

IN THE SUPREME COURT OF OHIO

HANS MICHAEL CORBAN,

Petitioner,

v.

CHESAPEAKE EXPLORATION, L.L.C., 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 Court Case No. 2:13-cv-00246

REPLY BRIEF OF AMICI CURIAE JEFFCO RESOURCES, INC., CHRISTOPHER AND VERONICA WENDT, CAROL S. MILLER, MARK AND KATHY RASTETTER, DOUGLAS HENDERSON, JOHN YASKANICH, DJURO AND VESNA KOVACIC, BRETT AND KIM TRISSEL, AND STEVEN E. AND DIANE CHESHIER IN SUPPORT OF PETITIONER

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ARGUMENT

Amici Curiae, Jeffco Resources, Inc., Christopher and Veronica Wendt, Carol S. Miller, Mark and Kathy Rastetter, Douglas Henderson, John Yaskanich, Djuro and Vesna Kovacic, Brett and Kim Trissel, and Steven E. and Diane Cheshier, submit this Reply Brief in support of Petitioner, Hans Michael Corban, on Certified Question of State Law I: “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?”

I. **CERTIFIED QUESTION OF STATE LAW I: “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?”**

Certified Question of State Law I has now been addressed by both the Seventh and Fifth District Courts of Appeals. Each has upheld the applicability of the 1989 DMA.

Recently, on October 16, 2014, the Fifth District Court of Appeals issued its decision in *Wendt v. Dickerson*, Case No. 2014 AP 01 0003, 2014-Ohio-4615. The Court followed the rationale of the Seventh District Court of Appeals in *Walker v. Shondrick-Nau*, Noble No. 13NO402, 2012-Ohio-1499 (7th Dist.), and *Swartz v. Householder*, 2014-Ohio-2359, 12 N.E.2d 1243 (7th Dist.), in holding the 1989 DMA still applied to current litigation after the 2006 DMA amendments if the statutory abandonment criteria was met before June 30, 2006, because the prior statute was self-executing and the lapsed right automatically vested with the surface owner. *Wendt*, 2014-Ohio-4615, ¶37.

Based on the *Swartz*, *Walker*, and *Wendt* decisions, the law of Ohio is currently uniform on the answer to Certified Question of State Law I: the 1989 DMA was self-executing

and applies to severed mineral interests abandoned prior to the change in the law on June 30, 2006.

A. THE 1989 DMA WAS SELF-EXECUTING AND THEREFORE, OPERATED AUTOMATICALLY TO CAUSE SEVERED OIL, GAS, AND OTHER MINERAL INTERESTS TO BECOME ABANDONED AND VESTED WITH THE RELATED SURFACE ESTATES

The plain language of the 1989 DMA provides that a severed mineral interest which is not subject to a preserving event during a relevant twenty-year period “shall be **deemed abandoned** and **vested** in the owner of the surface.” R.C. 5301.56(B)(1)**Error! Bookmark not defined..** *See also* Merit Brief of Amici Curie Jeffco Resources, Inc., et al., pp. 5-14.

1. **Respondent admits Michigan’s DMA, which used the same “deemed abandoned” and “vest” language, is unambiguously self-executing, and was the only state statute cited by the drafters of the 1989 DMA as a model.**

Respondents erroneously argue the language of the 1989 DMA stating “deemed abandoned” and “vested in the owner of the surface” is somehow less definitive than the language in Michigan’s dormant mineral statute. Such an argument not only ignores the express language of the statutes, it ignores the legislative history of the 1989 DMA which affirmatively supports the creation of an automatic abandonment mechanism. (*See* Fiscal Note Sub. S.B. 223, pp. 48-50, a copy of which was attached to the Merit Brief of *Amici Curie* Jeffco Resources, Inc., et al., as App. Ex. 1). Plain and simple, the mineral rights “revert to the surface landowner if the mineral right holder does nothing to the rights for 20 years. To extend their rights, a mineral right holder would simply have to file an extension with the local county recorder.” (App. Ex. 1, p. 1).

As Respondent North American Coal Royalty Company correctly points out at page 17 of its Merit Brief, the sponsor testimony referenced 15 states with existing dormant

mineral laws. However, as Respondent acknowledges, “[t]he only individual state statute that the drafters cited as a model was Michigan’s DMA.” Merit Brief of Respondent North American Coal Royalty Company, at p. 17 (emphasis added). This is critical because the Michigan DMA, which was expressly used as a model for Ohio’s 1989 DMA, both uses the key phrase “deemed abandoned” and “vest,” and is an automatic self-executing statute.

Michigan’s DMA provides in relevant part, “[a]ny interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged, or transferred by instrument recorded in the register of deeds office for the county where that interest in oil or gas is located for a period of 20 years shall . . . be **deemed abandoned.**” M.C.L.A. 554.291(1) (emphasis added). Michigan’s DMA continues, that “[a]ny interest in oil or gas **deemed abandoned** as provided in subsection (1) shall **vest** as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership.” M.C.L.A. 554.291(2) (emphasis added). Michigan’s DMA uses the same key words set forth in Ohio’s 1989 DMA – deemed abandoned and vest.

Respondent misleadingly omitted the portion of the Michigan DMA which included the same phrase “deemed abandoned” that is present in Ohio’s 1989 DMA. Despite that omission, Respondent admits the Michigan law “was unambiguously self-executing.” Merit Brief of Respondent North American Coal Royalty Company, at p. 17. There is no reason the same language is not unambiguously self-executing in the 1989 DMA. This is further supported by *Van Slooten v. Larsen*, 410 Mich. 21, 37, 299 N.W.2d 704, 707 (1980), which upheld the self-executing feature of the act, and which was decided 9 years before Ohio enacted its 1989 DMA.

In fact, the sponsor testimony in discussing the Michigan DMA, states, “Michigan’s legislators recognized the importance of including minerals in those defects and

errors **which should be eliminated by operation of time and non-use.**” (App. Ex. 1, p. 49)

(emphasis added). The testimony goes on to state:

The Michigan Act and the Model Act provide an additional mechanism for the elimination of dormant mineral interests which, when used in conjunction with the Marketable Title Act, is effective in accomplishing this goal. Under the Michigan Act, owners of severed mineral interests are required to file notice of their claims of interest **within 20 years after the last use of the interest**. A three-year grace period was provided for initial filing under the Michigan Act. Any severed mineral interest **deemed abandoned or extinguished** as a result of the application of the Michigan Act **vests in the owner of the surface**.

The major distinction between the proposed bill for consideration by the Ohio legislature and the Michigan Act is that the Michigan Act applies only to interests in oil and gas. It is apparent from the 1974 amendment of the Ohio Marketable Title Act that the Ohio Legislature has deemed it advisable for the Marketable Title Act to apply to all mineral interest except coal. The proposed Ohio Dormant Mineral Act has been drafted to conform to the Ohio Marketable Title Act and apply to any mineral interest except an interest in coal as defined by §5301.53(E) of the Marketable Title Act. **The proposed Bill, if passed, would have lead to the desired result as states by the Appellate Court in Heifer of terminating unused mineral interest not preserved by operations, transfers or a filing of notice of an intent to preserve interest.**”

The testimony makes clear: (1) Ohio’s 1989 DMA was modeled after Michigan’s DMA which was admittedly an automatic self-executing statute; (2) the focus of the 1989 DMA was on time and non-use of the mineral holder, not action by the surface owner; (3) there was no distinction between deemed abandoned or extinguished; and (4) the major distinction between Ohio’s DMA and Michigan’s Act was that Michigan’s was limited to oil and gas, and Ohio’s was broader, applying to all mineral interests except coal. The distinction was not that Michigan’s Act was self-executing (as upheld by the Michigan Supreme Court in 1980) but that Ohio’s would require an unspoken quiet title action. Any argument to the contrary ignores the plain text of the 1989 DMA, the use of the same “deemed abandoned” language in the automatic

self-executing Michigan DMA which the 1989 DMA was admittedly modeled after, and the sponsor testimony set forth above.

