

IN THE SUPREME COURT OF OHIO

RONALD E. DAHLGREN, *et al.*, )  
 )  
 Plaintiffs-Appellants, )  
 )  
 v. )  
 )  
 BROWN FARM PROPERTIES, *et al.* )  
 )  
 Defendants-Appellees. )

14-1655

On Appeal from the Carroll  
 County Court of Appeals,  
 Seventh Appellate District  
 (Case No. 2013 CA 896)

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
 OF APPELLANTS RONALD DAHLGREN, ELSA LYLE, HELEN DAHLGREN,  
 MARTHA DAHLGREN, CYNTHIA CROWDER, DANIEL DAHLGREN, CHARLES  
 DAHLGREN, AND DIANE PULLINS**

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ERIC C. JOHNSON (0026010)  
 Johnson & Johnson Law Offices  
 12 W. Main Street  
 Canfield, OH 44406  
 Telephone: (330) 533-1921  
 Eric.Johnson.EPO@Gmail.com  
 Attorney for the Dahlgren Appellants

J. DAVID HORNING (0046615)  
 400 S. Douglas Highway  
 Gillette, WY 82716  
 Telephone: (307) 682-2500  
 dave@coxhorning.com  
 Attorney for Appellee Thomas Beadnell

CLAY KELLER (0072927)  
 Jackson, Kelly, PLLC  
 17 S. Main St.  
 Akron, OH 44308  
 Telephone: (330) 252-9060  
 ckkeller@jacksonkelly.com  
 Attorney for Appellant Chesapeake

JOHN RAMBACHER (0036760)  
 MICHAEL KAHLENBERG (0082435)  
 825 S. Main St.  
 North Canton, OH 44720  
 Telephone: 330-639-2440  
 JRambacher@wr-law.com  
 Attorney for Appellee Brown Farm Properties

SEAN SMITH (0003548)  
 P.O. Box 252  
 Carrollton, OH 44615  
 Telephone: 330-627-4770  
 sean@childersandsmith.com  
 Attorney for Appellee Brian Wagner

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## **THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST**

Since 2010, Ohio has seen an influx of large oil and gas producing companies attempting to develop the Utica shale formation and, to a lesser degree, the Marcellus shale. Toward that end, billions of dollars have been expended in obtaining the required oil and gas leases and in drilling wells and installing pipelines and infrastructure.

Prior to expending a large sum to acquire an oil and gas lease on a particular property, an oil company will first perform its due diligence by making sure that the party signing such a lease is, in fact, the legal owner of the minerals. It is not uncommon to find that the minerals underlying a particular tract of land had, at some point in the past, been severed off by a prior owner.

In many states where a mineral severance has occurred, oil and gas companies interested in obtaining leases must track down the owners who made the severance. Where such owner is deceased, the company must locate and strike a deal with the deceased owner's assigns or heirs; such process can be very difficult and time consuming, particularly when there has been a long period of time since the mineral severance was made.

Ohio and other states have passed laws that permit an oil company to avoid the above process by striking a deal directly with the surface owner. These laws are referred to as 'dormant mineral' statutes and require that, before a deal can be struck with the surface owner, the mineral interest must have remained 'dormant' for a significant period of time.

Ohio's dormant mineral statute (O.R.C. 5301.56) was enacted in 1989 but was infrequently used prior to the advent of the Utica shale play. Only one appellate decision is known to exist which dealt with the 1989 version of the statute (*Riddel v. Layman*, Fifth Dist. No. 94 CA 114, 1995 WL 498812). In 2006, O.R.C. 5301.56 was amended and has been

frequently litigated in Ohio courts in the last several years due to the lack of clarity on how the statute is to operate. This lack of clarity has sometimes caused oil and gas companies operating in Ohio to refrain from drilling lands where mineral severances have occurred in the past.

The above discussion should make clear that the interpretation of Ohio's dormant mineral statute is of public or great general interest. Indeed, this Court has already accepted two cases which involve the same issue posed in this case. In *Corban v. Chesapeake*, U.S. Dist., S. Dist. Ohio, Case No. 2:13-CV-246, Ohio Supreme Court No. 2014 – 0804, this Court agreed to hear the issue of: "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?" That same issue can be found in the recently accepted case of *Walker v. Shondrick-Nau*, Seventh Dist. Ct. Appeals, Case No. 13 NO 402, 2014-Ohio-1499, Ohio Supreme Court No. 2014 – 0803.

In the instant matter, the sole issue before the trial court was whether or not landowners could base their quiet title claims upon the 1989 version of Ohio's dormant mineral statute, even though said statute was amended in 2006 -- long before the suit was filed. The only significant difference between this case and the two cases previously cited is that, in this case, Judge Markus ruled at the trial level that the 1989 statute could *not* be used.

Appellants believe it is important that they have the opportunity to present the arguments that they successfully used at the trial court level to this Court. It is urged that, at a minimum, the appeal be accepted so that a decision can be issued in conformance with this Court's decisions in the *Walker* and/or *Corban* cases; otherwise Appellants could be left with a final decision from the Court of Appeals that is in conflict with a later decision reached by this Court on the same issue.

## STATEMENT OF THE CASE AND FACTS

Ronald Dahlgren, Elsa Lyle, Helen Dahlgren, Martha Dahlgren, Cynthia Crowder, Daniel Dahlgren, Charles Dahlgren and Diane Pullins (“the Dahlgren Appellants”) are the holders of a 225 acre oil and gas mineral estate located in Carroll County, Ohio. They obtained such interest as the lineal descendants Leora Perry Dahlgren, who was the owner of the oil and gas minerals pursuant to a mineral reservation contained in a 1949 warranty deed. The Dahlgren Appellants leased their interest in the oil and gas minerals to multiple exploration and production companies between 2009 and 2011.

