

IN THE SUPREME COURT OF OHIO

Hans Michael Corban,	:
	:
Petitioner,	:
	:
v.	:
	:
Chesapeake Exploration, LLC, et al.,	:
	:
Respondents.	:

Case No. 2014-0804

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

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

**MERIT BRIEF OF *AMICI CURIAE*,
THE NOON, SHEPHERD, GREGOR, MERECKA, AND KINNEY FAMILIES,
IN SUPPORT OF THE RESPONDENTS
REGARDING THE FIRST CERTIFIED QUESTION**

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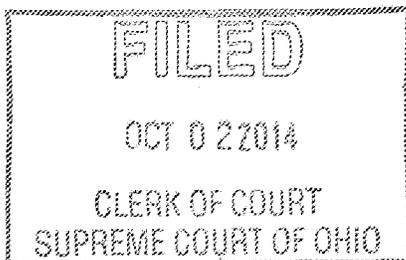
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STATEMENT OF INTEREST OF AMICI CURIAE

Collectively, *amici curiae* are individuals from five families holding record title to more than one thousand acres of severed oil and gas mineral interests located in the heart of Ohio's Marcellus and Utica Shale plays—namely, Guernsey, Belmont, and Noble Counties. More specifically, *amici curiae* include individuals from the following families: (i) the Noon family;¹ (ii) the Shepherd family;² (iii) the Doudna family;³ (iv) the Kinney family;⁴ and (v) the Greeger family.⁵ All have roots in eastern Ohio dating back to at least the early twentieth century, and many dating back to the nineteenth century.

Perhaps more importantly, *amici curiae* are the named defendants in active litigation matters involving the Ohio Dormant Minerals Act, R.C. 5301.56 (the "DMA")—specifically, the debate over the applicability of the 1989 or 2006 versions of the DMA. In each of those lawsuits (which are specifically set forth below), *amici curiae* have vigorously argued against the

¹ The Noon Family is represented by Patricia J. Shondrick-Nau, Executrix of the Estate of John R. Noon, and Successor Trustee of the John R. Noon Trust.

² The Shepherd Family includes the following heirs of the original three holders of the severed mineral interest: Barbara Shepherd, Marion L. Shepherd as Executor of the Estate of Joseph T. Shepherd, David Shepherd, Scott Whitacre, Susan L. Spencer, Steve Whitacre, Samuel J. Whitacre, Ralph E. Earliwine, James K. Earliwine, Rhonda K. Earliwine, Donley Williams, Mary E. Taylor, Cathy Jo Yontz, Carol W. Talley, Karen Stubbs, Pamela Skelly (deceased as of July 3, 2013), David Huisman, Debbie K. Allen (deceased as of September 22, 2013), Mark Phillips, Brian Phillips, Liana L. Phillips Yoder, Sallie S. Shepherd, John Mauersberger, George Mauersberger, Gwen C. Lewis, Wayne L. Shepherd, Brent M. Moser, Barrett D. Moser, and Kaye Anderson Hall.

³ The current members of the Doudna Family owning the severed mineral interests include: Harold E. Doudna, Robert J. Doudna, Phillip D. Doudna, Eli Rebich, Monty J. Merecka, Vicky Rolf, Justin J. Merecka, Charles A. Merecka, and Lory Merecka Shelton.

⁴ The Kinney Family includes: Virginia Lee Kinney, Royce B. Kinney, and The Virginia Fenton Groves Trust, Dated June 29, 1984 c/o Vicki L. Burke, Trust Officer for Unity National Bank, A Division of Park National Bank, Trustee.

⁵ The Greeger Family includes: Gary F. Greeger, Reba L. Greeger, Alan R. Greeger, Gloria Jean Greeger, Betty M. Wilson, Rae J. Abels, James R. Abels, David L. Lagle, Patricia L. Lagle, Nicholas J. Savage, Lynn A. Savage, Carl A. Lagle, Richard M. Lagle, and Tonya G. Lagle.

applicability of the 1989 version of the DMA, and in support of their constitutionally-protected private property rights to the severed oil and gas mineral interests. Those various litigation matters include cases currently pending before this Court (*Walker v. Shondrick-Nau*, Supreme Court of Ohio Case No. 2014-0803, appeal accepted on September 3, 2014);⁶ the Seventh District Court of Appeals (*Tribett v. Shepherd*, 7th Dist. Case No. 13-BE-22, 2014-Ohio-4320); the Belmont County Court of Common Pleas (*Captina Creek Preserve, Ltd. v. Doudna*, Case No. 13 CV 0318, and *Miller v. Kinney*, Case No. 14-CV-178, stayed pending this Court's decision in this case and *Walker v. Shondrick-Nau*); the Guernsey County Court of Common Pleas (*The Weekender, Ltd. v. Greegor*, Case No. 13-OG-000224); and the Noble County Court of Common Pleas (*Riski v. Shondrick-Nau*, Case No. 2014-0066).

In each of these matters, *amici curiae* raised (and strongly supported) the position of the Respondents in this case—namely, that: (i) after June 30, 2006, the only applicable version of the DMA is the 2006 version; and (ii) the 1989 version of the DMA is not "self-executing" or "automatic."⁷ As a result, *amici curiae* opine solely on the first certified question before the Court.

STATEMENT OF THE FACTS

Amici curiae adopt the statement of facts set forth in the Opinion and Order from the Southern District of Ohio in this case, a copy of which was filed with this Court on May 16, 2014. For the convenience of the Court, however, *amici curiae* highlight the facts pertinent to this brief.

⁶ Three of the issues accepted by this Court in *Walker v. Shondrick-Nau*, Supreme Court of Ohio Case No. 2014-0803 (Propositions of Law No. I, II, and III), involve nearly identical issues to those being briefed here.

⁷ See Preliminary Memorandum of Respondents, at 7–10.

- This action involves a dispute over the ownership of the subsurface oil, gas, and other minerals underlying approximately 164.48 acres of real property located in Harrison County, Ohio (the "Property").
- On July 2, 1959, The North American Coal Corporation conveyed the Property by deed to Orelen H. Corban and Hans D. Corban, but reserved to itself, and its successors and assigns, the rights to the oil, gas, and other minerals underlying the Property (the "Severance Deed").
- On or about January 30, 1974, The North American Coal Corporation (as lessor) entered into an oil and gas lease with National Petroleum Corporation (as lessee) covering the Property, which was recorded on February 6, 1974 with the Harrison County Recorder in Volume 53, Page 667 (the "1974 Lease").
- There was no development of the oil and gas mineral rights underlying the Property by virtue of the 1974 Lease.
- On or about January 16, 1984, The North American Coal Corporation (as lessor) entered into an oil and gas lease with C.E. Beck (as lessor) covering the Property, which was subsequently recorded with the Harrison County Recorder (the "1984 Lease").
- There was no development of the oil and gas mineral rights underlying the Property by virtue of the 1984 Lease.
- On or about November 24, 2008, Bellaire Corporation (the successor-in-interest to The North American Coal Corporation) transferred its interest in the Property to Defendant North American Coal Royalty Company ("North American Royalty") by quit-claim deed recorded in Harrison County.
- On or about January 28, 2009, North American Royalty (as lessor) entered into an oil and gas lease with Mountaineer Natural Gas Company (as lessee) covering the Property, which was recorded in Harrison County (the "2009 Lease").
- In December 2010 a well was drilled pursuant to the 2009 Lease. The well was completed in March 2011 and commenced production in June 2011.
- At no time did the Petitioner (as the surface owner of the Property) attempt to utilize the 2006 version of the DMA.

