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INTRODUCTION

Following oral argument, the Court accepted and ordered briefing on the Second Proposition of Law of cross-Appellant Harriet Evans (“Evans”). That proposition asks whether a restatement of a prior mineral reservation in later deeds is a “title transaction” under R.C. 5301.56, better known as the Ohio Dormant Mineral Act. Because the parties did not preserve a separate but related legal issue below, this case presents a poor vehicle in which to broadly resolve that question. And while the Court may still wish to address whether the deed in this case affected the mineral rights in question, it should do so carefully and with an understanding that future cases will present significantly different legal and factual questions.

This is a poor vehicle to resolve the proposition of law. As the State emphasized, this case does not address the interplay between the original 1989 version of the Dormant Mineral Act and the version of the law amended in 2006. That question was neither raised by the parties, nor addressed by the court below. (A fact that the Seventh District has emphasized in subsequent cases. *See Swartz v. Householder*, 2014-Ohio-2359 ¶ 17 (7th Dist.)). In light of the supplemental briefing that the Court ordered, this omission takes on greater relevance. The only deed Evans identifies as a savings event is the 2009 deed transferring the surface property to the Appellants in this case. But one cannot reserve that which they do not own. If the mineral interests had been deemed *automatically* abandoned before 2009 by operation of the 1989 version of the Dormant Mineral Act, the 2009 deed upon which Evans relies could not be a R.C. 5301.56(B)(3)(a) savings event—no matter how the Court rules on the general question of whether a later deed ever could qualify as such a savings event.

If the Court does decide to resolve the proposition, it should hold that the mere restatement of a prior reservation of mineral rights in a subsequent deed transferring the surface property does *not* qualify as a savings event under R.C. 5301.56. It should do so for at least two

reasons. *First*, R.C. 5301.56(B)(3)(a) requires more than just a title transaction; it requires that the *mineral interest be the subject of the title transaction*. When surface property is sold or transferred it is that surface property—not any mineral interest—that is the subject of the title transaction. *Second*, because the transfer of surface property says nothing about whether mineral interests are being actively used or maintained, permitting a surface transfer to qualify as a savings event would frustrate the purpose of the Dormant Mineral Act.

STATEMENT OF AMICUS INTERESTS

As the State said previously, its interest in this case is twofold—one in a public-interest capacity and one in a landowner capacity. First, the State has an interest in “remedy[ing] uncertainties in titles and . . . [facilitating] the exploitation of energy sources and other valuable mineral resources.” See *Texaco, Inc. v. Short*, 454 U.S. 516, 524 n.15 (1982) (citation omitted). Second, as a property owner, the State’s interest in obtaining a clear interpretation of the Dormant Mineral Act is similar to the interests of other property owners throughout Ohio. In many instances, ownership of the mineral rights underlying state land has reverted to the State by operation of the Dormant Mineral Act. Thus, the State has an interest in preserving ownership of those mineral interests that have vested in itself and in similarly situated surface property owners.

ARGUMENT

I. The Court should reserve the question of which version of the Dormant Mineral Act applies for a better vehicle.

Before its amendment in 2006, R.C. 5301.56 was self-executing. If a savings event (currently defined in R.C. 5301.56(B)(3)) did not occur within a period of 20 years, ownership of a dormant mineral interest *automatically* vested in the owner of the surface estate by operation of law. Under that interpretation of the statute, the mineral interest at issue in this case may have

been reunited with the surface estate prior to the 2009 deed and, if it had been, the reservation of the mineral interests contained in the deed would have been without force or effect.

But, as the State previously pointed out, the parties did not preserve that question. They proceeded under the assumption that the 2006 version of the Dormant Mineral Act applied. Neither the parties, nor the lower courts, addressed the question of whether the 2006 version of the Act *should* apply. The question whether the mineral interests remained severed in 2009 is therefore not presented in this case. As the State previously urged, the Court should make clear that its resolution of the questions presented in this case—particularly its resolution of the question on which it ordered supplemental briefing—does not implicate the larger question about the relationship between the different versions of the Act.

II. The restatement of a prior mineral reservation in a later transfer of surface property does not constitute a savings event under R.C. 5301.56(B)(3).

If the Court nevertheless opts to reach the proposition, it should hold that a later deed transferring surface property does not qualify as a savings event. The plain language supports that interpretation, as does the Dormant Mineral Act’s clear statutory purpose.

A. The plain language of R.C. 5301.56(B)(3)(a) requires that to qualify as a savings event, a mineral interest must be “the subject of” a title transaction.

It is important to begin with the right question, and the proposition of law presented in the cross-appeal asks the wrong one. For purposes of the Dormant Mineral Act, it does not matter whether the restatement of a prior mineral reservation in a later deed qualifies as a “title transaction.” What matters is whether it is a savings event under R.C. 5301.56. Under the plain language of the statute, it is not. That statute states that one of several possible savings events occurs when “[t]he mineral interest has been the subject of a title transaction” within the last twenty years. R.C. 5301.56(B)(3)(a).

As this language shows, a savings event under R.C. 5301.56(B)(3)(a) requires more than a title transaction; it requires that a mineral interest be *the subject of* a title transaction. *See id.* The phrase “the subject of” is not defined in the statute. It thus must be given its “plain, common, ordinary meaning,” and be “construed ‘according to the rules of grammar and common usage.’” *See Smith v. Landfair*, 135 Ohio St. 3d 89, 2012-Ohio-5692 ¶ 18 (quoting R.C. 1.42). As commonly understood, the “subject” of an action is affected or changed by the action. The ordinary meaning of the term “subject” is “one concerning which something is said or done,” American Heritage Dictionary, 1735 (5th ed. 2011), or “one that is acted on.”¹ The Oxford English Dictionary similarly defines “subject” in a legal context as “one considered the object of an agreement” and “something over which a right is exercised.”²

Under the ordinary meaning of “subject” then, a mineral interest is not the subject of a title transaction when the interest is merely referenced in a deed transferring surface property. There is no impact on a severed mineral interest when the surface property is transferred. The mineral interest is not “acted on” by such a deed or transfer. Nothing is done to the mineral interest—it remains the same as it was before the surface transfer. If anything, by limiting a transaction to the *surface* property and *excluding* the mineral interests, the presence of a reservation clause in a deed makes one thing clear: A mineral interest is *not* the subject of that deed transaction.