In March of 2012, the Dahlgren Appellants received notice that one of the surface owners of the property subject to the oil and gas mineral reservation intended to declare the oil and gas mineral interest abandoned pursuant to Ohio’s “dormant mineral” statute. The Dahlgren Appellants also became aware that additional surface owners of the property subject to the oil and gas mineral reservation were also asserting competing claims to the ownership of the oil and gas minerals. As a result, the Dahlgren Appellants filed a complaint to quiet title in the oil and gas mineral estate on February 14, 2013 in the Carroll County Court of Common Pleas.

Three different landowners were named as defendants in the litigation (the Appellees), as was Chesapeake Exploration, LLC (“Chesapeake”), who had obtained lease rights from the Dahlgren Appellants and who had a vested interest in the outcome of the litigation.

Appellees answered the complaint and also filed counterclaims asking that title to the subject oil and gas rights be quieted in their favor. Chesapeake filed an answer to the complaint asserting that it had a valid oil and gas lease that encumbered the subject properties.

All parties to the litigation later agreed upon and filed stipulations of fact concerning the matter and requested the trial court to enter judgment based upon such stipulations.

Countervailing motions for judgment were filed by all parties and the Dahlgren Appellants received a judgment in their favor. Appellees appealed to the Seventh District Court of Appeals and it ruled in their favor, citing earlier decisions it had reached in *Walker, supra*, and *Swartz v. Householder*, Seventh Dist. Ct. Appeals Case No. 13 JE 24, 2014-Ohio-2359. The essence of such rulings was that the 1989 statute was available for use by a landowner in a presently filed case and that it operated “automatically” so as to transfer ownership of the subject minerals to the landowners as of March 22, 1992.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

Proposition of Law #1. The 2006 amendment of Ohio’s “dormant mineral” statute was remedial in nature and intended to apply to facts occurring before its enactment. In suits filed after June 30, 2006 (the effective date of the amendment), courts should apply the new version of the statute, rather than the old version.

Proposition of Law #2. Under the 1989 version of Ohio’s “dormant mineral” statute, the twenty year dormancy period is measured from the date suit was commenced to determine title to the minerals.

#### **Introduction.**

In 1989, Ohio enacted ORC 5301.56, which is frequently referred to as the “dormant mineral statute” (hereafter the 1989 DMS). In 2006, the legislature “repealed” the 1989 DMS and enacted a new version of the statute (the 2006 DMS). The 2006 DMS sets out a procedure which requires a landowner seeking to recapture dormant minerals to assert that no “title transactions” (or other types of ‘savings events’) concerning the minerals have occurred within 20 years. The Dahlgren Appellants’ recording of oil and gas leases and mineral claim forms within the last several years defeated any ability of the Appellees to make such an assertion; thus their only hope of prevailing in the litigation rested upon a claim based on the 1989 DMS. In fact, the parties stipulated that the Appellees could not assert claims under the 2006 DMS.

The 1989 DMS was significantly changed when the statute was amended in 2006 to include a clear process for a landowner to follow. Under the 2006 DMS, the landowner must provide notice to the mineral owner (or his successors or assigns) of the landowner's intent to recapture the minerals. Then the landowner must record an affidavit asserting that the above notice was given and that none of six categories of 'savings events' occurred during the 20 year period preceding the date of notice. A mineral owner who wishes to contest the landowner's claim has an opportunity to record a countervailing affidavit or claim form within 60 days of receiving notice. Failing that, a landowner may require the County Recorder office to strike the mineral interest from the record.

Under the 1989 DMS, no notice or affidavit by the landowner was required. Moreover, the ability to have the Recorder strike the mineral interest was not provided for. Instead it simply provided at (B)(1) that the mineral would be "deemed abandoned and vested" in the surface owner "if" no savings events occurred "within the preceding twenty years."

Appellees urged that such statute applied to the quiet title claims lodged by the parties in a 2013 case; they also contended that the statute operated "automatically," despite the usage of the terms "deemed" and "if" and despite the lack of any action on their part in regard to a mineral claim until shortly before the litigation was commenced. Appellees also urged that "the preceding twenty years" referred to the twenty years preceding the effective date of the 1989 DMS. These arguments were rejected by Judge Markus at the trial level, but accepted by the Seventh District.

**The 2006 DMS Should be Used in Presently Filed Actions Rather than the 1989 DMS.**

The instant action was commenced in 2013 – long after the 2006 DMS became effective. The questions arises – Why would a trial court use the prior version of the statute to determine

the parties' rights to the subject minerals? Appellees' primary argument in favor of using the 1989 DMS is that, because the amendment in 2006 contained no language concerning retroactive application, the statute must be assumed to only operate prospectively (citing ORC 1.48).

A review of the 2006 DMS makes clear that it most certainly was intended by the legislature to cover events that had occurred prior to its passage. A reading of section (B) of the statute, reveals that “[a]ny mineral interests held by any person, other than the owner of the surface of the lands shall be deemed abandoned,” if proper notice is given by the landowner to the mineral owner, and if the minerals have remained dormant during the 20 years preceding the notice. The statute became effective on June 30, 2006. For a case that was filed in 2006, after the effective date of the statute, a reviewing court would need to look back 20 years – all the way back to 1986.

The statute therefore clearly conveys that it is intended to cover events occurring prior to its enactment; i.e., it operates retroactively. Any argument to the contrary would require the 2006 statute to only be available for use by a landowner *20 years after its passage* – a ridiculous interpretation. The 2006 DMS is no less retroactive in its operation than the 1989 DMS (which Appellees assert applies to a twenty year period prior to its enactment, notwithstanding the fact that it contains no express language that it is to operate retroactively).

It is clear that the changes made in the 2006 DMS were only procedural and remedial in nature; it removed the uncertainties in the prior law by setting forth clear procedures a surface owner must follow to achieve abandonment and vesting of a mineral interest. “For *Walker, Swartz* and the majority to so construe the 1989 version and further to give it force and effect after the effective date of the 2006 version creates an absurd result, nullifying the changes the General Assembly made to remedy an ambiguous statute.” *Eisenbarth v. Reusser*, Seventh Dist. Ct. Appeals Case No. 13 MO 10, 2014-Ohio-3792, concurring opinion at Paragraph 115.

