

IN THE SUPREME COURT OF OHIO

John D. Walker, Jr.,	:	
	:	
Appellee,	:	Case No. 2014-0803
	:	
v.	:	
	:	
Patricia J. Shondrick-Nau,	:	Jurisdictional Appeal from the
Executrix of the Estate of John R. Noon,	:	Seventh District Court of Appeals,
and Successor Trustee of the	:	Noble County, Case No. 13 NO 402
John R. Noon Trust,	:	
	:	
Appellant.	:	

**MERIT BRIEF OF APPELLANT PATRICIA J. SHONDRICK-NAU, AS EXECUTRIX
OF THE ESTATE OF JOHN R. NOON, AND SUCCESSOR TRUSTEE OF
THE JOHN R. NOON TRUST**

Matthew W. Warnock (0082368)*

**Counsel of Record*

Daniel C. Gibson (0080129)

Daniel E. Gerken (0088259)

BRICKER & ECKLER LLP

100 South Third Street

Columbus, Ohio 43215-4291

Telephone: (614) 227-2300

Facsimile: (614) 227-2390

mwarnock@bricker.com

dgibson@bricker.com

dgerken@bricker.com

COUNSEL FOR APPELLANT

Kenneth Cardinal (0010659)

758 North 15th Street

P.O. Box 207

Sebring, Ohio 44672

(330) 938-2161 direct

(330) 938-1556 fax

cardinallaw@sbcglobal.net

James F. Mathews (0040206)

BAKER, DUBLIKAR, BECK, WILEY & MATHEWS

400 South Main Street

North Canton, Ohio 44720

(330) 499-6000 direct

(330) 499-6423 fax

mathews@bakerfirm.com

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE

Like numerous lawsuits percolating through the courts in eastern Ohio, this matter involves a dispute between a surface owner and a prior owner of the property who lawfully reserved the oil and gas mineral rights. The focal point of the litigation is the seemingly innocuous question: Who owns the oil and gas mineral rights? Although the answer is literally worth thousands of dollars per acre, the question does not have a simple or straightforward answer.

In 1989, the General Assembly sought to help answer this question through the enactment of R.C. 5301.56, Ohio's Dormant Mineral Act (the "DMA"). Although designed to provide a surface owner with the opportunity to acquire title to previously-severed mineral rights that remained "dormant" for an unidentified 20-year time period, the 1989 version of the DMA proved to be inherently flawed. *See infra* pp. 7–10.

As a result, the DMA was substantially rewritten in 2006 to require a surface owner to follow a multi-step procedure, which includes fundamental due process protections, to regain ownership of previously severed mineral interests. Unfortunately, however, as the Seventh District Court of Appeals noted below: "No Ohio appellate court or the Ohio Supreme Court has yet to address the issue of when to apply the 1989 version of R.C. 5301.56 and when to apply the 2006 version." *Walker v. Shondrick-Nau*, 7th Dist. Noble No. 13 NO 402, 2014-Ohio-1499 at ¶ 35. The result is that surface and mineral owners are left no choice but to litigate, while oil and gas companies scramble to enter into oil and gas leases with both the surface owner and severed mineral interest owner or risk losing their significant financial investment.

In this case, the Court is presented with the unique opportunity to resolve this legal quagmire in a comprehensive manner by rejecting the holdings of the lower appellate court, which: (i) misapplied the law; (ii) rendered a decision that runs directly counter to the stated

purpose of the DMA; and (iii) overlooked a number of critical questions that must be answered if the 1989 version of the DMA remains applicable.

First and foremost, the decision below incorrectly interprets the 1989 version of the DMA to be a self-executing statute that did not require legal implementation. Contrary to the lower court's analysis, the 1989 version of the DMA is patently ambiguous, which means this Court must look beyond the text in order to ascertain the General Assembly's intent. *See, e.g.*, R.C. 1.49. When the Court examines the text and the statutory factors set forth in R.C. 1.49 to be considered in the interpretation of ambiguous statutes, it is clear that the General Assembly did not intend the 1989 version of the DMA to be self-executing.

Second, even if this Court ultimately determines that the 1989 version of the DMA is self-executing, it must determine the applicable 20-year look-back period under the 1989 version of the DMA—an issue the lower appellate court chose not to address. Only the Appellant's 20-year look-back period (commencing on the date of formal legal implementation of the 1989 version of the DMA), however, is consistent with the text (by giving meaning to the critical term "preceding"), and allows for the possibility of successive periods of nonuse.

Finally, the lower appellate court erred in holding that a deed which specifically references the severed mineral rights is not a "savings event" under R.C. 5301.56 unless the mineral interest is actually transferred or retained in the transaction. As set forth below, such a decision should be reversed based on: (i) the interplay of R.C. 5301.55 and R.C. 5301.49; (ii) the legislative history of the DMA; (iii) longstanding principles of statutory interpretation; and (iv) important public policy considerations (including those expressed in R.C. 5301.55).

This Court should reverse the decision of the Seventh District Court of Appeals and adopt each of the propositions of law accepted for jurisdiction for the reasons set forth below.