The court below adopted this ordinary interpretation of what it means to be *the subject of* a title transaction. It correctly concluded that a mineral interest is the subject of a title transaction only when that interest is the primary theme or basis for the

¹ Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/subject> (last visited September 26, 2014)

² OED Online, September 2014, Oxford University Press.
<http://www.oed.com/viewdictionaryentry/Entry/192686> (accessed September 26, 2014)

transaction. App. Op. ¶ 48. At least one court outside the Seventh District has found that conclusion persuasive. The Southern District of Ohio, when confronted with the same question about what it means to be “the subject of” a title transaction, relied on the Seventh District’s decision below describing its reasoning as “sound” and the decision as “highly persuasive.” See Exhibit 1, *Chesapeake Exploration, L.L.C. v. Buell*, 2:12-cv-00916 at 12 (S. Dist. OH Jan. 1, 2014).

B. The statute’s purpose confirms that the Court should abide by its plain text.

The Dormant Mineral Act’s purpose confirms its plain text. Laws like R.C. 5301.56 are designed to “remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources.” *Texaco v. Short*, 454 U.S. 516, 524 n.15 (citation omitted). That purpose is served only when mineral interests are themselves the specific subject of a title transaction, *not* when they are merely referenced in an unrelated transaction.

All of the savings events identified in R.C. 5301.56(B)(3) require action on the part of the owner of a mineral interest. That is so because the continued existence of mineral interests “about which there has been no display of activity or interest by the owners . . . for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public.” *Texaco*, 454 U.S. at 523 (citation omitted). Treating the restatement of a prior mineral interest reservation in an unrelated transaction as a savings event on the other hand does *not* require a display of activity or interest on the part of a mineral-interest owner and would prevent the abandonment of dormant mineral interests even when there is no dispute that the mineral interests had been unused (or even forgotten about) for years.

A hypothetical illustrates. Imagine a situation where ownership of oil and gas is severed from ownership of a surface estate. The surface property is then regularly transferred every few years for the next 50 years. Each transfer includes boilerplate language stating that it excludes

any severed mineral rights and each is duly recorded. With each transfer, the transferring and receiving parties become further and further removed from the original transaction severing the mineral rights. During that same 50-year period, nothing happens to the mineral rights. They remain severed, but are never transferred and no oil-and-gas production ever takes place. At the end of that period, does the fact that the surface property was transferred—in most cases, by parties far removed from the original transaction severing the rights—mean that the mineral rights have been put to productive use or otherwise preserved under R.C. 5301.56(B)(3)? The answer simply is no. But that is precisely the conclusion that Evans would have the Court reach.

C. None of the arguments in support of Evans’s proposition of law are persuasive.

Evans relies on the common-law doctrine of estoppel by deed to support her argument that a passing reference to a mineral estate in an unrelated transaction constitutes a savings event under R.C. 5301.56(B)(3)(a). *See* Evans Br. 4-5. That reliance is misplaced for several reasons. For starters, Evans asks the wrong question. The estoppel-by-deed doctrine focuses on property held under a deed—in this case the surface property. But the question under R.C. 5301.56 is not whether *surface owners* can be held to the terms of their deeds; it is whether the *mineral-interest owners* have abandoned their interests. The estoppel-by-deed doctrine does not speak to that question. Furthermore, whether a mineral interest has been abandoned under the Dormant Mineral Act is a statutory question; R.C. 5301.56 modifies or displaces common-law doctrines such as the one that Evans invokes. *See Thompson v. Ford*, 164 Ohio St. 74, 79 (1955) (The General Assembly “may modify or entirely abolish common-law actions and defenses.”). Indeed, one reason for R.C. 5301.56 and similar statutes is to address common-law problems created by dormant and abandoned mineral interests. *See* Exhibit 2, Uniform Dormant Mineral

Interests Act (1986) introductory cmt. at 1 (noting that, under common law, dormant and severed mineral interests may present difficulties if the owner of the interest is missing or unknown).

Like Evans, her *amici* also ask the wrong question. Their argument with respect to R.C. 5301.49(A) and the other provisions of the Marketable Title Act incorrectly focuses on the owner of a surface estate rather than the owner of a mineral interest. *See Noon, et al. Br. 4-5.* That misses the point of the Dormant Mineral Act. The Act's purpose is to identify abandoned mineral interests, remedy uncertainties in title, and encourage resource development by reuniting ownership of those interests in a surface owner who did not previously possess them. So it is consistent with R.C. 5301.49(A) to conclude that a surface owner may not have held title to a severed mineral interest, but that, through the inaction of the owner of a mineral interest, ownership of that interest was reunited with ownership of the surface estate. Not only that, but adopting *amici's* interpretation of R.C. 5301.49 would render R.C. 5301.56 largely meaningless. If R.C. 5301.56 cannot vest title to a mineral interest in a surface owner who did not already have marketable title to that mineral interest, there is little work left for the statute to do.

Amici's argument is not just wrong as a conceptual matter; it is also based on a statutory anachronism. R.C. 5301.49 was last amended in 1963. At that time, the Marketable Title Act expressly excluded mineral or mining interests. R.C. 5301.53(E) (1963). Further, R.C. 5301.56 *was* part of the Marketable Title Act (comprised of R.C. 5301.47 through 5301.56); it extended the Marketable Title Act's 40-year look-back period by three years if the look-back period had expired before the Act's effective date. *See Exhibit 3, Session Laws, R.C. 5301.49 and R.C. 5301.56 (1963).* R.C. 5301.56 has been radically altered since then. It is an entirely different law than the one that R.C. 5301.49 referenced in 1963. The relevant portions of the Revised Code have not been amended to reflect that change however.