The rights of landowners under the 1989 DMS were the potential for abandonment and vesting of a mineral interest, if certain conditions could be shown – the rights were inchoate. Though Appellees and many lower courts have repeatedly referred to the 1989 DMS as operating “automatically” to transfer minerals to landowners, a review of the statute shows that such word is not found therein. Instead, the statute “deemed” at Section (B) that the mineral rights would revert to the landowner only “if” certain conditions existed. Landowners’ rights to establish that conditions for a forfeiture had been met under the dormant mineral statute were not taken away when the statute was amended. The 2006 DMS only changed the procedure that must be followed to recapture such mineral rights. The 2006 DMS, rather than the 1989 DMS should be used to determine presently filed suits.

**Any Rational Interpretation of the 1989 DMS Requires a Landowner to File Suit to Take Advantage of the Statute**

Assuming that the 1989 DMS *is* available for use in a presently filed suit, the Court of Appeals nevertheless erred in interpreting how the statute was to operate. The 1989 DMS provides in relevant part:

- (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 ...
  - (B) THE MINERAL INTEREST IS HELD BY THE UNITED STATES, THIS STATE, OR ANY POLITICAL SUBDIVISION...
  - (C) **WITHIN THE PRECEDING TWENTY YEARS**, ONE OR MORE OF THE FOLLOWING HAS OCCURRED:
    - [the six categories of ‘savings events’ are then listed]

Under the 2006 DMS, an inquiry is made into whether a savings event occurred within the twenty years preceding the landowner’s required notice to the mineral owner of their intent to recapture the minerals. However, under the 1989 DMS, quoted above, the look back period is

less clear – it indicates “*within the preceding twenty years.*” The question that arises is:

Preceding what?

As explained in a report of the Ohio Bar Association’s Natural Resources Committee concerning the Dormant Mineral Act, a primary motivation for the statute being repealed and amended in 2006 was to clarify the ambiguity as to what constituted the 20 year period of time under the statute. As explained in the report:

... [I]n the years since enactment of ORC § 5301.56, Courts and practitioners have experienced difficulty interpreting this statute, which resulted in the Natural Resources Committee’s preparation of this amendment.

The major changes addressed in the amendment are the following:

- 1) the original statute provided for the lapse to occur if no specified activities took place within “the preceding twenty years.” Questions arose as to whether that language meant 20 years preceding enactment of the statute, 20 years preceding commencement of an action to obtain the minerals or any 20-year period in the chain of title. To clarify this, the amendment provides that the effective period is 20 years immediately preceding the filing of a notice ...

See, Report of the Ohio Bar Association’s Natural Resources Committee, at

[www.ohiobar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx](http://www.ohiobar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx) .

As discussed below, the only rational interpretation of the 1989 DMS, and the one adopted by Judge Markus in this case, is that the 20 year look back period is measured from the point that an action concerning title to the minerals was commenced.

Many trial courts and the Seventh District Court of Appeals have used a different method to determine the 20 year period. The analysis looks back from the effective date of the 1989 DMS, being March 22, 1989. The most obvious problem with this theory is that it results in the DMS applying to a single, specific 20 year time frame of 3/22/69 through 3/22/89. It would not apply, for example, to the time frame of 1/1/70 through 1/1/90. It would make little sense for the

legislature to pass a law, focused on encouraging mineral development in Ohio, and not have it move forward in time to include other 20 year periods.

A second problem with the theory is that it causes conflict with other provisions of the 1989 DMS. R.C. 5301.56(D)(1) provides that “[a] mineral interest may be preserved indefinitely [by the mineral owner] from being deemed abandoned by the occurrence of ... successive filings of claims to preserve mineral interests...” If the statute was only concerned with the 1969-1989 period, only one claim would need to be recorded -- there would be no need for “*successive*” filings to “*indefinitely*” preserve mineral rights for later 20 year periods. Additionally, part (B)(2) of the statute talks about a 3 year grace period following the effective date of 3/22/89 where a mineral owner would have an opportunity to effect a savings event so as to defeat any potential claim by the surface owner. Adding the three year grace period to the twenty years preceding the effective date results in a total of 23 years during which a savings event could occur, not the “*preceding twenty years*” referenced in the statute.

A third problem with the ‘twenty years from effective date’ theory is that the 1989 DMS, like any statute, must be interpreted so as to pass constitutional muster. If the 20 years is measured from the effective date, and if the statute is read as somehow “automatically” transferring title of the minerals to the landowner, issues of due process arise.

Ohio is not the only state to have enacted a dormant mineral statute. Other states, including Indiana, have done so. In *Texaco, Inc. v. Short*, 454 U.S. 516, 533-34, 102 S. Ct. 781, 794, 70 L. Ed. 2d 738 (1982) the United States Supreme Court was called upon to interpret the constitutionality of Indiana’s dormant mineral statute. Various issues were raised, including the lack of any notice being given to the mineral holder as part of the process (similar to Ohio’s original version of the DMS). On that issue, the court held:

We have concluded that appellants may be presumed to have had knowledge of the terms of the Dormant Mineral Interests Act. Specifically, they are presumed to have known that an unused mineral interest would lapse unless they filed a statement of claim. 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. If there has been a statutory use of the interest during the preceding 20-year period, however, by definition there is no lapse-whether or not the surface owner, or any other party, is aware of that use. Thus, no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice. **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.** (emphasis added)

The underlined language makes clear that, though Indiana's statute was "self-executing," a party wishing to take advantage of the statute would, nevertheless, have to pursue a quiet title action to "determine conclusively" the status of title. The mineral owner would obviously have a right to participate in such proceedings and would be afforded due process and the right to show that some savings event *had* occurred in the relevant time frame. If the 20 year look back period of the DMS is measured from the point that suit is filed, a dormant mineral owner would be afforded due process.