2. **The Ohio Legislature chose in 1989 to enact a self-executing DMA like Michigan and Indiana rather than a DMA that required a quiet title action or a notice procedure.**

As set forth above, despite referencing 15 states with existing dormant mineral laws, the 1989 Ohio Legislature expressly intended to enact a self-executing DMA, like Michigan's Act. Had Ohio Legislators intended in 1989 to require a quiet title action before any vesting occurred they could have provided such a mechanism, like California or Nebraska. *See, e.g.*, Cal. Civ. Code §883.240(a) ("An action to terminate a mineral right pursuant to this article shall be brought in the superior court of the county in which the real property subject to the mineral right is located."); Neb. Rev. Stat. §57-228 ("Any owner or owners of the surface of real estate from which a mineral interest has been severed, . . . may sue in equity in the county where such real estate, or some part thereof, is located, praying for the termination and extinguishment of such severed mineral interest").

Similarly, if the Ohio Legislators intended in 1989 to require surface owners to give notice of an intent to abandon and the ability of the mineral holder to preserve *after* that notice by filing a claim to preserve, they could have provided such a mechanism, like North Dakota or Kansas. *See, e.g.*, N.D. Cent. Code Ann. 38-18.1-04 et seq. and *Larson v. Norheim*, 830 N.W.2d 85, 2013 ND 60 (2013) (holding a mineral interest is not extinguished if the owner of the mineral interest within 60 days after first publication of the notice of lapse of mineral interest records a statement of claim); Kan. Stat. Ann. §55-1601 to 55-1607, and *Scully v. Overall*, 17 Kan. App. 2d 582, 840 P.2d 1211 (1992) (holding failure to file a statement of claim within the 20 year period will not cause a mineral interest to be extinguished if the owner filed

the statement of claim within 60 days after notice of the lapse was given under the notice provision of the statute).

The 1989 DMA did not require any such procedure, nor did it provide an additional time frame in which holders could come back and claim their interest *after* the 20 year period had run. The 1989 Ohio Legislature expressly modeled the 1989 DMA on a self-executing act (Michigan). The 2006 Legislature was not the 1989 Legislature. Despite any statement to the contrary in making the 2006 amendments to the DMA, the 2006 amendments did not clarify any ambiguity in the 1989 DMA, they fundamentally changed the type of dormant mineral statute in Ohio from a self-executing statute (like Michigan and Indiana) to a notice statute (like North Dakota and Kansas).

B. THE 1989 DMA PROVIDES FOR THE USE OF CONTINUOUS TWENTY-YEAR DORMANCY REVIEW PERIODS AND IS NOT BASED UPON THE DATE ON WHICH A SURFACE OWNER COMMENCES A QUIET TITLE LAWSUIT.

The merit brief of *Amici Curiae*, the Noon, Shepherd, Gregor, Merecka, and Kinney Families (collectively “Noon *Amici*”), argues that the phrase “within the preceding twenty years,” as used in the 1989 DMA, means two things: (1) a surface owner had to file a quiet title lawsuit to bring about abandonment and vesting and (2) that the “preceding twenty years” means the 20 years which precede the filing of a quiet title lawsuit. (See Merit Brief of *Amici Curiae*, the Noon, Shepherd, Gregor, Merecka, and Kinney Families). However, both assertions are wrong and ignore the plain language of and legislative intent behind the 1989 DMA. Additionally, this issue does not appear to be before the Court as neither of the certified questions requests the Court to define what the “preceding twenty years” means. However, to the extent the Court looks at this issue, it will find that Noon *Amici*’s argument is not supported by the 1989 DMA’s text or its legislative purpose and history.

1. **The Plain Language of the 1989 DMA Provides for Continuous Twenty-year Review Periods, Without Any Reference to a Formal Legal Action by a Surface Owner.**

Noon *Amici*'s argument that a surface owner cannot "self-servingly determine that the statutory savings events do not apply" ignores the 1989 DMA's text and its purpose. The surface owner, or any party examining the public record, does not arbitrarily determine if a severed mineral interest has remained dormant for a period of 20 years. Instead, the party would examine whether between March 22, 1969 and June 30, 2006, the holder of the severed mineral holder used his or interest every 20 years. If that individual failed to use his or her interest every 20 years, then the interest was no longer owned separate and apart from the surface estate, but was merged with the surface estate. The 1989 DMA, therefore, operates in the same manner as the Marketable Title Act, as the latter does not require a property owner to take any "formal" action to bring about the extinguishing of stale property interests. *Evans v. Cormican*, 5th Dist. Licking No. 09 CA 76, 2010-Ohio-541, (Jan. 5, 2010) (finding that the Marketable Title Act operates, automatically, to remove clouds from title that pre-date the root of title); *see Heifner v. Bradford*, 4 Ohio St.3d 49, 446 N.E.2d 440 (1983); *see Collins v. Moran*, 7th Dist. Mahoning No. 02 CA 218, 2004-Ohio-1381 (March 17, 2004). Noon *Amici*'s argument, if accepted, would render not just the 1989 DMA meaningless, but also the Marketable Title Act and does not serve the purpose of easing and facilitating future real property transactions and therefore, must be ignored.

Additionally, the phrase "within the preceding twenty years" does not lend itself to more than one reasonable interpretation, as Noon *Amici* seem to suggest. Instead, the language and purpose of the 1989 DMA provides for continuous twenty-year periods, meaning a mineral

holder must use and/or preserve his or her interest every 20 years, just as a property owner must do every 40 years under the Marketable Title Act, generally. R.C. 5301.56 (D)(1) provides:

A mineral interest may be preserved indefinitely from being deemed abandoned under division (B)(1) by the occurrence of any of the circumstances described in division (B)(1)(c) of this section, including but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

In *Eisenbarth v. Reusser*, the Honorable Mary DeGenaro found that the use of a fixed period violates the express terms of the 1989 DMA, and instead, held that the 1989 DMA was susceptible to continuous review periods:

The provision in R.C. 5301.56(D)(1) delineating the process for preserving severed mineral rights for successive terms signals the General Assembly's intention that in order to preserve that interest, every 20 years a savings event must occur or the holder must file a claim to preserve, in order to retain their interest for another 20 years.

7th Dist. No. Case No. 13 MO 10, 2014-Ohio-3792, ¶124 (Aug. 28, 2014) (DeGenaro, J., concurring in judgment only). In *Albanese v. Batman*, the Belmont Court of Common Pleas came to the same conclusion:

A static twenty (20) year look back period would have no need for a provision calling for indefinite preservation of mineral interest through successive filings of preservation claims. Based upon the same, this Court finds the 1989 Dormant Mineral Act to provide for a “rolling look back period.”

This Court finds this determination to be consistent with the comments set forth in the Ohio Legislative Service Commission Report relating to the 1989 Enactment of R.C. 5301.56. The Commission therein stated:

Under the act, an interest could be preserved indefinitely from deemed abandonment by the occurrence of any of the four listed categories of exceptional circumstances within each preceding 20 year period.

Belmont County Court of Common Pleas Case No. 12 CV 0044 (Apr. 28, 2014).

As this statute is part of the Marketable Title Act and was expressly intended to ease and facilitate future mineral transactions, it is reasonable to conclude that the General Assembly intended the law to operate prospectively, and in perpetuity, and not based upon the filing of a formal legal action which is not referenced anywhere in the 1989 DMA's text. Additionally, because the 1989 DMA is not a forfeiture statute, but instead, is a statute of abandonment, it should not be strictly construed against abandonment. (*See* Section I(F) of Merit Brief of *Amici Curie* Jeffco Resources, Inc., et al.). In fact, R.C. 5301.55 explicitly mandates that the 1989 DMA is to "be liberally construed" to effect its purpose, which would undoubtedly be to operate in a continuous manner to ensure that precious mineral resources are produced in an efficient and reasonable manner. Requiring the filing a lawsuit to bring about abandonment and vesting under the 1989 DMA does not ease mineral transactions. Instead, it injects the complexity of litigation into the mix.