Amici are also wrong when they argue that there is a disconnect between allowing mineral-interest owners to preserve their interests by filing a claim to preserve those interests while at the same time concluding that a savings event occurs only when the mineral interest *itself* is the subject of a title transaction. *See* Noon, et al. Br. 7. There is no disconnect. The distinction makes sense in light of the purpose of the Dormant Mineral Act. R.C. 5301.56 identifies abandoned mineral interests. It is perfectly reasonable to conclude that an interest has *not* been abandoned when the interest owner files a claim to preserve it. By comparison, it says nothing about whether the mineral-interest owner has abandoned a mineral interest when two third parties transfer a surface estate. That is true even if the mineral interest is mentioned in connection with the surface transfer. In such a situation, the mineral-interest owner has done nothing that would suggest that the mineral interest has not been abandoned—let alone taken any steps to actively preserve it. To conclude otherwise would leave a mineral-interest owner at the mercy of any number of surface owners who may or may not refer to a previous reservation of a mineral interest when they transfer the surface property.

Of course, it must be acknowledged that there is something logical about the conclusion that surface-estate owners, who takes possession under a deed explicitly excepting severed mineral interests, do not own the excepted interests. But the focus of R.C. 5301.56 remains on what mineral-interests owners of have done—or, more appropriately, what they *have not* done. If twenty years have passed and the *mineral interest* has not been the subject of one of the actions identified in R.C. 5301.56(B)(3), then that mineral interest will be deemed abandoned—regardless of what the surface owner may or may not have done. And while it may be reasonable, or even equitable, to hold surface owners to the language of the deed for which they bargained, the very existence of the Dormant Mineral Act shows that the General Assembly has

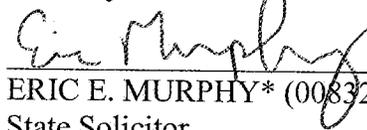
determined that the State's interest in "remedy[ing] uncertainties in titles and . . . facilitat[ing] the exploitation of energy sources and other valuable mineral resources," *Texaco*, 454 U.S. at 524 n.15 (citation omitted), must sometimes win out over other competing interests.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below. It should either leave undecided the cross-appellant's second proposition of law, or hold that the mere restatement of a prior mineral reservation in a later deed is not a savings event pursuant to R.C. 5301.56(B)(3)(a).

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Cross-Appellees was served on September 26, 2014, by U.S. mail on the following:

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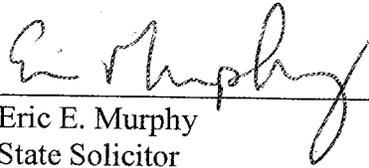
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APPENDIX

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

ORIGINAL

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

I CERTIFY THAT THIS IS A TRUE AND
CORRECT COPY OF OUR RECORDS

On: 1/2/14
John P. Hehman, Clerk

By: [Signature]
Deputy Clerk

Date: 1-10-14

Chesapeake Exploration, L.L.C., et al.,

Plaintiffs,

14-0067

v.

Case No. 2:12-cv-916

Kenneth Buell, et al.,

Judge Michael H. Watson

Defendants.

OPINION AND ORDER

This diversity action requires the court to determine which parties are entitled to the mineral rights that lie below 90.2063 acres of property located in Harrison County, Ohio. The parties have filed cross-motions for summary judgment. ECF Nos. 38, 39. In addition, Plaintiffs filed a Motion for Leave to File a Surreply in Opposition to Defendants' Motion for Summary Judgment, ECF No. 50, which Defendants oppose, ECF No. 51. For the following reasons, the Court defers ruling on the summary judgment motions, **CERTIFIES** two questions of Ohio law to the Supreme Court of Ohio, and **STAYS** the proceedings pending the outcome of certification.

I. PROCEDURAL HISTORY

On October 4, 2012, Plaintiffs Chesapeake Exploration, L.L.C. ("Chesapeake"), CHK Utica, L.L.C. ("CHK Utica"), Larchmont Resources, L.L.C. ("Larchmont"), and Dale Pennsylvania Royalty, L.P. ("Dale"), filed a complaint

against Defendants Kenneth Buell, ArieH Ordronneau, Sunni Ordronneau, Jeffrey Elias, Janice Elias, Dennis Elias, and Margaret Elias (collectively "Defendants") as well as North American Coal Royalty Company ("North American") and Total E&P USA, Inc. ("Total E&P"), seeking to quiet title to the oil and gas rights under Defendants' surface estates. Plaintiffs included North American and Total E&P as defendants due to their interests in the oil and gas rights. Compl., ECF No. 1. Defendants answered with a third party complaint against Dale Property Services and counterclaims and cross claims against North American and Total E&P to quiet title. Countercl., ECF No. 12. Defendants also allege slander of title and unjust enrichment and seek declaratory and injunctive relief. *Id.*

Chesapeake, CHK Utica, Larchmont, and Dale voluntarily dismissed Kenneth Buell on November 14, 2012. ECF No. 11. North American and Total E&P were realigned as Plaintiffs on January 7, 2013, and February 22, 2013, respectively. ECF Nos. 17, 30. Chesapeake, CHK, Larchmont, Dale, Total E&P, and North American will be collectively referred to as "Plaintiffs."

II. FACTS

Both Plaintiffs and Defendants set forth the undisputed facts in their respective summary judgment motions. Given the facts, however, the parties dispute who is the legal owner of the mineral rights beneath 90.2063 acres of land ("the "Property") located in Harrison County, Ohio. The Property has been frequently transferred since 1958.