Appellants advocate a reading of the 1989 DMS whereby the Dahlgren family's valuable mineral rights can "automatically" be forfeited, without any notice or ability to contest the landowner's claim. Such an interpretation does not pass constitutional muster.

### **CONCLUSION**

The trial court committed no error within the opinion under appeal and its decision should be upheld by this Court. Applying the 2006 DMS to this case solves all of the inherent problems with applying the 1989 DMS.

Appellees' arguments that the 2006 DMS was not intended to operate retroactively ignore the plain language of the statute. Moreover, the changes made to the statute were remedial and procedural in nature and did not eliminate Appellee' rights thereunder.

The 1989 DMS's use of the words "deemed abandoned" merely created a presumption of abandonment that could be rebutted by the mineral owner within the context of a quiet title action. The statute was not intended to "automatically" convey ownership to landowners.

Even if landowners have the right to use the 1989 DMS in presently filed actions, looking back 20 years from any point other than the filing of a lawsuit by a landowner leads to a nonsensical interpretation of the 1989 DMS that conflicts with other provisions of that statute and runs afoul of due process considerations. Because savings event occurred within the 20 years preceding this suit, Appellees' claims under the 1989 DMS must fail.

For the above reasons, the Dahlgren Appellants urge this Court to exercise jurisdiction over this appeal.

Respectfully Submitted,

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Eric C. Johnson (0026010)  
Johnson & Johnson Law Offices  
12 W. Main Street  
Canfield, OH 44406  
Telephone: (330) 533-1921  
Eric.Johnson.epo@gmail.com  
Attorney for the Dahlgren Appellants

**CERTIFICATE OF SERVICE**

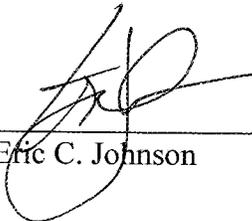
The undersigned certifies that a copy of the foregoing Brief was served upon the following persons by regular U.S. Mail on 9/24/14 :

J. DAVID HORNING  
Attorney for Thomas Beadnell  
400 S. Douglas Highway  
Gillette, WY 82716

JOHN RAMBACHER  
Attorney for Brown Farm Properties  
825 S. Main St.  
North Canton, OH 44720

SEAN SMITH  
Attorney for Brian Wagner  
P.O. Box 252  
Carrollton, OH 44615

CLAY KELLER  
Attorney for Chesapeake Exploration  
One Cascade Plaza, Suite 1010  
Akron, OH 44308

  
\_\_\_\_\_  
Eric C. Johnson

STATE OF OHIO )  
 )  
CARROLL COUNTY )

IN THE COURT OF APPEALS OF OHIO  
SS: SEVENTH DISTRICT

RONALD DAHLGREN, et al., )  
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PLAINTIFFS-APPELLEES, )  
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VS. )  
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BROWN FARM PROPERTIES )  
LLC, et al., )  
 )  
DEFENDANTS-APPELLANTS. )

CASE NO. 13 CA 896

JUDGMENT ENTRY

*Jnl 4 Pg 830*

For the reasons stated in the Opinion rendered herein, the first assignment of error is with merit and is sustained. The second assignment of error need not be addressed as the trial court was not asked to and did not declare that the 1989 DMA was unconstitutional. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Carroll County, Ohio, is reversed and the case is remanded for the entry of an order for abandonment. Costs taxed against appellees.

**FILED**

SEP 09 2014

COURT OF APPEALS  
CARROLL COUNTY, OHIO

*Joseph M. Unsworth*

*Maureen T. Coffey*

*C. H. White*  
JUDGES.

**FILED**

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEP 09 2014

SEVENTH DISTRICT

COURT OF APPEALS  
CARROLL COUNTY, OHIO

RONALD DAHLGREN, et al., )  
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 VS. )  
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 BROWN FARM PROPERTIES )  
 LLC, et al., )  
 )  
 DEFENDANTS-APPELLANTS. )

CASE NO. 13 CA 896

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court,  
Case No. 13CVH27445.

JUDGMENT:

Reversed and Remanded.

JUDGES:

Hon. Joseph J. Vukovich  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: September 9, 2014

APPEARANCES:

For Plaintiffs-Appellees:

Attorney Eric Johnson  
120 West Main Street  
Canfield, Ohio 44406  
(For the Dahlgren)

Attorney Clay Keller  
Attorney Michael Altvater  
One Cascade Plaza, Suite 1010  
Akron, Ohio 44308  
(For Chesapeake)

For Defendant-Appellant:

Attorney John Rambacher  
Attorney Michael Kahlenberg  
825 South Main Street  
North Canton, Ohio 44720  
(For Brown Farm Properties)

Attorney J. David Horning  
400 South Douglas Highway  
Gillette, Wyoming 82716  
(For Thomas Beadnell)

Attorney Sean Smith  
P.O. Box 252  
Carrollton, Ohio 44615  
(For Brian Wagner)

VUKOVICH, J.

{¶1} The defendant surface owners appeal the decision of the Carroll County Common Pleas Court which granted judgment to the Dahlgren family plaintiffs allowing them to maintain title to their severed mineral interests. The trial court denied the surface owners' assertion that the mineral interests had been abandoned and were automatically reunited with the surface under the 1989 Dormant Mineral Act. The court concluded that as no action was taken by the surface owners prior to the enactment of the 2006 version of the DMA, only the new version applied. Based upon prior holdings of this court, the trial court's decision is reversed, and the case is remanded for the entry of an order of abandonment.

STATEMENT OF THE CASE

{¶2} In 1949, Leora Perry Dahlgren sold over 225 acres in Carroll County. At that time, she severed the minerals and reserved them for herself. When she died in 1977, her children inherited her mineral interest. In 2009 and thereafter, the Dahlgren heirs started signing oil and gas leases, which are currently all held by Chesapeake Exploration LLC. In 2012, a notice of intent to declare mineral interests abandoned was sent by a landowner, and some Dahlgren heirs responded by filing claims to preserve the mineral interests. No affidavit of abandonment was then filed by the landowners. Due to the uncertainty, Chesapeake escrowed payments.