ARGUMENT IN SUPPORT OF RESPONDENTS
REGARDING THE FIRST CERTIFIED QUESTION

This *amicus* brief focuses solely on the first question certified to this Court by the Southern District of Ohio:

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?

By way of background, the General Assembly enacted the original (and now superseded) version of the DMA in 1989. Although designed to provide a surface owner with the opportunity to acquire title to previously-severed mineral rights that remained "dormant" for a 20-year time period, the 1989 version of the DMA proved to be fatally flawed. Specifically, the 1989 version of the DMA: (i) failed to specify a mechanism for determining the applicable 20-year look-back period; and (ii) proved impractical and unworkable due to ambiguity regarding whether it provided for "automatic" abandonment of mineral interests without any due process protections being offered to the severed mineral interest owner(s). *See, e.g., Eisenbarth v. Reusser*, 7th Dist. Monroe No. 13 MO 10, 2014-Ohio-3792, ¶ 108 (DeGenaro, P.J., concurring in judgment only) (citing H.B. 288 Rep. Mark Wagoner, Sponsor Testimony before the Ohio House Public Utilities Committee).

As a result, the DMA was substantially rewritten in 2006 to require a surface owner to follow a multi-step procedure, replete with fundamental due process protections, in order to regain ownership of previously-severed mineral interests. As the Seventh District Court of Appeals noted in *Walker v. Noon*, however: "the Ohio Supreme Court has yet to address the issue of when [if ever] to apply the 1989 version of R.C. 5301.56 and when to apply the 2006 version." 7th Dist. Noble No. 13 NO 402, 2014-Ohio-1499, ¶ 35. The result has been that surface and mineral owners (such as *amici curiae*) are left with no choice but to litigate the issue

in Ohio's courts. The issue is now squarely before this Court. And, for the reasons set forth below, the 2006 version of the DMA is the only version to be applied after June 30, 2006 because the 1989 version of the DMA was not "self-executing."

A. The Answer to the First Certified Question Depends on Whether a Surface Owner Was Required to Take Legal Action to Establish Abandonment Under the 1989 Version of the DMA Prior to June 30, 2006.

While Petitioner asserts that the retroactive application of the 2006 version of the DMA to his claim would unconstitutionally destroy his vested rights, the Court need not even reach that question. Instead, the answer to the first certified question is conclusively established by a determination as to whether the Petitioner (and other surface owners) had to take legal action to establish abandonment under the 1989 version of the DMA prior to June 30, 2006.⁸

If the 1989 version of the DMA did not require legal implementation, and is deemed "self-executing," the rights to severed mineral interests vested in surface owners on a date prior to June 30, 2006.⁹ Once the merger of the surface and mineral estates occurs, there would be no use for, or application of, the 2006 version of the DMA because there would no longer a severed mineral interest to abandon.

On the other hand, if the 1989 version of the DMA is not "self-executing," then surface owners must have implemented its abandonment claim under the 1989 version of the DMA while it remained a valid law.¹⁰ In other words, to establish a mineral interest as "deemed

⁸ For purposes of this *amicus* brief, the date of June 30, 2006 shall refer to the effective date of the 2006 version of the DMA.

⁹ Of course, if the 1989 version of the DMA was "self-executing," it still operated to vest rights in the surface owner only in the absence of a savings event. R.C. 5301.56(B) (eff. March 22, 1989). Ascertaining *whether* a savings event occurred under the 1989 version, however, would merely constitute the *application* of the 1989 version of the DMA to a disputed claim.

¹⁰ Moreover, if it was determined, under Petitioner's construction of the law, that a savings event precluded vesting in a surface owner prior to June 30, 2006, but a period of 20 years of nonuse

abandoned and vested in the owner of the surface" under the 1989 version of the DMA, the surface owner must have taken some legal action to establish abandonment prior to June 30, 2006. If the surface owner took no such action prior to that date, then: (i) record title to the mineral interest remains—as before—with the mineral interest owner; and (ii) only the 2006 version of the DMA (the version of the statute in effect when the surface owner's claim is being made) can be used to obtain relief. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (explaining that a court should "apply the law in effect at the time it renders the decision,' . . . even though that law was enacted after the events that gave rise to the suit," quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)); *see also Criss v. Springfield Twp.*, 9th Dist. Summit Nos. 13262, 13271, 1989 Ohio App. LEXIS 2699, 25 (July 25, 1989).

As set forth below, this is the most sensible construction of the 1989 version of the DMA.

B. The 1989 Version of the DMA Is Not "Self-Executing."

Ascertaining the General Assembly's intent at the time of the enactment of the 1989 version of the DMA is the primary objective of any court interpreting its provisions. *See Henry v. Cent. Natl. Bank*, 16 Ohio St.2d 16, 242 N.E.2d 342 (1968), paragraph 2 of the syllabus (holding that "[t]he primary purpose of the judiciary in the interpretation or construction of statutes is to give effect to the intention of the General Assembly, as gathered from the provisions enacted, by the application of well settled rules of interpretation, the ultimate function being to ascertain the legislative will").

When a statute is ambiguous, however, the "court is charged with construing the language in a manner that reflects the intent of the General Assembly." *Clark v. Scarpelli*, 91

passed following that savings event, concluding *after* June 30, 2006, then only the 2006 version of the DMA applies. This would be true because no complete, 20-year period of dormancy or nonuse would have passed before the 2006 amendments took effect.

Ohio St.3d 271, 274, 744 N.E.2d 719 (2001) (defining ambiguous to mean "subject to more than one reasonable interpretation"). More specifically, "where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent." *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991), citing *Meeks v. Papadopoulos*, 62 Ohio St.2d 187, 190, 16 O.O.3d 212, 404 N.E.2d 159 (1980).

The "ambiguity of the 1989 version of the ODMA is readily apparent." *Eisenbarth*, 2014-Ohio-3792, at ¶ 65 (DeGenaro, P.J., concurring in judgment only). Practitioners in every DMA case, trial courts,¹¹ and appellate judges (in the same appellate district),¹² have advanced competing interpretations of the 1989 version of the DMA (including as to whether the Act is "self-executing," and what 20-year look-back period applies). Even the General Assembly itself recognized the inherent ambiguity in the statute during the legislative process surrounding the enactment of the 2006 version of the DMA: "Unfortunately, Ohio's Dormant Mineral Statute has seldom been used, in large measure because the statute did not clearly define when a mineral interest became abandoned and exactly how the process to reunite the mineral ownership with the surface ownership was to be accomplished. House Bill 288 *removes the ambiguity in the*

¹¹ Compare *Dahlgren v. Brown Farm Properties, LLC*, Carroll C.P. No. 13CVH27445 (Nov. 5, 2013), and *M&H Partnership v. Hines*, Harrison C.P. No. CVH-2012-0059 (Jan. 14, 2014), with *Wendt v. Dickerson*, Tuscarawas C.P. No. 2012 CV 02 0135 (Feb. 21, 2013), *Walker v. Noon*, Noble C.P. No. 212-0098 (Mar. 20, 2013), *Marty v. Dennis*, Monroe C.P. No. 2012-203 (Apr. 11, 2013), *Eisenbarth v. Reusser*, Monroe C.P. No. 2012-292 (June 6, 2013), *Shannon v. Householder*, Jefferson C.P. No. 12CV226 (July 17, 2013), *Tribett v. Shepherd*, Belmont C.P. No. 12-CV-180 (July 22, 2013), *Taylor v. Crosby*, Belmont C.P. No. 11 CV 472 (Sept. 16, 2013), *Hendershot v. Korner*, Belmont C.P. No. 12-CV-453 (Oct. 28, 2013), *Swartz v. Householder*, Jefferson C.P. No. 12CV328 (July 17, 2013), and *Blackstone v. Moore*, Monroe C.P. No. 2012-166 (Jan. 22, 2014).

