

ORIGINAL

# In The Supreme Court of Ohio

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

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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF FACTS .....	4
ARGUMENT .....	6
PROPOSITION OF LAW NO. 1: THE 2006 VERSION OF THE ODMA APPLIES 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 .....	7
I.    Ohio Law Requires Application of the Law in Effect at the Time Mr. Corban Made His Claim .....	7
II.   The ODMA as Enacted in 1989 Was Not Self-Executing .....	11
A.   The Language of the ODMA is Not Self-Executing or Automatic .....	11
B.   The Legislative Purpose of the ODMA Requires Compliance With the 2006 Amendments .....	16
C.   Ohio’s Abhorrence of Forfeitures Precludes Applying the ODMA as Self-Executing .....	22
PROPOSITION OF LAW NO. 2: THE PAYMENT OF A DELAY RENTAL DURING THE PRIMARY TERM OF AN OIL AND GAS LEASE MAKES THE MINERAL INTEREST THE SUBJECT OF A TITLE TRANSACTION SUCH AS TO EFFECTUATE A “SAVING EVENT” UNDER THE ODMA .....	24
I.    Oil and Gas Leases Make the Mineral Interest the Subject of a Title Transaction .....	24
II.   The Termination of an Oil and Gas Lease Makes the Mineral Interest the Subject of a Title Transaction .....	26
III.  The Payment of a Delay Rental Makes the Mineral Interest the Continuing Subject of a Title Transaction .....	27
IV.  Petitioner’s and <i>Amici</i> Offer No Reason to Find That a Delay Rental Payment Does Not Make a Mineral Interest the Subject of a Title Transaction .....	30
CONCLUSION .....	32
Appendix .....	APPENDIX 001

**TABLE OF AUTHORITIES**

**Cases**

*Bank of Toledo v. Toledo*,  
1 Ohio St. 622 (1853) .....23

*Beer v. Griffith*,  
61 Ohio St.2d 119 (1980) .....30

*Bruesewitz v. Wyeth LLC*,  
131 S.Ct. 1068 (2011).....13

*Colonial Mortg. Service Co. v. Southard*,  
56 Ohio St.2d 347 (1978) .....12

*Combs v. Comm'r of Social Security*,  
459 F.3d 640 (6th Cir. 2006) .....8, 9, 10

*Eisenbarth v. Reusser*,  
2014-Ohio-3792 (7th Dist. 2014) ..... passim

*Energetics, LTD v. Whitmill*,  
497 N.W.2d 497 (Mich. 1993) .....32

*Farnsworth v. Burkhardt*,  
2014-Ohio-4184 (7th Dist. 2014).....10

*Harris v. Ohio Oil Co.*,  
57 Ohio St. 118 (1897) .....28

*Hupp v. Beck Energy Group*,  
2014-Ohio-4255 (7th Dist. 2014) .....28

*Kelly v. Ohio Oil Co.*,  
57 Ohio St. 317 (1897) .....17

*Kramer v. PAC Drilling Oil & Gas, L.L.C.*,  
197 Ohio App.3d 554, 2011-Ohio-6750.....28

*Landgraf v. USI Film Prods.*,  
511 U.S. 244 (1994) .....7, 8, 11

*Longbottom v. Mercy Hosp. Clermont*,  
137 Ohio St.3d 103 (2013) .....8

*M&F Supermarket, Inc. v. Owens*,  
997 F.Supp. 908 (S.D. Oh. 1997) .....8

*Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio), Inc.*,  
62 Ohio St.3d 387 (1992) .....17, 19, 22

*Norwood v. Horney*,  
110 Ohio St.3d 353 (2006) .....23

*Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*,  
65 Ohio St.3d 532 (1992) .....23

*P C K Properties, Inc. v. City of Cuyahoga Falls*,  
112 Ohio App. 492 (9th Dist. 1960).....29

<i>Smith v. The New York Central R.R. Co.</i> , 170 N.E. 637 (Ohio 1930) .....	10, 11
<i>Sogg v. Zurz</i> , 121 Ohio St. 3d 449 (2009) .....	23
<i>State ex. Rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.</i> , 967 N.E.2d 193 (Ohio 2012) .....	12, 14, 26
<i>State v. Ayala</i> , 1998 Ohio App. LEXIS 5416 (10th Dist. Nov. 10, 1998).....	8
<i>Swartz v. Householder</i> , 12 N.E.3d 1243 (7th Dist. 2014) .....	14, 15, 23
<i>Texaco, Inc. v. Short</i> , 454 U.S. 516 (1982) .....	13, 15, 21
<i>Tribett v. Shepherd</i> , 2014-Ohio-4320 (7th Dist. 2014) .....	10, 21, 22
<i>Walker v. Shondrick-Nau</i> , 2014 WL 1407942 (7th Dist. Apr. 3, 2014) .....	14, 15
<i>Wiseman v. Cambria Products Co.</i> , 61 Ohio App.3d 294 (4th Dist. 1989).....	17

**Statutes**

Ind. Code. § 32-5-11-1 (1976).....	15
Ohio Const., Art. I § 19 .....	23
Ohio Rev. Code Ann. § (3)(c) .....	32
Ohio Rev. Code Ann. § 3(f).....	32
Ohio Rev. Code Ann. § 5301.251.....	17
Ohio Rev. Code Ann. § 5301.47(F).....	25, 26, 29
Ohio Rev. Code Ann. § 5301.49(D) .....	16
Ohio Rev. Code Ann. § 5301.50.....	16
Ohio Rev. Code Ann. § 5301.55.....	21
Ohio Rev. Code Ann. § 5301.56(2).....	32
Ohio Rev. Code Ann. § 5301.56(B) (2006).....	6
Ohio Rev. Code Ann. § 5301.56(B)(1) (1989).....	6, 12
Ohio Rev. Code Ann. § 5301.56(B)(3)(a) .....	25, 27
Ohio Rev. Code Ann. § 5301.56(B)(3)(b).....	30
Ohio Rev. Code Ann. § 5301.56(E) .....	6

**Other Authorities**

<i>Black's Law Dictionary</i> (9th Ed. 2009).....	13
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G.C. Thornton, *Legislative Drafting* 83-84 (2d ed. 1979).....13

## INTRODUCTION

Over fifty years ago, the ownership of the mineral estate, including the right to explore for and produce oil and gas, was severed from the ownership of the surface of the property at issue in this case. Under the common law, that severance was permanent. In 1989 the Ohio Dormant Mineral Act (“ODMA”) was passed, although by its terms it could come into effect no earlier than 1992. Mr. Corban acquired the surface of the property in 1999, but did not acquire any record interest in the oil and gas under the surface. In 2006, the ODMA was amended to clarify the procedural steps needed to divest ownership from a mineral rights owner and its lessee and vest ownership in the surface owner. Mr. Corban took none of those steps, and instead brought suit in the federal district court in 2013 – seven years after the General Assembly clarified the ODMA procedures – contending that the ODMA had automatically vested ownership of the oil and gas in the surface owner in 1992, without any entry of such vesting on the public record.

The federal district court’s first certified question of law to this Court asks:

*Does the 2006 version or the 1989 version of the ODMA apply to claims asserted after 2006 alleging 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?*

The language of the ODMA, its legislative purpose, and Ohio’s abhorrence of forfeiture all compel the conclusion that Mr. Corban was required to comply with the procedures in effect at the time he made his claim before the mineral owner of record, North American Coal Royalty Company (“North American”) and its oil and gas lessees Chesapeake Exploration, L.L.C., CHK Utica, L.L.C., Larchmont Resources, L.L.C., Dale Pennsylvania Royalty, LP and TOTAL E&P USA, INC. (“Chesapeake”), were divested of their substantial investments in the oil and gas estate. The 2006 amendments simply clarified the procedure for effecting such a divestiture,

including requiring notice to the record owner of the mineral interests, providing that mineral interest owner an opportunity to record its claim of ownership and, if it failed to do so, allowing for the abandonment of the mineral interest and vesting of ownership in the surface owner on the public record.