STATEMENT OF FACTS

None of the facts in this case are, or ever have been, in dispute. At the heart of this case is the ownership of the oil and gas mineral rights underlying two parcels totaling approximately 42.226 acres located in Noble County, Ohio (the "Property"). John Noon first acquired the Property in 1964. Approximately one year later, on July 26, 1965, Mr. Noon sold the surface of the Property by quit claim deed, but expressly reserved the oil and gas mineral rights underlying the Property (the "1965 Severance Deed"). Specifically, the 1965 Severance Deed states:

Excepting and reserving to the Grantor [John Noon], his heirs, successors and assigns, all coal, oil and gas and all other minerals underlying the premises together with all the easements, rights and privileges therein which Grantor, his heirs, successors or assigns in his or their sole discretion may deem necessary, desirable or convenient in order to remove said coal, oil, gas and other minerals by any method now employed or hereafter developed, including strip mining methods, from said premises and also to reclaim as required, or permitted by law, said premises and any other premises now or hereafter owned, leased or operated upon by Grantor, his heirs, successors and assigns.

Over the subsequent 12 years, the surface rights to the Property were transferred three times—twice in 1970, and once in 1977. Each of these three conveyances specifically referenced, by volume and page number, the reservation of the oil and gas mineral rights in the 1965 Severance Deed. John D. Walker, Jr. (the "Appellee") purchased the surface rights to the Property in 2009.

On November 28, 2011, the Appellee sent a notice of abandonment of the mineral rights to Mr. Noon under the 2006 version of the DMA, with service perfected on December 2, 2011. Contrary to R.C. 5301.56(H)(2), the Appellee recorded an affidavit of abandonment in the Noble County Recorder's Office on January 3, 2012. In response, and pursuant to R.C. 5301.56(H)(1), Mr. Noon timely recorded an affidavit and claim to preserve the severed mineral interest on

January 10, 2012 in the Noble County Recorder's Office—approximately 39 days after receiving the notice of abandonment and well before the 60-day limitation in R.C. 5301.56.

On April 27, 2012, and after unsuccessfully attempting to utilize the 2006 version of the DMA, the Appellee filed a complaint to quiet title and for declaratory judgment seeking to divest John Noon of his mineral rights based exclusively on the DMA. This is the first time the Appellee even attempted to use the superseded 1989 version of the DMA.

The parties filed cross-motions for summary judgment. On March 20, 2013, the Noble County Court of Common Pleas issued a decision granting summary judgment in favor of the Appellee, and denying Mr. Noon's motion. In finding in favor of Plaintiff, the trial court applied the 1989 version of the DMA and concluded that the three surface transfers in 1970 and 1977 did not qualify as "savings events" under R.C. 5301.56(B)(3)(a).

Mr. Noon timely appealed to the Seventh District Court of Appeals.¹ On April 3, 2014, the Seventh District affirmed the trial court's decision, holding that: (i) "in order for the mineral interest to be the 'subject of' the title transactions" for purposes of R.C. 5301.56(B)(3)(a), the grantor must actually convey or retain that interest; (ii) the 1989 version of the DMA controls over the 2006 version of the DMA; and (iii) the state constitutional concerns (due process and retroactivity) regarding the application of the 1989 version of the DMA need not be addressed. It is from this decision that this appeal arises.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The 2006 version of the DMA is the only version of the DMA to be applied after June 30, 2006, the effective date of said statute.

¹ During the pendency of the appeal, Mr. Noon passed away. A motion for substitution of parties was granted by the Seventh District on January 8, 2014, thereby substituting the Appellant as the real party in interest for purposes of this appeal.

and

Proposition of Law No. II: To establish a mineral interest as "deemed abandoned" under the 1989 version of the DMA, the surface owner must have taken some action to establish abandonment prior to June 30, 2006. In all cases where a surface owner failed to take such action, only the 2006 version of the DMA can be used to obtain relief.

Propositions of Law I and II are both answered by the resolution of a single question: Was the 1989 version of the DMA self-executing? The text, purpose and history of the law reveal that it was not.

A. Background: The 1989 and 2006 versions of the DMA.

As noted above, the General Assembly enacted the original (and now superseded) version of the DMA in 1989. The 1989 version of the DMA provided that "[a]ny 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: [listing the so-called "savings events"].*" (Emphasis added). R.C. 5301.56(B).

Although designed to provide a surface owner with the opportunity to acquire title to previously-severed mineral rights that remained "dormant" for a 20-year time period, the 1989 version of the DMA was flawed in that it: (i) failed to specify a mechanism for determining the applicable 20-year look-back period; and (ii) proved impractical and unworkable due to ambiguity regarding whether it provided for "automatic" and self-executing abandonment of mineral interests without any due process protections being afforded to the severed mineral interest owner(s). *See, e.g., Eisenbarth v. Reusser*, 7th Dist. Monroe No. 13 MO 10, 2014-Ohio-3792, ¶ 108 (DeGenaro, P.J., concurring in judgment only) (citing H.B. 288 Rep. Mark Wagoner, Sponsor Testimony before the Ohio House Public Utilities Committee); *Farnsworth v. Burkhardt*, 2014-Ohio-4184, ¶ 92 (7th Dist. 2014) (DeGenaro, P.J., concurring in judgment only).

To remedy the infirmities with the 1989 version of the DMA, the General Assembly substantially rewrote the statute in 2006. The 2006 modifications to the DMA required a surface owner to follow a multi-step procedure, which includes fundamental due process protections for severed mineral interest owners, in order to regain ownership of those previously-severed mineral interests. Specifically, the 2006 version of the DMA now requires a surface owner to: (i) "[s]erve notice by certified mail, return receipt requested, to each holder [of the mineral rights] or each holder's successors or assignees," *see* R.C. 5301.56(E)(1); (ii) publish notice at least once in a newspaper of general circulation in each county in which the land is located, but only if certified mail notice proves unsuccessful, *see* R.C. 5301.56(E)(1); and (iii) timely record an affidavit of abandonment if the holder of the severed mineral interest does not record a claim to preserve the mineral interest or an affidavit identifying a "savings event" under R.C. 5301.56(B).²

While there is no dispute that the 2006 version of the DMA applies to all present claims for abandoned mineral interests and is not self-executing, resolution of the first two propositions of law depends entirely on whether the 1989 version of the law was self-executing during the time it was in effect. If the 1989 version of the DMA did not require legal "implementation" by surface owners, and is deemed "self-executing," then the rights to severed mineral interests automatically vested in surface owners on a date prior to June 30, 2006, regardless of whether the surface owner took any action at all.³ Once the merger of the surface and mineral estates

² Notably, the Appellee proved unable to successfully use the 2006 version of the DMA, which is the only reason claims under the 1989 version of the DMA were even raised.