¹² See *Eisenbarth v. Reusser*, 7th Dist. Monroe No. 13 MO 10, 2014-Ohio-3792, ¶¶ 65–72 (DeGenaro, P.J., concurring in judgment only) (strongly disagreeing with Judge Vukovich and Judge Donofrio regarding the applicability of the 1989 version of the DMA).

existing statute." (Emphasis added.) *Eisenbarth*, 2014-Ohio-3792, at ¶ 108 (DeGenaro, P.J., concurring in judgment only), quoting H.B. 288 Rep. Mark Wagoner, Sponsor Testimony before the Ohio House Public Utilities Committee.

As a result of the ambiguity in the language of the 1989 version of the DMA, this Court must go beyond the mere text of the statute, and focus on other means of determining what interpretation best effectuates the intent behind the 1989 version of the DMA. Specifically, R.C. 1.49 states that this Court, "in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; (B) The circumstances under which the statute was enacted; (C) The legislative history; (D) The common law or former statutory provisions, including laws upon the same or similar subjects; (E) The consequences of a particular construction; (F) The administrative construction of the statute."

As set forth below, taking into account all of the relevant factors leads to the inescapable conclusion that the 1989 version of the DMA was not intended to be "self-executing." Rather, the only rational construction of the statute is that it required a surface owner to take legal action under the 1989 version of the DMA while it remained in effect.

1. *Amici's* interpretation is most consistent with the express purpose of the DMA.

Amici's interpretation best—indeed uniquely—effectuates the General Assembly's stated objectives of the DMA itself. The very purpose of the DMA is expressly set forth in R.C. 5301.55, which states, in relevant part: "Sections 5301.47 to 5301.56, *inclusive*, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in section 5301.48 of the Revised Code." (Emphasis added.) In essence, this provision uniquely expresses the "object[s] sought to be attained" by the DMA—namely, to (i) simplify and

facilitate real property transactions, and (ii) allow persons to rely on the record chain of title. According to the General Assembly itself, *any* interpretation of the 1989 version of the DMA—even if it has to be "liberally construed" to resolve ambiguity—must "effect th[is] legislative purpose[.]" *See* R.C. 5301.55.

The Petitioner's theory of "self-executing" divestiture, however, severely frustrates these objectives. In fact, interpreting the 1989 version of the DMA to divest mineral interest owners of their constitutionally protected private property rights without any action or legal notice directly contravenes the legislative intent because it (i) complicates transactions involving the oil and gas mineral rights, and (ii) undercuts the public's ability to rely on the record chain of title.

The first problem with the Petitioner's interpretation would be that no one could actually ascertain from the record chain of title whether the statute actually operated in a self-executing manner to abandon mineral rights. The reason is simple—a number of the "savings events" set forth in R.C. 5301.56 can only be determined by looking outside of the record chain of title. For example:

- Establishing that there has not been "actual production or withdrawal of [the] minerals" and that a "drilling or mining permit" was not "issued to the holder" of the severed mineral interest would require detailed research at the Ohio Department of Natural Resources, Division of Oil and Gas Resources Management ("ODNR"), testimony from the appropriate person at ODNR and/or an actual site walk of the property in question. *See* R.C. 5301.56(c)(ii) (eff. March 22, 1989).
- Proving that the mineral rights have not been "used in underground gas storage" would require detailed discussions with the relevant natural gas distribution company, ODNR, the Public Utilities Commission of Ohio, and/or the Federal Energy Regulatory Commission, as well as testimony from the appropriate person(s). *See* R.C. 5301.56(c)(iii) (eff. March 22, 1989).

This very problem was noted by the National Conference of Commissioners on Uniform State Laws in the prefatory note to its Uniform Dormant Mineral Interests Act (the "UDMIA"), which the 1989 version of the DMA was modeled in part on. The UDMIA specifically noted certain

downsides to "nonuse" statutory schemes (as employed in the 1989 version of the DMA), and emphasized "recording" as a "key element" of any dormant mineral act. Specifically, the UDMIA stated:

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. . . .

The nonuse scheme has advantages and disadvantages. . . . 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.* . . .

(Emphasis added.) Uniform Dormant Mineral Interests Act, Prefatory Note 2–3 (1986) (a copy of the UDMIA is attached hereto as Appendix A-1). As a result, the "self-executing" interpretation of the 1989 version of the DMA directly contradicts the essential objective of the DMA, allowing persons to rely on record chain of title. *See* R.C. 5301.55.

The second problem of interpreting the 1989 version of the DMA as "self-executing" would be that hundreds, if not thousands, of severed mineral interests would be "vested" in surface owners as of March 22, 1992, without anything—not one document—in the public record establishing such abandonment. Abstractors, title examiners, and title attorneys are appropriately taught to rely on the documents in the courthouse in the record chain of title. But under the Petitioner's theory of divestiture, which requires no legal action or implementation, the record chain of title is rendered all but meaningless. This interpretation of the 1989 version of the DMA cannot prevail because it directly contradicts both of the DMA's express objectives. *See* R.C. 5301.55.

Finally, under the "self-executing" theory of abandonment, numerous active oil and gas leases with severed mineral rights owners across the state (as well as the extraction operations conducted under those leases) would be vulnerable to challenges brought under the 1989 version of the DMA. If allowed to proceed, surface owners in such lawsuits could continue to assert that

at some unknown date in the past, the severed mineral interests merged with the surface estate. An energy company embarking on a complex and expensive development operation could never definitively ascertain whether it had leased with the true mineral holder. This constant, unending threat would place (and has placed) a permanent cloud over the productive development of properly-recorded severed mineral interests. This is not the outcome desired by the Ohio General Assembly—indeed, to the contrary, the General Assembly expressly stated that the 1989 version of the DMA should be "liberally construed" to (i) simplify and facilitate real property transactions, and (ii) allow persons to rely on record chain of title. *See* R.C. 5301.55.

2. *Amici's* interpretation is consistent with the legislative history behind the DMA.

The legislative history surrounding the 1989 version of the DMA (although sparse) also supports *amici's* interpretation. Indeed, neither the text of the 1989 version of the DMA (as introduced or enacted) nor the legislative service commission's analyses of the 1989 version of the DMA indicate that the 1989 version of the DMA was intended to be "self-executing" or "automatic."¹³

Further, Judge DeGenaro recently opined: "By virtue of the 2006 ODMA, we have the rare benefit of the General Assembly's statement of its intent with respect to the ambiguous language of the 1989 ODMA. That alone dictates that the 1989 version is no longer controlling; to decide otherwise makes the enactment of the 2006 ODMA meaningless." *Eisenbarth*, 2014-Ohio-3792, at ¶ 65 (DeGenaro, P.J., concurring in judgment only). Elaborating on this sentiment, Judge DeGenaro even more recently noted:

¹³ *See Analysis of Sub. S.B. 223 (As Reported by H. Civil & Commercial Law)*, 1989; *Analysis of Sub. S.B. 223 (As Reported by S. Judiciary)*, 1989. Copies of these analyses are attached hereto as Appendices A-21 and A-25, respectively.