In October of 1958, Powhatan Mining Company ("Powhatan") transferred the surface rights of the Property to Clarence and Anna Bell Sedoris, excepting all oil, gas, coal, or other mineral rights (the "Mineral Rights") to itself and its successors. Powhatan transferred the Mineral Rights to the North American Coal Company ("NA Coal") (a separate entity from Plaintiff North American) when the two companies merged in 1959.

A. The Surface Rights

In 1968, Clarence and Anna Bell Sedoris transferred the Property to Jerry and Janice Torok. The Toroks transferred the Property to Levi and Naomi Miller in 1983. The Millers conveyed the Property in September of 1984 to Dennis and Linda Elias. That deed contained a clause (the "Reservation Clause") excepting and reserving the Mineral Rights originally reserved in the Powhatan to Sedoris deed. Linda Elias conveyed her portion of the Property to Dennis Elias ("Dennis") on December 4, 1989 via a quitclaim deed which included the Reservation Clause.

Dennis then began to break up the property. Dennis transferred 10.37 acres of the Property to Jeffrey Elias and Janice Elias in April of 1995. That deed did not contain the Reservation Clause. Dennis next transferred 20.17 acres of the Property to John and Marilyn Jackson on October 21, 1996. That deed also did not contain the Reservation Clause. After the above conveyances, Dennis retained approximately 59.66 acres of the Property.

The Jacksons then transferred their claim in the Property to Benjamin Wiker who transferred the same to the Ordronneaus on July 27, 2011. The Jackson to Wiker deed was given subject to "all restrictions and reservations of record," and the Wiker to Ordronneau deed contained the Reservation Clause.

B. The Mineral Rights

In 1973, NA Coal leased the Mineral Rights to National Petroleum Corporation for a term of ten years, recorded in Harrison County on February 6, 1974. National Petroleum Corporation assigned its interest to American Exploration Company by a recorded assignment on May 12, 1975. At the expiration of the lease term, the Mineral Rights reverted back to NA Coal.

NA Coal next leased the Mineral rights to C.E. Beck, recorded on February 6, 1984 ("1984 Lease"). C.E. Beck assigned its interest to Carless Resources on May 30, 1985, and Carless recorded the assignment the same day. In January of 1989, the lease expired, and the rights reverted to NA Coal by the terms of the 1984 Lease. NA Coal changed its name to Bellaire on July 7, 1992, and later transferred the Mineral Rights to North American via quitclaim deed, recorded in Harrison County on December 16, 2008.

On January 28, 2009, North American leased the Mineral Rights ("2009 Lease") to Mountaineer, who assigned its interest to Dale Property on May 6, 2010. Dale Property assigned its interest under the 2009 Lease to Ohio Buckeye Energy, L.L.C., reserving a 1.25% royalty interest. Dale Property assigned its royalty interest to Plaintiff Dale Pennsylvania on June 28, 2012.

On October 5, 2011, Ohio Buckeye Energy assigned a portion of its interest to Larchmont, which interest was recorded. On November 1, 2011, another portion of Ohio Buckeye Energy's interest was assigned to CHK Utica. Ohio Buckeye Energy merged with Chesapeake on December 22, 2011, merging the remainder of Ohio Buckeye's interest in the 2009 Lease into Chesapeake. Chesapeake transferred a portion of its interest in the 2009 Lease to Total E&P on December 30, 2011.

Currently, North American is the record owner of the Mineral Rights. Larchmont and CHK Utica are leasing a portion of the Mineral Rights from North American by assignment. Chesapeake is the lessee of the remainder of the lease interest, although Dale Pennsylvania has a 1.25% royalty interest in the lease. Dennis Elias owns 59.66 acres of the Property. Jeffrey and Janice Elias own 10.37 acres of the Property, and the Ordronneaus own 20.17 acres of the Property.

III. STANDARD OF REVIEW

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

The Court must grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also *Van Gorder v. Grand Trunk Western R.R., Inc.*, 509 F.3d 265, 268 (6th Cir. 2007).

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

IV. ANALYSIS

The parties agree that this case directly concerns the Ohio Dormant Mineral Act (“ODMA”). Ohio Revised Code § 5301.56, *et seq.* The ODMA, enacted in 1989, operates to return dormant, severed mineral rights to the surface land holder by placing a twenty-year limit on dormant mineral rights. In other words, when someone other than the surface land holder (“land holder”) obtains the sub-surface mineral rights, that mineral rights holder (“mineral rights

holder") is deemed to have abandoned the mineral rights if those rights lay dormant for twenty years, at which time they revert back to the land holder. The manner in which the mineral rights return to the land owner changed between the 1989 version of the statute and the 2006 version due to an amendment in the statute.

Under either version of the ODMA, a twenty-year clock begins to run the moment that the mineral rights are acquired by someone other than the land holder. If twenty years run in which the rights are dormant and there is no "savings event" under § 5301.56(B), the mineral rights vest in the manner prescribed by the statute. A § 5301.56(B) savings event restarts the twenty-year clock from the date of the event.

The 1989 ODMA does not specify 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, but it did provide a three year grace period under which a mineral rights holder could maintain his interest. The three year grace period expired on March 23, 1992.

The 2006 ODMA requires that notice be given by the land holder to the mineral rights holder of record before the mineral rights can vest in the land

holder. Ohio Rev. Code § 5301.56(B) (2006).¹ Once notice is given, the mineral rights holder has sixty days to either file a claim to preserve the interest under § 5301.56(B)(3)(e) or file an affidavit identifying a savings event under § 5301.56(B)(3). If the mineral rights holder fails to file a claim to preserve the mineral rights or identify a savings event within sixty days, the mineral rights vest upon memorialization of the abandonment in the county record. Ohio Rev. Code § 5301.56(H)(2).

