

ORIGINAL

**IN THE SUPREME COURT OF OHIO**

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RONALD EDWARD DAHLGREN, et al.,

Plaintiffs/Appellants,

v.

BROWN FARM PROPERTIES, LLC, et al.,

Defendants/Appellees.

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On Appeal from the Carroll County  
Court of Appeals, Seventh District

Supreme Court Case No. 2014 1655

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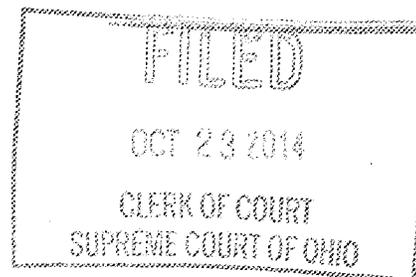
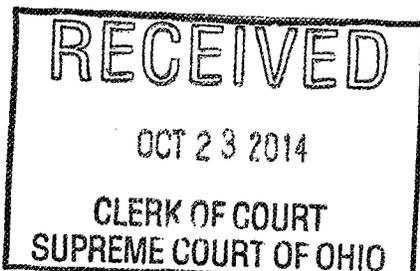
**APPELLEES BROWN FARM PROPERTIES, LLC, THOMAS BEADNELL, AND  
BRIAN WAGNER'S MEMORANDUM IN OPPOSITION TO JURISDICTION**

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The 1989 version of Ohio’s Dormant Minerals Act was self-executing and caused the Oil and Gas Interest to vest in the Surface Owners automatically as of March 22, 1989, and because the 2006 Amended Act was neither retroactive nor remedial in nature.	
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**STATEMENT OF POSITION AS TO WHY THIS CASE IS NOT  
OF PUBLIC OR GREAT GENERAL INTEREST**

Although there has been a great influx of activity related to the production of oil and gas in Eastern Ohio recently, the oil and gas industry is not new to Ohio; neither are the statutes which deal with oil, gas and mineral interests. Ohio's Dormant Mineral Act ("DMA"), RC §5301.56, is part of Ohio's Marketable Title Act, and has generally been accepted as good law for decades, automatically vesting ownership of abandoned mineral interests in surface owners in order to encourage development of these interests.

The effect of severed mineral interests on the fee simple owner's right to present enjoyment of all aspects of the land, including the minerals beneath the surface, and the use and development of those mineral resources have long been an issue to States, including Ohio. When mineral interests are severed from the surface of the property, the not infrequent result is that in some cases they simply become stale, stagnant, abandoned, and unused. Over the passage of time the severed mineral interest becomes "dormant". Dormancy is not uncommon. Tuttle, *Dormant Mineral Statute . . . Is Constitutional*, 51 U. Cin. L. Rev. 452 (1982), citing *Severed Mineral Interests, A Problem without a Solution*, 46 N.D.L.Rev. 451 (1970). When a severed mineral owner for whatever reason merely does nothing and ignores his interest, we are left with nothing more than a name on a deed, often times from decades past. Many States have attempted to alleviate this problem by enacting what are called "dormant mineral statutes".<sup>1</sup> Ohio is no exception. On March 22, 1989 Ohio enacted ORC §5301.56 as an expansion of the

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<sup>1</sup> Pennsylvania Dormant Oil and Gas Act, 58 Pa. Cons. Stat. 701.1; Maryland Dormant Mineral Interest Act, Md. Code Ann., Envir, 15-1201; Michigan Dormant Mineral Act, Mich. Comp. Laws Ann. 554.291; Indiana Dormant Minerals Act, Ind. Code 32-23-10-1.

Ohio Marketable Title Act. It is similar to that of the dormant mineral statutes of other States in that it provides for the abandonment and vesting of the severed mineral interest to the surface owner if the mineral interest is not used or a claim to preserve the interest is not filed within a prescribed period of time.

Although there may be heightened public awareness due to the increased activity of the oil and gas industry in Ohio, there is no great public or general interest in the DMA as there is nothing novel or unsettled about the DMA and its application and effect. The Appellate Court in this case has been consistent, both before and after this case, in its interpretation and application and the concept and validity of an automatic lapse or deemed abandonment by statute has already been upheld by the United States Supreme Court, *Texaco, Inc. v. Short*, 102 S. Ct. 781 (1982). Even Chesapeake Exploration LLC, a party to this case, and its parent company, Chesapeake Energy, one of the largest oil and gas producers in Ohio, has knowledge of this.