³ Of course, if the 1989 version of the DMA was "self-executing," it still operated to vest rights in the surface owner only in the absence of a savings event. R.C. 5301.56(B) (eff. March 22, 1989). Ascertaining *whether* a savings event occurred under the 1989 version, however, would

occurred, there would be no use for, or application of, the 2006 version of the DMA, because there would no longer be a severed mineral interest to abandon.

On the other hand, if the 1989 version of the DMA was not "self-executing," then surface owners had to "implement" or legally effectuate an abandonment claim under the 1989 version of the DMA while it remained a valid law.⁴ That is, to establish a mineral interest as "deemed abandoned and vested in the owner of the surface" under the 1989 version of the DMA, the surface owner must have taken some legal action to effectuate the abandonment prior to June 30, 2006. If the surface owner took no such action prior to that date, as is the undisputed case here, then: (i) record title to the mineral interest remains—as before—with the mineral interest owner; and (ii) only the 2006 version of the DMA can be used to cause abandonment and vesting in the surface owner prospectively.

For the reasons set forth below, the 2006 version of the DMA is the only version to be applied after June 30, 2006 because the 1989 version of the DMA was not "self-executing."

B. The 2006 version of the DMA is the only version to be applied after June 30, 2006 because the 1989 version of the DMA was not "self-executing."

The 1989 DMA is ambiguous with respect to whether or not it was intended to be "self-executing," and as a result, this Court must look beyond the text in order to ascertain the General Assembly's intent. *See, e.g.*, R.C. 1.49. When the Court examines the text and the "other matters" to be considered in the interpretation of ambiguous statutes, it is clear that the General Assembly did not intend the 1989 version of the DMA to be self-executing.

merely constitute the *application* of the 1989 version of the DMA to a disputed claim, and thus would constitute a rejection of the first three propositions of law.

⁴ Even under the Appellee's construction of the law, if it were determined that a savings event precluded vesting in a surface owner prior to June 30, 2006, then only the 2006 version of the DMA applies because no complete, 20-year period of dormancy or nonuse would have passed before the 2006 amendments took effect.

1. The 1989 version of the DMA is ambiguous, requiring consideration of more than just the text to determine its meaning.

The "ambiguity of the 1989 version of the ODMA is readily apparent." *Eisenbarth*, 2014-Ohio-3792, at ¶ 65 (DeGenaro, P.J., concurring in judgment only); see *Farnsworth*, 2014-Ohio-4184, at ¶ 82 (DeGenaro, P.J., concurring in judgment only) ("The 2006 ODMA removed the ambiguity and potentially arbitrary operation of the 1989 ODMA[.]"). Practitioners in every DMA case, trial courts,⁵ and appellate judges (even in the same appellate district),⁶ have advanced competing interpretations of the 1989 version of the DMA, in particular with respect to the operation of the 20-year look-back period and whether the law was self-executing.

The General Assembly explicitly recognized this ambiguity in the statute during the legislative process surrounding the enactment of the 2006 version of the DMA: "Unfortunately, Ohio's Dormant Mineral Statute has seldom been used, in large measure because the statute did not clearly define when a mineral interest became abandoned and exactly how the process to reunite the mineral ownership with the surface ownership was to be accomplished. House Bill 288 removes the ambiguity in the existing statute." (Emphasis added.) *Eisenbarth*, 2014-Ohio-

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

⁶ See *Eisenbarth v. Reusser*, 7th Dist. Monroe No. 13 MO 10, 2014-Ohio-3792, ¶¶ 65–72 (DeGenaro, P.J., concurring in judgment only) (strongly disagreeing with Judge Vukovich and Judge Donofrio regarding the applicability of the 1989 version of the DMA).

3792, at ¶ 108 (DeGenaro, P.J., concurring in judgment only) (citing H.B. 288 Rep. Mark Wagoner, Sponsor Testimony before the Ohio House Public Utilities Committee).

And the Ohio State Bar Association has observed that one of the "major changes addressed in the [2006] amendment" was the ambiguity with respect to how "the original [1989] statute provided for the lapse to occur if no specified activities took place within 'the preceding twenty years.' Questions arose as to whether that language meant [i] 20 years preceding enactment of the statute, [ii] 20 years preceding commencement on an action to obtain the minerals or [iii] any 20-year period in the chain of title." *See OSBA, Report of the Natural Resources Committee*, <https://www.ohioabar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx> (accessed Oct. 28, 2014) (hereinafter, the "2006 OSBA Report").⁷

In light of this patent ambiguity in the 1989 law, this Court's task is to construe "the language [of the statute] in a manner that reflects the intent of the General Assembly." *Clark v. Scarpelli*, 91 Ohio St.3d 271, 274, 744 N.E.2d 719 (2001) (defining ambiguous to mean "subject to more than one reasonable interpretation"). More specifically, "where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent." *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991) (citing *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190, 16 O.O.3d 212, 404 N.E.2d 159 (1980)). And, R.C. 1.49 further provides that this Court, "in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; (B) The circumstances under which the statute was enacted; (C) The legislative history; (D) The common law or former statutory provisions, including laws

⁷ For the Court's convenience, a copy of the 2006 OSBA Report is provided in the attached Appendix.

upon the same or similar subjects; (E) The consequences of a particular construction; (F) The administrative construction of the statute."