The parties agree that the only possible savings event that has occurred in this case arises under § 5301.56(B)(3)(a), which requires that "the mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located" within the preceding twenty years.² For example, if the mineral rights were the subject of a title transaction in 1984, then the twenty-year clock restarts in 1984, and the mineral rights could not vest in the land holder until 2004. However, the parties dispute both whether the 1989 or 2006 version of the ODMA governs this dispute and whether a savings event has occurred at all. Plaintiffs argue the 2006 version of the ODMA applies because the expiration of a lease is a savings event and therefore the twenty year clock began in 1989, at the expiration of the

¹ Defendants make no argument that they gave notice to Plaintiffs or any party.

² The 2006 ODMA notes that it is the preceding twenty years from the date the land holder gives notice to the mineral rights holder. The 1989 ODMA is silent as to when the preceding twenty-year period begins.

1984 Lease. Defendants argue that the 1989 version applies and the twenty year clock began in 1959, when Powhatan merged with NA Coal.

Plaintiffs contend that any savings event occurring after 1986 restarted the twenty-year clock, meaning the twenty-year period would not fully run until after the 2006 amendments. As the 2006 version would be applicable upon expiration of twenty years, Plaintiffs contend that Defendants had to give notice before the Mineral Rights could vest.

Plaintiffs allege that at least three distinct types of title transactions took place that amount to savings events. First, Plaintiffs posit any conveyance evidenced by a deed that included the Reservation Clause is a title transaction. Such a deed was conveyed in 1984, 1989, and 2011. Second, Plaintiffs argue that an executed and recorded oil and gas lease is a title transaction. Third, Plaintiffs argue a title transaction occurs when a lease expires and the oil and gas interest reverts to the lessor. Plaintiffs conclude that because multiple title transactions took place after 1986, notice was required but not given, and thus, the Mineral Rights have not been abandoned.

Defendants argue that the last savings event occurred when Powhatan merged with NA Coal in 1959, and when the grace period expired in 1992, no title transaction had taken place in the last twenty years. Thus, they conclude the Mineral Rights automatically vested to Dennis Elias in 1992. Defendants contend that none of the title transactions alleged by Plaintiffs constitutes a recorded title transaction under either version of the ODMA. Alternatively,

Defendants argue that even if the 1984 Lease is a title transaction, the date of the recording in 1984, not the expiration, is the start of the twenty-year clock, which automatically fully vested the Mineral Rights to the Defendants in 2004, before the 2006 amendments.

In this diversity case, the Court must apply the substantive law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In doing so, this Court is bound by the decisions of the state's highest court. *Pennington v. State Farm Mut. Auto Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009). If the state's highest court has not directly addressed the issue, however, this Court must predict how the state's highest court would resolve the matter. *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 624 (6th Cir. 2008). In that case, the decisions of the state's intermediate appellate courts are deemed authoritative, unless there is a strong showing that the state's highest court would reach a different result. *Id.*

The ODMA does not define the term "title transaction." Nonetheless, the Ohio Marketable Title Act ("OMTA") defines the term "title transaction" as "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage." Ohio Rev. Code § 5301.47(F). Although the OMTA definition of a title transaction is broad, for our purposes it is limited by the language of the ODMA, which requires that the mineral interest be the

subject of the title transaction in order for the title transaction to qualify as a savings event. Ohio Rev. Code § 5301.56(B)(3)(a). Neither version of the ODMA specifically states whether any title transaction alleged by Plaintiffs qualifies as a savings event. The Court addresses each in turn.

A. A Reservation Clause in a Surface Land Deed is not a Title Transaction Because the Mineral Interest is not the Subject of the Title Transaction.

Plaintiffs rely heavily on a Harrison County Common Pleas Court's decision for the proposition that a reservation clause in a deed to a surface estate is a title transaction under the ODMA. *Dodd v. Croskey*, No. CVH-2011-0019, (Harrison C.P. Oct. 29, 2012) (unreported, cited by Plaintiffs at ECF No. 39-5). However, since the parties have briefed the issue, the Seventh District Court of Appeals has overruled the *Dodd* decision. *Dodd v. Croskey*, 2013-Ohio-4257, 2013 WL 5437365, at *9 (Ohio Ct. App. 7th Dist. Sept. 23, 2013).³ In discussing what constitutes the "subject of a title transaction," the Seventh District found that there is no statutory definition of what the legislature meant by "subject of" and thus afforded the words their ordinary meaning. *Id.*

"The common definition of the word "subject" is[:] topic of interest, primary theme or basis for action. Webster's II New Riverside University Dictionary 1153 (1984). Under this definition the mineral interests are not the "subject of" the title transaction. Here, the primary purpose of the title transaction is the sale of surface rights. While the deed does mention the oil and gas reservations, the deed does not transfer those rights. In order for the mineral interest to be the "subject of" the title transaction the grantor must be conveying that interest or retaining that interest. Here, the mineral interest was not being

³ Both Plaintiffs and Defendants have notified the Court of the 7th District's decision in a notice of supplemental authority.

conveyed or retained by . . . the party that sold the property to appellants.

Therefore, we disagree with the trial court's conclusion that oil and gas interests were the "subject of" the 2009 title transaction. Instead we specifically find that they were not the "subject of" the 2009 title transaction."

Id.

Although the Court is only bound by decisions of the Ohio Supreme Court, *Dodd* is nearly identical to the dispute *sub judice* and is the only statement from any Ohio appeals court on this specific issue. Moreover, its reasoning is sound. Thus, this decision, from the same county as the present dispute, is highly persuasive, and it warrants the same result in this case.

The subject of the deeds which contained the Reservation Clause was the surface land, not the mineral rights. In those deeds, the Reservation Clause operated to limit the portions of the property that could be expected to be included in the transfer. When read in this manner, it is clear that the Reservation Clause sought to exclude the Mineral Rights from being a subject of the deed transaction.

Accordingly, the conveyances of deeds including the Reservation Clause were not title transactions that restarted the twenty-year clock under either the 1989 ODMA or the 2006 ODMA.