The timing of the enactment of both versions of the ODMA has presented Ohio's judiciary with a rare opportunity; virtually every case involving the statute has been filed *after* the amendments to the ambiguous statute have been enacted. Instead of engaging in the typical exercise of divining legislative intent by reading the proverbial tea leaves, the General Assembly has provided us with a billboard of the meaning of these terms by virtue of sponsor testimony and Legislative Services' analysis of the 2006 ODMA, let alone the express statutory language of R.C. 5301.56 the General Assembly enacted.

Tribett v. Shepherd, 7th Dist. Case No. 13-BE-22, 2014-Ohio-4320, ¶ 129 (DeGenaro, P.J., concurring in judgment only).

As a result, the legislative history of the 1989 version of the DMA supports *amici's* interpretation.¹⁴

3. *Amici's* interpretation is the only one that is consistent with Ohio's common law, including rules governing the interpretation of forfeiture statutes.

"An individual's vested right—created by common law or statute—has been generally defined by the Ohio Supreme Court as being in essence a property right, which is to be recognized and protected by the state from arbitrary deprivation." *Eisenbarth*, 2014-Ohio-3792, at ¶ 78 (DeGenaro, P.J., concurring in judgment only). *See also State ex rel. Jordan v. Indus. Comm.*, 120 Ohio St.3d 412, 413–414, 900 N.E.2d 150 (2008) (defining a vested right as "one that 'so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent,'" quoting *Harden v. Ohio Atty. Gen.*, 101 Ohio St. 3d 137, 139, 2004-Ohio-382, 802 N.E.2d 1112, ¶ 9). In the context of the DMA, a "fee simple interest—which includes severed mineral rights—under common law 'cannot be extinguished or abandoned by nonuse, and it is not necessary to rerecord or to maintain current property records

¹⁴ It is also worth noting that Presiding Judge DeGenaro recently opined: "By virtue of the 2006 ODMA, we have the rare benefit of the General Assembly's statement of its intent with respect to the ambiguous language of the 1989 ODMA. That alone dictates that the 1989 version is no longer controlling; to decide otherwise makes the enactment of the 2006 ODMA meaningless." *Eisenbarth*, 2014-Ohio-3792, at ¶ 65 (DeGenaro, P.J., concurring in judgment only).

in order to preserve an ownership interest in minerals." *Eisenbarth*, 2014-Ohio-3792, at ¶ 78 (DeGenaro, P.J., concurring in judgment only). Yet, interpreting the 1989 version of the DMA to be "self-executing" unreasonably and arbitrarily divests severed mineral interest owners of their own vest common law property rights. *See, e.g., Eisenbarth*, 2014-Ohio-3792, at ¶ 87 (DeGenaro, P.J., concurring in judgment only) (noting "[t]he interpretation of the 1989 ODMA [as 'self-executing'] in *Walker* and *Swartz* and adopted by the majority has resulted in a retroactive, substantive deprivation of the [severed mineral owners'] common law vested interest in the severed mineral rights").

Compounding matters, the Petitioner's interpretation of the 1989 version of the DMA turns on its head the longstanding principle that courts should "favor individual property rights when interpreting forfeiture statutes." *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 605 N.E.2d 368 (1992). There is no doubt that the DMA is a forfeiture statute.

The word "forfeiture" is defined in *Black's Law Dictionary* 722 (9th Ed. 2009) as follows: "1. The divestiture of property without compensation. 2. The loss of a right, privilege or property because of a crime, breach of obligation, or neglect of duty." *See also Ohio Transport, Inc. v. Pub. Utilities Comm.*, 164 Ohio St. 98, 106, 128 N.E.2d 22 (1955) (noting that a "forfeiture has been defined as a divestiture of property without compensation in consequence of some default or act forbidden by law"). Under the Petitioner's "self-executing" theory of abandonment, the 1989 version of the DMA results in both the "divestiture of property without compensation," and the loss of a vested "right" to a private "property" interest based on the alleged "neglect of duty" of the severed mineral owner.

As a forfeiture statute, the DMA is thus subject to this Court's holdings that:

- "Forfeitures . . . are not favored in law or equity and statutory provisions therefor must be strictly construed." *State ex rel. Lukens v. Indus. Comm. of Ohio*, 143 Ohio St. 609, 611, 56 N.E.2d 216 (1944); and
- "*Whenever possible*, such statutes must be construed to avoid a forfeiture of property," (Emphasis added.) *State v. Lilliock*, 70 Ohio St.2d 23, 26, 434 N.E.2d 723 (1982), *superseded on other grounds*, R.C. 2933.41(C).

In light of the inherent ambiguity in the 1989 version of the DMA, and its operation as a forfeiture statute,¹⁵ the admonition to "*whenever possible*" find a construction that avoids a forfeiture of rights requires adoption of *amici's* interpretation. Even if implying the existence of a limited procedural obligation on surface owners were not the interpretation most consistent with the statutory text, which it is, the mere fact that it is *possible* to construe its provisions that way requires this Court to do so.

4. Interpreting the 1989 version of the DMA as "self-executing" would have negative—and far-reaching—consequences.

a. Interpreting the 1989 version of the DMA to be "self-executing" or "automatic" violates the Ohio Constitution.

The critical question here is whether the surface owners' proposed interpretation of the 1989 version of the DMA violates the Ohio Constitution. This question has not been addressed by any Ohio court and is an issue of first impression for this Court.

Surface owners (such as those filing on behalf of, or in support of, the Petitioner), and Ohio trial courts,¹⁶ however, continue to place sole and total reliance on the United States

¹⁵ See, e.g., *Eisenbarth*, 2014-Ohio-3792, at ¶ 82 (DeGenaro, P.J., concurring in judgment only) ("Because the 1989 ODMA did not require the holder's consent or notice, the [severed mineral interest owners'] vested interest was taken arbitrarily and operated as a forfeiture, an especially harsh result considering the 1989 ODMA is being applied in a case filed after that version is no longer in effect . . .").

¹⁶ See e.g., *Tribett v. Shepherd*, Belmont C.P. No. 12-CV-180 (July 22, 2013) (concluding that the 1989 version of the statute was constitutional based on the United States Supreme Court's decision in *Texaco v. Short*); *Taylor v. Crosby*, Belmont C.P. No. 11 CV 472 (Sept. 16, 2013) (same).

Supreme Court's decision in *Texaco v. Short*, 454 U.S. 516 (1981).¹⁷ The *Texaco* Court, however, did not analyze any state constitutional claims. Instead, the United States Supreme Court upheld the constitutionality of Indiana's dormant mineral statute under the United States Constitution, specifically due process, equal protection and takings claims under the Fourteenth Amendment. Thus, the constitutional analysis under *Texaco* is not relevant in determining the constitutionality of the 1989 version of the DMA under the Ohio Constitution.