As set forth below, taking into account all of the relevant factors leads to the inescapable conclusion that the 1989 version of the DMA was not intended to be "self-executing." Rather, the best interpretation of the statute is that it required a surface owner to take legal action under the 1989 version of the DMA (while that law remained in effect) in order to effectuate the vesting of abandoned mineral rights in the surface owner.

2. Appellant's interpretation is *most* consistent with the statutory text as a whole.

While the text of the 1989 version does not unambiguously resolve the question of whether it is self-executing, Appellant's interpretation is the best of the available alternatives.

Specifically, the 1989 version of the DMA provided that a severed mineral interest "shall be deemed abandoned and vest in the owner of the surface, if none of [eight statutory "savings events"] applies . . . [w]ithin the preceding twenty years" R.C. 5301.56(B)(1), (B)(1)(c) (eff. March 22, 1989). Any viable interpretation must adopt a 20-year look-back period which: (a) gives meaning to the critical term "preceding" in subsection (B)(1)(c); and also (b) allows for the possibility of successive 20-year periods of nonuse, which the statute clearly contemplates.

As set forth in detail below in support of Appellant's Proposition of Law No. III, *see infra* pp. 22–28, only Appellant's interpretation, which ties the commencement of the 20-year look-back period to some "implementing action" by the surface owner, adequately upholds *the* elementary canon of statutory construction that "each provision in a statute should be given effect." *Scott v. Reinier*, 58 Ohio St. 2d 67, 73, 388 N.E.2d 1226 (1979).

3. Appellant's interpretation is most consistent with the express objectives of the 1989 version of the DMA.

Appellant's interpretation best—indeed uniquely—effectuates the General Assembly's stated objectives of the DMA itself. The purpose and objectives of the DMA are expressly set forth in R.C. 5301.55, which states, in relevant part: "Sections 5301.47 to 5301.56, *inclusive*, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in section 5301.48 of the Revised Code." (Emphasis added.) This provision expresses the "object[s] sought to be attained" by the DMA—namely, to (i) simplify and facilitate real property transactions, and (ii) allow persons to rely on the record chain of title. According to the General Assembly itself, *any* interpretation of the 1989 version of the DMA—even if it has to be "liberally construed" to resolve ambiguity—must "effect th[is] legislative purpose[.]" *See* R.C. 5301.55.

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

Under Appellee's interpretation, no one could actually ascertain from the record chain of title whether the surface owner regained the ownership of previously severed mineral rights. The reason is simple: a number of the "savings events" set forth in R.C. 5301.56 can only be determined by looking outside of the record chain of title. For example:

- Establishing that there has not been "actual production or withdrawal of [the] minerals" and that a "drilling or mining permit" was not "issued to the holder" of

the severed mineral interest would require detailed research at the Ohio Department of Natural Resources, Division of Oil and Gas Resources Management ("ODNR"), testimony from the appropriate person at ODNR and/or an actual site walk of the property in question. *See* R.C. 5301.56(c)(ii) (eff. March 22, 1989).

- Proving that the mineral rights have not been "used in underground gas storage" would require detailed discussions with the relevant natural gas distribution company, ODNR, the Public Utilities Commission of Ohio, and/or the Federal Energy Regulatory Commission, as well as testimony from the appropriate person(s). *See* R.C. 5301.56(c)(iii) (eff. March 22, 1989).

This very problem was noted by the National Conference of Commissioners on Uniform State Laws in the prefatory note to its Uniform Dormant Mineral Interests Act (the "UDMIA"), upon which the 1989 version of the DMA was modeled, in part. The UDMIA specifically noted certain downsides to "nonuse" statutory schemes, and emphasized "recording" as a "key element" of any dormant mineral act. Specifically, the UDMIA stated:

A number of statutes have made nonuse of a mineral interest for a term of years, e.g., 20 years, the basis for termination of the mineral interest. . . .

The nonuse scheme has advantages and disadvantages. . . . Its major drawbacks are that it requires resort to facts outside the record and it *requires a judicial proceeding to determine the fact of nonuse*. . . .

(Emphasis added.) Uniform Dormant Mineral Interests Act, Prefatory Note 2–3 (1986).⁸ As a result, the "self-executing" interpretation of the 1989 version of the DMA directly contradicts the essential objective of the DMA: allowing persons to rely on record chain of title. *See* R.C. 5301.55.

Indeed, under Appellee's construction, hundreds, if not thousands, of severed mineral interests would be "vested" in surface owners as of March 22, 1992, without anything—not one document—in the public record establishing such abandonment. Abstractors, title examiners,

⁸ For the Court's convenience, a copy of the Uniform Dormant Mineral Interests Act is provided in the attached Appendix.

and title attorneys are appropriately taught to rely on the documents in the courthouse in the record chain of title. Where no legal action or implementation is required of surface owners, the record chain of title is rendered all but meaningless. While the General Assembly could have chosen such a path, this interpretation of the 1989 version of the DMA cannot prevail because it directly contradicts the DMA's express objectives, as stated unequivocally by the General Assembly itself. *See* R.C. 5301.55.