Mr. Corban and his *Amici*, all of whom are apparently self-interested surface owners or lessees of surface owners, contend that the ODMA's provision that mineral interests "shall be deemed abandoned and vested" – as it existed before the 2006 amendments – meant that such abandonment and vesting occurred automatically without any action by the surface owner, any court involvement, any notice to the mineral owner or lessees of record, or any notice to the public by entry on the public record. Curiously, they make this claim despite the fact that this exact phrase remains in the ODMA after the 2006 amendment clarified the act through procedures to actually vest the minerals in the surface owner. If the General Assembly meant to automatically take away one person's property and give it to another person, it would have said so. That is what the Indiana legislature did when it provided that dormant interests were "extinguished" and "the ownership shall revert," and what the General Assembly did in other parts of the Ohio Marketable Title Act ("OMTA") when it provided that certain unclaimed interests were "extinguished" or "null and void." The General Assembly's use of the word "deemed" in the ODMA, on the other hand, indicated that some additional action was required to actually vest the interest. An interpretation creating an "automatic transfer" of mineral rights under the prior version of the statute without any action taken by the surface owner is not supported by the statute. In fact, the statute was little used because it was ambiguous and inoperable. In 2006, the General Assembly clarified its intent that a procedural mechanism was required to place the transfer of ownership on the record before any property could change hands

pursuant to the ODMA. Mr. Corban's desire to have the Court go back to the ambiguous version of the statute to now effectuate an automatic forfeiture of the mineral rights, which purportedly occurred two decades ago, is meritless.

The very purpose of the ODMA also cuts against Mr. Corban's automatic vesting argument: the sole purpose of the ODMA is to create a balanced mechanism to address the problem which arises in those few cases where the inability to identify or locate owners of a long-unused mineral interest frustrated efforts to develop mineral resources. In those limited instances, the ODMA provided a tool to transfer ownership of the mineral interest to the surface owner if the mineral interest owner had not complied with one of the act's broad requirements (which do not require production but simply some activity showing active use of the mineral interest). The ambiguous original language of the ODMA did not specify the procedure for how an interest would be vested, so the General Assembly clarified that in the 2006 amendments. The ODMA was never intended to favor surface owners over mineral owners nor was it intended to automatically and silently transfer ownership of mineral interests. Such a rule will foster more confusion and less reliable title searches, as a title searcher would be forced to guess at whether the interest was owned by the mineral owner and its lessees of record or if the interests had, at some past period, been transferred with no entry on the record.

Finally, Ohio law abhors forfeitures and the ODMA must be read with that in mind. It is inconceivable that the General Assembly intended to automatically divest known mineral interest owners and lessees of their valuable property interests without explicitly saying so.

The second question certified by the federal court is:

*Is the payment of a delay rental during the primary term of an oil and gas lease a title transaction and "savings event" under the ODMA?*

This Court has already heard arguments on the issue of whether an oil and gas lease and the reversion of ownership of the oil and gas estate to the mineral interest owner at the termination of the lease are acts that make the mineral interest the subject of a title transaction so as to preclude a finding of dormancy under the ODMA. *Chesapeake v. Buell*, 2014-0067. It is Chesapeake's position that a recorded oil and gas lease which is in effect during the 20 year period in question precludes the surface owner from being able to apply the ODMA to acquire the mineral rights. The oil and gas lease is the opposite of dormancy – it is the primary way by which mineral interests are exercised. Payment of delay rentals during the primary term would continue the lease in effect and the requirement to make such payments is a matter of record, thus meeting the requirements and purpose of the ODMA.

#### **STATEMENT OF FACTS**

The facts in this case are undisputed. *See* Opinion and Order from the United States District Court, Southern District of Ohio, Eastern Division, May 14, 2014 (“Order”), p. 2, (Petitioner's Appendix Exhibit 1). At issue is the legal ownership of the mineral interest beneath 164.5 acres of land (the “Property”) in Harrison County, Ohio. *Id.* at p. 2.

In 1959, the North American Coal Corporation (“NA Coal,” a different entity than North American), conveyed the surface rights to the Property to Orlean H. Corban and Hans D. Corban, reserving for itself and its successors the oil, gas, and other mineral rights. *Id.* at pp. 2-3. After a series of transfers, Petitioner Hans Michael Corban came to own the surface of the Property in 1999. *See id.* at p. 3. Like all of his predecessors in interest going back to 1959, Mr. Corban acquired only the ownership of the surface, not the minerals. For the forty (40) years in which Mr. Corban's predecessors in interest owned the surface of the Property, and fourteen (14) years of Mr. Corban's ownership – nearly all of which predated any discovery of the valuable oil and

gas rights underneath the Property by the gas industry – no claim was made to the ownership of the mineral interest.

As to the mineral interest, in January of 1974 NA Coal entered into an oil and gas lease with National Petroleum Corporation (“NPC”) for ten years (the “1974 Lease”), recording the lease on February 6, 1974. *Id.* In May of 1975 NPC assigned the 1974 Lease to American Exploration Company (“AEC”). *Id.* at pp. 3-4. In 1978, AEC assigned the 1974 Lease to C.E. Beck, acting for and on the behalf of RSC Energy Corporation. *Id.* at p. 4. In 1984, this lease expired, no production had occurred, and the mineral interest thus reverted back to NA Coal. *Id.* That same year, NA Coal entered into another lease, with C.E. Beck, which included a five-year primary term and was recorded in February of 1984 (the “1984 Lease”). *Id.* C.E. Beck assigned the 1984 Lease to Carless Resources, Inc. (“Carless”), and that assignment was recorded in May of 1985. *Id.* Although no production took place pursuant to this lease, delay rentals were paid to NA Coal in 1985, 1986, 1987, and 1988. *Id.* When the 1984 Lease expired in 1989 the mineral interest reverted to NA Coal, which was then known as Bellaire. *Id.*

In 2008, Bellaire transferred the mineral interest to North American. *Id.* In January of 2009 North American entered into an oil and gas lease (the “2009 Lease”) with Mountaineer Natural Gas Company (“Mountaineer”). *Id.* Chesapeake has a lessee interest in the 2009 Lease. *Id.* at pp. 4-5. A well has been producing pursuant to the 2009 Lease since June of 2011. *Id.* at p. 5.

As originally enacted in 1989, the ODMA provided that

Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies:

O.R.C. § 5301.56(B)(1) (1989). The statute then went on to list various events that worked to cause the mineral interest not to be deemed abandoned and vested. In 2006, the ODMA was amended to read as follows:

Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if *the requirements established in division (E) of this section are satisfied and none of the following applies:*

O.R.C. § 5301.56(B) (2006) (emphasis added). The relevant clarification is found in the language emphasized in the 2006 amendments to the act, which made clear that the ODMA required the absence of any of the listed acts, in addition to the surface owner's compliance with "division (E)," before any transfer of property could take place. Division (E) requires a series of notification procedures that must be undertaken "[b]efore a mineral interest becomes vested under division (B) of this section ... ." O.R.C. § 5301.56(E).

### ARGUMENT

Applying the notice procedures of the ODMA to claims filed after 2006 meets the purpose of the ODMA and is supported by language found in that statute since its inception. Such a holding does nothing more than require Mr. Corban to comply with a procedural process clarified seven years before the filing of this action. Similarly, finding that a delay rental payment makes a mineral interest the subject of a title transaction is directly supported by both the intent and language of the ODMA.

## PROPOSITION OF LAW NO. 1:

### THE 2006 VERSION OF THE ODMA APPLIES 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.

Ohio law requires Mr. Corban to comply with the 2006 amendments to the ODMA because that is the procedure in effect at the time of his claim. Part of the problem is with the federal court's phrasing of the question certified – there are not two “versions” of the ODMA; there is a single act passed in 1989 and clarified by amendments passed in 2006. These amendments simply clarified what the ODMA always required – the procedures by which a mineral interest went from being “*deemed* abandoned and vested” to actually *being* abandoned and vested and thus transferring to the surface owner.