As a result, this Court must answer the simple and straightforward question: Does an interpretation of the 1989 version of the DMA as "self-executing" violate the Ohio Constitution? The answer is yes, it violates the Ohio Constitution's prohibition on retroactive legislation in Article II, Section 28.

As this Court long ago explained:

Retroactive laws and retrospective application of laws have received the near universal distrust of civilizations. English common law, as expressed and commented upon by Bracton, Coke, Bacon and Blackstone, has fully articulated the disdain of retroactive laws. The laws of all the states and the federal government have reflected this same attitude.

The possibility of the unjustness of retroactive legislation led to the development of two rules: one of statutory construction, and the other of constitutional limitation. The rule of statutory construction operated to set the ban against retroactivity upon laws affecting prior acts, events or cases. However, this principle was not applied to ban all legislation having retrospective effect. General laws of Parliament and of the King were, under this rule of construction, considered to have only prospective effect unless the Act expressly stated that it was to be applied retrospectively.

"...

The second rule, that of constitutional limitation, was developed first in this country and was based upon the same principle of justice underlying

¹⁷ It should also be noted that the *Texaco* decision was rendered by a split court (a 5-4 decision) nearly 30 years ago when the country (in particular Ohio and the greater Appalachia region) was not in the middle of an oil and gas boom.

the rule of statutory construction. *This principle of justice was expanded logically from the rule of statutory construction, to "include a prohibition against laws which commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws."* This second rule assumed constitutional proportions at an early state in American jurisprudence.

By its Constitution of 1851, Ohio has quite clearly adopted the above prohibition against retroactive legislation. Section 28, Article II states that: "The general assembly shall have no power to pass *retroactive laws*, or laws impairing the obligation of contracts * * *." (Emphasis added.) This was a much stronger prohibition than the more narrowly constructed provision in Ohio's Constitution of 1802. Accordingly, it must be concluded that Ohio has adopted both of the foregoing safeguards against retrospective legislation.

(Emphasis added; citations and footnote omitted.) *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 104–105, 522 N.E.2d 489 (1988).

In order for a retroactive law to be deemed unconstitutional, a court must first "determine whether the General Assembly expressly intended the statute to apply retroactively." *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28 (2000). In the context of the 1989 version of the DMA, the General Assembly *expressly intended* the 1989 version of the DMA to apply retroactively. By its very terms, the 1989 version of the Act examines a 20-year time period prior to the enactment of the statute, with the potential effect of deeming abandoned severed mineral rights that were created and vested long before the enactment of that statute.

Undoubtedly, the Petitioner and his supporting *amici* will contend that the 1989 version of the DMA operated prospectively—primarily because there is no language in the text of the 1989 version of the DMA declaring it to operate retroactively. Yet, this ignores the longstanding recognition of this Court that "a statute that applies prospectively may nonetheless implicate the Retroactivity Clause." *Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St.3d 103, 109, 2013-Ohio-4068, 998 N.E.2d 419, ¶ 24. As this Court has recognized, "the constitutional limitation

against retroactive laws "include[s] a prohibition against laws which commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws." *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745, ¶ 14.¹⁸ As a result, no matter how one looks at it, the 1989 version of the DMA operates retroactively.

Because the General Assembly did intend the 1989 version of the DMA to operate retroactively, then the court must determine "whether the statute is [1] substantive, rendering it *unconstitutionally* retroactive" or merely [2] "remedial and curative" and therefore comports with the Ohio Constitution, even if it applies retroactively. *Id.* A statute is substantive—and unconstitutionally retroactive—where it "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities to a past transaction." *Bd. of Edn. of the Cincinnati School Dist. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St. 3d 308, 316, 744 N.E.2d 751 (2000). Thus, "a statute that retroactively creates a new right is unconstitutionally retroactive if, and only if, it also impairs a vested right or creates some new obligation or burden as well." *Id.*

The 1989 version of the DMA is undoubtedly *substantive* because it "impairs vested rights . . . or imposes new or additional burdens, duties, obligations, or liabilities to a past transaction." *Hamilton Cty. Bd. of Revision*, 91 Ohio St. 3d at 316, 744 N.E.2d 751. In fact, interpreting the 1989 version of the DMA as "self-executing" or "automatic" does both: (i) it impairs (and takes away and gives to another) the vested rights of severed mineral interest owners across the State of Ohio; and (ii) it imposes new burdens, duties and obligations on the severed

¹⁸ Interestingly, the Petitioner cites to and acknowledges this language on page 18 of its brief.

mineral interest owner (e.g., requiring the filing of a preservation affidavit during the three-year grace period).

As a result, the Petitioner's interpretation of the 1989 version of the DMA violates the Ohio Constitution, specifically Article II, Section 28.

b. Interpreting the 1989 version of the DMA to be "self-executing" fails to give effect to the entirety of R.C. 5301.56(B)(1).

The 1989 version of the DMA provided that a severed mineral interest "shall be deemed abandoned and vest in the owner of the surface, if none of [eight (8) statutory "savings events"] applies . . . [w]ithin the preceding twenty years" R.C. 5301.56(B)(1), (B)(1)(c) (eff. March 22, 1989). This language gives rise to two interrelated questions, the answer to which support *amici's* interpretation

The first question is: Who determines whether the statutory "savings events" apply? For Petitioner's interpretation to prevail, this Court would have to conclude that the General Assembly intended surface owners to self-servingly determine that the statutory savings events do not apply, and "deem" the mineral rights to have "vested" (in himself). But, this makes little sense. The only entity qualified to make these determinations is a court of law. A surface owner cannot cause the mineral rights to vest in himself simply by determining, without a legal judgment, that none of those eight savings events occurred. Instead, the text of the 1989 version of the DMA suggests that the surface owner needed to take formal legal action while the 1989 version of the DMA remained in effect.

This conclusion bears itself out in answering the second, but interrelated question: Preceding what? Unlike the 2006 version of the DMA, which specifies that the 20-year look-back period begins on the "date on which notice is served or published," R.C. 5301.56(B)(3), the 1989 version did not specify the starting point for its 20-year look-back period. Instead, as noted

above, the 1989 version of the DMA provided that a severed mineral interest "shall be deemed abandoned and vest in the owner of the surface" if certain statutory savings events did not occur "[w]ithin the preceding twenty years." R.C. 5301.56(B)(1) (eff. March 22, 1989). The statute, however, failed to answer the fundamental question: Preceding what?

As a result of this ambiguity, three different and competing answers emerged. In fact, each answer was contemplated in a 2006 report issued by the Ohio State Bar Association: "the original statute [the 1989 version of the DMA] 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 [i] 20 years preceding enactment of the statute, [ii] 20 years preceding commencement on an action to obtain the minerals or [iii] any 20-year period in the chain of title [i.e., the 'rolling' look-back]." See Ohio State Bar Association, *Report of the Natural Resources Committee*, <https://www.ohiobar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx> (accessed September 30, 2014). As set forth below, the best and most textually sound interpretation is that the look-back period is calculated from the date the surface owner takes legal action to declare the mineral interest vested in the surface owner.