Furthermore, the application and effect of the DMA has been litigated almost entirely within the Seventh Appellate District, demonstrating that it is not a matter of great public or general interest.

The Appellants themselves concede as much when they ask this Court to accept jurisdiction if for no other reason than to afford them the benefit of any subsequent favorable decision by this Court in pending unrelated cases. Until there may be a conflicting decision from another appellate district, it is self-evident that it is not a matter of great public or general interest.

Finally, Appellants urge that this Court should accept jurisdiction of this appeal so that it might hear the arguments Appellants briefly “successfully” made to the trial court, but that is not only irrelevant, it is not accurate. Those arguments and the trial court’s decision have not only

been repeatedly and exhaustively dealt with and dismissed by the Seventh District Court of Appeals and a number of trial courts, those arguments are also exhaustively addressed in other cases of which this Court has already accepted jurisdiction and are now pending.

In sum, a heightened public awareness in the oil and gas industry does not equate to a public or great general interest calling for this Court's review. Accordingly, jurisdiction should not be accepted.

### **STATEMENT OF THE CASE AND FACTS**

This quiet title action was brought on February 11, 2013 by Plaintiffs, Ronald Edward Dahlgren, Elsa Anne Lyle, Helen Mary Dahlgren, Martha Perry Dahlgren, Cynthia Ann Crowder, Daniel Carl Dahlgren, Charles Stephen Dahlgren, and Diane Ellen Pullens (collectively, the "Dahlgrens") against Brown Farm Properties, LLC ("Brown Farm"), Brian L. Wagner ("Wagner"), Thomas Beadnell ("Beadnell") (collectively, Brown Farm, Wagner, and Beadnell, the "Surface Owners"), and Chesapeake Exploration, LLC. The Dahlgrens claim ownership in the oil and gas by virtue of a mineral reservation in a 1949 deed by their ancestor, Leora Perry Dahlgren. Their Complaint sought to quiet title in their favor regarding oil and gas interests in certain real property.

Individually, each of the three Surface Owners filed answers and counterclaims requesting that title be quieted in their favor.

Importantly, upon agreement, all parties submitted 37 Joint Stipulations of fact to the Court, which represent the only facts of record in this matter. Critically, in those Joint Stipulations, the parties stipulated and agreed that if the Former DMA applied, the severed

mineral interests were vested in the Appellee surface owners, but if the Amended DMA applied, the severed mineral interests remained with the Appellants.

On November 5, 2013, the court issued a Final Order and Judgment Entry quieting title. Due to errors in the November 5, 2013 Entry, on November 13, 2013, the court issued a *nunc pro tunc* entry and Final Opinion and Judgment Entry quieting title in favor of the Dahlgrens, finding that the 1989 version of the DMA did not apply, that the Gas and Oil Interests were not deemed abandoned. The Surface Owners timely appealed the November 13, 2013 Judgment Entry.

On September 9, 2014 the Court of Appeals for the Seventh Appellate District issued its Opinion reversing and remanding the trial court's decision and ordering abandonment of the oil and gas to the Surface Owners.

## **ARGUMENT IN OPPOSITION TO THE PROPOSITIONS OF LAW**

### **As to Proposition of Law # 1:**

The 1989 version of Ohio's Dormant Minerals Act was self-executing and caused the Oil and Gas Interest to vest in the Surface Owners automatically as of March 22, 1989, and because the 2006 Amended Act was neither retroactive nor remedial in nature.

As the Court of Appeals perhaps best pointed out:

The 2006 DMA deals with rights that have not yet been deemed abandoned and vested . . . The current DMA thus eliminated automatic vesting after June 30, 2006. But this does not mean that it erased interests that were previously deemed vested . . . The conclusion made was that when the 2006 version was enacted, any mineral interest that was treated as abandoned under the 1989 version stayed abandoned and continued to be vested in the surface owner, and once the mineral interest vested in the surface owner, it reunited with the surface estate pursuant to statute regardless of whether the event had yet to be formalized. See *Swartz*, 7<sup>th</sup> Dist. Nos. 13JE24, 13JE25 at ¶ 34, citing *Walker*, 7<sup>th</sup> Dist. No. 13NO402 at ¶ 41. (Opinion at page 9)

The Court of Appeals correctly found that the trial court erred when it failed to follow the clear directive of the Former DMA that the Dahlgrens' claim to the Gas and Oil Interests were deemed abandoned to the Surface Owners on March 22, 1992 and instead applied the legal principles of the Amended DMA, which did not take effect until nearly fourteen years after the abandonment and vesting had occurred. In addition, the Appellate Court found that the trial court's retroactive application of the Amended DMA ran afoul of several provisions of the Ohio Revised Code, the Ohio Constitution, and common law.