{¶3} In 2013, the Dahlgrens filed a declaratory judgment action against surface owners Brown Farm Properties LLC, Brian Wagner, and Thomas Beadnell. The three surface owners filed counterclaims asking the court to find the mineral interests abandoned and asserting that compliance with the 2006 DMA was not required due to the self-executing feature of the 1989 DMA. Chesapeake was named as a defendant but supported the claims of the mineral holders over the surface owners.

{¶4} On August 5, 2013, the parties filed a stipulation. The filing recited the stipulated facts, asked the court to decide the case on the briefs, and acknowledged that no trial was necessary. It was stipulated that the mineral interests were not the

subject of any title transactions from March 22, 1969 through March 22, 1992, nor any time thereafter until a lease was signed for part of the mineral interest in 2009. It was stipulated that no other savings event or condition existed during those times either.

{115} The stipulations concluded that if the oil and gas interests have as a matter of law been abandoned and vested in the surface owner by operation of former R.C. 5301.56, then the surface owners are the holders of the mineral interests, but if the oil and gas interests were not as a matter of law abandoned and vested in the surface owner by operation of former R.C. 5301.56, then the surface owners make no claim to the oil and gas underlying the realty. The parties then filed briefs in support of their respective requests for judgment.

{116} On November 13, 2013, the trial court ruled that the 2006 DMA controls and thus there was no abandonment. The court noted that the DMA is part of the Marketable Title Act, which states that 5301.47 to 5301.56 shall be liberally construed to effect the legislative purpose of simplifying and facilitating land transactions by allowing reliance on a record chain of title. See R.C. 5301.55. The court found that the surface owners' interpretation conflicts with this legislative purpose. The court also pointed out that forfeitures are not favored. The court expressed "doubt" about the constitutionality of the 1989 DMA as it did not specifically outline how to dispute the abandonment and opined that the 2006 amendments intended to resolve the issue of notice and opportunity to be heard.

{117} The trial court accepted the surface owners' argument that the 1989 DMA deemed rights abandoned if none of the statutory conditions existed within twenty years of March 22, 1989 with allowance for the three year grace period. However, the court found that at most, the lack of a statutory savings event created inchoate rights, essentially opining that the statute could not actually vest an ownership interest without judicial confirmation or opportunity for the mineral owner to contest the lack of a saving events. The court concluded that before a right could become more than inchoate, the 1989 DMA impliedly required implementation, such as by a recorded abandonment claim or court proceedings to confirm abandonment.

{¶18} The court added that absent implementation or enforcement of abandoned rights before the 2006 amendments, the surface owner lost the opportunity to proceed under the 1989 DMA and must now comply with the 2006 procedures. On this topic, the court found that existing procedures govern a court proceeding, opining that the changes were procedural ones that did not affect substantive rights. The surface owners filed a timely notice of appeal.

#### DORMANT MINERAL ACT

{¶19} The 1989 Dormant Mineral Act became effective on March 22, 1989 in R.C. 5301.56 as an addition to the Ohio Marketable Title Act, which is contained within R.C. 5301.47 through R.C. 5301.56. The 1989 DMA provides that a mineral interest held by one other than the surface owner "shall be deemed abandoned and vested in the owner of the surface" if no savings event occurred within the preceding twenty years. R.C. 5301.56(B)(1)(c) (unless the mineral interest is (a) in coal or (b) held by the government).

{¶10} The six savings events are as follows: (i) the mineral interest was the subject of a title transaction that has been filed or recorded in the recorder's office, (ii) there was actual production or withdrawal by the holder, (iii) the holder used the mineral interest for underground gas storage; (iv) a mining permit has been issued to the holder; (v) a claim to preserve the mineral interest was filed; or (vi) a separately listed tax parcel number was created. R.C. 5301.56(B)(1)(c)(i)-(vi).

{¶11} The statute provided the following grace period: "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." R.C. 5301.56(B)(2). There were no obligations placed upon the surface owner prior to the statutory abandonment and vesting.

{¶12} On June 30, 2006, amendments to the DMA became effective. No grace period was provided. The language in division (B), "shall be deemed abandoned and vested in the owner of the surface," now operates only if none of the savings events apply and "if the requirements established in division (E) of this section are satisfied." R.C. 5301.56(B).

{¶13} "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 surface owner shall provide a specific notice and file a timely affidavit of abandonment with the county recorder. R.C. 5301.56(E). See also R.C. 5301.56(E)(1) (notice by certified mail return receipt requested to each holder or each holder's successors or assignees, at the last known address, but if service of notice cannot be completed to any holder, then notice by publication), (E)(2) (affidavit of abandonment must be filed at least 30 but not later than 60 days after date notice is served or published), (F), (G) (specifying what the notice and affidavit must contain). In addition, the new twenty-year period for finding abandonment looks back from the date of this notice.

{¶14} The 2006 DMA also adds that that a mineral holder who claims an interest has not been abandoned may file with the recorder: (a) a claim to preserve or (b) an affidavit containing a savings event within 60 days after the notice of abandonment is served or published. R.C. 5301.56(H)(1). If no such timely document is recorded, then the surface owner "who is seeking to have the interest deemed abandoned and vested in the owner" shall file with the recorder a notice of the failure to file. R.C. 5301.56(H)(2) (was called memorialization; changed to "notice of failure to file" on January 31, 2014). "Immediately after" such recording, "the mineral interest shall vest in the owner of the surface \* \* \*." *Id.*

#### ASSIGNMENT OF ERROR NUMBER ONE

{¶15} The appellant surface owners set forth two assignments of error, the first of which provides: "The trial court erred in retroactively applying the 2006 version of the Ohio Dormant Mineral Act to a mineral interest that was deemed automatically abandoned and vested in the Surface Owners, pursuant to a previous version of the Act."