#### I. Ohio Law Requires Application of the Law in Effect at the Time Mr. Corban Made His Claim.

There is nothing unfair about requiring Mr. Corban to comply with the procedures put in place by the General Assembly. On the other hand, it is grossly inequitable to allow him to extinguish the ownership of a mineral interest owner and lessee who had made a substantial investment in those rights and are actively exploring for and producing oil and gas.

The United States Supreme Court has held that “a court should apply the law in effect at the time it renders its decision ... even though that law was enacted after the events that gave rise to the suit.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (quotations omitted). “A statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment ... .” *Id.* at 269 (citations omitted). Instead,

[t]he conclusion that a particular rule operates ‘retroactively’ comes at the end of a process of judgment concerning the nature and extent of the change in law and the degree of connection between the operation of the new rule and a relevant past event ... . [F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

*M&F Supermarket, Inc. v. Owens*, 997 F.Supp. 908, 912-13 (S.D. Oh. 1997) (quoting *Landgraf*, 511 U.S. at 269-70 (internal citations omitted)).

“Changes in *procedural rules* may often be applied [even] in suits arising before their enactment without raising concerns about retroactivity.” *State v. Ayala*, 1998 Ohio App. LEXIS 5416, at \*6-7 (10th Dist. Nov. 10, 1998) (quoting *Landgraf*, 511 U.S. at 275) (emphasis added). “[T]he fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.” *Landgraf*, 511 U.S. at 275. The question is “whether there is a change in substantive obligation as opposed to a change in the way in which the same obligation is adjudicated.” *Combs v. Comm’r of Social Security*, 459 F.3d 640, 647 (6th Cir. 2006). A change in the way rights are adjudicated is not “retroactive,” even if it “may be outcome-determinative for some ... .” *Id.* See also *Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St.3d 103, 109-110 (2013) (“Although the Retroactivity Clause bars statutes that extinguish preexisting rights ... it does not prohibit legislation that merely *affects the methods and procedures by which rights are recognized ...*”) (citations and quotations omitted) (emphasis added).

The 2006 amendments to the ODMA did not “extinguish preexisting rights.” *Longbottom*, 137 Ohio St.3d at 109-110. Instead, they merely clarified the “methods and procedures by which rights are recognized, protected and enforced ... .” *Id.* The duties of notice and filing enacted in 2006 clarified when and how (*i.e.*, the process by which) a mineral right is deemed abandoned and vested. As identified by the sponsor of the 2006 amendments, the General Assembly clarified the *process* for adjudicating a claim of abandonment, but not the *substantive elements* of such a claim. See Sponsor Testimony of H.B. 288 Before the House Energy and Public Utilities Committee (Representative Mark Wagoner) (attached as Appendix

Exhibit 1) (specifically identifying the problem that the amendments were trying to solve when he testified that the 1989 ODMA “did not clearly define ... exactly how the *process* to reunite the mineral ownership with the surface ownership was to be accomplished[,]”) (emphasis added); Report of the Ohio Bar Association’s Natural Resources Committee (attached as Appendix Exhibit 2) (stating that the 2006 amendments were “a necessary clarification of the existing statute”). Although this clarification “may be outcome-determinative for some” surface owners, *see Combs*, 459 F.3d at 647, it certainly is not for all. Indeed, for any surface owner who follows the procedures put forth in the 2006 ODMA, and receives no response from any mineral interest owner, the mineral interest will vest in the surface owner. Thus, because the 2006 amendments merely clarify a procedure to perfect a right, as opposed to extinguishing that right, those procedures can be applied to any claim arising after 2006 without any concern for violating concepts of retroactivity.

This concept is illustrated in *Combs*. There, an amendment to the social security disability statute removed “obesity” from the list of conditions that would make a claimant “conclusively presumed” to be disabled. *Id.* at 642. The claimant had originally filed her disability claims, which included obesity, before the amendment, and thus may have had a vested right in that claim. *Id.* After the amendment, however, she was no longer entitled to a conclusive presumption, and had to provide proof of the disability. *Id.* at 642-43. Applying the amendment was not found to be precluded by the *Landgraf* factors of “fair notice, reasonable reliance, and settled expectations.” *Id.* at 646. The court found the amendment to be a procedural change, and thus not unlawfully retroactive, despite the fact that it was “[d]oubtless [that] there are situations in which a procedural rule will have such substantive effects ... .” *Id.* at 647. The 2006 amendments did exactly what the law at issue in *Combs* did – change or clarify

a procedure for making a claim. In *Combs*, the claim was for disability, while here it is a claim that property has been dormant. In both instances, only the procedure – and not any substantive rights – have been clarified. Here, just as in *Combs*, the statute at issue is not impermissibly retroactive. See, e.g. *Eisenbarth v. Reusser*, 2014-Ohio-3792, ¶ 87 (7th Dist. 2014) (DeGenaro, P.J., concurring in judgment only) (“The ODMA is remedial in nature; specifically, it was enacted to delineate the procedure to determine whether or not a severed mineral interest has been abandoned and if so, how to reunite it with the surface fee. By virtue of the 2006 ODMA, which we cannot ignore, the General Assembly clarified a major ambiguity in the 1989 ODMA ...”).<sup>1</sup>

The 2006 amendments to the statute were remedial; they clarified the “*process* to reunite the mineral ownership with the surface ownership[,]” Sponsor Testimony of H.B. 288 Before the House Energy and Public Utilities Committee (Representative Mark Wagoner) (emphasis added), not the *substantive* law – what actually needs to happen before that process can be undertaken. This kind of a procedural or remedial amendment does not violate any prohibition on retroactive legislation:

It has, however, been decided in numerous cases that retroactive laws refer to those which create and define substantive rights, and which either give rise to, or take away, the right to sue or defend actions at law. It has been further declared at numerous times that a statute which is ‘remedial’ in its operation on rights, obligations, duties, and interests *already existing* is not within the mischiefs against which that clause of the Constitution was intended to safeguard, and the remedial statutes do not even come within a just construction of its terms.

*Smith v. The New York Central R.R. Co.*, 170 N.E. 637, 638 (Ohio 1930) (emphasis added).

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<sup>1</sup> Judge DeGenaro reiterates this, and many of the remainder of the points from her opinion in *Eisenbarth*, see below, in another concurring in judgment only opinion in *Farnsworth v. Burkhardt*, 2014-Ohio-4184, ¶¶ 69-96 (7th Dist. 2014) as well as a dissenting opinion in *Tribett v. Shepherd*, 2014-Ohio-4320, ¶¶ 78-132 (7th Dist. 2014).

In *Smith*, the legislature shortened the statute of limitations for personal injury claims from four to two years, and the plaintiff brought suit more than two years after his claim accrued. *Id.* at 50-51. This Court held that the claim was time-barred under the amended statute, even though the plaintiff had a “vested right” in his cause of action. *Id.* at 51. Just as *Smith* had to comply with the law in effect when he brought his claim, so must plaintiffs under the ODMA. Mr. Corban filed his claim that the mineral interest beneath his property was abandoned in 2013; there is no prohibition on retroactivity that prohibits him from having to follow a 2006 clarification of the procedure which governs that claim.

## **II. The ODMA as Enacted in 1989 Was Not Self-Executing.**

Because “a court should apply the law in effect at the time it renders its decision[,]” *Landgraf*, 511 U.S. at 273, if this Court finds that the 2006 amendments to the ODMA were not impermissibly retroactive then it need go no further: the 2006 amendments should apply to any action filed after their passage. However, even if this Court does not make that finding, Mr. Corban remains incorrect that the ODMA was or is in any manner “self-executing.”

### **A. The Language of the ODMA is Not Self-Executing or Automatic.**

Mr. Corban’s entire argument that he should not have to comply with the law as it existed when he filed his suit is based on his contention that ownership of the mineral interest had already automatically vested in him pursuant to the ODMA before the 2006 amendments took effect. Mr. Corban argues that the ODMA was self-executing and that mineral rights were transferred to the surface owner without any notice to the mineral interest owners of record or to the public by an entry on the public record.