Pursuant to R.C. §1.48, absent direct intent, statutes are not retroactive: "A statute is presumed to be prospective in its operation unless **expressly made** retrospective." (emphasis added). Without a clear proclamation of retroactivity, a court must apply a Statute prospectively. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 889, syllabus. The Amended DMA contains no express directive for retroactive application. Accordingly, the Appellate Court correctly found that in applying the Amended DMA to the facts below, the trial court erred and violated R.C. §1.48.

The Court of Appeals recognized that once the substantive rights in the Gas and Oil Interests automatically vested in the Surface Owners on March 22, 1992 under the Former DMA, the trial court could not compel them to comply with a statute enacted fourteen (14) years later to reach that same conclusion. *Walker v. Noon*, Noble C.P. No. 212-009 (March 20, 2013) ("[A]ny discussion of R.C. 5301.56, effective June 30, 2006 is moot, because as of June 30, 2006, any interest of the Defendant [mineral interest holder] in the oil and gas had been abandoned.").

In addition, R.C. §1.58 expressly provides that the amendment of a statute does not affect prior actions taken under the former version. Specifically, the statute provides:

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereof, prior to the amendment or repeal.

(emphasis added).

During the effective period of the Former DMA, the Oil and Gas Interests claimed by the Dahlgrens were deemed abandoned and vested in favor of the Surface Owners. Pursuant to R.C. §1.58, the trial court was precluded from interpreting the later amendment of the Act to effectively “undo” this previously-decided legal conclusion under the Former Act.

Article II, §28 of the Ohio Constitution precludes a law from being retroactively applied to divest a person of a vested right. *State ex rel. Jordan v. Indus. Comm.*, 120 Ohio St.3d 412, 2008-Ohio-6137, 900 N.E.2d 150. The Supreme Court has defined a vested right as:

A vested right may be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right. [It is one] which it is proper for the state to recognize and protect, and which an individual cannot be deprived of arbitrarily without injustice...A right...cannot be considered vested unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of existing laws.

In finding that the Gas and Oil Interests belonged to the Dahlgrens, the trial court unconstitutionally deprived the Surface Owners of a previously vested right in the Gas and Oil Interests that had already been deemed abandoned and vested in the surface estate. The trial court erred and was properly reversed

As to Proposition of Law #2:

The look-back or “dormancy” period under Ohio’s Dormant Mineral Act as enacted March 22, 1989 is measured from a date twenty years preceding the Act, or from March 22, 1969.

First and foremost, Appellants’ Proposition of Law #2 was not raised on appeal and is not an issue in this case due to the parties’ Joint Stipulations of Fact wherein the parties stipulated that if the Former DMA applied, the dormancy period had run.

On March 22, 1989, the Ohio Legislature passed the Dormant Mineral Act, R.C. §5301.56, (the “Former DMA”), which provided a statutory procedure for the automatic abandonment of oil and gas interests in real property. The Act provided:

(B)(I) 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;
- (ii) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located;
- (iii) The mineral interest has been used in underground gas storage operations by the holder;
- (iv) A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the

type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 of the Revised Code, 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.
- (vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

(emphasis added).

As reflected in its legislative history, the purpose of the Former DMA was to provide clarity to title chains that contained idle, unused, undeveloped, or simply forgotten mineral interests and reservations. Under the Former DMA, a mineral interest is **deemed abandoned** and reunited with the surface owner unless during the preceding twenty (20) years, one of the events listed in subsections (c)(i)-(vi) occurred. The Former DMA also expressly defined the twenty year period to mean the twenty years prior to its effective date.<sup>2</sup>

Under the Former DMA, the claimed owner of a severed Gas and Oil Interest was not without recourse to preserve his rights and prevent the automatic abandonment of the interest. Rather, the owner of that Gas and Oil Interest needed only file and record a claim to preserve the interest pursuant to R.C. §5301.56(c)(v). Failing such affirmative steps by the claimed owner of the interest, the Former DMA provided for automatic abandonment and reversion of the interest to the owner of the surface estate.