{¶16} Appellants assert that the 1989 DMA contains an automatic, self-executing feature by stating that the mineral interest shall be deemed abandoned and vested in the owner of the surface if none of the savings conditions apply in the pertinent time period. They argue that the 2006 DMA was not expressly made retrospective and thus its new procedures and rights should be applied only

prospectively without erasing previous mineral interests that automatically vested in the surface owner, citing R.C. 1.48. Appellants point out that a reenactment, amendment, or repeal does not affect the prior operation of a statute or any right, privilege, or obligation previously acquired, accrued, accorded, or incurred under the prior statute, citing R.C. 1.58.

{¶17} It is urged that the trial court erred in creating an affirmative duty on the part of the surface owner where the statute contains no such duty. Appellants conclude that a court cannot imply that certain acts must be done in order for a surface owner to maintain vested rights under a statute and that if such acts are not done by the time a new statute is enacted, then the surface owner loses the ability to proceed to have their previously vested rights declared by a court.

{¶18} Appellees respond that the mere fact of a look-back period shows that the DMA was intended to apply retrospectively. They insist that the 2006 amendments deal only with procedural and remedial matters and do not affect substantive rights, urging that a surface owner still has a right to recapture the minerals under the 2006 act but must follow various new procedures in order to do so. They contend that the only right given to the surface owners under the 1989 DMA was the potential for abandonment and vesting, which potential still exists after the 2006 amendments. Appellees agree with the trial court's position that any right was inchoate and conclude that the 1989 DMA was not automatic or self-executing because such words were not contained in the statute.

{¶19} Appellees state that there was no prior operation of a statute under R.C. 1.58 because no judicial action or official act was instituted under that statute while it existed. It is also suggested that the twenty-year period in the 1989 DMA be read looking back twenty years from the date of a court action, concluding that if one does not file an action during the existence of the act, there can be no action filed under the act. Appellees note that we did not discuss the 1989 DMA and applied only the 2006 DMA in *Dodd*. They assert that the word "deemed" merely created a rebuttable presumption and refer to the legislative intent stated in R.C. 5301.55 that

the statutes shall be liberally construed to simplify and facilitate land transactions by allowing reliance on the record chain of title.

{¶20} The statement in the MTA, that the statutes are to be liberally construed to facilitate and simplify land transactions by allowing reliance on the record chain of title, does not mandate a holding that the 1989 DMA can no longer be utilized after the 2006 amendment. As they state that the 1989 DMA could have been utilized prior to the 2006 DMA, until that point and prior to official confirmation, the title records on an abandoned mineral interest would have been just as unclear then as they are said to be now. In other words, if there was not an irreconcilable conflict during the time of the 1989 DMA,<sup>1</sup> we cannot say such conflict is created as to a prior statute due to the mere enactment of a new version.

{¶21} In any event, this was merely a consideration proposed to support the trial court's decision and was not the ultimate ruling by the trial court. As to our *Dodd* case, this was our first encounter with the DMA, and those parties only presented arguments concerning the 2006 DMA and did not present arguments to this court under the 1989 DMA. See *Dodd v. Croskey*, 7th Dist. No. 12HA6, 2013-Ohio-4257. We have thus instructed that the lack of reference to the 1989 DMA in *Dodd* is not dispositive as to whether the 1989 DMA can still be used to assert vested rights. See *Swartz v. Householder*, 7th Dist. Nos. 13JE24, 13JE25, 2014-Ohio-2359, ¶ 17 (if parties do not invoke a statute, we proceed under the impression that the parties agreed that said statute was not dispositive, e.g. if parties were to agree that there was no abandonment under the 1989 DMA, then they would proceed under only the 2006 DMA, and we would accept that position).

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<sup>1</sup>In *Swartz*, we addressed a suggestion that the 1989 DMA was invalid because it wholly conflicted with the purpose of the MTA. We pointed out that R.C. 1.51 states that if a general provision conflicts with a special provision, they shall be construed if possible by giving effect to both, and if the conflict is irreconcilable, the special prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail. *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 20, citing *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 26-33. We then stated that the DMA is more specific, it was enacted later, and the legislative intent is clearly to reattach mineral interests back to the surface under a twenty-year look back. *Id.*

{¶22} In both *Swartz* and *Walker*, this court ruled on the issue of whether the 1989 DMA can still be used to declare mineral interests abandoned thereunder. In *Walker*, we first concluded that the 1989 DMA can still be used after the 2006 amendments because the prior statute was self-executing and the lapsed right automatically vested in the surface owner. See *Walker v. Shondrick-Nau*, 7th Dist. No. 13NO402, 2014-Ohio-1499 (fka *Walker v. Noon*). In *Swartz*, this court maintained the *Walker* holding and reiterated its rationale. In fact, arguments were made to this court in those appeals as to whether this court should adopt the trial court's holding in the very case before us now, and we declined to do so.

{¶23} We opined that the 1989 DMA is the type of statute characterized by automatic lapsing and reversion to the surface owner known as a self-executing statute due to the language "shall be deemed abandoned and vested in the owner of the surface if none of the statutory conditions exist." *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 27, citing *Walker* and *Texaco*, 454 U.S. 516 (Indiana's DMA was self-executing as it provided the mineral interest shall be extinguished and ownership shall revert upon the non-occurrence of savings events within the pertinent time period).

{¶24} This court reviewed R.C. 1.48 and R.C. 1.58 in *Walker* and *Swartz*. Pursuant to R.C. 1.58(A), the reenactment, amendment, or repeal of a statute does not affect the prior operation of the statute or any prior action taken thereunder. R.C. 1.58(A)(1). In addition, the reenactment, amendment, or repeal of a statute does not affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder. R.C. 1.58(A)(2). And, the reenactment, amendment, or repeal of a statute does not affect any proceeding or remedy in respect of any such privilege, obligation, or liability and the proceeding or remedy may be instituted, continued, or enforced as if the statute had not been repealed or amended. R.C. 1.58(A)(4).