The phrase "within the preceding twenty years" is not ambiguous or so vague as to confuse a reasonable mineral holder. If a mineral holder, between 1989 and 2006, wished to determine whether his or her interest was abandoned under the 1989 DMA, he or she would reasonably examine the 20 years preceding the date of such a review. For instance, if a holder of an interest created in 1970 examined the 1989 DMA on June 1, 2002, he or she would reasonably examine the 20 years preceding June 1, 2002. That mineral holder, on that date of examination, would reasonably ask: "Within the preceding 20 years, did any of the preserving events occur?" It would be unreasonable for that holder to ask "Has the surface owner filed a quiet title lawsuit? If he or she did, did any of the preserving events occur?" The only way to conclude that a mineral holder on March 23, 1992, or June 1, 2001, would reasonably conclude

that the 1989 DMA defined the twenty-year period as the 20 years immediately preceding an action would be to rewrite the statute to say “within the twenty years which precede the date on which the surface owner commences an action to recover the mineral interest.” The 1989 DMA contains no language, and as discussed above, no additional language need be added to adopt *Amici Curiae’s* interpretation. If the General Assembly had intended such a result, they could have chosen to model the 1989 DMA after a statute that differed from Michigan’s dormant mineral statute.

The Pre-*Eisenbarth* Caselaw on This Issue Clearly Embraces the Use of Continuous Twenty-year Review Periods.

Noon *Amici’s* assertion that there are “three different and competing” answers on what “within the preceding twenty years” means misconstrues the pre-*Eisenbarth* precedent on the issue. Courts considering this issue have ruled in manners consistent with their particular facts. The difference in holdings, principally whether a court has utilized the March 22, 1969, to March 22, 1992, time period or examined each twenty-year period between March 22, 1969, and June 30, 2006, turns on the different fact patterns of each case.

For example, in *Riddel v. Layman*, the court did not consider the issue of fixed or rolling review periods. *Riddel v. Layman*, 5th Dist. No. 94CA114, 1995 WL 498812 (July 10, 1995). Thus, the *Riddel* holding did not embrace this issue. The reserving deed at issue was executed January 4, 1965, but not recorded until June 12, 1973. *Id.* at *1. Appellee, Eula Layman, filed a claim to preserve mineral interest with the Licking County Recorder. *Id.* While not stated in the opinion, that “Claim to Preserve A Mineral Interest” was recorded on May 28, 1992, at Volume 450, Page 400, of the Licking County Recorder’s Office, and is a matter of public record. The date of that claim to preserve and the actual document were before the Fifth

District when it decided *Riddel*. (See Appellate Brief of Appellee Eula Faye Layman, a copy of which is attached hereto as App. Ex. 1, p.10). Note that the claim to preserve was recorded within 20 years of the recording of the prior mineral severance. Therefore, on January 25, 1994, when Appellant Riddel filed the complaint to quiet title, the issue was not whether the mineral interest could be abandoned after June 12, 1993 (20 years after the recording of the severance deed) because a claim to preserve had been filed in 1992, but whether the mineral interest had been abandoned prior to the filing of the claim to preserve on May 28, 1992. This is because it was argued “there was no title transaction regarding the mineral rights in the twenty years prior to the enactment of the statute on March 22, 1989, and Appellee Layman failed to file a claim to preserve interest in the mineral rights by March 22, 1992, within the three year savings statute.” *Id.* at *2. The appellee in *Riddel*, who ultimately prevailed, expressly argued that the 1989 DMA utilized “rolling” review periods. (App. Ex. 1, p. 17).

Thus, the issue in *Riddel* was whether the preserving event was the title transaction on January 4, 1965 (in which case the interest could have been subject to abandonment), or whether the preserving event was the date that transaction was recorded, on June 12, 1973. The court found the preserving event was the recording. Thus, the reservation was not dormant for 20 years, as the 1973 recorded deed preserved the interest until June 12, 1993, and the claim to preserve was filed prior to that, on May 28, 1992.

When there was no savings event within the first review period, the courts had no need to look to any other period. In *Wendt*, the holders could not identify a single savings event during any time period when the 1989 DMA was in effect. 2014-Ohio-4615. Thus, it did not matter what twenty-year period the court chose to review and it made sense to use the first date available for the abandonment, March 22, 1992. The same facts were present in *Wiseman v.*

Potts. Morgan C.P. Case No. 08 CV 0145 (June 29, 2010). In *Tribett v. Shepherd*, the severed mineral interest was not subject to a title transaction between March 22, 1969 and March 22, 1992. 7th Dist. Belmont No. 13BE22, 2014-Ohio-4320, ¶61 (Sep. 29, 2014); *Tribett v. Shepherd*, Belmont C.P. Case No. 12-CV-180 (July 22, 2013). What did occur between those years was a deed between surface owners which may reference to prior reservations, but which would not qualify as a title transaction under the 1989 DMA. *Id.* (“The fact that the grantors chose to include the reservation language does not equate to the Appellants ‘using’ their minerals as anticipated by the language of the statute.”); see *Walker*, 2014-Ohio-1499 (holding that a reference to a prior reservation does not constitute a title transaction under the 1989 DMA). Thus, in *Tribett* there was no title transaction during the initial twenty-year period and thus, it makes perfect sense that the trial court chose to use that period to establish abandonment. However, that court did not hold that the 1989 DMA used a static review period. In fact, that very court, the Belmont County Court of Common Pleas, subsequent to the *Tribett* decision adopted the “rolling” review periods analysis. *Taylor v. Crosby*, Belmont C.P. Case No. 11 CV 422 (Sep. 16, 2013). Finally, in *Marty v. Dennis*, there were no preserving events between March 22, 1969, and June 30, 2006, and thus, the issue of the use of “rolling” review periods was not outcome determinative. Monroe C.P. Case No. 2012-203 (April 11, 2013).

Conversely, when a savings event was present in the initial twenty-year period, then courts have looked for subsequent savings events. For example, in *Shannon v. Householder*, the severed interest was subjected to a recorded oil and gas lease on March 17, 1978, and a recorded certificate of transfer on July 12, 1979. Jefferson C.P. Case No. 12CV226 (July 17, 2013) *affirmed by Swartz*, 2014-Ohio-2359 (same facts were presented in the *Swartz v. Householder* case). The trial court held that it needed to be subjected to another event before

July 13, 1999. Similarly, in *Taylor*, the severed mineral interest was subjected to an oil and gas lease in 1975. Belmont C.P. Case No. 11 CV 422. Thus, the court held that the mineral interest had to be subject to an additional event between 1975 and 1995. *Id.* Finally, the *Albanese* court, after reviewing the 1989 DMA's plain language and the legislative intent behind the statute, found that a recorded will is a title transaction. Belmont C.P. Case No. 12 CV 0044. Importantly, that will was recorded with the Belmont County Recorder's Office on April 10, 1989. Thus, it was recorded within the 20 years preceding enactment and was recorded at such a late date to preserve the interest throughout the remainder of the 1989 DMA's effective date (April 10, 1989 through April 10, 2009).

Any other approach ignores the plain language and intent of the 1989 DMA and embraces a view that the General Assembly intended to define the "within the preceding twenty years" based upon undefined actions. As discussed in *Amici Curiae's* merit brief, the 1989 DMA did not impose any obligation on the surface owner. (See Merit Brief of *Amici Curiae*, Sections I(A), (B), and (E)). As this statute is part of the Marketable Title Act and was expressly intended to ease and facilitate future mineral transactions, the only reasonable conclusion is that the General Assembly, on March 22, 1989, intended the law to operate prospectively, in perpetuity, and automatically based upon the inaction of dormant mineral interest holders. Additionally, because the 1989 DMA is not a forfeiture statute, but instead, is a statute of abandonment it should not be strictly construed against abandonment. In fact, R.C. 5301.55 explicitly mandates that the 1989 DMA is to "be liberally construed to effect [sic] the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain."