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<sup>2</sup> The effective date of the Act was March 22, 1989, however, it provided for a 3-year grace period to allow mineral interest owners to prevent abandonment by taking certain affirmative action. Thus, abandonment of the mineral interests was deemed to occur on March 22, 1992, absent a savings event occurring between March 22, 1969 and March 22, 1989 and absent an a savings event being procured between March 22, 1989 and March 22, 1992.

In 2006, the Act was amended (the “Amended DMA”), adding the additional step of requiring the surface owner to serve a notice of abandonment upon the purported holder of a Gas and Oil Interest before the abandonment occurred. However, the Amended DMA was silent as to its effect on all Gas and Oil Interests previously deemed automatically abandoned and vested under the Former DMA.

The Appellate decisions in *Swartz v. Householder*, 7<sup>th</sup> Dist. Nos. 13JE24, 13JE25, 2014-Ohio 2359; *Walker v. Shondrick-Nau*, 7<sup>th</sup> Dist. No. 13NO402, 2014-Ohio-1499; and *Eisenbarth v. Reusser*, 7<sup>th</sup> Dist. No. 13MO10, 2014-Ohio-3792; directly and fully address the application of the Former DMA and the twenty-year period for abandonment. Their effect is not difficult to discern. The Former DMA stated that the interests would be deemed abandoned unless “within the preceding twenty years, one or more of the [savings events] has occurred.” Appellants ask the rhetorical question: “preceding what?” The answer to the inquiry is intuitive. The DMA became effective March 22, 1989, but given its stated intent and effect of automatically extinguishing unused or forgotten interests, contained a three-year “grace period” from its enactment for owners of Gas and Oil Interests to file for preservation of their claimed interests.

If these purported owners of the mineral interests failed to take action, their interests were forever abandoned. This result does not require statutory construction. It only mandates reading the plain language of the statute.

Thus, the answer to the rhetorical question: “preceding what?” is elementary. If a savings event did not occur within twenty years prior to the enactment of the DMA and if a Gas and Oil Interest owner did not subsequently act to preserve the claim between March 22, 1989 and March 22, 1992, the interest was deemed abandoned and reverted to the surface estate. *Riddel v. Layman*, No. 94CA114, 1995 WL 498812 (Ohio Ct. App., 5<sup>th</sup> Dist., 1995).

In any event, whether the twenty-year look back is calculated from March 22, 1992 or from March 22, 1989, the parties here have stipulated that no savings event occurred in either of these two time frames. Appellants argue a distinction without a difference of actual consequence to the determination of this action

Certainly recognizing the language of the Act is determinative of Appellants' claim, they attempt to distract the Court from the logical resolution of this matter by arguing certain "absurd results" occur if the twenty-year look back period runs from the effective date of the Act. But it cannot be disputed that the United States Supreme Court has approved the very statutory scheme Appellants now call to question, despite the "absurdities" Appellants claim here.

Several recent Ohio Common Pleas cases and Appellate decisions have applied the 1989 version of the DMA to fact situations very similar to those in this case. *Wiseman v. Potts*, Morgan Co. Common Pleas, No. 2008CV145; *Wendt v. Dickerson*, Tuscarawas Co. Common Pleas, No. 2012 CV 02 0135; *Walker v. Noon*, Noble Co. Common Pleas, No. 2012-0098; *Marty v. Dennis*, Monroe Co. Common Pleas, No. 2012-230; *Bender v. Morgan*, Columbiana Co. Common Pleas, No. 2012-CV-378; *Shannon v. Householder*, Jefferson Co. Common Pleas, No. 2012 CV 226; *Swartz*, (supra); *Walker*, (supra); *Eisenbarth*, (supra). Appellants argue that all of these courts were wrong in applying the 1989 version of the DMA because the "look-back period" set forth in the statute, in the opinion of the Appellants, renders absurd results. What they are really saying is that the application of the 1989 DMA as set forth by those cases, renders results unfavorable to Appellants. Whatever the results, we must remember that "in interpreting a statute a court should always turn to one cardinal canon before all others . . . Courts must presume that a legislature says in a statute what it means and means in a statute what it says

there.” *Connecticut Nat’l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). In reviewing the language of the 1989 DMA, the Ohio legislature could not have been more clear.