Second, under the "self-executing" theory of abandonment, numerous active oil and gas leases with severed mineral rights owners across the state (as well as the extraction operations conducted under those leases) would be vulnerable to challenges brought under the 1989 version of the DMA. If allowed to proceed, surface owners in such lawsuits could continue to assert that at some unknown date in the past, the severed mineral interests merged with the surface estate. An energy company embarking on a complex and expensive development operation could never definitively ascertain whether it entered into an oil and gas lease with the actual holder of the mineral interest. This constant, unending threat would place (and has placed) a permanent cloud over the productive development of properly-recorded severed mineral interests. This is not the outcome desired by the General Assembly. Indeed, to the contrary, the General Assembly expressly stated that the 1989 version of the DMA should be "liberally construed" to simplify and facilitate real property transactions. R.C. 5301.55.

By contrast, Appellant's interpretation upholds both of the stated statutory objectives. By requiring a surface owner to commence an action under the law before the mineral rights will be deemed abandoned ensures that the chain of title accurately reflects the state of ownership. And, importantly, it does so without implying any new or additional grace period for severed mineral

interest owners—once the surface owner files the action, there is nothing that can be done subsequently to legally prevent the abandonment, absent a prior savings event.

As a corollary, Appellant's interpretation furthers the objective of simplifying and facilitating real property transactions—including those relating to the development and use of severed mineral interests—by establishing a means of publicly identifying the precise date on which the surface and mineral estates merged. Such clarity and public certainty advances the productive development of properly-recorded severed mineral interests, just as the General Assembly intended. *See* R.C. 5301.55.

4. Appellant's interpretation is consistent with the legislative history.

The legislative history surrounding the 1989 version of the DMA (although sparse) also supports Appellant's interpretation. As an initial matter, neither the text of the 1989 version of the DMA (as introduced or enacted) nor the legislative service commission's analyses of the 1989 version of the DMA indicate that the 1989 version of the DMA was intended to be "self-executing" or "automatic."⁹ In fact, the words "self-executing" and "automatic" appear nowhere in the legislative history, and are, in fact, legal fallacies crafted by surface owners today.

Just as importantly, Presiding Judge DeGenaro recently opined: "By virtue of the 2006 ODMA, we have the rare benefit of the General Assembly's statement of its intent with respect to the ambiguous language of the 1989 ODMA. That alone dictates that the 1989 version is no longer controlling; to decide otherwise makes the enactment of the 2006 ODMA meaningless."

Eisenbarth, 2014-Ohio-3792, at ¶ 65 (DeGenaro, P.J., concurring in judgment only).

Elaborating on this sentiment, Judge DeGenaro more recently noted:

⁹ *See Analysis of Sub. S.B. 223 (As Reported by H. Civil & Commercial Law)*, 1989; *Analysis of Sub. S.B. 223 (As Reported by S. Judiciary)*, 1989. For the Court's convenience, copies of these analyses are provided in the attached Appendix.

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

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

The legislative history of the 1989 version of the DMA, while limited, supports Appellant's interpretation—particularly in light of the 2006 amendments.

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

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

In the context of the DMA, a "fee simple interest—which includes severed mineral rights—under common law 'cannot be extinguished or abandoned by nonuse, and it is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals.'" *Eisenbarth*, 2014-Ohio-3792, at ¶ 78 (DeGenaro, P.J., concurring in judgment only). Yet, interpreting the 1989 version of the DMA to be "self-executing"

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

Compounding matters, Appellee's interpretation of the 1989 version of the DMA turns on its head this Court's longstanding principle that courts should "favor individual property rights when interpreting forfeiture statutes." *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 605 N.E.2d 368 (1992). There is no doubt that the DMA is a forfeiture statute. The word "forfeiture" is defined in *Black's Law Dictionary* 722 (9th Ed. 2009) as follows: "1. The divestiture of property without compensation. 2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."¹⁰ *See also Ohio Transport, Inc. v. Pub. Utilities Comm.*, 164 Ohio St. 98, 106, 128 N.E.2d 22 (1955) (noting that a "forfeiture has been defined as a divestiture of property without compensation in consequence of some default or act forbidden by law"). Under the "self-executing" theory of abandonment, the 1989 version of the DMA results in both the "divestiture of property without compensation," and the loss of a vested "right" to a private "property" interest based on the alleged "neglect of duty" of the severed mineral owner.

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

- "Forfeitures . . . are not favored in law or equity and statutory provisions therefor must be strictly construed." *State ex rel. Lukens v. Indus. Comm. of Ohio*, 143 Ohio St. 609, 611, 56 N.E.2d 216 (1944); and

¹⁰ For the Court's convenience, a copy of *Black's Law Dictionary* 722 (9th Ed. 2009) is provided in the attached Appendix.

- "Whenever possible, such statutes must be construed to avoid a forfeiture of property." (Emphasis added.) *State v. Lillock*, 70 Ohio St.2d 23, 26, 434 N.E.2d 723 (1982), *superseded on other grounds*, R.C. 2933.41(C) (statute repealed July 1, 2007).

Particularly in light of the inherent ambiguity in the 1989 version of the DMA, its operation as a forfeiture statute¹¹ obligates this Court to heed the admonition to "*whenever possible*" find a construction that avoids a forfeiture of rights. That is, even if implying the existence of a limited procedural obligation on surface owners (e.g., to have taken formal legal action under the 1989 version of the DMA) were not the interpretation most consistent with the statutory text—which it is—the mere fact that it is *possible* to construe its provisions that way requires this Court to do so.