The language of the ODMA does not support that construction. The ODMA provides that if none of the enumerated acts occurred in the relevant 20-year period, the mineral rights

“shall be *deemed* abandoned and vested.” O.R.C. § 5301.56(B)(1) (1989) (emphasis added).

The ODMA does not say “shall be abandoned and vested,” nor does it say “automatically vested,” nor does it include any other words that would make vesting self-executing. That is why the federal district court here found that the ODMA as enacted in 1989 did not “specify any method for vesting of the mineral interests in the surface land holder.” Order, p. 8. That is exactly what the 2006 amendments clarified. “The 2006 ODMA corrected inoperable, not merely ambiguous, statutory language. The current version of R.C. 5301.56 not only clarifies the process, it specifies the look-back period trigger and mandates notice to the holder before the mineral rights are deemed abandoned; only then can allowable vesting occur with the surface owner.”

*Eisenbarth* (DeGenaro, P.J., concurring in judgment only) ¶ 70.

It is fundamental that the Court’s interpretation of a statute must begin with the words of the statute and that the Court must give effect to each word. Each word should be given its usual meaning and the Court should apply the usual rules of grammar. *State ex. Rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 967 N.E.2d 193, 198 (Ohio 2012) (“Venerable principles of statutory construction require that in construing statutes, we must give effect to every word and clause in the statute. We must read words and phrases in context and construe them in accordance with rules of grammar and common usage ...”) (citations and quotations omitted). Applying these rules of statutory interpretation here leads to the conclusion that the ODMA as enacted in 1989 required some unspecified action before mineral rights could be taken from the record owner and vested in the surface owner. Because the General Assembly stated that mineral rights shall be “deemed abandoned and vested,” the word “deemed” modifies both “abandoned” and “vested.” See, e.g., *Colonial Mortg. Service Co. v. Southard*, 56 Ohio St.2d 347, 349 (1978) (“Because the two conditions are joined by an ‘and’ meaning ‘in addition to,’

both conditions must be met ... ”). *See also Bruesewitz v. Wyeth LLC*, 131 S.Ct. 1068, 1078 (2011) (“[L]inking independent ideas is the job of a coordinating junction like ‘and’ ... ”).

The word “deemed” means “[t]o treat (something) as if (1) it were really something else, or (2) it has qualities that it does not have ... .” *Black’s Law Dictionary* (9th Ed. 2009). *See also* G.C. Thornton, *Legislative Drafting* 83-84 (2d ed. 1979) (“‘Deem’ is a useful word when it is necessary to establish a legal fiction either positively by ‘deeming’ something to be something it is not or negatively by ‘deeming’ something not to be something which it is”). It clearly implies that some authority or person must take further action. *See Eisenbarth* (DeGenaro, P.J., concurring in judgment only) ¶ 84 (“Considering the entire statutory phrase from the ODMA, the term ‘deem’ modifies the remaining language. ... . The extent of the right the [surface owners] held under both the 1989 and 2006 ODMA was the *potential* for abandonment and vesting, this right was not lost when the ODMA was amended. Instead, the *procedure* surface owners had to follow to reunite the severed mineral rights with the surface fee was clarified. This interpretation is borne out by the clarifying language adopted in the 2006 ODMA and the General Assembly’s explanation of the reasons for the amendments ... ”) (original emphasis).

Mr. Corban and his *Amici* violate a basic rule of construction by either pretending that the word “deemed” is not in the ODMA or giving it no meaning. For example, the State argues that “[t]he term ‘shall’ is mandatory[,]” ignoring entirely the word “deemed” in arriving at its conclusion that “the 1989 version is self-executing.” Merit Brief of *Amicus Curiae* State of Ohio in Support of Petitioner (“State *Amicus* Brief”), p. 6 (seeking to protect its own interests as Ohio’s largest surface land owner). Instead, the State argues that “[u]sage of the word ‘deemed’ to convey complete and final abandonment and vesting was not (and is not) uncommon ... .” *Id.* at p. 15. In support of this contention the State cites *judicial* language from *Texaco, Inc. v. Short*,

454 U.S. 516 (1982), which is not subject to the same canons of *statutory* interpretation as the ODMA. This reading violates a canon of statutory interpretation by simply ignoring a word in the statute; the State would have this Court read the ODMA the same way whether it called for the mineral interest to be “deemed abandoned and vested” or simply to be “abandoned and vested.” This gives no effect whatsoever to the word “deemed,” and is therefore improper. *See Carna*, 967 N.E.2d at 198 (“[W]e must accord significance and effect to every word, phrase, sentence, and part of the statute ...”) (citations omitted). *See also Eisenbarth* (DeGenaro, P.J., concurring in judgment only) ¶ 81 (disagreeing with a reading of the ODMA as self-executing and finding it improper to “overwrit[e] the language of the statute by replacing the word ‘deemed’ with ‘automatic’”).

The phrase “deemed abandoned and vested” remains in the ODMA after the 2006 amendments. *See* Statement of Facts, above. There is no dispute that the ODMA is not now self-executing – it clearly includes a series of notice requirements. If, as Mr. Corban and *Amici* claim, the ODMA as originally enacted was self-executing based on the term “deemed abandoned and vested,” there is no reason that the General Assembly would have kept those precise words in the statute when making the 2006 amendments. Mr. Corban and *Amici* do not claim that the ODMA is *now* self-executing, yet the statute still contains exactly the phrase Mr. Corban and *Amici* rely on to argue that the ODMA *was* self-executing as enacted in 1989.

*Amici* also rely on the Seventh District cases of *Walker v. Shondrick-Nau*, 2014 WL 1407942 (7th Dist. Apr. 3, 2014) and *Swartz v. Householder*, 12 N.E.3d 1243 (7th Dist. 2014), each of which found that the ODMA was self-executing as originally enacted. Both of these cases similarly ignore words of the statute inconvenient to their interpretation. In *Walker* – currently being considered by this Court on appeal, *see Walker v. Shondrick-Nau*, No. 2014-0803

– and *Swartz*, the Seventh District fails entirely to discuss or consider the fact that rights are not simply “vested” under the ODMA, but “*deemed* abandoned and vested.” *See, e.g., Walker*, 2014 WL 1407942, at \*7 (discussing the decision in *Dahlgren v. Brown Farm Properties, L.L.C.*, Carroll C.P. No. 13CVH 27445 (Nov. 5, 2013) (Petitioner’s Appendix Exhibit 12), *rev’d* 2014-Ohio-4001 (7th Dist. 2014), *notice of appeal filed* 2014-1655 (Ohio)) and failing to recognize that the word “*deemed*” precedes the word “vested” in finding that rights automatically vested in the surface owner); *Swartz*, 12 N.E.3d at 1244, 1249, 1251 (noting that the “issue for our review” involved “surface owners with rights ‘*deemed* vested’” but either failing to apply the term “*deemed*” to the vesting of rights, or simply ignoring the presence of the word completely in completing its analysis) (emphasis added).

The reliance by Mr. Corban and his *Amici* on the Indiana statute at issue in *Texaco* is similarly misplaced and actually proves Chesapeake’s argument. The Indiana statute was explicitly self-executing as it provided that the mineral interest “*shall*, if unused for a period of 20 years, *be extinguished*, unless a statement of claim is filed in accordance with section five hereof, and the ownership *shall revert* to the then owner of the interest out of which it was carved.” *Texaco*, 454 U.S. 518 n. 3 (quoting Ind. Code. § 32-5-11-1 (1976)) (emphasis added). The use of the definitive language “*shall ... be extinguished*” and “*shall revert*” by the Indiana statute is in stark contrast to the conditional language used in the ODMA stating only that the mineral interest “*shall be deemed* abandoned and vested.” That contrast makes clear that the drafters of the ODMA did *not* intend for the statute to operate in the same manner as Indiana’s statute. *See also Eisenbarth* (DeGenaro, P.J., concurring in judgment only) ¶ 101 (finding that the ODMA’s “vigorous statutory protection stands in stark contrast with Indiana’s statute”). This intent is also evidenced by the fact that the ODMA language of “*deemed* abandoned and

vested” is significantly less conclusive than other language used within the larger statute of which the ODMA is a part, the OMTA. *See* O.R.C. §§ 5301.50 and 5301.49(D) (using language indicating that rights are “declared to be null and void” or “extinguished”). *See also Eisenbarth* (DeGenaro, P.J., concurring in judgment only) ¶ 85 (“[I]t must be recalled that the ODMA is part of the OMTA, which, in other sections, notably uses more emphatic language like ‘extinguished,’ and ‘null and void,’ which is appropriately characterized as automatic in nature. This stands in sharp contrast to the ‘deemed’ language used in the ODMA”) (citation omitted).<sup>2</sup>