Appellants continue to claim “absurdities” despite the fact that this very statutory scheme has been upheld by the United States Supreme Court. For instance, Appellants argue that the twenty-year period must run from the date a quiet title action is brought. In making the argument, Appellants cite *Texaco* and its preliminary discussion of whether the Indiana dormant mineral act’s self-executing provision was constitutional. The cited text is interesting, but it is **not** the Court’s actual holding on the issue.

Upon closer inspection, the **actual opinion** of *Texaco* in this regard rejects Appellants’ argument. According to the *Texaco* Court, an automatic lapse or deemed abandonment by statute is no different than a statute of limitations barring a claim, regardless of whether it is actually filed and pursued. In the personal injury context, a potential defendant is not required to notify a plaintiff that its claim will be barred if suit is not filed within the statute of limitations. That legal result is self-executing. The same holds true here, as recognized in *Texaco*:

Appellants simply claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. **That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional.** The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary’s claim is barred without giving notice of that proceeding.

*Texaco* at 454 (emphasis added).

Here, Appellants were given an opportunity to contest the abandonment of the interests. “Finally, we note that *Dahlgren* expressed concern about the opportunity to contest abandonment without recognizing that the very suit before it was the opportunity to contest . . .” *Dahlgren* at ¶ 31 citing *Swartz*. The DMA itself, and its legal effect upon Appellants’ claimed interest, is the

only “notice” that was required. Due process of law is not offended by a self-executing DMA, provided that an appropriate grace period precedes the determinative effect of the Act.

Appellants acknowledge that when interpreting a statute, a court must give effect to its plain language. And yet, the position Appellants advocate – requiring a quiet title action to be filed to begin the twenty-year look back period under the DMA – is **completely absent** from the provisions of the statute. It is not a fair reading of the plain language of a statute to insert entire paragraphs and additional requirements that were omitted by the Legislature. That the General Assembly amended the DMA in 2006 to insert additional steps and remove the automatic lapse of future mineral interests speaks to the fact that the 1989 version of the DMA did not require such affirmative steps by the surface owner. It was self-executing.

### **CONCLUSION**

For the reasons stated above, the Court of Appeals correctly reversed and remanded the trial court’s decision ordering an abandonment of the Gas and Oil Interest to the Surface Owners, the Appellees herein. Despite Appellants’ assertions to the contrary, Ohio’s DMA as Amended in 2006 was not merely remedial and certainly not retroactive. As to the 1989 version of Ohio’s DMA, although Appellants urge the Court to focus on the words “deemed abandoned”, the Court cannot simply ignore the words that immediately follow, “*and vested*”. Finally, and perhaps unique to this case, the parties entered into very specific Joint Stipulations of Fact that, coupled with a plain reading of the DMA, control the outcome of this matter. The Court of Appeals correctly understood the impact of exactly those two factors and rendered the correct decision. For that very reason, Appellees respectfully submit that this case is not one of great public or general interest that warrants the Court’s review.

Respectfully Submitted,

WINKHART, RAMBACHER & GRIFFIN



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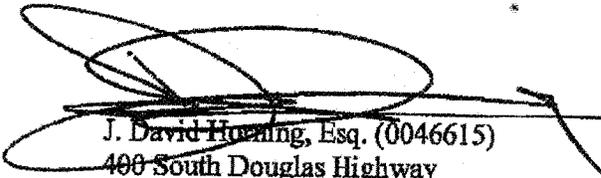
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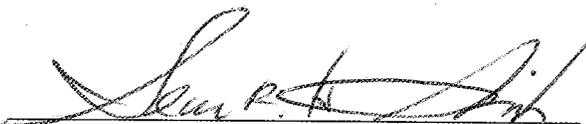
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**CERTIFICATE OF SERVICE**

I certify that on October 22, 2014, copies of the foregoing Memorandum in Opposition to Jurisdiction of Appellants Brown Farm Properties, LLC, Thomas Beadnell and Brian Wagner were served by regular U.S. mail, postage pre-paid, upon the following:

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