{¶25} Pursuant to R.C. 1.48, "[a] statute is presumed prospective in its application unless expressly made retrospective." In accordance, a statute must "specifically indicate" that it applies retroactively or it will be implemented as applying

only prospectively. See, e.g., *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 15 (to overcome the presumption that it applies only prospectively, the legislature must “clearly proclaim” the retroactive application); *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, fn. 2 (not retroactive because legislature did not specify that statute applied retrospectively and no indication that law was clarification as opposed to modification); *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 40 (if a statute is silent on intent to apply retrospectively, then it applies only prospectively); *Bartol v. Eckert*, 50 Ohio St.31, 33 N.E. 294 (1893).

{¶26} We concluded that the statute to be applied is the one existing at the time the cause of action accrued unless the new statute existing at the time the suit was filed enunciates that it applies to causes of action that accrued prior to the effective date. *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 29, citing the above cases and adding *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 179, 183 (where new statute clearly said that it applied to suits filed after its effective date, it had retroactive application to injuries that occurred prior to enactment). See also *Walker*, 7th Dist. No. 13NO402 at ¶45-50, reviewing *Cadles of Grassy Meadows, II, LLC v. Kistner*, 6th Dist. No. L-09-1267, 2010-Ohio-2251, ¶17 (a new statute of limitations for revivor of judgments, which shortened the time for such action, did not apply to judgments that became dormant prior to enactment where that new statute of limitations contained no clear expression of retrospective application, even though the statute was enacted before the revivor action was filed).

{¶27} This court stated that a vested interest can be a property right created by statute; a vested interest so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent. See *Walker*, 7th Dist. No. 13NO402 at ¶ 40, quoting *State ex rel. Jordan v. Industrial Comm.*, 120 Ohio St.3d 412, 2008-Ohio-6137, 900 N.E.2d 150, ¶ 9; *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 29. The 1989 DMA, with its three-year grace period, specifies that the mineral interest is deemed abandoned and the surface owner obtains a

vested right if any of the listed circumstances apply, none of which are disputed on appeal here. See Former R.C. 5301.56(B)(1).

{¶28} The 2006 DMA deals with rights that have not yet been deemed abandoned and vested as it states, "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 subject to the interest shall do both of the following \* \* \*." See *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 35, citing R.C. 5301.56(E). The current DMA thus eliminated automatic vesting after June 30, 2006 (imposing new enforcement obligations on the surface owner and redrawing the savings event timeline).

{¶29} But, this does not mean that it erased interests that were previously deemed vested (merely because a suit had not yet been filed to formalize the reverter). *Id.* The most pertinent definition of the word "deem" here would be: "to treat [a thing] as being something that it is not, or as possessing certain qualities that it does not possess. It is a formal word often used in legislation to create legal fictions \* \* \*." Garner, *The Dictionary of Modern Legal Usage*, 254 (2d Ed.1995).

{¶30} The conclusion made was that when the 2006 version was enacted, any mineral interest that was treated as abandoned under the 1989 version stayed abandoned and continued to be vested in the surface owner, and once the mineral interest vested in the surface owner, it reunited with the surface estate pursuant to statute regardless of whether the event had yet to be formalized. See *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 34, citing *Walker*, 7th Dist. No. 13NO402 at ¶ 41. It was pointed out that the 2006 DMA contains no language eliminating property rights that were previously expressly said to be vested, i.e. it contains no statement that its new requirements for surface owners and the new rights for mineral holders apply retrospectively. See *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 34, citing *Walker*, 7th Dist. No. 13NO402 at ¶ 51. It was therefore decided that absent express language eliminating the prior automatic abandonment and vesting of rights under the old act, the amendments do not affect causes already existing (regardless of whether a suit is filed before or after the amendments). See *id.*

{¶31} We explained that a look-back period (which already existed under the old statute) did not expressly or even implicitly make a statute retroactive. *Id.* at fn. 2. The notice of abandonment is the new trigger for the look-back, which item can only apply prospectively because one could not file a notice of abandonment with the 2006 DMA statutory effects and triggers before it was even created. In other words, the new DMA instituted a *new look-back initiator* (the notice of abandonment) to be employed prospectively in the future. *Id.* It was expressed in *Swartz*:

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 the 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.

“It 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). *Dahlgren* concluded that the lack of savings events at most created an inchoate right because judicial action would be required in order to officially transfer ownership on the records (or a recording of a disputed title so the mineral owner could contest the dispute).

“Yet, the terms “inchoate” and “vested” are generally opposites. See, e.g., *Bauman v. Hogue*, 160 Ohio St. 296, 301, 116 N.E.2d 439 (1953); *Walker*, 7th Dist. No. 13NO402 at ¶ 43. An inchoate right is a right that *has not fully* developed, matured, or vested. Black’s Law Dictionary (9th Ed.2009) (online). We conclude that it is contrary to the plain language of the statute to hold that the surface owner’s right to the

abandoned mineral interests are inchoate even though the statute expressly stated that the right vested upon the lack of a savings event within the pertinent time period. Finally, we note that *Dahlgren* expressed concern about the opportunity to contest abandonment without recognizing that the very suit before it was the opportunity to so contest (that there were savings events in the pertinent time period).

“As we held in *Walker*, the 1989 DMA can still be utilized for mineral interests that were deemed vested thereunder \* \* \*.”

*Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 36-39. See also *Walker*, 7th Dist. No. 13NO402, ¶ 43 (“the *Dahlgren* court’s characterization of the mineral rights under the 1989 version is contrary to the statute itself, which stated that the mineral rights are ‘vested.’”).