**B. The Legislative Purpose of the ODMA Requires Compliance With the 2006 Amendments.**

The legislative purpose of the ODMA was to facilitate, but not require, the production of oil and gas by clearing from the public record mineral interests where the owners of record could not be properly identified or located in a title search. The ODMA does not require a mineral interest owner to produce minerals; instead a mineral interest owner only needs to comply with one of the ODMA’s many, broad mechanisms for maintaining its rights.<sup>3</sup> Chesapeake’s reading of the Act is consistent with that purpose – interpreting the ODMA so as to require some action on the public record before a mineral interest can be divested and transferred makes the public

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<sup>2</sup> If Mr. Corban’s argument for a self-executing ODMA is accepted, the possibility will arise that surface owners may have purchased and sold mineral rights without actually knowing they were doing so. For example, in this matter Mr. Corban claims the mineral and surface interests merged in 1992, with no notation on the record, as a result of the operation of the ODMA. This means that when Mr. Corban purchased the surface rights in 1999, he was in fact purchasing, and his predecessor-in-interest was selling, both the surface rights and the mineral rights, despite the fact that the deed to Mr. Corban “was subject to conditions, restrictions and easements if any, contained in prior instruments of record” such as the prior severance of the mineral interest from the surface. *See* Brief of Petitioner Hans Michael Corban (“Petitioner’s Brief”), p. 3.

<sup>3</sup> Mr. Corban has noted that the ODMA’s twenty-year period is subject to extension by, among other things, a “claim to preserve any mineral interest ... .” Plaintiff’s Motion for Partial Summary Judgment (attached as Appendix Exhibit 9), p. 9.

record more reliable while at the same time protecting the valuable interests of mineral owners and their lessees.<sup>4</sup>

Under Ohio law, the ownership of oil and gas underneath a property can be severed from the ownership of the surface of that property. *See, e.g., Wiseman v. Cambria Products Co.*, 61 Ohio App.3d 294, 298 (4th Dist. 1989) (citing *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317 (1897)). Under traditional common law that severance was permanent. *See, e.g., Dahlgren* at p. 8. Before the enactment of the ODMA in 1989 when oil and gas rights were conveyed away they were conveyed away *forever*. This permanent severance of the mineral interest, however, could lead to a lack of mineral development because, over time, it could become difficult to determine or even find the owners of the mineral interest. That would run contrary to the State's interest, as "[i]t is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." *Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 389 (1992).

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<sup>4</sup> Requiring an action on the record before the transfer of any property via the ODMA is not inconsistent with finding that an unrecorded expiration or termination of an oil and gas lease makes the mineral interest the subject of a title transaction, as argued by the Petitioners in *Buell*. An unrecorded transfer of property rights has *no* presence whatsoever on the record. An oil and gas lease, on the other hand, expires or terminates pursuant to its terms, which are recorded in the record to be examined by any member of the public or interested party. In fact, when only a memorandum of an oil and gas lease is filed pursuant to O.R.C. § 5301.251, Ohio law specifically requires that the term of the lease and any rights of extension be expressly stated in the memorandum:

The memorandum of lease shall contain the names of the lessor and the lessee and their addresses as set forth in the lease, a reference to the lease with its date of execution, a description of the leased premises with such certainty as to identify the property, ... *the term of the lease, together with any rights of renewal or extension of the lease, and the date of commencement of the term or manner of determining the commencement of the term as set forth in the lease.*

O.R.C. § 5301.251 (emphasis added).

Faced with this problem, the main purpose of the General Assembly in enacting the ODMA was to provide clear chains of title so as to “encourage the development of minerals in Ohio which have been previously ignored due to defects in title[,]” *not* to divest known mineral owners and lessees of their substantial investment in acquiring their rights. S.B. 223, H.B. 521, Proponent Testimony, ODMA (1989), p. 3 (Petitioner’s Appendix Exhibit 9, p. 78). *See also* S.B. 223 Floor Speech (2/23/88) (attached as Appendix Exhibit 3) (“The enactment of the legislation will encourage the development of minerals in Ohio which have been previously ignored due to defects in title”); *Taylor v. Crosby*, Belmont C.P. No. 11-CV-422, at p. 4 (Sep. 16, 2013) (attached as Appendix Exhibit 4) (“Dormant and abandoned mineral interests were viewed as of no benefit to the state, while making use of the state’s mineral resources was for the public good”). Recognizing that they could not *require* a mineral interest owner to produce minerals, however, the General Assembly drafted the ODMA such that – in every iteration – the statute allows multiple mechanisms other than production to hold a mineral interest.

The ODMA was modeled in part on the Uniform Dormant Mineral Interests Act (“UDMIA”) (*Amicus Curiae* State of Ohio Appendix Exhibit 2 ), which was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws in 1986. *See* S.B. 223, H.B. 521, Proponent Testimony, ODMA (1989), at p. 3 (noting that the draft legislation that would become the ODMA “contains the essential elements recommended by the national Conference of Commissioners on Uniform State Laws” and attaching a copy of the UDMIA for consideration). Like the ODMA, the intent of the UDMIA was to identify unused mineral interests and allow for the possibility that they could be brought back into use, not to deprive the mineral owners and their lessees of their rights. *See* UDMIA, Prefatory Note, at p. 4 (explaining that the clearing of title “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”).

In order to achieve the legislative purpose of the ODMA a procedural mechanism which (1) actually achieves the purpose of the statute by delineating the mineral ownership *on the record*, and (2) the contours of which were clarified by the General Assembly in passing the 2006 amendments, is required prior to any mineral interest vesting in the surface owner. *See, e.g. Eisenbarth* (DeGenaro, P.J., concurring in judgment only) ¶ 67 (“[G]iven the unique procedural circumstances this case presents, namely, construing an ambiguous statute *after* it has been amended to remove the ambiguity, we need not resort to ... canons [of statutory interpretation] in order to glean [legislative] intent. 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”); ¶ 114 (“We do not need to determine the General Assembly’s intention with respect to the meaning of the future operation of the 1989 ODMA after the effective date of the 2006 ODMA because the newer version of the statute has told us”). Mr. Corban’s interpretation of the ODMA, on the other hand, mis-states the General Assembly’s intent and would actually frustrate its true purpose by making the public record less reliable. *See, e.g., id.* (DeGenaro, P.J., concurring in judgment only) ¶ 84 (“To interpret the 1989 ODMA as self-executing would confound the purpose of the OMTA, as well as the ODMA; to engender reliance upon publicly recorded documents rather than private ones for transactions affecting title to real property, such as ownership of severed mineral rights”); ¶ 106 (“To

construe the 1989 version as automatically self-executing, as well as controlling despite being replaced by the 2006 version, thwarts the General Assembly's express intention to require recordation of all interests to facilitate a searchable chain of title for real property in general and for mineral rights specifically. It also flies in the face of the General Assembly's stated purpose of encouraging economic mineral production"); ¶ 117.

Mr. Corban argues that the statute was "intended to divest ownership of a [m]ineral [i]nterest." Petitioner's Brief, p. 7. In support of this statement Mr. Corban relies on S.B. 223, H.B. 521, Proponent Testimony, ODMA (1989), and its discussion of "the Ohio Marketable Title Act [being] not generally effective as a means of eliminating severed mineral interests[.]" and then extrapolates to the conclusion that the ODMA was intended to eliminate severed mineral interests. See Petitioner's Brief, pp. 7-8. Although one of the *outcomes* of the ODMA may be the elimination of a severed mineral interest, that outcome says nothing about the *purpose* for which the law was put in place. That purpose is elucidated in the very same document on which Mr. Corban relies, as the Proponent Testimony explicitly states that "the enactment of the Dormant Mineral Act will *encourage the development of minerals in Ohio* which have been previously ignored *due to defects in title.*" S.B. 223, H.B. 521, Proponent Testimony, ODMA (1989), p. 3 (emphasis added).

