded; address of lessor and lessee; release. *All leases, licenses, and assignments thereof*, or of any interest therein, given or made concerning lands or tenements in this state, by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto, ***shall be filed*** *for record and recorded in such lease record without delay*, and shall not be removed until recorded.
>
> * * *
>
> *Whenever any such lease is forfeited for failure of the lessee, his successors or assigns to abide by specifically described covenants provided for in the lease, or because the term of the lease has expired,* ***the lessee****, his successors or assigns,* ***shall have such lease released of record*** *in the county where such land is situated* without cost to the owner thereof.
>
> *No such lease or license is valid until it is filed for record*, except as between the parties thereto, unless the person claiming thereunder is in actual and open possession.

(Emphasis added.) Bearing in mind that there are other savings events that do not involve mineral rights being the subject of title transactions, it seems reasonable to accept that this explicit language precisely identifies the nature of a mineral interest that fits the statutory

reference in R.C. 5301.56(B)(3) as a "mineral interest has been the subject of a title transaction that has been filed or recorded."

Applying this mandatory language, it would appear that a lease of a mineral interest to be considered a title transaction, must be recorded of record in the county where the land is located. Of more direct import to Certified Question No. 2, it would appear equally required that, for the expiration of a mineral interest lease to qualify as a title transaction, such release must be filed of record in the same county where the lease was recorded—the county where the land is located. As a corollary, if the lessee fails in this statutory duty, the release of lease cannot render the expiration of that lease a mineral interest the subject of a title transaction recorded in the county where the land is located.

The holder of the mineral interest is master of his own destiny with respect to the recordation of both the lease itself and the release of such a lease upon its expiration according to its terms or forfeiture by the lessee. By statute, the lessor is given authority to file for record with the county recorder, with notice to the lessee by certified mail (or publication if certified mail fails), an affidavit of forfeiture of a lease that has expired. *See* R.C. 5310.332(A)(1). Hence, if the mineral interest holder wants a lease expiration to constitute a title transaction of record, he can make it occur by following the statutory procedure.

Therefore, it appears reasonable that, when it comes to the "subject to a title transaction" savings event, the key should be the date of recordation, the most recent in time being sufficient to restart the twenty year clock. An unrecorded release upon expiration (or <u>no</u> release) or forfeiture of a lease does not qualify as a title transaction affecting the mineral interest recorded in the county where the land is located.

2. **A delay rental payment is only the performance of a contractual option by a lessee to forestall termination of an oil and gas lease during its primary term, which, if not filed of record, cannot be the subject of a title transaction in compliance with R.C. 5301.56(B)(3)(a). Unless any of the other identified savings events in R.C. 5301.56(B)(3)(b) through (f) have occurred independently, abandonment is deemed to have vested the mineral interest in the surface holder.**

The primary aim of the ODMA is to promote the efficient development of the state's oil and gas resources. That legitimate state goal is advanced by creating greater transparency as to the marketability of oil and gas interests. One struggles to discern how the unrecorded payment of delay rentals during the primary term can advance these objectives. Clearly, the unrecorded payment of delay rentals does not serve the purpose of providing a public record of the continuation or expiration of an oil and gas lease.

It should be noted that, if a lessee wants record evidence of a delay rental payment, the lessee can file an affidavit complying with R.C. 5301.252, which authorizes such an affidavit "by any person having knowledge of the facts" in the office of the county recorder where the real estate is located "related to matters that may affect the title to real estate in this state." R.C. 5301.252(B)(3) lists "the happening of any condition or event that may create or terminate an estate or interest."

Finally, R.C. 5301.56(H) provides that, after notice of failure to file a mineral interest is recorded, the mineral interest shall vest in the surface owner "and *record* of the mineral interest shall cease to be notice to the public of the existence of the mineral interest..." (Emphasis added).

The overall scheme of the recording statutes is to provide notice to third parties. Whether a recorded memorandum of lease mentions that the primary term can be maintained by the payment of a delay rental or rentals as an alternative to development of the leasehold, that mention provides no notice that the delay rental payments actually have—or have not—been

made. If a recorded oil and gas lease or memorandum of oil and gas lease describes a defined primary term and an indefinite secondary term dependent on the capability of the leasehold to produce natural gas in paying quantities, it cannot seriously be contended that the recordation of the lease also is filed notice of the actual release of the leasehold to the lessor. At best, it is notice that the lease may or may not be released to the lessor. Only when a release of the lease is filed of record will there be indisputable evidence of the possession of the mineral interest.

Consider that the other savings events identified in R.C. 5301.56(B)(3) are observable to a title examiner or to an investigator who examines the public record and, if necessary, visits the leasehold. Under Division (B)(3), actual production can be observed; land pooled or unitized can be determined from records in the county recorder's office. Maps defining the boundaries of underground storage operations are required to be filed with the Division of Oil and Gas Resources Management ("*DOGRM*"), and maps are to be filed as often as each six months if the boundaries change during the six-month period. *See* R.C. 1571.02. If a drilling permit has been issued to the holder, an affidavit that states the name of the permit holder, number, type of permit and legal description of the affected lands must be filed. *See* R.C. 5301.252. But, in any event, the existence of a permit can be determined by reviewing the publicly available records of DOGRM. This is not the case with respect to the termination of a lease whether due to non-payment of delay rentals or otherwise. Absent a filing that discloses such information it remains known only to the lessor and the lessee.

To summarize, there appears scant basis to hold that an unrecorded delay rental payment constitutes a title transaction recorded in the county where the land is located that affects the mineral interest. The lessee has adequate statutory tools under R.C. 5301.252 to record such

payments if it is desired that such payments be treated as title transaction of which the mineral interest is the subject.

CONCLUSION

Unquestionably, the Court is facing important questions raised in this case, and in others already pending before the Court, as well as others that can be anticipated in the future as pending cases are decided by the Courts of Appeals. The 2006 amendment to the Ohio Dormant Mineral Act has generated an immense amount of confusion. The litigation generated by the 1989 Dormant Mineral Act pales by comparison. Although well intentioned, it appears the amendment may have worsened rather than improved the situation.

That said, it is respectfully requested that based on a careful analysis of applicable authority, statutory language and rules of construction associated therewith:

1. The first Certified Question should be answered: The 1989 version of the ODMA applies to determine surface owners' claims asserted after the 2006 amendment alleging that the rights to oil, gas, and other minerals had automatically vested in the surface land holder prior to the 2006 amendment as a result of abandonment.
2. The second Certified Question should be answered: The payment of a delay rental during the primary term of an oil and gas lease that is not memorialized in an instrument filed for record in the county where the land is located is not a title transaction that constitutes a "savings event" under the ODMA.

Respectfully submitted,

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The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following parties via regular U.S. mail, postage pre-paid, on this 2nd of September, 2014:

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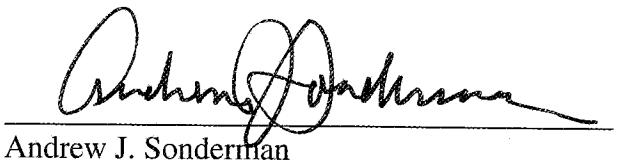

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