To construe the 1989 DMA as utilizing a review period based upon a phantom action, i.e. one not identified or referenced in the statute, would be fatal to the purpose and goal of the statute. As a result, the Court should ignore Noon *Amici*'s nonsensical interpretation, and instead, should hold that the 1989 DMA utilized continuous twenty-year review periods.

2. **Even if the 1989 DMA's Text is Ambiguous, the Purpose and Intent of the Law is to Use Continuous Twenty-Year Periods.**

Even if the phrase "preceding twenty years" is ambiguous, which *Amici Curiae* expressly deny, the legislative intent and history of the 1989 DMA require an interpretation embracing continuous review periods, without any reference to a phantom action by surface owners. When determining legislative intent of an ambiguous statute, a court may consider the purpose of the statute, the object sought to be obtained, and the legislative history. R.C. 1.49. When seeking to determine the legislative intent behind the 1989 DMA, the Court is confined to examining the legislative history of the 1989 DMA, without regard to the 2006 amendments made thereto. *Tribett v. Shepherd*, 7th Dist. Belmont No. 13 BE 22, 2014-Ohio-4320, fn. 1 (Sep. 29, 2014). Such a rule is appropriate when one considers that the members of the General Assembly in 1989 may not be the same members in 2006. *Id.* It is inappropriate for Noon *Amici* to make reference to statements by the 2006 General Assembly, as that body was not the same legislative body that drafted and enacted the 1989 DMA. It is the legislative body serving in 1989 that one should examine when determining the legislative intent.

The explicit legislative history behind the 1989 DMA confirms that it was to operate on a "rolling" basis. (See S.B. 223 (As Introduced), a copy of which is attached hereto as App. Ex. 2; see also Fiscal Note Sub. S.B. 223, pp. 48-50, a copy of which is attached to *Amici Curiae*'s Merit Brief as App. Ex. 1). The 1989 DMA was introduced to work parallel to the Marketable Title Act by "terminating unused mineral interests not preserved by operations,

transfers or a filing of notice of an intent to preserve interest.” (App. Ex. 1 attached to *Amici Curiae*’s Merit Brief, pp. 48-50). Plain and simple, the mineral rights “revert to the surface landowner if the mineral right holder does nothing to the rights for 20 years. To extend their rights, a mineral right holder would simply have to file an extension with the local county recorder.” (App. Ex. 1 attached to *Amici Curiae*’s Merit Brief, p. 1). The General Assembly explicitly stated that they intended mineral holders to be able to “extend” their mineral interests by one of several preserving acts, including the filing of a claim to preserve. They did not use the phrase “preserve indefinitely” when describing the abandonment and preservation mechanism. **Importantly, they did not indicate that their intent was to have the twenty-year period be defined by the action of a surface owner.** If they had intended to define that period by the date on which a surface owner commenced an action to terminate a mineral interest, they could have done so by adopting the language of the Uniform Dormant Mineral Interests Act, which was before them when they enacted the 1989 DMA. (App. Ex. 1 attached to *Amici Curiae*’s Merit Brief, p. 51). They did not adopt any such language, and instead, opted to treat the 1989 DMA like its companion, the Marketable Title Act.

Additionally, when the 1989 DMA was originally introduced, the General Assembly stated that a mineral interest holder could avoid abandonment by the “continuing occurrence of any of the items listed in the bill” (referring to the exceptions and preserving events). (App. Ex. 2, p. 3). The General Assembly did not intend for the indefinite preservation of an interest upon the “occurrence” of any of the preserving events, but intended for the “continuing occurrence” of preserving events. (App. Ex. 2, p. 3). And once again, the General Assembly never stated that it intended to measure the twenty-year period from when a surface owner commences a recovery action. Thus, if the Court finds that the phrase “within the

preceding twenty years” is ambiguous, it must interpret that phrase in accordance with the purpose of the statute and the General Assembly’s stated intent within the law’s legislative history: a mineral interest must have been subjected to continuous preserving events and as such, the law utilizes continuous review periods. R.C. 1.49(A), (B), and (C). Finally, as previously discussed, the 1989 General Assembly attempted to model the 1989 DMA after Michigan’s dormant mineral statute, which operated within continuous, twenty-year review periods, whereby the existence of any such period of dormancy would have the interest deemed abandoned and vested with the surface owner.

C. THE 2006 AMENDMENTS TO THE 1989 DMA CANNOT BE RETROACTIVELY APPLIED AGAINST SURFACE OWNERS WHO ACQUIRED VESTED PROPERTY RIGHTS UNDER THE 1989 DMA.

Respondent’s, North American Coal Royalty Company, argument that the 2006 version of the statute was expressly made retroactive against surface owners who acquired vested rights under the 1989 DMA ignores Ohio law and the plain language of the 2006 amendments. (See Merit Brief of *Amici Curiae* Jeffco Resources, Section I(G)). At the outset, Respondent, North American Coal Royalty Company, concedes the fact that the General Assembly was entitled to impose minor obligations upon holders of severed mineral interests. It acknowledges that a legislature may condition the continued retention of vested property rights upon the performance of affirmative duties. *See United States v. Locke*, 471 U.S. 84, 104, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1984). (See Merit Brief of Respondent, North American Coal Royalty Company, p. 27). Starting on March 22, 1989, severed mineral holders were prospectively obligated to utilize their severed mineral interests by one of several enumerated actions. Their failure to take future action conclusively evidenced their present intent to irrevocably abandon their rights and confirmed that their abandonment of their rights in the initial twenty-year period (March 22,

1969 and March 22, 1989) was intentional.

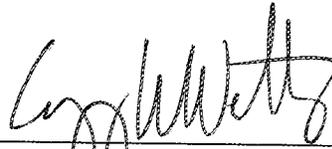
Petitioner then goes further by erroneously arguing that this Court, in *Heifner v. Bradford*, held that a statute which does not express its intent to retroactively divest vested property may still be applied in such a manner. In *Heifner*, this Court simply applied the Marketable Title Act to the facts before it, without reference to a retroactivity challenge. 4 Ohio St.3d 49. The Fifth District Court of Appeals, on the other hand, did address the issue of the Marketable Title Act's applicability to interests created before its enactment date. *Heifner v. Bradford*, 5th Dist. Case No. CA-81-10, 1982 WL 2902 (Jan. 29, 1982) *overruled on other grounds by* 4 Ohio St. 3d 49. Importantly, the Fifth District distinguished between a statute which examines past conduct, but applies prospectively (which is appropriate) and a statute which examines past conduct and operates based solely upon that inaction without the ability to preserve one's rights (which is inappropriate without a grace period). *Id.* at *8. In *Heifner*, the appellate court was examining changes to the Marketable Title Act which brought mineral interests under its purview. *Id.* Those changes did not become self-executing (meaning they did not extinguish severed mineral interests) until the end of a grace period. *Id.* As such, it operated prospectively.

Contrary to Petitioner's argument, both the 1989 DMA and the 2006 version operate solely on a prospective basis. The 1989 DMA did not effectuate abandonment and vesting until the end of a three-year grace period (ending March 22, 1992), even though it reviewed mineral holders' conduct in the 20 years which preceded the statute's enactment (March 22, 1969-March 22, 1989). Thus, it gave mineral holders three years to act and therefore, operated prospectively. The 2006 version of the statute, without making any express statement that those surface owners who had acquired rights under the 1989 DMA were to lose

those rights, examines actions in the 20 years predating notice, but gives all mineral holders 60 days to preserve their interests. Thus, it operated prospectively.

CONCLUSION

Based on the foregoing, in answering the First Certified Question of State Law, the Court should hold that the 1989 DMA was self-executing, without the need for action by surface owners, and should further hold that any rights acquired thereunder cannot and were not impacted by the 2006 amendments to the statute. The 1989 DMA applies to claims asserted after 2006 when 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.



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APPENDIX EXHIBIT 1

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

1994 MAR 15 10 13

JAMES B. RIDDEL

Plaintiff-Appellant

vs.

Case No. 94-CV-00038

EULA FAYE LAYMAN, et al.