6. **Construing the 1989 version of the DMA to be "self-executing" renders it constitutionally invalid and produces inequitable results.**
 - a. **Interpreting the 1989 version of the DMA to be "self-executing" is contrary to the Ohio Constitution's ban on retroactive legislation.**

Appellee's proposed interpretation of the 1989 version of the DMA also violates the Ohio Constitution. While surface owners and Ohio trial courts continue to place sole and total reliance on the United States Supreme Court's decision in *Texaco v. Short*, 454 U.S. 516 (1981),¹² the reality is that the *Texaco* Court did not analyze any state constitutional claims. Instead, the United States Supreme Court upheld the constitutionality of Indiana's dormant mineral statute

¹¹ See, e.g., *Eisenbarth*, 2014-Ohio-3792, at ¶ 82 (DeGenaro, P.J., concurring in judgment only) ("Because the 1989 ODMA did not require the holder's consent or notice, the [severed mineral interest owners'] vested interest was taken arbitrarily and operated as a forfeiture, an especially harsh result considering the 1989 ODMA is being applied in a case filed after that version is no longer in effect . . .").

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

under the United States Constitution, specifically, under the due process, equal protection, and takings clauses in the Fifth and Fourteenth Amendments.¹³

Construing the 1989 version of the DMA as Appellee proposes, however, violates the Ohio Constitution's prohibition on retroactive legislation in Article II, Section 28. As this Court long ago explained:

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

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

". . .

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

By its Constitution of 1851, Ohio has quite clearly adopted the above prohibition against retroactive legislation. Section 28, Article II states that: "The general assembly shall have no power to pass *retroactive laws*, or laws impairing the obligation of contracts" (Emphasis added.)

¹³ It should also be noted that the *Texaco* decision was rendered by a split court (a 5-4 decision) nearly 30 years ago when the country (in particular Ohio and the greater Appalachia region) was not in the middle of an oil and gas boom.

This was a much stronger prohibition than the more narrowly constructed provision in Ohio's Constitution of 1802. Accordingly, it must be concluded that Ohio has adopted both of the foregoing safeguards against retrospective legislation.

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

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

Undoubtedly, the surface owner (and any supporting *amici*) will contend that the 1989 version of the DMA operated prospectively—primarily because there is no language in the text of the 1989 version of the DMA declaring it to operate retroactively. Yet, this ignores the longstanding recognition of this Court that "a statute that applies prospectively may nonetheless implicate the Retroactivity Clause." *Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St.3d 103, 109, 2013-Ohio-4068, 998 N.E.2d 419, ¶ 24. As this Court has recognized, "the constitutional limitation against retroactive laws 'include[s] a prohibition against laws which commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws.'" *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745, ¶ 14 (quoting *Van Fossen*, 36 Ohio St.3d at 105). As a result, no matter how one looks at it, the 1989 version of the DMA operates retroactively.

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

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

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

b. Interpreting the 1989 version of the DMA to be "self-executing" would produce inequitable results.

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

Indeed, interpreting the 1989 version of the DMA as "self-executing" allows surface owners to inequitably sit on their rights indefinitely, which runs afoul of the equitable principles underlying the doctrine of laches. *See Eisenbarth*, 2014-Ohio-3792, at ¶ 90 (DeGenaro, P.J., concurring in judgment only) ("[T]he doctrine of laches is a fair consideration when determining which version of the ODMA to rely upon when a surface owner's claim to the severed mineral rights could have been, but was not, asserted before the effective date of the 2006 ODMA."). "Stated simply, laches is an equitable doctrine that bars a party from asserting an action when there is an unexcused delay that prejudices the opposing party." *Gordon v. Reid*, 2d Dist. Montgomery No. 25507, 2013-Ohio-3649, ¶ 15 (citing *Baker v. Chrysler*, 179 Ohio App.3d 351, 361, 901 N.E.2d 875 (2d Dist. 1998)). In this case, the Appellee (like most surface owners) did not assert or attempt to enforce any abandonment claim during the 17 years the 1989 version of the DMA remained in effect, or at any time prior to the filing of his lawsuit in 2013. Such total inaction on the part of the surface owner (and his predecessors-in-interest) cannot and should not divest the Appellant of her properly recorded, and long-vested, property rights in the oil and gas mineral estate.

Making matters worse, the Appellant in this case (like most severed mineral interest owners) took steps necessary to both develop the severed mineral interests and/or preserve such interests under the 2006 (and current) version of the DMA. As Ohio courts recognize, one of the clearest forms of "material prejudice" that "necessitate[s] the application of laches" is "a change

in the defendant's position that would not have occurred had the plaintiff not delayed in asserting her rights." *State ex rel. Donovan v. Zajac*, 125 Ohio App.3d 245, 250, 708 N.E.2d 254 (11th Dist. 1998). Here, the Appellant filed preservation claims/affidavits under R.C. 5301.56(C) and/or (H)¹⁴ and entered into an oil and gas lease. These affirmative actions by the severed mineral interest owner constitute "a change in position" that would not have occurred "but for" the surface owner's lengthy and unreasonable delay in asserting a claim under the 1989 version of the DMA.

Of course, if the 1989 version of the DMA required nothing of a surface owner, then their delay is immaterial—but that is precisely the point. Interpreting the ambiguous provisions of the law as Appellee proposes is not only inconsistent with the text and history of the statute itself, but it produces absurd and inequitable results that the legislature clearly did not intend. Consideration of all relevant factors leads to the inescapable conclusion that the General Assembly did not intend that the 1989 version of the DMA be "self-executing."

Proposition of Law No. III: To the extent the 1989 version of the DMA remains applicable, the 20-year look-back period shall be calculated starting on the date a complaint is filed which first raises a claim under the 1989 version of the DMA.