The Petitioner proposes the least plausible answer to the question (the third in the 2006 OSBA report)—preceding any 20-year period in the chain of title. Better known as the "rolling" 20-year look-back theory, this interpretation allows a surface owner to "pick any date that exists between March 22, 1989 and June 30, 2006 and then look back 20 years from that date." *Eisenbarth*, 2014-Ohio-3792, at ¶ 39. In essence, with the benefit of hindsight, the surface owner gets to choose whatever 20-year period is most beneficial to the surface owner. The Seventh District Court of Appeals, however, recently rejected the use of the rolling look-back period as being arbitrary and unreasonable. *Eisenbarth*, 2014-Ohio-3792, at ¶¶ 33–51 ; see *id.* at

¶ 123 (DeGenaro, P.J., concurring in judgment only) (noting that the "arbitrary selection of some random date to put a savings event outside the 20-year look back period is so violative of due process it does not warrant further discussion").

Just as importantly, this interpretation uniquely reads the word "preceding" completely out of the text. To wit, the 2006 OSBA report noted that: "Questions arose as to whether that language meant [i] 20 years *preceding* enactment of the statute, [ii] 20 years *preceding* commencement on an action to obtain the minerals or [iii] *any 20-year period in the chain of title.*" (Emphasis added.) Ohio State Bar Association, *Report of the Natural Resources Committee*, <https://www.ohiobar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx> (accessed September 30, 2014). For these reasons, the "rolling" look back period must be rejected.

The first answer above centers on the effective date of the 1989 version of the DMA (or March 22, 1989), and proposes a fixed 20-year look-back period running from March 22, 1969 through March 22, 1989. In essence, only those mineral interests which already were dormant for at least 20 years as of the effective date of the 1989 version of the DMA would be deemed abandoned and vested in the surface owner (assuming the mineral interest owners failed to take advantage of the three-year grace period).

While a fixed look-back period has the virtue of giving meaning to the term "preceding" (by tying it to the date of the enactment of the statute), it ignores the law's clear indication that it was not intended to apply just once as of 1989 (or, more accurately, in 1992, at the conclusion of the three-year grace period). As Petitioner himself notes, the 1989 law contemplated the possibility of successive 20-year periods of nonuse. *See* Petitioner's Brief, at 10 (citing R.C. 5301.56(D)(1) (eff. March 22, 1989) (allowing for "successive filings of claims to preserve

mineral interests . . . [indefinitely]""). Successive filings to preserve mineral interests would be superfluous if the statute only provided for abandonment once, as of March 22, 1989. For these reasons, the fixed 20-year look-back must be rejected.

The most reasonable answer among the three presented in the 2006 OSBA report (and the answer proposed by *amici*) focuses on the "20 years preceding commencement on an action to obtain the minerals" under the 1989 version of the DMA. This interpretation not only preserves the commonsense understanding of the term "preceding" (and the indisputably *backward*-looking operation of the 20-year look-back period), but gives effect to the entirety of the 1989 version of the DMA (e.g., the contemplation of successive 20-year periods of nonuse). See *Martin v. Ohio Dept. of Human Servs.*, 130 Ohio App.3d 512, 522, 720 N.E.2d 576 (2d Dist. 1998) (recognizing that "[g]enerally, a statute will be construed so as to give effect to all of its provisions"); see also R.C. 1.47(B) ("In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective.").

To be sure, *amici's* interpretation adds words to the statute. But, so do the other alternatives. And, as set forth in this brief, tying the start of the 20-year look-back period to the implementation of legal action under the 1989 version of the DMA does the least violence to the words and statutory scheme that the General Assembly actually adopted. In fact, *amici's* interpretation even entitles Petitioner and other surface owners to the "arbitrary selection of some random date" and a rolling look-back period, but simply obligated them to memorialize that date publicly prior to June 30, 2006.

For these reasons, only *amici's* interpretation gives effect to the entirety of the 1989 version of the DMA.

c. Interpreting the 1989 version of the DMA to be "self-executing" leads to inequitable results.

Reading the 1989 version of the DMA to require the surface owner to take some formal legal action in order to effectuate the vesting of the mineral rights produces the most equitable results—in this case and the many like it.

As an initial matter, interpreting the 1989 version of the DMA as "self-executing" allows surface owners to inequitably sit on their rights indefinitely, which runs afoul of the equitable principles underlying the doctrine of laches. See *Eisenbarth*, 2014-Ohio-3792, at ¶ 90 (DeGenaro, P.J., concurring in judgment only). "Stated simply, laches is an equitable doctrine that bars a party from asserting an action when there is an unexcused delay that prejudices the opposing party." *Gordon v. Reid*, 2d Dist. Montgomery No. 25507, 2013-Ohio-3649, ¶ 15 (citing *Baker v. Chrysler*, 179 Ohio App.3d 351, 361, 901 N.E.2d 875 (2d Dist. 1998)). In this case, the Petitioner (like most surface owners) did not assert or attempt to enforce any abandonment claim during the 17 years the 1989 version of the DMA remained in effect, or at any time prior to the filing of their lawsuit in 2013. Such total inaction on the part of the surface owner (and its predecessors-in-interest) cannot and should not divest the Respondents of their properly recorded, and long-vested, property rights in the oil and gas mineral estate.

Making matters worse, the Respondents in this case (like most severed mineral interest owners) took steps necessary to both develop the severed mineral interests and/or preserve such interests under the 2006 (and current) version of the DMA. As Ohio courts recognize, one of the clearest forms of "material prejudice" that "necessitate[s] the application of laches" is "a change in the defendant's position that would not have occurred had the plaintiff not delayed in asserting her rights." *State ex rel. Donovan v. Zajac*, 125 Ohio App.3d 245, 250, 708 N.E.2d 254 (11th Dist. 1998).

Here, the Respondents transferred their interest in the severed oil and gas mineral rights to an entity specifically set up for the purpose of mineral development (specifically, to Respondent North American Royalty), and subsequently entered into the 2009 Lease. Now, those leased mineral interests are actually being developed by the other named Respondents.

Similarly, all of the *amici curiae* took similar steps to prepare for the current shale boom, including: (i) filing preservation claims/affidavits under R.C. 5301.56(C) and/or (H);¹⁹ (ii) entering into oil and gas leases;²⁰ (iii) completing appropriate title curative work in the probate courts;²¹ and/or (iv) establishing a separate tax parcel number for the severed oil and gas mineral estate with the county auditor's office.²² All of these affirmative actions by the severed mineral interest owners constitute "a change in position" that would not have occurred "but for" the surface owners' lengthy and unreasonable delay in asserting a claim under the 1989 version of the DMA.

As set forth above, the factors set forth in R.C. 1.49 lead to the inescapable conclusion that the 1989 version of the DMA is *not* "self-executing."

CONCLUSION

In the face of an ambiguous statute, this Court must choose the best interpretation; it should choose *amici's* interpretation. Only in doing so, and rejecting the interpretation of the

¹⁹ See *Walker v. Shondrick-Nau*, Sup. Ct. Ohio No. 2014-0803; *The Weekender, Ltd. v. Greegor*, Guernsey C.P. No. 13-OG-000224; *Miller v. Kinney*, Belmont C.P. No. 14-CV-178; *Captina Creek Preserve, Ltd. v. Doudna*, Belmont C.P. No. 13 CV 0318; *Tribett v. Shepherd*, 7th Dist. Belmont No. 13-BE-22; *Riski v. Shondrick-Nau*, Sup. Ct. Ohio No. 2014-0066.