B. Whether an Oil and Gas Lease is a Title Transaction is a Question for the Supreme Court of Ohio.

Plaintiffs contend that the 1984 Lease was a title transaction that was properly recorded. Plaintiffs further contend that the *expiration* of the 1984 Lease in 1989 also operated as a title transaction, making the "date of record of the title transaction" 1989. If the expiration of the 1984 Lease in 1989 was a title transaction, then the clock restarted in 1989, and Defendants' interest in the mineral rights could not have vested until 2009, after the 2006 ODMA took effect. Plaintiffs therefore argue that at the earliest, the twenty-year clock would run in 2009, and because Defendants did not give notice, as required by the 2006 ODMA, the Mineral Rights could not have vested in Defendants.

Defendants contend that a lease is not a title transaction because it is omitted from the OMTA's list of enumerated title transactions and because it would cause redundancies in the ODMA. Defendants also argue that even if the expiration of a lease is a title transaction, the expiration is not a sufficient title transaction under the ODMA to constitute a savings event because the expiration was not recorded.

Both Plaintiffs and Defendants argue that Supreme Court of Ohio decisions support their position.

1. Statutory Interpretation Does Not Resolve the Question

Defendants argue that the language of the OMTA indicates that a lease is not a title transaction because it is not included in the list of what the statute defines as a title transaction.

Plaintiffs retort that the language of the OMTA "does not purport to give a complete or exclusive list of every possible type of title transaction." P. Resp. 7, ECF No. 46. The Court agrees.

Defendants argue that "had the Ohio Legislature intended for an oil and gas lease to qualify as a 'title transaction' for purposes of the 1989 Act, it knew how to do so—by incorporating such language into the statute." D. Reply 11, ECF No. 48. While this may be true, the legislature also knew how to explicitly exclude all other transactions from the definition and chose not to do so. The definition of a title transaction in § 5301.47(F) provides a non-exhaustive list of what is considered a title transaction. The word "including" means it is not exclusive, and other unlisted transactions may qualify as title transactions. This definition is also broad, involving "any transaction affecting title to any interest in land." Ohio Rev. Code § 5301.47(F) (emphasis added). Defendants' argument would require the Court to render the word "including" superfluous in the OMTA.⁴ The list in the OMTA is non-exhaustive. Thus, failure to include an oil and gas

⁴ "Courts may not delete words used or insert words not used," when interpreting a statute. *Cline v. Ohio Bureau Motor Vehicles*, 573 N.E.2d 77, 80 (Ohio 1991).

lease in the list does not mean an oil and gas lease is not a title transaction under the OMTA.

Defendants next argue that the language of the ODMA requires a finding that an oil and gas lease is not a title transaction under the ODMA. Defendants rely on § 5301.56(B)(3)(b), which states that a mineral interest fails to vest to the surface owner if, within the last twenty years, one or more of the following has occurred: "there has been actual production or withdrawal of minerals by the holder from the lands, *from lands covered by a lease to which the mineral interest is subject*, from a mine a portion of which is located beneath the lands, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations" Ohio Rev. Code § 5301.56(B)(3)(b) (emphasis added).

Defendants contend that if an oil and gas lease is itself a title transaction, the twenty-year clock would already be stayed without actual production under the lease. In other words, the clause "from lands covered by a lease to which the mineral interest is subject" would be rendered superfluous because whether there is production under the lease or not, the twenty-year clock would already be reset merely by executing the oil and gas lease.

Plaintiffs argue that both production under a lease and the recordation of the lease as a title transaction can separately, and at different times, operate to restart the twenty-year clock. For example, recording a lease in 1985 would start the twenty-year clock in 1985, but production under that lease in 1989 would restart the twenty-year clock in 1989. Therefore, Plaintiffs contend, no part of the

statute is superfluous if a lease is a title transaction. Plaintiffs further posit that under Defendants' reading, a drilling permit would not be a savings event because it would make actual production under the permit irrelevant. But receiving a drilling permit is a savings event under § 5301.56(B)(3)(d), therefore Defendants' argument is flawed. Plaintiffs argue the same reasoning also applies to conveyances, if a conveyance of the minerals is a title transaction which prevents vesting in the surface owner, then actual production by the mineral holder would be "irrelevant," so the conveyance must not be a savings event. P. Opp. 9, ECF No. 46. A conveyance is a title transaction under § 5301.56(B)(3)(a).

No part of the statute would be rendered superfluous by finding that an oil and gas lease is a title transaction. The ODMA states that "one or more of the following," savings events restarts the twenty-year clock. Ohio Rev. Code § 5301.56(B)(3) (emphasis added). This necessarily means that the Ohio Legislature contemplated that those events could happen simultaneously or in succession and made clear that the combination of, or occurrence of individual events would each reset the twenty-year clock. For example, a 25 year oil and gas lease could be recorded in 1985. That could start the clock if plaintiffs are right, and it would run in 2005. If there is production in 1995, the twenty-year clock would restart and run in 2015.

Further, although an application for a drilling permit is a savings event under § 5301.56(B)(3)(d), that does not render the "actual production" clause in

§ 5301.56(B)(3)(b) superfluous even though a permit is required before actual production may take place under Ohio Revised Code § 1509.05. Because the clause in Ohio Revised Code § 5301.56(B)(3) would not be made superfluous, Defendants' statutory construction argument fails.

2. Supreme Court of Ohio Case Law Focuses on the Nature of the Statute and the Lessee's Interest in Determining the Character of the Oil and Gas agreement.

As noted above, the definition in the OMTA for a title transaction is broad and includes "any transaction affecting title to any interest in land." Ohio Rev. Code § 5301.47(F) (emphasis added). Both Plaintiffs and Defendants cite to Supreme Court of Ohio decisions to support whether the execution or expiration of an oil and gas lease constitute a title transaction. Plaintiffs argue that an oil and gas lease creates a fee simple determinable and gives the lessee ownership of the oil and gas estate. Defendants argue that an oil and gas lease is merely a license and not a fee simple conveyance, and therefore is not a title transaction because it does not convey title.