If the Court concludes that the 1989 version of the DMA is self-executing, then the third proposition of law is superfluous. If the Court concludes that the 1989 version of the DMA is not self-executing, however, then the question remains: What did it require surface owners to do in order to effectuate a transfer of the mineral rights? While the undisputed facts of this case reveal that no implementing action whatsoever was taken by Appellee, and the Court therefore

¹⁴ *Walker v. Shondrick-Nau*, 2014-Ohio-1499, ¶ 6 ("On January 10, 2012, Noon filed an affidavit and claim to preserve mineral interest.").

does not need to answer this question to resolve the appeal, Ohio is in need of clarity on the issue.

As noted above, the 1989 version of the DMA provided that a severed mineral interest "shall be deemed abandoned and vest in the owner of the surface, if none of [eight (8) statutory "savings events"] applies . . . [w]ithin the preceding twenty years" R.C. 5301.56(B)(1), (B)(1)(c) (eff. March 22, 1989). This language gives rise to the fundamental question: "Preceding what?" The best course is to interpret the statute as requiring legal implementation (e.g., the filing of a quiet title or declaratory judgment action), and to conclude that the 20-year look-back period under the 1989 version commenced on the date such legal action was filed. In essence, the answer to the "preceding what" question is: preceding the date on which the surface owner commenced a legal action under the 1989 version of the DMA.

The patent ambiguity with respect to the 20-year look-back under the 1989 version of the DMA has resulted in three different and competing answers emerging to the "preceding what" question. In fact, each answer was contemplated in the 2006 OSBA report: "the original statute [the 1989 version of the DMA] provided for the lapse to occur if no specified activities took place within 'the preceding twenty years.' Questions arose as to whether that language meant [i] 20 years preceding enactment of the statute, [ii] 20 years preceding commencement on an action to obtain the minerals or [iii] any 20-year period in the chain of title [i.e., the 'rolling' look-back]." See OSBA, *Report of the Natural Resources Committee*, <https://www.ohioabar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx> (accessed Oct. 28, 2014).

Appellee's preferred interpretation is the third alternative identified in the 2006 OSBA Report, and is the least plausible. Often referred to as a "rolling" 20-year look-back, this

interpretation allows a surface owner to "pick any date that exists between March 22, 1989 and June 30, 2006 and then look back 20 years from that date." *Eisenbarth*, 2014-Ohio-3792, at ¶ 39. In essence, with the benefit of hindsight, the surface owner gets to choose whatever 20-year period is most convenient for the surface owner. The Seventh District Court of Appeals recently rejected the use of the rolling look-back period as being arbitrary and unreasonable. *Eisenbarth*, 2014-Ohio-3792, at ¶ 123 (DeGenaro, P.J., concurring in judgment only) (noting that the "arbitrary selection of some random date to put a savings event outside the 20-year look back period is so violative of due process it does not warrant further discussion").

Despite the Seventh District Court of Appeals' recent rejection of the so-called "rolling look-back" period, Presiding Judge DeGenaro recently supported a "rolling look-back" interpretation of the statute (although describing it a bit differently) in her concurring opinions in *Eisenbarth*, 2014-Ohio-3792, at ¶ 72 (DeGenaro, P.J., concurring in judgment only), and *Farnsworth v. Burkhardt*, 2014-Ohio-4184, ¶ 92 (7th Dist. 2014) (DeGenaro, P.J., concurring in judgment only). Specifically, in both *Eisenbarth* and *Farnsworth*, Judge DeGenaro described the relevant 20-year period as commencing on the date of the last statutory "savings event," and rolling forward. *Eisenbarth*, 2014-Ohio-3792, at ¶ 72 (DeGenaro, P.J., concurring in judgment only) ("Pursuant to the 1989 ODMA, the January 23, 1974 lease constitutes a savings event which preserved the Reussers' mineral rights for the statutory 20 year period, here until January 23, 1994."); *Farnsworth*, 2014-Ohio-4184, at ¶ 92 (DeGenaro, P.J., concurring in judgment only) ("Pursuant to the 1989 ODMA, the original severance of the mineral rights . . . in 1980 was . . . a savings event which preserved the mineral rights for the initial statutory 20 year period, which ran here until 2000."). This explanation reveals the significant textual problem with this interpretation, regardless of whether it is described as a "rolling look-back" or roll forward.

While Appellee's interpretation allows for the prospective application of the law to successive periods of nonuse, it simply ignores the term "preceding" altogether (as well as the backward looking operation that it implies), and replaces it with a *forward*-looking twenty-year period, beginning with the last statutory savings event. But if the General Assembly intended to create a *forward*-looking twenty-year period, it easily could have written the law to do so. For example, the General Assembly could have adopted: (i) the language of the 2006 OSBA report ("any 20-year period in the chain of title"); or (ii) Judge DeGenaro's description (specifying that the 20-year period runs *forward* in time from the date of a savings event); or (iii) the language from Michigan's dormant mineral act statute, which is often relied upon by surface owners, *see, e.g.*, Mich. Compiled Laws 554.291(1) (referencing dormancy or nonuse "for a period of 20 years" without use of the term "preceding"). Instead, the General Assembly wrote a law that deemed mineral rights abandoned only if no savings event had occurred "[w]ithin the *preceding* twenty years . . . ," although it failed to specify what the 20-year period must precede. (Emphasis added.) R.C. 5301.56(B)(1), (B)(1)(c) (eff. March 22, 1989). Nonetheless, "it is the duty of the court to give effect to the words used in a statute, not to insert words not used." *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, paragraph three of the syllabus. Appellee's interpretation constitutes a wholesale replacement of the statutory language and scheme that basic principles of statutory interpretation do not permit.