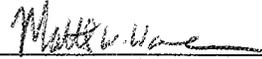
²⁰ See *Walker v. Shondrick-Nau*, Sup. Ct. Ohio No. 2014-0803; *The Weekender, Ltd. v. Greegor*, Guernsey C.P. No. 13-OG-000224; *Miller v. Kinney*, Belmont C.P. No. 14-CV-178; *Captina Creek Preserve, Ltd. v. Doudna*, Belmont C.P. No. 13 CV 0318.

²¹ See *Miller v. Kinney*, Belmont C.P. No. 14-CV-178.

²² See *id.*

1989 version of the DMA as self-executing, will this Court achieve the overarching goal of reasonably determining the General Assembly's intent.

Respectfully submitted,



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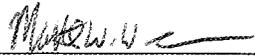
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APPENDIX

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 1-3, 1986

With Prefatory Note and Comments

UNIFORM DORMANT MINERAL INTERESTS ACT

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

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

Draft Statute

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

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

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

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

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

UNIFORM DORMANT MINERAL INTERESTS ACT

SECTION 1. STATEMENT OF POLICY.

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

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

COMMENT

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

SECTION 2. DEFINITIONS.

As used in this (Act):

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

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

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

COMMENT

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

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

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

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

SECTION 3. EXCLUSIONS.

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

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

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

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

COMMENT

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

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

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

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

SECTION 4. TERMINATION OF DORMANT MINERAL INTEREST.

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

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

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

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

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

(3) Recordation of an instrument that creates, reserves, or otherwise evidences a claim to or the continued existence of the mineral interest, including an instrument that transfers, leases, or divides the interest. Recordation of an instrument constitutes use of (1) any recorded interest owned by any person in any mineral that is the subject of the instrument.

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

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

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

COMMENT

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

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

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

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

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

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

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

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

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

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

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

SECTION 5. PRESERVATION OF MINERAL INTEREST BY NOTICE.

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

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

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

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

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

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

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

COMMENT

This section is broadly drawn to permit a mineral owner to preserve not only his or her own interest but also any or all interests. For example, the mineral owner may share with one or more other persons. This section permits the mineral owner to preserve the interests of all of the co-owners by specifying the interests to be preserved. Likewise, the mineral interest being preserved may be subject to an overriding royalty or sublease or executive lease. In this situation, the mineral owner may elect also to preserve any or all of the interests subject to it, by specifying the interests in the notice of intent to preserve. The mineral owner may also elect to preserve the interest as to some or all of the minerals included in the interest.

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

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

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

SECTION 6. LATE RECORDING BY MINERAL OWNER.

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

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

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

COMMENT

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

SECTION 7. EFFECT OF TERMINATION.

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

COMMENT

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

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

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

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

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

SECTION 3. SAVINGS AND TRANSITIONAL PROVISIONS.

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

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

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

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

COMMENT

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

SECTION 6. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

SECTION 10. SHORT TITLE.

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

SECTION 11. SEVERABILITY CLAUSE.

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

SECTION 12. EFFECTIVE DATE.

This [Act] takes effect _____.

SECTION 13. REPEALS.

The following acts and parts of acts are repealed:

- (1) _____
- (2) _____
- (3) _____

Sub. S.B. 223
(As Reported by H. Civil & Commercial Law)

Sens. Cupp, Schafrath, Nettle, Drake, Burch

Provides that, in the absence of certain specified occurrences within the preceding 20-year period, such as the filing of a written notice to preserve a claim of a subsurface mineral interest, any such interest that is not in coal or not of a governmental entity will be deemed abandoned and its title vested in the surface owner.

CONTENT AND OPERATION

Existing law

When a person buys an interest in land, the Marketable Title Act (secs. 5301.47 to 5301.56) generally makes it unnecessary to do a title search back further than the date that is known as the "effective date of the root of title" (see below). This is because the Act generally cuts off interests existing prior to the effective date of the root of title, unless they have been preserved by the recording of a preserving notice as provided in the Act.

The "root of title" is the conveyance or other title transaction, in the seller's chain of title, that was most recently recorded as of a date 40 years before the date on which marketability is being determined. The "effective date" of the root of title is the date on which the conveyance or transaction was recorded. (Sec. 5301.47(E).)

Current section 5301.56 provides that, regardless of when the 40-year period expires, for the purpose of recording a preserving notice of a right, title, estate, or interest in (subsurface) minerals, "with the exception of coal, such period shall not be considered to expire until after December 31, 1976." The bill would repeal this dated provision and substitute the provisions described below for determining when a mineral interest (other than coal or of a governmental entity) has become dormant and when the interest vests in the owner of the surface land.

Changes proposed by the bill

* This analysis was prepared before the report of the House Civil and Commercial Law Committee appeared in the House Journal.

"Deemed" abandonment. The bill would not change existing law concerning marketable title to, or the filing of preserving notices for, an interest in surface lands. However, under the bill, any mineral interest held (see COMMENT 1) by any person other than the owner of the surface lands would be deemed abandoned and would vest in the owner of the surface lands if none of the following applies (sec. 5301.56(B)(1)):

(1) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal (division (B)(1)(a));

(2) The mineral interest is held by the United States, Ohio, or any of their political subdivisions, body politics, or agencies (division (B)(1)(b));

(3) Within the preceding 20 years, one or more of the following has occurred (division (B)(1)(c)):

--The mineral interest has been the subject of a title transaction (see COMMENT 2) filed or recorded in the office of the recorder of the county in which the lands are located;

--There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations in which the mineral interest is participating. In the latter situation, the instrument or order creating or providing for the pooling or unitization of oil or gas interests would have to have been filed or recorded in the office of the recorder of the county in which the lands that are subject to the pooling or unitization are located. (A related cross-reference change would be made in section 317.08(A).)

--The mineral interest has been used in underground gas storage operations by the holder;

--A drilling or mining permit (see COMMENT 3) has been issued to the holder, and an affidavit stating the name of the permit holder, the type of permit and its number, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with law (sec. 5301.252), in the office of the recorder of the county in which the lands are located;

--A claim to preserve the interest has been filed in compliance with the bill (see below);

--In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the auditor's tax list and the treasurer's duplicate tax list in the county in which the lands are located.

A mineral interest would not be "deemed abandoned" because none of the listed circumstances applies until three years from the bill's effective date (sec. 5301.56(B)(2)).

Preserving notice. A claim to preserve a mineral interest from being deemed abandoned could be filed by its holder with the recorder of the county in which the particular lands are located. The claim would consist of a notice that states the nature of the mineral interest and any recording information upon which the claim is based, otherwise complies with section 5301.52 (content of a preserving notice), and states that the holder does not intend to abandon, but instead to preserve, his rights in the mineral interest (sec. 5301.56(C)(1)). An exception to the latter "notice" requirements would be that any holder of an interest for use in underground gas storage operations could preserve his interest, and those of any lessor, by a single claim that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. Such a single claim would be prima-facie evidence of the use of each separate interest in underground gas storage operations. (Sec. 5301.56(C)(3).)

A claim would have to be filed and recorded as provided in sections 317.18 to 317.201 (indexes maintained by a county recorder) and in section 5301.52 (preserving notices) (secs. 317.18, 317.20(E), 317.201, and 5301.56(C)(1)). A claim that complies with the above-described notice content, filing, and recording requirements would preserve the rights of all holders of a mineral interest in the "same lands" (sec. 5301.56(C)(2)).