The nature of an oil and gas agreement in Ohio is unsettled. "[O]il and gas agreements have been characterized as leases, licenses, corporeal hereditaments, rights, easements, and/or interests in real estate." *Rayl v. E. Ohio Gas Co.*, 348 N.E.2d 385, 389 (Ohio Ct. App. 9th Dist. 1973) (overruled on other grounds). "Cases which discuss the character of the lessee's interest often do so in the context of determining the impact of a statute upon the oil and gas

lease." *In re Frederick Petroleum Corp.*, 98 B.R. 762, 763 (S.D. Ohio 1989).⁵

Two Supreme Court of Ohio cases take divergent views of the nature of oil and gas leases but neither concerns whether a lease of severed subsurface mineral rights is a title transaction under the ODMA.

In *Harris v. Ohio Oil Co.*, 48 N.E. 502, 506 (Ohio 1897), the court noted in dicta that an oil and gas lease conveyed a fee estate. A landowner leased the oil and gas rights to Harris who assigned his interest to the Ohio Oil Company. Harris then purchased the lands from the original landowner and thus became the lessor. The Supreme Court of Ohio noted in dicta that an oil and gas lease conveys more than a mere license because it is the land that is granted, demised, and let and that the lessee has a limited, vested estate in the lands for the purposes named in the lease. *Id.* The ultimate issue in *Harris* was whether there was an implied covenant to reasonably develop and protect oil and gas lines. The conclusion that a lease equated to a fee estate meant that such an implied covenant did exist, but a breach of said covenant did not forfeit the lease.

Plaintiffs rely on the Ninth District's reading of *Harris* in *Kramer v. PAC Drilling Oil and Gas, L.L.C.*, for the proposition that an oil and gas lease conveys ownership of the oil and gas estate. 968 N.E.2d 64, 67 (Ohio Ct. App. 9th Dist. App. 2011). Thus, Plaintiffs posit that a recorded conveyance of a fee estate, i.e.

⁵ The court in *Frederick* found that for the purpose of determining whether an oil and gas lease was a lease of real property under 11 U.S.C. § 365(d)(4), Ohio would rule similarly to Oklahoma courts and find that oil and gas leases are licenses. 98 B.R. at 766.

the oil and gas estate, is necessarily a "transaction affecting title to any interest in land." Ohio Rev. Code § 5301.47(F). Because the minerals rights are the subject to such a transaction, Plaintiffs argue that the lease is necessarily a savings event.

Conversely, in *Back v. Ohio Fuel Gas Co.*, 113 N.E.2d 865 (Ohio 1953), the court found that an oil and gas lease was a license. *Back* involved an instrument conveying oil and gas rights in the form of a deed recorded in the lease records. The holder of the rights admitted the deed was not a lease because it granted rights in perpetuity. *Id.* at 867. The Court held that the deed was a license in practice, although not in form, because "[p]ossession of oil and gas, having as they do a migratory character, can be acquired only by severing them from the land under which they lie, and in effect the instrument of conveyance in the instant case is no more than a license to effect such a severance." *Id.*⁶

Neither of these cases addresses the nature of the transaction at issue in this case. In the instant case, unlike either Ohio Supreme Court case, the mineral rights have already been severed from the land holder and are being leased to a third party.⁷ Further, as the court in *Frederick* noted, the context of the statute has always been a key factor in how to consider the nature of the

⁶ At least one court of appeals concluded that the finding of the oil and gas lease as a license was not binding because it was not in the syllabus. *Bath Twp. v. Raymond C. Firestone, Co.*, 747 N.E.2d 262, 266 (Ohio Ct. App. 9th Dist. 2000).

⁷ For a further discussion of the Ohio case law on this subject, see *Frederick*, 98 B.R. at 763-66.

lease. The ODMA was not enacted at the time either *Harris* or *Back* were decided. Because the context of the statute is extremely important, and no Ohio court has considered the nature of an oil and gas lease under the ODMA, the Court declines to answer the question of whether the execution of a lease of severed subsurface mineral rights constitutes a title transaction under the ODMA.

C. Whether a Lease Expiration is a Recorded Title Transaction is also a Question for the Supreme Court of Ohio.

Even if this Court were able to determine how the Supreme Court of Ohio would rule concerning whether the execution of oil and gas lease is a title transaction under the ODMA, the parties dispute whether the proper date from which the twenty-year clock begins is the date the lease was recorded or the date the lease expired. Plaintiffs posit that it would be nonsensical for an abandonment clock to begin while a mineral rights holder is actively renting and collecting rental payments under a lease, and therefore the expiration of the lease restarts the clock. P.'s Opp. 11, ECF 46.

Defendants argue that a lease expiration is not a title transaction, and also that even if it is, the expiration is not recorded and thus does not comport with the requirements of § 5301.56(B)(3)(a) to qualify as a savings event.

The Supreme Court of Ohio has not considered this issue, but in *Energetics, Ltd. v. Whitmill*, 442 Mich. 38 (1993), the Michigan Supreme Court decided that under the Michigan Dormant Minerals Act ("MDMA"), the reversion of rights under a recorded lease is a savings event that restarts the twenty-year

clock at the time of the reversion. The MDMA prevents vesting when the mineral interest has been "sold, leased, mortgaged, or transferred by instrument recorded," in the last twenty years. Mich. Comp. Laws § 554.291 (2006).

Although the MDMA expressly considers the execution of a lease a savings event, the Michigan Supreme Court found that the lease in that case was a recorded instrument transfer and thus the twenty-year clock restarted from the day the rights under the lease reverted to the lessor (the expiration of the lease). *Energetics*, 442 Mich. at 47. This is because that day, the rights transferred from the lessee to the lessor "by instrument recorded," i.e. the lease. *Id.* Although the Michigan Supreme Court's analysis is instructive, it is by no means binding as the ODMA and the MDMA differ in their definition of a savings event.