Defendants-Appellees

FRED TARBOX
LINDA TARBOX

Defendants-Appellees

ANSWER BRIEF OF APPELLEE EULA FAYE LAYMAN

APPEAL FROM THE COURT OF COMMON PLEAS OF LICKING COUNTY, OHIO

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APPELLEE'S RESPONSE TO APPELLANT'S STATEMENTS
OF ASSIGNMENTS OR ERROR

ASSIGNMENT OF ERROR NO. 1

A mineral interest is not extinguished under R.C. §5301.56(B)(1) if a recording of a title transaction affecting that interest is made within the preceding twenty years.

ASSIGNMENT OF ERROR NO. 2

The trial court properly certified the trial court's judgment of September 14, 1994, as a final judgment under Civil Rule 54(B).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is the twenty year period under R.C. §5301.56(B)(1), the Ohio Dormant Mineral Act, twenty years from the recording of a title transaction?

2. Was the 49% mineral interest reserved in the deed from Austin C. Layman and Eula Faye Layman, husband and wife, to Hilda J. Layman, executed on January 6, 1965, and recorded on June 12, 1973, extinguished by the Ohio Dormant Mineral Act?

3. Where a judgment of a trial court disposes of less than all of multiple claims against multiple parties, and makes a finding under Civil Rule 54(B) that there is no just reason for delay in entering final judgment on those claims which have been adjudicated, is the judgment subject to appeal?

STATEMENT OF THE CASE

1. Judgment from Which Appeal is Taken

This is an appeal from a summary judgment of the Court of Common Pleas, filed September 15, 1994. The judgment made final adjudication of three of multiple claims, and the judgment contained certification as a final judgment under Civ. R. 54(B).

2. Nature of Dispute

The case involves the validity of a 49% mineral interest in a 111 acre farm in McKean Township, Licking County, Ohio, which interest was reserved to Defendant Eula Faye Layman and her deceased husband, Austin C. Layman, in a deed recorded on June 14, 1973.

3. Primary Issue Before Court

The question presented is whether the reserved 49% mineral interest owned by Defendant Layman has been extinguished by R.C. §5301.56, the Ohio Dormant Mineral Act (O.D.M.A.).

4. Trial Court's Holding

The trial court found that the mineral interest in dispute had not been extinguished by the O.D.M.A. and granted summary judgment against Plaintiff and in favor of Defendant Layman on the first claim of the complaint seeking to quiet title, and also granted summary judgment in favor of Defendant Layman against all parties on the first and second claims in her counterclaim and cross-claims, those being for a

declaratory judgment and to quiet title.

5. Parties

The plaintiff is the owner of the subject real estate who took title from Defendants Tarbox in April, 1990, by warranty deed without excepting any interest in mineral rights. (Appendix, Ex. D)

Defendant Layman is the record owner of an undivided 49% interest in the mineral rights in the lands by virtue of a reservation contained in a deed recorded June 12, 1973. (Appendix, Ex. A)

Defendants Tarbox had been the purchasers of the subject premises on land contract from Austin C. Layman and Eula Faye Layman, dated and recorded May, 1964, said land contract containing the 49% mineral reservation. (Appendix, Ex. B)

In completion of the land contract, Hilda J. Layman deeded the property to the Tarboxes by deed dated May 23, 1973, and filed July 3, 1973 (Appendix, Ex. C). This deed did not contain the reservation of the 49% mineral interest, although the land contract forming the basis for the deed excepted the 49% mineral interest.

Defendants Tarbox are also the grantors in a warranty deed to Plaintiff dated March 27, 1990, and recorded April. 15, 1990, which deed did not except any interest in mineral rights. (Appendix Ex. D)

Defendant Clinton Oil Company is the lessee under an oil and gas lease dated April 27, 1992, from Defendant Layman as lessor covering the subject premises, which lease was recorded

May 8, 1993.

Additional Defendant Bank One of Columbus, N.A., is the holder of a mortgage from Riddel, covering the subject premises, which mortgage was filed January 29, 1992, and which is subordinate to Defendant Layman's 49% mineral interest.

Additional Defendant National Union Fire Insurance Company of Pittsburgh is the holder of a judgment lien in the amount of \$25,429.93 against Plaintiff James B. Riddel, originally filed May 4, 1987, and renewed May 4, 1992, which lien, if valid, would be subordinate to Defendant Layman's 49% mineral interest.

Defendant United States of America, Acting through Farmers Home Administration, was named an additional defendant due to the existence of record of a security agreement affecting the subject premises, but has filed a disclaimer indicating it has no interest in the premises.

6. Pleadings and Claims

A. Complaint of Plaintiff Riddel

The complaint filed by Riddel, owner of the 111 acres, more or less, contained three claims and named as defendants Layman, The Clinton Oil Company, holder of an oil lease in the premises and Fred C. Tarbox and Christina Kay Tarbox, Plaintiff's predecessors in title from whom Riddel purchased the premises.

The first claim of the complaint sought to quiet title to the Plaintiff's property in favor of Plaintiff, which would include the oil and gas interests in dispute, declaring null

and void and canceling all oil and gas leases on Plaintiff's land and barring all persons.

The second and third claims of Plaintiff's complaint sought damages against Defendants Tarbox for breach of contract of sale and breach of warranty contained in the warranty deed.

Plaintiff filed a motion to amend the counterclaim to add an additional claim to quiet title in his favor additional allegations pertaining to merger of title. This motion to amend was not ruled upon as it was mooted by the Court summary judgment.

B. Counterclaim and Cross-claim of Layman

Defendant Eula Faye Layman has filed a counterclaim and cross-claim against all original parties to the action and against additional defendants, Bank One of Columbus, N.A. ("Bank One"), National Union Fire Insurance Company of Pittsburgh ("National Union"), and Farmers Home Administration seeking in the first claim a declaratory judgment that her mineral interest is valid and not extinguished by the O.D.M.A., and in the second claim to quiet title to the 49% mineral interest in her favor against all parties to this action.

C. Counterclaim of Clinton Oil Company

Defendant Clinton Oil company filed a counterclaim seeking a declaratory judgment that its oil and gas lease was valid and for damages for slander of title.

D. Other Pleadings

Appellees Tarbox filed no pleadings requesting affirmative relief.

7. Discovery

Discovery included various requests for admissions to Plaintiff Riddel which were responded to.

8. Defendant Layman's Motion For Summary Judgment and Granting of Same

Defendant Layman filed her motion for summary judgment seeking summary judgment on the first claim in the complaint and on her first and second claim in her counterclaim and cross-claim.

Factual materials in support of the motion for summary judgment consisted of the response to Plaintiff Riddel's requests for admission and certified copies of various deed and other public records.

After hearing, the trial court granted Layman's motion for summary judgment in her favor dismissing the first claim for relief in the complaint, and in her favor and against all other parties on the first and second claims in her counterclaim and cross-claim.

9. Civ. Rule 54(B) Certification

The trial court's summary judgment filed September 14, 1994, contained the following certification:

"The Court further finds that there is no just reason for delay in entering final judgments on the claims adjudicated by this entry, and that the

judgment dismissing the first claim for relief in the complaint and the judgments granting the first and second claims for relief in Defendant Layman's counterclaim and cross-claims are final judgments within the meaning of Civil Rule 54(B)."

10. Appeal Filed

From the judgment filed September 14, 1994, Plaintiff Riddel filed his notice of appeal. Riddel has filed his assignments of error and brief.

However, an Appellee, Tarbox, has also filed an Appellee's brief claiming error in the rendering of the summary judgment. Tarbox filed no notice of appeal, and it is questionable that they can claim error in the judgment of the trial court absent filing a notice of appeal, or be heard regarding same.