A mineral interest could be preserved indefinitely from deemed abandonment by the occurrence of any of the previously listed events within the preceding 20-year period. Successive filings of claims to preserve a mineral interest would be specified as one example of those events. (Sec. 5301.56(B)(1)(c) and (D)(1).)

Miscellaneous provision. The filing of a claim to preserve a mineral interest from being deemed abandoned would not affect the right of a lessor of an oil or gas lease to obtain a forfeiture pursuant to section 5301.332 (the basis and procedure for forfeiture and cancellation of natural gas and oil land leases) (sec. 5301.56(D)(2)).

COMMENT

1. Proposed section 5301.56(A)(1) would define a holder as the record holder of a mineral interest, and any person who derives his rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

2. A title transaction, as defined in existing section 5301.47(F), means any transaction affecting title to any interest in land, including title by will or descent, by tax deed, by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, by decree of any court, or by warranty deed, quit claim deed, or mortgage.

3. A drilling or mining permit would be defined as a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code (Oil and Gas, Coal Surface Mining, and Other Surface Mining, respectively) to the holder to drill an oil or gas well or to mine other minerals (sec. 5301.56(A)(2)).

ACTION	DATE	JOURNAL ENTRY
Introduced	05-28-87	p. 404
Reported, S. Judiciary	02-16-88	p. 1389
Passed Senate (32-0)	02-23-88	p. 1407
Reported, H. Civil & Commercial Law	--	--

Sub S.B. 223
(As Reported by S. Judiciary)

Sens. Cupp, Schafrath, Nettle, Drake

Provides that, in the absence of certain specified occurrences within the preceding 20-year period, including failure to file a written notice of claim in subsurface minerals, a mineral estate (other than in coal) is considered abandoned and the title vests in the surface owner.

BACKGROUND

When a person buys an interest in land, the Marketable Title Act (sections 5301.47 to 5301.56 of the Revised Code) makes it unnecessary for the most part to do a title search back further than the date that is known as the effective date of the root of title. This is so because the Act generally cuts off interests existing prior to the effective date of the root of title, unless those interests have been preserved by the recording of a preserving notice as provided in the Act.

The "root of title" is the conveyance, in the seller's chain of title, that was most recently recorded as of the date 40 years before the date on which marketability is determined. The "effective date of the root of title" is the date on which was recorded the conveyance that is the root of title.

Current section 5301.56 provides that regardless of when the Marketable Title Act's 40-year period expires, for the purpose of recording a preserving notice of a claim in the right, title, estate or interest in and to subsurface minerals, with the exception of coal, such period shall not be considered to expire until after December 31, 1976. The bill would repeal this section because it no longer applies to conveyances of interests in minerals and would replace it with guidelines for determining when an interest in a mineral estate (other than coal) has become dormant and the interest would vest in the owner of the surface land.

CONTENT AND OPERATION

The bill would not change existing law concerning marketable title to or the filing of preserving notices for an interest in surface land. Under the bill, any mineral interest held (see COMMENT 1) by any person other than the owner of the surface land, would be deemed abandoned and would vest in the owner of the surface land if neither of the following applies (sec. 5301.56(B)):

(1) The mineral interest is one in coal, or mining or other rights pertinent to or exercisable in connection with the mining of coal;

(2) Within the preceding 20 years, one or more of the following has occurred:

(a) The mineral interest has been the subject of a title transaction (see COMMENT 2) which has been filed or recorded in the office of the county recorder of the county in which the land is located;

(b) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which such interest is subject, or, in the case of oil or gas, from lands pooled, utilized, or included in unit operations in which the interest is participating, provided that the instrument creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located;

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

(d) A drilling or mining permit (see COMMENT 3) has been issued to the holder, provided that an affidavit stating the name of the permit holder, the type of permit and its number, and a legal description of the land affected by the permit has been filed or recorded, in accordance with section 5301.252 (filing affidavits on facts relating to title), in the office of the county recorder of the county in which the land is located;

(e) A claim to preserve the interest has been filed in compliance with the provisions of the bill (see below);

(f) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the auditor's tax list and the treasurer's duplicate tax list in the county in which the land is located.

No mineral interest would be considered abandoned based on failure to comply with this provision prior to three years from the bill's effective date (sec. 5301.56(B)).

A claim to preserve a mineral interest from being deemed abandoned could be filed for record with the county recorder of the county in which the land is located. The claim would have to be filed in accordance with section 5301.52 (contents of notice), state the recording information, if any, upon which the claim is based, and state that the claimant does not intend to abandon but rather to preserve his rights in the mineral interest described. The properly filed claim would preserve the rights of all holders of a mineral interest in the same land. Any holder of an

interest for use in underground gas storage operations to preserve his interest, and those of any lessor, by a single claim, defining the boundaries of the storage field or zone and its formations, without describing each separate interest claimed. This claim also would establish prima-facie evidence of the use of such interest in underground gas storage operations. (Sec. 5301.56(C).)

A claim filed pursuant to the procedure described above also would have to be recorded as provided in sections 317.18 to 317.201 (governing indexes maintained by a county recorder) (see COMMENT 4) and 5301.52 (contents of notice claiming to preserve an interest in land) (sec. 5301.56(D)). A mineral interest could be preserved indefinitely from the bill's presumption of abandonment by the continuing occurrence of any of the events listed in the bill (the mineral is coal or the events listed occurred within the preceding 20 years). Indefinite preservation also could be accomplished by successive filings of claims to preserve a mineral interest by the method provided by the bill. (Sec. 5301.56(C).)

The filing of a claim to preserve a mineral interest from being deemed abandoned as provided by the bill would not affect the right of a lessor of an oil or gas lease to obtain a forfeiture pursuant to section 5301.332 (provides basis and procedure for forfeiture and cancellation of natural gas and oil land leases) (sec. 5301.56(E)). The bill specifies that its provisions would not apply to any mineral interest held by a governmental entity (sec. 5301.56(F)).

COMMENT

(1) Section 5301.56(A)(1) defines a holder as including not only the record holder of a mineral interest, but also any person who derives his rights from, or a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

(2) Title transaction, as defined in division (f) of section 5301.47, means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

(3) A drilling or mining permit is a permit issued under Chapter 1509., 1513., or 1514. (Oil and Gas, Coal Surface Mining, and Other Surface Mining, respectively) of the Revised Code to the holder to drill an oil or gas well or mine other minerals (sec. 5301.56(A)(2)).

(4) Sections 317.18 to 317.201 of the Revised Code set forth guidelines to be followed by a county recorder in maintaining the records of all real estate located in the county. For example, section 317.19 requires that a daily register of deeds and a daily register of mortgages be kept. The county recorder also is responsible for maintaining an alphabetical index, both direct and reverse, of the names of both parties to all instruments affecting county real estate (sec. 317.18). In addition, section 317.201 provides that every notice of preservation of claims filed in the recorder's office be logged in a record book called a "Notice Index." The bill adds references to section 5301.56 filings in sections 317.18, 317.20, and 317.201.

ACTION	DATE	JOURNAL ENTRY
Introduced	05-28-87	p. 404
Reported, S. Judiciary	02-16-88	p. 1389