Because the ODMA was enacted to clear title to allow for the possibility of production, the idea that the ODMA was "self-executing" has no basis in logic. The *Dahlgren* court best explained this, noting that "the surface owners' interpretation of the 1989 version conflicts with the 'legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title'" because "[a] title examiner might well find the recorded Dahlgren deed with its reservation of mineral rights, without any record that shows whether the

Dahlgrens or their descendants preserved or abandoned those rights.” *Dahlgren* at pp. 14-15 (quoting O.R.C. § 5301.55). Ohio Revised Code Section 5301.55 states that “the legislative purpose” of the OMTA is “simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title . . . .” The ODMA was intended to *clarify* record title, and a “self-executing” version of the statute would transfer title to the severed mineral interest with *no indication whatsoever* on the record. When a record chain of title cannot be relied upon, the “defects in title” that the ODMA expressly sought to avoid once again come into play, S.B. 223, H.B. 521, Proponent Testimony, ODMA (1989), p. 3, chilling the development of oil and gas in Ohio because potential oil and gas lessees have no definitive means to determine from whom they should be leasing. As such, finding the ODMA to be self-executing flies directly in the face of the statutory purpose of clearing title to facilitate the production of minerals.<sup>5</sup>

The factual background of this case, similar to other ODMA cases, provides another reason why Mr. Corban’s position is unconvincing. In her dissent in *Tribett*, Judge DeGenaro noted that:

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<sup>5</sup> *Amici* also fail to acknowledge that a self-executing ODMA is directly at odds with the purpose of the statute. The State of Ohio alleges that a self-executing interpretation “serves both goals[]” of the ODMA, and cites the *Texaco* decision in support. See State *Amicus* Brief, p. 14. See also Brief of *Amici Curiae* Gulfport Energy Corporation, Paloma Resources, LLC and Protégé Energy III LLC in Support of Petitioner Addressing Certified Questions of State Law (“Gulfport *Amicus* Brief”), pp. 15-17. However, the portions of *Texaco* cited refer only to the purposes of the dormant mineral act at issue in that case, not to the purpose specifically served by a self-executing statute. Additionally, the Jeffco *Amicus* Brief argues that a self-executing interpretation of the statute actually *simplifies* the record title, because it allows “a landman who is attempting to ascertain the rightful owner of oil and gas rights” to simply “review the public records associated with a severed mineral interest” and decide if any of “the enumerated ‘savings event[s]’ have occurred within any of the relevant twenty-year periods,” and if they have not “then the landman is safe to lease those rights from the surface owner . . . .” Merit Brief of *Amici Curiae* Jeffco Resources, Inc. et al. in Support of Petitioner (“Jeffco *Amicus* Brief”), p. 13. This argument bestows upon this hypothetical landman tremendous power to determine the rights of parties, while doing nothing to actually clarify the *record* to title, the explicit goal of the General Assembly in passing the ODMA.

[a]pplying the majority's rationale, the Tribetts[] have owned the mineral rights by virtue of the 1989 ODMA automatically vesting them with the formerly severed interest since March 22, 1992. Yet, the Tribetts failed to further the public benefit of oil and gas development by doing nothing with the mineral rights from 1992 through April, 2012, when they filed the quiet title action ... . Thus, their inaction with respect to developing the mineral interest is equal to that of the Shepherds. To favor the Tribetts' inaction over the Shepherds' condones arbitrary action ... .

*Tribett* (DeGenaro, P.J., dissenting) ¶ 114. The same rationale applies here, to an even greater extent. Mr. Corban – like the surface owner in *Tribett* – claims that the mineral interest vested in the surface owner in 1992, but he did nothing with that interest until filing suit to quiet title. North American, on the other hand, leased the mineral interest to Chesapeake which has been producing from a lease of which the subject mineral interest is a part. Just as there was no basis to favor the apathetic surface owner in *Tribett*, there is no basis to favor Mr. Corban here; the only parties attempting to effectuate a “public benefit” are the Respondents. *See, e.g., id.*

**C. Ohio's Abhorrence of Forfeitures Precludes Applying the ODMA as Self-Executing.**

Finally, Mr. Corban's interpretation of the ODMA fails to take into account Ohio's abhorrence of forfeitures. The Court is urged to look at just what Mr. Corban and his *Amici* are arguing here: they want to take a property interest away from a known mineral interest owner and lessee who made substantial investments to acquire their interests, and who have utilized those interests to drill a producing natural gas well, and transfer that interest to a surface owner who made no investment at all and simply plans to profit by leasing the rights. Such an inequitable result is exactly why Ohio law abhors forfeitures and it must be presumed that the General Assembly acted with full knowledge of that law. There is certainly no reason to presume that the General Assembly meant to effect such a dramatic transfer of property interests in the automatic manner suggested by Mr. Corban without explicitly saying so.

Despite the impact that a self-executing ODMA will have, *Amici* have attempted to argue that their interpretation effects an “abandonment,” as opposed to a “forfeiture,” an event abhorred by Ohio law. See *Gulfport Amicus* Brief, pp. 13-15; *Jeffco Amicus* Brief, pp. 14-15. This is incorrect. First, *Swartz*, relied on in some manner by Mr. Corban and all *Amici*, specifically and repeatedly calls this transfer of property rights a forfeiture. See, e.g., *Swartz*, 12 N.E.3d at 1251. Second, *Amicus* quotes the Black’s Law Dictionary definition of “abandonment” as including “[t]he relinquishing of a right or interest with *the intention of never reclaiming it.*” *Gulfport Amicus* Brief, p. 14 (emphasis added). Clearly the mineral interest owner, in every case before any court, intended to reclaim – or better still never intended to give up – its mineral interest, otherwise it would not be in court fighting for it. As such, any self-executing interpretation of the ODMA unquestionably works a forfeiture, a result abhorred by Ohio law. See, e.g. Ohio Const., Art. I § 19 (“Private property shall ever be held inviolate”); *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534 (1992) (“Forfeitures are not favored by the law. The law requires that we favor individual property rights when interpreting forfeiture statutes”); *Norwood v. Horney*, 110 Ohio St.3d 353, 362 (2006) (“The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself”) (quoting *Bank of Toledo v. Toledo*, 1 Ohio St. 622, 632 (1853)); *id.* at 363 (“Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces”); *Dahlgren*, at p. 15 (“Forfeitures are not favored by the law. The law requires that we favor individual property rights when interpreting forfeiture statutes”) (quoting *Sogg v. Zurz*, 121 Ohio St. 3d 449 (2009)).

## PROPOSITION OF LAW NO. 2:

### THE PAYMENT OF A DELAY RENTAL DURING THE PRIMARY TERM OF AN OIL AND GAS LEASE MAKES THE MINERAL INTEREST THE SUBJECT OF A TITLE TRANSACTION SUCH AS TO EFFECTUATE A “SAVING EVENT” UNDER THE ODMA.

The payment of a delay rental evidences the active ownership and enjoyment of the mineral interest, and affects title to the leased property by continuing the lessee’s interest in the property. A delay rental payment ensures that an oil and gas lease remains in effect, thereby also ensuring that the fee simple determinable interest held by the lessee remains with that party, as opposed to transferring back to the lessor if the rental is not paid. A delay rental payment perpetuates the fee simple determinable interest conveyed under the oil and gas lease, clearly making the leased mineral interest the subject of a title transaction.<sup>6</sup> Any other finding would lead to the anomalous result that an act specifically taken to maintain the lessee’s right during the bargained for primary term of an oil and gas lease to explore for and produce oil and gas would not be sufficient conduct to meet the ODMA’s purpose of facilitating production.