STATEMENT OF FACTS

1. Reservation of Mineral Interest

The 49% mineral interest was reserved to Austin C. Layman and Eula Faye Layman, husband and wife, in a deed executed on January 6, 1965, and filed June 12, 1973. (Appendix, Ex. A)

Austin C. Layman, the owner of an undivided one-half interest of the 49% mineral interest, died intestate in January, 1972. An affidavit of transfer by intestacy was filed on July 1, 1992, in O.R. Volume 458, page 203, indicating one-third of Austin C. Layman's undivided one-half interest in the 49% mineral reservation passed to Eula Faye Layman, and one-third each to the decedent's children, Bruce Roderic Layman and Susan Carol Layman (See attached Exhibit F) by virtue of Austin C. Layman's death. These two children quit-claimed their interest in the subject lands to their mother, Eula Faye Layman, by quit claim deeds filed and recorded July 1, 1992, in O.R. Volume 458, page 206, and O.R. Volume 458, page 209. (Attached Exhibits G, H)

2. Purchase Of Premises By Plaintiff; No Exception In Deed

Plaintiff purchased the subject property in April, 1990, and the deed from Tarboxes to him contained no exception for minerals. (Attached Exhibit D)

After his purchase, Plaintiff learned that Defendant Eula Faye Layman was the record owner of a 49% oil and gas interest in the subject premises, by virtue of the reservation contained in the deed recorded June 12, 1973.

3. Notice of Reservation and Additional
"Title Transaction" Filed Within
20 Year Period

Since the deed in question was recorded on June 12, 1973, the twenty year "look-back" period under the O.D.M.A., discussed infra, would expire on June 12, 1993.

On May 28, 1992, Defendant Layman filed a claim to preserve the mineral interest (Exhibit E). On July 1, 1992, an affidavit of transfer of title and two quit claim deeds were recorded (Exhibits F, G and H). All of these items constituted "title transactions" and were within the twenty year "look-back" period starting with June 12, 1993.

4. Factual Matters Before Court

A. Recorded Documents

The pertinent documents filed of record which are contained in the record on appeal are as follows, and true copies thereof are attached in the Appendix:

(1) Deeds and Land Contracts

1. Warranty deed from Austin C. Layman and Eula Faye Layman, to Hilda J. Layman, covering 111 acres, more or less, in McKean Township, Licking County, Ohio, dated January 4, 1965, filed for record June 12, 1973, and recorded June 14, 1973, in Deed Volume 708, page 586, Licking County, Ohio (Appendix Ex. A), which contains the following exception:

"Also excepting and reserving to the first parties [grantors Austin C. Layman and Eula Faye Layman] their heirs and successors, an undivided forty-nine percent of all mineral rights, including

oil and gas, and a like per cent of rentals and royalties payable under the present oil and gas lease on the premises and any furthe [sic] lease or license which may be granted; however, granting unto the second party, the first right of refusal to purchase said forty-nine per cent of the mineral reservation, should the first parties, their heirs or devisees desire to sell."

(Emphasis added)

This deed also expressly recited that it was subject to a land contract dated May 23, 1964, between Austin C. Layman and Eula Faye Layman to Fred C. Tarbox.

2. Land contract from Austin C. Layman and Eula Faye Layman, husband and wife, to Fred C. Tarbox, covering 111 acres in McKean Township, Licking County, Ohio, dated May 23, 1964, containing the same exception of 49% of the minerals, filed May 25, 1964, in Mortgage Volume 471, page 547, Licking County, Ohio. (Appendix Ex. B)

3. Warranty deed from Hilda J. Layman, unmarried, to Fred C. Tarbox, Jr., and Christina Kay Tarbox, covering the subject premises, dated May 23, 1973, but containing no reservation of the mineral interest, filed for record on July 3, 1973, and recorded on July 5, 1973, in Deed Volume 709, page 727, Licking County, Ohio. (Appendix Ex. C)

4. Warranty deed from Fred C. Tarbox and Christina Kay Tarbox, husband and wife, to James B. Riddle, covering 111 acres, more or less, and containing no reservation of the mineral interest, dated March 27, 1990, filed April 5, 1990, and recorded on April 5, 1990, in Official Record Volume 316, page 295, Licking County, Ohio. (Appendix Ex. D)

(2) Documents and Deeds Pertaining to Preservation of Layman's Mineral Interest

5. Claim to reserve mineral interest by Eula Faye Layman, filed and recorded May 28, 1992, in Official Record Volume 450, page 400, Licking County, Ohio. (Appendix Ex. E)

6. Affidavit of transfer of title, for the undivided one-half interest in the 49% mineral interest of Austin C. Layman, who died intestate on January 27, 1972, a resident of Merritt Island, Florida, said affidavit filed July 1, 1992, and recorded in Official Record Volume 458, page 203, Licking County, Ohio. (Appendix Ex. F)

7. Quit claim deed from Bruce Roderic Layman, single, to Eula Faye Layman, covering the subject premises, filed July 1, 1992, and recorded July 1, 1992, in Official Record Volume 458, page 206, Licking County, Ohio. (Appendix Ex. G)

8. Quit claim deed from Susan Carol Layman, single, to Eula Faye Layman, covering the subject premises, filed July 1, 1992, and recorded July 1, 1992, in Official Record Volume 458, page 209, Licking County, Ohio. (Appendix Ex. H)

B. Plaintiff's Responses to Request for Admissions

Plaintiff's responses to request for admissions served by Defendant The Clinton Oil Company are also attached to establish the admissions of Plaintiff contained therein. (Appendix Ex. I)

RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR NO. 1

IF A RECORDING OF A TITLE TRANSACTION AFFECTING A MINERAL INTEREST WAS MADE WITHIN THE PRECEDING TWENTY YEARS, SUCH MINERAL INTEREST IS NOT EXTINGUISHED UNDER R.C. 5301.56(b)(1).

1. Ohio Dormant Mineral Act

R.C. §5301.56(B)(1), known as the Ohio Dormant Mineral Act, effective March 22, 1989, pertains to mineral interests in realty, and states in pertinent part:

"(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies:

"* * * * *"

"(c) Within the preceding twenty years, one or more of the following has occurred:

"(i) 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;

"* * * * *"

"(v) A claim to preserve the interest has been filed in accordance with division (C) of this section;

"* * * * *"

"(2) A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, until three years from the effective date of this section."

(Emphasis added)

2. Only Requirement Is Recordation Of A Title Transaction In Preceding 20 Years

The only requirement in R.C. §5301.56(B)(1)(c) is the

recording of a title transaction within the preceding twenty years.

3. Three Year Grace Period;
"Look Back" Period Begins From
End Of Three Year Grace Period

R.C. §5301.56 was effective March 22, 1989, and contained a three year grace period. Under R.C. §5301.56(A)(2), supra, a mineral interest is not deemed abandoned until three years from the effective date of the statute.

Thus, the 20 year "look back" period created in R.C. §5301.56(B)(1)(c)(i), supra, would begin on March 22, 1972, and ended on March 22, 1992.

Consequently, if there was recordation of any "title transaction" between March 22, 1972, and March 22, 1992, the subject mineral interest would not be extinguished.

4. Title Transaction Defined
In R.C. §5301.47(F)

R.C. §5301.56(B)(1)(c)(i) speaks of a "recorded" "title transaction". This term is defined in R.C. §5301.47(F) as follows:

"(F) 'title transaction' means any transaction affecting title to any interest in land, including title by will or descent, title by 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."

(Emphasis added)

Clearly, the deed from Austin C. Layman and Eula Faye Layman creating the 49% mineral reservation is a "title transaction", as are the affidavit for transfer of real estate

inherited and the quit claim deeds from Bruce Roderic Layman and Susan Carol Layman to Eula Faye Layman. (Appendix, Ex. G, H)

5. Deed Filed June 12, 1973, Constitutes Compliance With Twenty Year Provision Of Statutes

The first possible twenty year period would have commenced on March 22, 1992, and go backward twenty years to March 22, 1972.

Thus, the deed from Austin C. Layman and Eula Faye Layman, husband and wife, to Hilda J. Layman, was filed with the Licking County Recorder on June 12, 1973, well within the twenty year period provided for in R.C. §5301.56.