Given the dearth of Ohio authority, the best course of action is to certify these important questions of Ohio law to the Supreme Court of Ohio. Rule 9.01(A) of the Practice Rules of the Supreme Court of Ohio allows a federal court to certify questions of Ohio Law to the Supreme Court if the analysis may be determinative of the proceeding and there is no controlling precedent.

Certification helps to conserve resources, avoid "friction generating error," and acknowledge the state court's status as the final arbiter on state law matters when a federal court is construing a state statute in the absence of controlling state law. *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 410 (6th Cir. 2008) (quoting *Arizonans for Official English v. Arizona*, 520 U.S.

43, 79 (1997)). Because federal courts act as outsiders, there is a "responsibility

to make sure that questions of state law are 'settled right,' not that they are just 'settled.'" *Rutherford v. Columbia Gas*, 575 F.3d 616, 627 (6th Cir. 2009) (Clay, J., concurring). "This rationale is all the more compelling where, as here, the state's highest court has yet to address an issue directly and thus the federal courts are called upon to 'predict' what that court would do." *Id.* The Court may *sua sponte* certify a question to the Supreme Court of Ohio. *Planned Parenthood*, 531 F.3d at 408 (citing *Elkins v. Moreno*, 435 U.S. 647, 662 (1978)).

V. CERTIFICATION REQUIREMENTS

A. The Certified Questions

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

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

AND

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?

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

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

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

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

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

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

b. Defendants: ArieH Ordronneau, Sunni Ordronneau; Jeffrey Elias; Janice Elias; Dennis Elias; and Margaret Elias.

4. **Names, Addresses, Telephone Numbers, and Attorney Registration**

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

C. Instructions to the Clerk

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

VI. CONCLUSION

For the foregoing reasons, the Court **CERTIFIES** two questions of Ohio law to the Supreme Court of Ohio in accordance with Ohio State Supreme Court

Rule § 9.01. Further, this case will be **STAYED** pending the outcome of the proceedings in the Supreme Court of Ohio.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

UNIFORM DORMANT MINERAL INTERESTS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

Approved and Recommended for Enactment
in All the States

At its

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

With Prefatory Note and Comments

EXHIBIT 2

UNIFORM DORMANT MINERAL INTERESTS ACT

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

W. JOEL BLASS, P.O. Box 160, Gulfport, MS 39501, Chairman
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Advisors to Special Committee on Uniform Dormant Mineral Interests Act

FRANK H. MORISON, American Bar Association
LYMAN A. PRECOURT, American College of Real Estate Lawyers

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

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
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UNIFORM DORMANT MINERAL INTERESTS ACT

PREFATORY NOTE

Nature of Mineral Interests

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

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

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

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

Potential Problems Relating to Dormant Mineral Interests

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

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

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

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

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

Approaches to the Dormant Mineral Problem

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

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

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

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

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

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

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

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

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

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

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

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

Draft Statute

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

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

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

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

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

record thereof, need not be acknowledged or witnessed, but if written upon the margin of the record, the signing must be attested by the county recorder.

If said waiver of priority is by separate instrument, it shall be recorded in the book provided by section 5301.34 of the Revised Code for the recording of satisfactions of mortgages. For such recording, the county recorder *** *may* charge the fee as provided by section 317.32 of the Revised Code for recording deeds. For entering any such waiver of priority upon the margin of the record of said mortgage, or for attesting it, the recorder *** *is* entitled to the fees for recording such waivers of priority as are charged for assignments or satisfactions of mortgages under section 317.32 of the Revised Code. (*Amended in Amended House Bill No. 1*)

Record marketable title; exceptions.

Sec. 5301.49. Such record marketable title shall be subject to:

(A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest; and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in section 5301.51 of the Revised Code;

(B) All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with section *** 5301.51 of the Revised Code;

(C) The rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title;

(D) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title or record is started; provided that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of section 5301.50 of the Revised Code;

(E) The exceptions stated in section 5301.53 of the Revised Code. (*Amended in Amended House Bill No. 1*)

Three-year extension.

Sec. 5301.56. If the forty-year period specified in sections 5301.47 to 5301.56, inclusive, of the Revised Code, has expired prior to three years after *** September 29, 1961, such period shall be extended three years after *** September 29, 1961. (Amended in Amended House Bill No. 1)

Fees.

Sec. 5310.15. On filing an application for registration, the applicant shall pay to the clerk of the probate court or the clerk of the court of common pleas ten dollars, which is full payment for all clerk's fees and charges in such proceeding on behalf of the applicant. Any defendant, except a guardian ad litem, on entering his appearance by filing a pleading of any kind, shall pay to the clerk five dollars, which is full payment for all clerk's fees on behalf of such defendant. When any number of defendants enter their appearance at the same time in one pleading by filing a pleading of any kind, one fee shall be paid.

Every required publication in a newspaper shall be paid for by the party on whose application the order of publication is made, in addition to the fees prescribed in the first paragraph of this section. The party at whose request, or on whose behalf, any notice is issued, shall pay for the service of such notice except when such notice is sent by mail by the clerk or the county recorder.

Examiners of titles shall receive for examining title or original reference, and making report on all matters arising under the application, including final certificate as to all necessary parties being made and properly brought before the probate court or the court of common pleas, and as to the proceedings being regular and legal, one half of one per cent of the appraised tax value, the fee in no case to be less than seventy-five or more than two hundred fifty dollars, for each separate and distinct parcel of land included in the application although made up of more than one tract.

Upon a reference to an examiner of titles or to any other person upon a hearing to take evidence and make report to the court, the fee of the referee shall be fixed by the court at not more than fifteen dollars per day for the time actually employed.

For a certificate of an examiner of titles that all necessary parties are before the court, and the proceedings are regular and legal in a suit for partition, foreclosure of mortgage, marshalling of liens, or other suit or proceeding affecting the title of any interest in, or lien or charge upon registered lands, the fees shall be fixed by the court, and shall not be more than twenty-five dollars