#### **I. Oil and Gas Leases Make the Mineral Interest the Subject of a Title Transaction.**

The ODMA states that:

(B) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if ... none of the following applies:

...

(3) Within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section, one or more of the following has occurred:

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<sup>6</sup> At no point in the ODMA is the language “saving event” or “savings event” utilized.

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

O.R.C. § 5301.56(B)(3)(a). The term “title transaction” is defined in O.R.C. § 5301.47(F) as “any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee’s, assignee’s, guardian’s, executor’s, administrator’s, or sheriff’s deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.”

In *Buell*, this Court has already received briefs, and heard argument, regarding whether or not an oil and gas lease makes a mineral interest the subject of a title transaction. It does. An oil and gas lease makes a mineral interest the subject of a title transaction because production of oil and gas is the primary purpose of an oil and gas lease (which is the most used mechanism to engage in oil and gas production on any property),<sup>7</sup> and activities leading to production are generally required to keep an oil and gas lease in force.<sup>8</sup> An oil and gas lease fits squarely into the definition of title transaction at O.R.C. § 5301.47(F), especially given Ohio’s treatment of oil and gas leases as conveying a fee simple determinable interest, and is substantively similar to many of the instruments used as exemplars in that statute. For these reasons and others, almost every Ohio court to confront this question has found that an oil and gas lease makes a mineral interest the subject of a title transaction, and recently the Seventh District Court of Appeals, the

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<sup>7</sup> See, e.g., *Williams and Meyers, Oil and Gas Law*, § 601 (attached as Appendix Exhibit 10) (“The basic document of the oil and gas industry is the lease which authorizes an operator, the lessee or his assignee, to enter upon described premises for the purpose of exploring for and developing the mineral resources in the premises”).

<sup>8</sup> See, e.g., *Williams and Meyers, Manual of Oil and Gas Terms*, § 8-L (attached as Appendix Exhibit 11) (noting that among the most common types of leases are those that “are executed for a term of years and so long thereafter as oil and gas is produced”).

only District Court to address the issue, has found the same. *See Eisenbarth*, ¶ 32 (“[A] recorded oil and gas lease over the minerals sought to be abandoned can be a savings event”).<sup>9</sup>

## **II. The Termination of an Oil and Gas Lease Makes the Mineral Interest the Subject of a Title Transaction.**

This Court has also previously accepted briefs and heard arguments on the question of whether or not the termination of an oil and gas lease makes a mineral interest the subject of a title transaction. *See Buell*. Once again, the answer to this question is “yes.” In this instance every Ohio court to address the characterization of the termination of an oil and gas lease has found that the termination makes the mineral interest the subject of a title transaction, as has the only court in another state to address the issue in relevant circumstances. Those courts found that the expiration of a lease transfers title to the oil and gas, and therefore prohibits any transfer of ownership under a dormant mineral act. Any finding to the contrary would lead to the nonsensical result that the mineral estate could be deemed abandoned at a time during which it was subject to development pursuant to the terms of an oil and gas lease and prior to reverter

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<sup>9</sup> Although not directly at issue to the certified questions in this case, Mr. Corban dedicated ten (10) pages of his brief to the question of whether or not an oil and gas lease made a mineral interest the subject of a title transaction (arguing that it did not). *See* Petitioner’s Brief, pp. 29-39. An oil and gas lease makes a mineral interest the subject of a title transaction for the reasons expressed above, and each of Mr. Corban’s arguments are explicitly addressed in the Merit and Reply Brief filed by the Petitioners in *Buell*. Respondents here only note Mr. Corban’s argument that an oil and gas lease cannot make a mineral interest the subject of a title transaction because it impacts the mineral interest, not the “land.” *See* Petitioner’s Brief, pp. 30-32. This argument improperly fails to consider all the language of the statute, *see Carna*, 967 N.E.2d at 198, as a title transaction is defined as “any transaction affecting title to *any interest in land*” not merely a transaction affecting “land.” R.C. § 5301.47(F) (emphasis added). It cannot credibly be disputed that the mineral interest is an “interest in land.”

under the fee simple determinable conveyed.<sup>10</sup> The entire term of an oil and gas lease, including the first day, the last day, and every day in between, prohibits the transfer of a mineral interest via the ODMA. During that entire time the mineral estate is held in fee simple determinable by the lessee and the lessor (mineral interest owner) holds the possibility of reverter should the lease not be developed. Allowing for the forfeiture of mineral interests at any time before that fee simple determinable has terminated would work two separate forfeitures, and also violates Ohio's long-standing preference for its citizens' freedom of contract.

### **III. The Payment of a Delay Rental Makes the Mineral Interest the Continuing Subject of a Title Transaction.**

A delay rental is a "sum of money payable to the lessor by the lessee for the privilege of deferring the commencement of drilling operations or the commencement of production during

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<sup>10</sup> In *Energetics, Ltd. v. Whitmill*, 497 N.W.2d 497, 501-02 (Mich. 1993), the Supreme Court of Michigan found that this was not the case under the Michigan statute, stating that "if the Legislature had intended that result, it easily could have provided explicitly that the twenty-year dormancy period shall not run during a period when a severed interest is 'subject to a lease.'" Although the Michigan Legislature did not draft that state's statute in that manner, the Ohio General Assembly did. The ODMA states that the mineral interest cannot be deemed abandoned when "[t]he mineral interest has been *the subject of* a title transaction . . ." R.C. § 5301.56(B)(3)(a) (emphasis added). In Ohio, unlike in Michigan, the mineral interest is the subject of a title transaction the entire time it is subject to an oil and gas lease.

the primary term of the lease.”<sup>11</sup> *Williams and Meyers, Manual of Oil and Gas Terms*, § 8-D (attached as Appendix Exhibit 5). Where, as in the case of the 1984 Lease, delay rental payments are called for by the Lease, those payments are necessary “in order to avoid early termination of the lease.” Order, p. 16. Thus, delay rental payments continue an oil and gas lease. As such, the payment of a delay rental makes a mineral interest the subject of a title transaction because it perpetuates the fee simple determinable estate conveyed under the oil and gas lease, delaying the possibility of reverter for the time period specified under the lease and effectuating the purpose of the ODMA by allowing for the continued possibility of production.

First, an oil and gas lease is a hybrid instrument, combining a traditional lease with a property interest and conveying a fee simple determinable, whose sole purpose is to allow for the production of minerals. See, e.g., *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 130 (1897) (making clear that an oil and gas lease conveys “a vested, though limited, estate in the lands for the purposes named in the lease”); *Kramer v. PAC Drilling Oil & Gas, L.L.C.*, 197 Ohio App.3d 554, 2011-Ohio-6750, ¶ 11 (“In a typical oil or gas lease, the lessor is a grantor and grants a fee

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<sup>11</sup> The State argues that the making of delay rental payments should not make a mineral interest the subject of a title transaction because “treating a delay rental payment as a savings event would frustrate that purpose [of oil and gas development] and would make it possible to tie up property indefinitely.” State *Amicus* Brief, p. 18. This argument showcases a misunderstanding of the basic terms of an oil and gas lease. As noted above, delay rental payments can only be made “during the primary term of the lease.” *Williams and Meyers, Manual of Oil and Gas Terms*, § 8-D. The primary term is a set number of years, however, see *Williams and Meyers, Manual of Oil and Gas Terms*, § 8-P (attached as Appendix Exhibit 12) (defining a primary term as a “period of time ...”), and thus delay rental payments made during that term cannot “tie up property indefinitely.” Ohio courts have specifically held that “delay rental provisions in oil and gas leases ... only apply during the *primary term* of the lease.” *Hupp v. Beck Energy Group*, 2014-Ohio-4255, ¶ 91 (7th Dist. 2014) (original emphasis). In any case, a mineral interest *owner* is never required to actually produce the minerals so the State’s concern about “t[ying] up property indefinitely” is nonsensical. The cases that discuss “tying up” property involve disputes between a mineral interest owner and its lessee. That concern is why courts have limited delay rental payments to the primary term when a lease is not otherwise clear on the point. A severed surface owner, by definition, has no pecuniary interest in whether the minerals are ever produced.