6. Recordation Within Twenty Year Period Is Only Requirement Of Statute

Under R.C. §5301.56(B)(1)(c)(i), the key is the filing or recordation of the title transaction within the previous 20 years.

Since this "title transaction" was recorded on June 12, 1973, it was within the 20 year look-back period provided by R.C. §5301.56(B)(1)(c)(i) considering the three year "grace period" in R.C. §5301.52(B)(2).

Hence, the Plaintiff's mineral interest was not extinguished by R.C. §5301.56(B)(1).

7. Legislative Intent Is That Record Title Prevail

The legislative intent in enacting R.C. §5301.41-56 is clearly stated in R.C. §5301.55, which states:

"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 transaction by allowing persons to rely on a record chain of title as described in section 5301.48 of the Revised Code, subject only to such limitations as appear in section 5301.40 of the Revised Code."

(Emphasis added)

It is therefore clear that the legislative intent was that persons should be able to rely on the record chain of title, and that record title be the determinative issue. Only when there has been a recording of a "title transaction" does the statute apply.

Consequently, the statute should be construed to provide that the twenty year period in R.C. 5301.56(B)(1) applies only to matters filed of record within that period.

8. Mineral Interest Was Preserved Beyond June 12, 1993, By Timely Filing Of Claim To Preserve Mineral Interest And Two Quit Claim Deeds

Under the O.D.M.A., supra, a mineral interest may also be preserved by the filing of a claim. The method to file a claim to preserve a mineral interest is set forth in R.C. §5301.56(C) as follows:

"(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 [317.20.1] and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:

"(a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;

"(b) Otherwise complies with section 5301.52 of the Revised Code;

"(c) States that the holder does not intend to abandon, but instead to preserve, his rights in the mineral interest.

"(2) A claim that complies with division (C)(1) of this section or, if applicable, divisions (C)(1) and (3) of this section preserves the rights of all holders of a mineral interest in the same lands.

"(3) Any holder of an interest for use in underground gas storage operations may preserve his interest, and those of any lessor of the interest, by a single claim, that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. The claim is prima-facie evidence of the use of each separate interest in underground gas storage operations."

A. Claim to Preserve Interest Timely Filed

Since the title transaction affecting Defendant Layman's 49% interest occurred on June 12, 1973, she was allowed 20 years from then, until June 12, 1993, in which to file a claim to preserve her 49% mineral interest. This she properly did by filing a claim to preserve mineral interests on May 28, 1992. Thus, her interest was preserved.

**B. Other Recorded Title Transactions
Within 20 Year Period**

Further, there were other "title transactions" within that 20 year period ending June 12, 1993. These are:

1. claim to preserve mineral interest filed by Eula Faye Layman on May 28, 1992;
2. quit claim deed from Bruce Roderic Layman, single, to Eula Faye Layman, filed July 1, 1992;

3. quit claim deed from Susan Carol Layman to Eula Faye Layman, filed July 1, 1992.

Since "title transactions" were recorded during the 20 year "look back period" beginning June 12, 1993, the recordation preserved Defendant Layman's 49% reserved mineral interest.

9. R.C. §5301.56 Should Be Construed To Avoid Forfeiture Of Mineral Interest

Under Ohio law, forfeitures of interest are disfavored and statutes providing for forfeitures are strictly construed. This principle is set forth in 3 Ohio Jur 3d, Forfeitures and Penalties, §5, wherein it is stated:

"Forfeitures are regarded as odious, not being favored either in equity or at law, Accordingly it is well settled that a statutory provision for a forfeiture must be strictly construed. Moreover, a statute should, if possible, be so construed as to avoid a forfeiture. Whatever may be the nature or kind of forfeiture, it is not to be carried, by construction, beyond the clear expression of the statute creating it, and a forfeiture can only be claimed where the requirements of the law are strictly complied with."

(Emphasis added)

To the extent that construction of R.C. §5301.56 is required, under prevailing Ohio law the court must construe the statute in such a way as to avoid a forfeiture.

RESPONSE TO ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THERE WAS "NO JUST REASON FOR DELAY."

1. Appellant's Claim

The Appellant's assignment of error states:

"2. The Trial Court [sic] erred in determining that there is 'no just reason for delay'."

This assignment of error demonstrates a complete ignorance of the rules applicable to Civil Rule 54(B) practice and is at best wholly misguided and at worst frivolous.

2. Civil Rule 54(B)

Civil Rule 54(B) provides in pertinent part, as follows:

"(B) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no reason for delay. * * *"

(Emphasis added)

The staff notes to the 1992 amendments to Civil Rule 54(B) state:

"RULE 54(B) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

"The amendment to Civ. R. 54(B) is intended to complement an amendment to App. R. 4 also effective July 1, 1992. The purpose of both amendments is to clarify the applicability of Civ. R. 54(B) to a judgment on less than all of the claims arising out of the same transaction as well as separate transactions and to the immediate appealability of that judgment. A question as to the applicability of Civ. R. 54(B) to multiple claims arising out of the

same transaction and the appealability of a Civ. R. 54(B) judgment to those claims and appealability was raised by the decision of the Supreme Court in Chef Italiano Corp. v. Kent State University (1989), 44 Ohio St. 3d 86, 541 N.E. 2d 64. The rule is amended to expressly state that it does apply to multiple claims that arise out of the same or separate transactions."

3. Any Single Claim Must Be Adjudicated In Its Entirety

Before Civil Rule 54(B) applies, the court must adjudicate one of multiple claims for relief in its entirety. The claim must be otherwise final, within the meaning of R.C. §2505.02, before certification may be made.

In Noble v. Colwell (1989), 44 Ohio St. 93 the syllabus states:

"An order which adjudicates one or more but fewer than all the claims or the rights and liabilities of the parties must meet the requirements of R.C. §2505.02 and Civ. R. 54(B) in order to be final and appealable."

Under R.C. §2505.02, a claim is final if it is dispositive of the entire claim. While a case may contain multiple claims, if one claim is adjudicated in its entirety, then that claim may be appealed upon certification under Civ. R. 54(B).

4. The Three Claims Disposed Of By Summary Judgment Were Adjudicated In Full And Dispositive Of Entire Claim And Were Final Within The Meaning Of R.C. §2505.02

In this case, the judgment of the trial court adjudicated three claims in their entirety and disposed of all three.

The first claim adjudicated was the first claim contained in Plaintiff's complaint, seeking to quiet title to the 49%

reserved mineral interest in favor of Plaintiff and against Defendants including Defendant Layman. The court held against Plaintiff, and granted summary judgment against Plaintiff and in favor of Defendant Layman dismissing his first claim for relief. That obviously is dispositive of the entirety of that claim and is final within the meaning of R.C. §2505.02.

The second claim adjudicated by the summary judgment was the first claim for relief in Defendant's counterclaim and cross-claim, that being for a declaratory judgment that the 49% mineral reservation is valid and not extinguished by the O.D.M.A., and that the interest is superior to the interests of Bank One, Columbus, N.A., and National Union Fire Insurance Company of Pittsburgh. That declaratory judgment was dispositive of the entirety of Defendant Layman's first claim for relief and is final within the meaning of R.C. §2505.02.

The third claim adjudicated by the summary judgment was Defendant Layman's second claim for relief seeking a judgment quieting title to the 49% mineral interest in her favor against all other parties to the action. The court found in favor of Defendant Layman and quieted title in her favor against Plaintiff and all other parties. This disposed of the entirety of the second claim and is final within the meaning of R.C. §2505.02.

5. Trial Court's Finding Of
"No Just Reason For Delay"
Is Matter Of Discretion

The seminal authority for the finding of "no just reason for delay" is Wisintainer v. Elcen Power Strut (1993), 67 Ohio

St. 3d 352, wherein the syllabus reads:

"1. For purpose of Civ. R. 54(B) certification, in deciding that there is no just reason for delay, the trial judge makes what is essentially a factual determination - whether an interlocutory appeal is consistent with the interests of sound judicial administration.