{¶32} We also expressed that the 1989 DMA need not be seen as incomplete for failing to mention specific implementation provisions. *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 22. A court action, such as for declaratory judgment or quiet title to formalize the statutory vesting, already legally existed as a matter of course, and a statute need not explain to the reader how they can file a court action to have their vested rights formally declared. *Id.* See also *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982) (which emphasized the difference between the self-executing feature of a dormant mineral act and a subsequent judicial determination that a lapse did occur).

{¶33} As we have specifically ruled that the 1989 DMA can still be used to declare mineral interests abandoned, we resort to stare decisis as governing here. This assignment of error is sustained.

#### ASSIGNMENT OF ERROR NUMBER TWO

{¶34} As a second assignment of error, the landowners posit: “The trial court erred in finding application of the Former Act violative of Due Process.”

{¶35} Here, the surface owners wish to preemptively contest any suggestion that the 1989 DMA deprived the mineral holders of an opportunity to dispute the claims, apparently in case the mineral holders raised a cross-assignment. The

surface owners point out that the 1989 DMA provided a three-year grace period during which mineral holders could file a claim to preserve and avoid abandonment. They also state that mineral holders can always file a declaratory judgment or quiet title action, noting that this was the remedy chosen by the Dahlgrens here. They note that the Dahlgrens' inability to prove a savings event because one did not occur has no relation to due process.

{¶36} The Dahlgrens respond to this assignment with suggestions as to unconstitutionality of the 1989 DMA. However, we refuse to render a decision on constitutionality here. As Chesapeake (the Dahlgrens' fellow appellee) points out, the trial court mentioned some constitutional concerns in dicta, but the court refrained from ruling on those issues. This issue assigned by the surface owners as potential error need not be addressed because the trial court did not actually declare that the 1989 DMA was unconstitutional.

{¶37} The trial court's decision is based upon its conclusion that the 1989 Act impliedly requires implementation before it finally settled rights and that absent implementation by the surface owner (by court action or recordation of a document in the recorder's office) prior to the 2006 amendments, the 2006 amendments govern. In explaining what appear to be various policy reasons in support of its conclusion, the court stated that it "doubts" statutory abandonment would be constitutionally enforceable without giving the mineral holder "the opportunity to dispute the relevant claims." The trial court noted the *Texaco* statement regarding due process prior to judgment in a quiet title action and concluded that without notice and an opportunity to be heard, statutory abandonment may violate Art. I, Sec. 19 of Ohio's Constitution. The trial court then *declared that it need not determine that issue* where other considerations reach the same result.

{¶38} The court generally stated that due process mandates notice and opportunity to respond before a dispute about statutory rights can be resolved and mentioned that statutes should be construed in the manner that best confirms their constitutionality. The court then accepted for purposes of its decision that the 1989 DMA deemed the minerals abandoned if none of the statutory conditions existed

within twenty years of March 22, 1989 (or in the three years thereafter). The court concluded that the 1989 DMA created at most an inchoate right and did not transfer ownership without judicial confirmation or other opportunity to contest a claim that there were no relevant savings events. The court added that the 2006 amendments were mere procedural changes and that current procedures governing the dispute must be applied.

{¶39} The trial court's due process expressions challenged by appellants are mere observational concerns and dicta rather than rulings invalidating the 1989 DMA on constitutional grounds. The court's essential holding was that the 1989 DMA could no longer be applied after the 2006 amendments.

{¶40} In *Swartz*, we mentioned that a statute could not be challenged as unconstitutional in a declaratory judgment action without notification to the attorney general of the constitutional challenge. See *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 36, citing R.C. 2721.12 (if any statute \* \* \* is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard."); *Cicco v. Stockmaster*, 89 Ohio St.3d 95, 98-100, 728 N.E.2d 1066 (2000) (reiterating that this requirement is jurisdictional and finding a problem even where the attorney general was given copy of the summary judgment motion where constitutionality was first raised); *Malloy v. Westlake*, 52 Ohio St.2d 103, 105-107, 370 N.E.2d 457 (1977). This was a declaratory judgment action by the Dahlgrens.

{¶41} Importantly, they did not seek in their complaint to have the 1989 DMA ruled unconstitutional as a violation of due process. In fact, their last filing in the trial court *specified that they do not challenge the constitutionality of the DMA*. (Nov. 1, 2013 Response to Defendant's Request for Judgment). In *Walker and Shannon*, we refused to address the matter of whether the 1989 DMA was constitutional where said issue was not properly preserved below. Moreover, the stipulations here concluded that if the oil and gas interests have as a matter of law been abandoned and vested in the surface owner by operation of former R.C. 5301.56, then the defendant landowners are the owners and holders of the mineral interests, but if the

oil and gas interests were not a matter of law abandoned and vested in the surface owner by operation of former R.C 5301.56, then the defendant landowners make no claim to the oil and gas interest underlying their respective real properties.

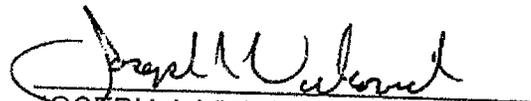
{¶42} In sum, we have the appellee-Dahlgrens' response below admitting that they did not challenge the constitutionality of the DMA, the concluding stipulations framing the issue the court was asked to address, the current argument of appellee-Chesapeake that there was no ruling by the trial court on constitutionality and thus there is nothing for us to review (which appellants would not contest), the requirement to notify the attorney general of an action to declare a statute unconstitutional, the trial court's mere dubitative language in dicta that it "doubts" the statute would be considered constitutional, and the trial court's overriding conclusion that the 1989 DMA can no longer be applied after the 2006 amendments. Considering all of this, this assignment of error need not be addressed as the trial court was not asked to and did not declare that the 1989 DMA was unconstitutional.

{¶43} In conclusion, the judgment of the trial court is reversed, and the case is remanded for the entry of an order of abandonment.

Donofrio, J., concurs.

Waite, J., concurs.

APPROVED:

  
JOSEPH J. VUKOVICH, JUDGE