simple determinable interest to the lessee, who is actually a grantee”).<sup>12</sup> A “fee simple determinable” is a grant of a fee simple property interest that may be terminated under specific conditions. *See, e.g., P C K Properties, Inc. v. City of Cuyahoga Falls*, 112 Ohio App. 492, 495 (9th Dist. 1960) (“[A] determinable fee simple is an estate created with a special limitation which delimits the duration of an estate in land ...”). The typical oil and gas lease provides for a primary term of a set number of years and then an indefinite secondary term that continues so long as production of oil or gas continues. *See, e.g., Williams and Meyers, Manual of Oil and Gas Terms*, § 8-L. A delay rental payment continues the primary term of an oil and gas lease and thus perpetuates the fee simple determinable estate conveyed thereunder by delaying reversion to the mineral interest owner. To find that an oil and gas lease does not maintain a mineral interest owner’s rights under the ODMA would flip the intent of the statute on its head: mineral interest owners and their lessees would be deprived of the rights they bargained for because they engaged in the activity the General Assembly sought to facilitate (oil and gas development). Where the parties to an oil and gas lease have taken steps to continue that activity through the payment and acceptance of a delay rental there can be no doubt that the mineral interest is not then dormant or abandoned.

Second, a title transaction is defined as “any transaction *affecting title to any interest in land ...*” O.R.C. § 5301.47(F) (emphasis added). As discussed above and in *Buell*, an oil and gas lease conveys a fee simple determinable and one of the ways the rights conveyed continue to be held by the lessee is through the payment of a delay rental. Thus, the delay rental payment “affect[s] title” to the mineral “interest in land” by maintaining the fee simple determinable that was granted to the lessee, and postponing the happening of the reverter to the lessor. *See, e.g.,*

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<sup>12</sup> For a further discussion of Ohio law’s characterization of an oil and gas lease as granting a fee simple determinable, see § II.A.3 of the Merit Brief of the Petitioners in *Buell*.

*McLaughlin v. CNX Gas Co.*, No. 5:13cv1502, p. 5 (N.D. Ohio Dec. 13, 2013) (attached as Appendix Exhibit 6) (“[T]itle transaction means *any transaction* affecting title to *any interest* in land. It is difficult for the Court to conceive of a broader definition than the one chosen by Ohio law. . . . [T]he statute simply requires a transaction that affects title to any interest in the land”).

There is no dispute that, although not required by any version of the ODMA, when oil or gas are produced pursuant to an oil and gas lease, the mineral interest cannot be rendered abandoned. O.R.C. § 5301.56(B)(3)(b). Like production, the payment of delay rentals – either on a yearly or upfront basis – works to continue the existence of the lease through its primary term. It is generally the case that either the payment of delay rentals, or production, are required to allow a lease to run to the end of its primary term, *see, e.g., Beer v. Griffith*, Syl. Pt. 2, 61 Ohio St.2d 119 (1980) (“[a]bsent express provisions to the contrary” – i.e. the payment of delay rentals – “an oil and gas lease includes an implied covenant to reasonably develop the land”) (citations omitted), and thus whichever option the parties to an oil and gas lease choose, in exercising their freedom of contract, should work to prohibit any transfer of ownership under the ODMA.

**IV. Petitioner’s and *Amici* Offer No Reason to Find That a Delay Rental Payment Does Not Make a Mineral Interest the Subject of a Title Transaction.**

Mr. Corban and the *Amici* argue that a delay rental payment cannot make the mineral interest the subject of a title transaction because it is not recorded. *See* Petitioner’s Brief, p. 42; State *Amicus* Brief, p. 17, Gulfport *Amicus* Brief, pp. 25-30. This argument omits entirely, however, the fact that the oil and gas *lease* at issue in this case is recorded, and explicitly calls for the making of delay rental payments, thereby providing record evidence to any interested party that the mineral interest is the subject of a title transaction (the oil and gas lease), which

may be extended via a delay rental payment.<sup>13</sup> This is sufficient to prohibit the passage of any ownership interest via the ODMA. As the oil and gas lease is recorded, a trained title searcher has all the information he or she will need – the names and addresses of both lessee and lessor – to ascertain whether or not events like the payment of delay rentals have occurred such as to extend the lease to the expiration of the entire primary term explicitly elucidated in the lease. See Ohio Title Standards, 4.4 Encumbrances-Leases (attached as Appendix Exhibit 7) (“Problem A: Should an oil, gas or coal lease be shown when satisfactory *evidence* is furnished that rentals are in default and that minerals are not being produced? Standard A: No, provided further that the primary term of the lease has expired. . . . Problem B: May an examiner omit from his opinion reference to a recorded lease when the terms expressed in the lease have expired? Standard B: Yes, in the absence of notice of renewal arising from possession, record *or otherwise*”) (emphasis added); Joseph Shade, *Petroleum Land Titles: Title Examinations & Title Opinions*, 46 Baylor L. Rev. 1007, 1045-46 n. 144 (attached as Appendix Exhibit 8) (“[I]n [the] primary term, the cloud can be removed by *evidence* of expiration of the lease, such as by non-production and non-payment of delay rentals. After the primary term . . . expires, the cloud can possibly be removed *through physical inspection of the property . . .*”) (emphasis added) (citing Lewis G. Mosburg, Jr., *Landman’s Handbook on Petroleum Land Titles*). See also Gulfport Amicus Brief, p. 29 (discussing “a title examiner or . . . an investigator” going outside of the recorded documents to “if necessary, visit[] the leasehold”).

Even without the recording of the oil and gas lease evidencing the delay rental payments, a delay rental payment properly makes a mineral interest the subject of a title transaction. In examining whether the unrecorded expiration of an oil and gas lease tolled that state’s dormant

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<sup>13</sup> This contrasts with Mr. Corban’s argument here that he silently acquired his interest in the minerals with absolutely no record of such a transfer.

mineral act, the Supreme Court of Michigan expressly disavowed a strict requirement of recording:

[w]e disagree with the Court of Appeals to the extent that its opinion can be read to suggest that the act is merely a ‘recording statute’ which automatically triggers forfeiture of title whenever a twenty-year period elapses without the recording of an instrument. As already indicated, although the statute refers to five types of activity that toll the running of a dormancy period, only the first two listed above involve a recording requirement. Even though recording clearly is an important component of the act’s design, the Legislature has not relied on recording as the exclusive means to further its objectives.

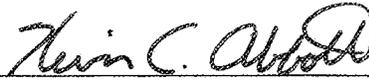
*Energetics, LTD v. Whitmill*, 497 N.W.2d 497, 501 (Mich. 1993). Like the statute at issue in *Energetics*, the ODMA is not “merely a ‘recording statute’ ... .” *Energetics*, 497 N.W.2d at 501. Instead, just like the dormant mineral act at issue in *Energetics*, the ODMA allows for multiple types of activity that prohibit the passage of any mineral interest, some of which do not require a recording of any kind. See O.R.C. §§ 5301.56(B)(1), (2), (3)(c), and 3(f). Just as was the case for the Michigan Act, “[e]ven though recording clearly is an important component of the [ODMA’s] design, the legislature has not relied on recording as the exclusive means to further its objectives.” *Energetics*, 497 N.W.2d at 501.

### **CONCLUSION**

The purpose of the ODMA is to clear record title to mineral interests where such record owners cannot be identified or located. One option before this court (applying the 2006 amendments) requires a surface owner seeking to obtain mineral ownership to do so on the record; another (construing the ODMA to be “self-executing”) does not. This Court should effectuate the purpose of the statute and require any claim brought after the 2006 amendments to comply with those procedures before the mineral interest can be forfeited and transferred to the surface owner. This Court can also effectuate the purpose of the ODMA by finding that a delay

rental payment called for by the recorded oil and gas lease so as to keep the lease in effect precludes a finding of dormancy.

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**CERTIFICATE OF SERVICE**

I certify that on this 2<sup>nd</sup> day of October, 2014, a copy of the foregoing was served via Regular U.S. Mail upon the following:

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