"2. Where the record indicates that the interests of sound judicial administration could be served by a finding of "no just reason for delay," the trial court's certification determination must stand."

The foregoing test simply grants discretion to the trial court to determine what "is consistent with the interests of sound judicial administration." In this case, the key issue is whether the 49% mineral interest was extinguished, and once that was resolved it would moot other claims and make resolution of those claims unnecessary. Obviously, that would be in the interest of sound judicial administration.

In addition, the Appellant makes no claim that the trial court abused its discretion in making Civ. R. 54(B) certification.

6. Authority Cited By Appellant
Is Wholly Inapplicable

The paucity of Appellant's position in this assignment of error is amply demonstrated in a review of the authority he claims in support of the claimed error.

A. Counsel cites Cooper v. Cooper 140 [sic] Ohio App. 3d 327 (1987), 14 OBR 394 as authority. In that case, a finding of contempt was appealed. After the finding of contempt was made, an order was put on with Civ. R. 54(B) language. The Court of Appeals, however, held that the action

for contempt consists of two elements: "(1) the finding of contempt itself and (2) the sentence on contempt." The court of appeals held that the finding of contempt, alone, without a sentence having been rendered, was not itself a final appealable order and 54(B) certification of the contempt finding alone without the sentence did not make it such. Obviously, a judgment or order, itself, must be final before Civil Rule 54(B) applies.

B. Plaintiff next cites O'Neills Dept. Store v. Taylor, Stark County Court of Appeals Unreported Case No. CA-7219, decided November 30, 1987, as authority for its claim that the trial court was in error. In that case, this Court, in an opinion written by the late Judge Ira Turpin, stated:

"The sole assignment of error is overruled. An order denying a motion for summary judgment is not a final appeal order. * * *"

(Emphasis added)

In this case, the judgment does not deny a motion for summary judgment; it grants a motion for summary judgment which is dispositive of the entirety of certain of the claims for relief, i.e. the first claim in Riddel's complaint and the two claims in Layman's counterclaim and cross-claim.

For counsel to cite authority involving the denial of a motion for summary judgment in a case where the motion for summary judgment was granted is clear evidence of a complete misunderstanding of the applicable law and clear evidence of the frivolous nature of the claim. At a bare minimum, counsel should be held to a standard of at least reading the case

authority which is cited.

C. Counsel for Appellant also cites Fuller v. Fuller, Stark County Court of Appeals Case No. 7250, decided October 26, 1987. Upon a simple reading of this unreported case, a copy of which is included in Appellant's brief, the Court would find the following holding from this Court, speaking through Milligan, J., as follows:

"Appellants' first assignment of error challenges the trial court's failure to add Civ. R. 54(B) certification language to its judgment entry overruling a dismissal-summary judgment motion.

"Civ. R. 54(B) certification is an essential prerequisite to an appeal from a truly final judgment rendered non-appealable because of undisposed claims or parties.

"An order denying a motion in summary judgment is not a final appealable order. Balson v. Dodds (1980) 62 Ohio App. 2d 287, 405 N.E. 2d 193; State ex. rel. Overmyer v. Walinski (1966), 8 Ohio St. 2d 23, 22 N.E. 2d 312; Mulqueen v. Thomas Lombardi & Sons, Inc. (March 17, 1986), Stark App. No. CA-6724, unreported. therefore, the trial court's refusal to add the requested Civ. R. 54(B) certification language "no just reason for delay" was proper. In fact, the trial court would have committed reversible error by including the Civ. R. 54(B) recital. Mulqueen, supra: McGraw v. The Canton Drop Forging & Mfg. Co. (Sept. 8, 1987), Stark App. No. CA-7180, unreported. The trial court's determination of "no just reason for delay" is always subject to appellate review and reversal if erroneously recited; the certification does not automatically convert a judgment which is not final into a final appealable order. Cooper v. Cooper (1984), 14 Ohio App. 3d 327, 471 N.E. 2d 525; Douthitt v. Garrison (1981), 3 Ohio App. 3d 254, 444 N.E. 2d 1068; Mulqueen, supra."

(Emphasis added)

Once again, counsel for Appellant cites a case involving overruling of a motion for summary judgment as authority for its claim for non-appealability. This case involves the

granting of a motion for summary judgment.

D. Appellant next cites Priester v. State Foundry Co. (1961), 172 Ohio St. 28, in support of its claim that no final, appealable order is before the court.

First, this case was decided in 1961, long before July 1, 1970, when the provisions of Civil Rule 54 were first effective, and, obviously, before the current version of Civil Rule 54(B) was adopted in July 1, 1992.

Second, a reading of the Priester case shows that the action involved only one claim against one defendant for breach of an employment agreement. A motion for summary judgment was filed and the court found that part of the sole claim was undisputed, but that part of the sole claim was the subject of disputed issues of fact, and set the matter for trial on those issues of disputed fact. There was no determination of the entire claim, indeed, only part of the sole claim in the case was adjudicated.

The Supreme Court of Ohio stated in paragraph 2 of the syllabus:

"2. There can be no appeal from an order rendered pursuant to a motion for summary judgment which order does not purport to be a judgment upon the whole case or for all the relief asked, even though such order purports to be a judgment upon part of the case and for part of the relief asked."

The Priester case is simply not applicable to the case at bar. First, Civil Rule 54(B) was not in effect when the case was decided. Second, it involved decision on only part of the one claim involved in the case.

In the instant case, three separate claims were adjudi-

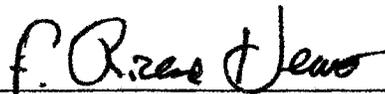
cated in their entirety; the first claim of Plaintiff's complaint, and the two claims of Defendant's counterclaim and cross-claim. In contrast, in Priester, only part of one claim against one defendant was adjudicated.

As such, Priester simply has no application to the case at bar.

CONCLUSION

The judgment of the Court of Common Pleas was proper, the judgment was properly certified under Civil Rule 54(B) and the it should be affirmed.

Respectfully submitted,

A handwritten signature in cursive script that reads "F. Richard Heath". The signature is written in dark ink and is positioned above a horizontal line.

F. RICHARD HEATH
Attorney for Defendant
Eula Faye Layman

APPENDIX EXHIBIT 2

S.B. 223
(As Introduced)

FILE IN FILE
DO NOT REMOVE FROM FILE

Sens. Cupp, Schafrath, Nettle

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

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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(F)):

(1) The mineral interest is not in coal, or mining or other rights pertinent to or exercisable in connection with the mining;

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

(a) The interest has been conveyed, leased, transferred, or mortgaged by an instrument filed or recorded in the recorder's office of the county in which the lands are 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;

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

(d) A drilling or mining permit has been issued to the holder (see COMMENT 2);

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

No mineral interest would be considered abandoned based on failure to comply with this provision prior to three years from the effective date of this section (sec. 5301.56(H)).

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. It would consist of a notice, verified under oath, of the nature of the interest claimed, a description of the land, the volume and page of any recorded instrument on which it is based, the name and address of the holder, and a statement that the holder does not intend to abandon but to preserve his rights. The 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 could preserve his interest, and those of any lessee, by a single claim, defining the boundaries of the storage field or pool 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 317.19 to 317.201 (governing indexes maintained by a county recorder) (see COMMENT 3) and 3301.52 (contents of notice claiming to preserve an interest in land) of the Revised Code (sec. 3301.52(C)). A mineral interest would be preserved indefinitely from the bill's presumption of abandonment by the continuing occurrence of any of the items listed in the bill (the mineral is dead if 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. 3301.52(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 3301.333 (provides basis and procedure for forfeiture and cancellation of natural gas and oil land leases) (sec. 3301.56(E)). The bill specifies that its provisions would not apply to any mineral interest held by a governmental entity (sec. 3301.56(F)).

COMMENT

(1) Section 3301.56(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) A drilling or mining permit is a permit issued under Chapter 1509, 1512, 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. 3301.56(A)(2)).

(3) 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."

ACTION	DATE	JOURNAL ENTRY
Introduced	05-28-87	p. 484

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