Another alternative—the first interpretation described in the OSBA report ("20 years preceding enactment of the statute")—reads the 1989 version of the DMA as providing for a fixed, 20-year look-back period from March 22, 1989 (the effective date of the statute). In essence, only those mineral interests which already were dormant for at least twenty years as of the effective date of the 1989 version could be deemed abandoned and vested (assuming the

mineral interest owners failed to take advantage of the three year grace period for preservation). While this "fixed" look-back period has the virtue of giving meaning to the term "preceding" (by tying the look-back to the date of the enactment of the statute), it fails to allow for the possibility of successive 20-year periods of nonuse, which the statute clearly contemplates. *See, e.g.*, R.C. 5301.56(D)(1) (eff. March 22, 1989) (allowing for "successive filings of claims to preserve mineral interests . . . [indefinitely]"). Under this interpretation, the "successive filings" language would be rendered superfluous, as the 1989 version operated only once with respect to severed mineral interests that had been dormant for at least twenty years as of March 22, 1989. The "fixed look-back" interpretation gives meaning to the word preceding, but writes out of the statute completely the language contemplating prospective application to successive periods of nonuse.

Uniquely among the three alternatives, Appellant's interpretation of the look-back period—described in the 2006 OSBA report as the "20 years preceding commencement on an action to obtain the minerals"—both preserves the common sense understanding of the term "preceding" (and the indisputably *backward*-looking operation that it implies), while also allowing for the prospective application of the statute to successive, twenty-year periods of dormancy. Specifically, it makes clear that the relevant twenty years are those that "precede" the commencement of a legal action by the surface owner, while also allowing for the possibility of abandonment where a period of nonuse of the severed mineral rights does not reach twenty years until sometime after March 22, 1989.

Notably, nothing in Appellant's interpretation implies that a severed mineral interest owner would have the opportunity under the 1989 version of the DMA to preserve or retain the interests once a surface owner commenced such an action—a key distinction with the operation

of the 2006 version and so-called, pure "notice" dormant minerals acts in other states. *Compare* R.C. 5301.56(H) (providing that mineral interest holder can file a "claim to preserve the mineral interest" after being served notice), *with* Neb. Rev. Stat. § 57-228 ("Any owner . . . of the surface estate . . . may sue . . . praying for the termination and extinguishment of such severed mineral interest[.]"), *and* 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."). The 1989 version of the DMA simply contemplated that the commencement of an action would mark the date from which the 20-year look-back occurred, and "if none of [eight statutory "savings events"] applies . . . [w]ithin the preceding twenty years..." then the mineral rights automatically vested in the surface owner on the date of filing.¹⁵

To be sure, Appellant's interpretation does not emerge from the unambiguous text of the statute. But neither do the alternatives. The difference is that Appellant's construction interprets the law in a manner that is the most consistent with the overall statutory scheme while doing the least violence to the words that the General Assembly actually adopted. Indeed, from a purely textual perspective, reading into the statute an implied requirement that a surface owner file a claim under the very statute under consideration in order to avail himself of the rights created thereunder requires the least supplementation of the ambiguous statutory text. In addition, Appellant's interpretation is the most reasonable interpretation from a practical perspective, as

¹⁵ Of course, the severed mineral interest owner could assert that a savings event had occurred *prior* to the commencement of the action, in which case the surface owner's claim would and should be fully litigated. But, as the Supreme Court in *Texaco v. Short* observed, that merely illustrates the difference between a statute's mechanism for mineral rights divestiture "and a subsequent judicial determination that [such divestiture] did in fact occur." 454 U.S. 516, 533 (1982). As demonstrated below, that distinction is another reason why requiring a surface owner to commence an action—so that a court can decide any disputes over abandonment—is also more consistent with the policy objectives of the law to make the record title more reliable.

the question inevitably arises: Who determines whether a statutory "savings event" applies? Appellee would have this Court conclude that the General Assembly intended that surface owners would decide for themselves, at any time they felt it was convenient or in their best interest, that the statutory savings events do not apply, and to "deem" the mineral rights as "vested" in themselves. But only a court of law is qualified to make such determinations, especially in the face of a disputed claim. The 1989 version of the DMA gives no indication that it meant to transform a surface owner into a judiciary unto himself. And, in cases of disputed claims (e.g., where, as here, the existence of a savings event is precisely the thing to be litigated), allowing anything other than the filing of an action to effectuate the transfer contemplated under the law would make the chain of title inherently *unreliable*.

Because the text of the 1989 version of the DMA clearly contemplates that the surface owner was required to take formal legal action, the best reading of the law is the one that holds that the twenty-year look-back period commences on the date a surface owner filed a complaint under the statute.

Proposition of Law No. IV: For purposes of R.C. 5301.56(B)(3), a severed oil and gas mineral interest is the "subject of" any title transaction which specifically identifies the recorded document creating that interest by volume and page number, regardless of whether the severed mineral interest is actually transferred or reserved.

and

Proposition of Law No. V: Irrespective of the savings events in R.C. 5301.56(B)(3), the limitations in R.C. 5301.49 can separately bar a claim under the DMA.

If the Court holds that the 1989 version of the DMA is not self-executing, then it is not required (though it likely would still be prudent) to resolve Propositions of Law IV and V. That is because whether a "savings event" under R.C. 5301.56(B) took place is irrelevant if Appellee failed to take the requisite legal action to effectuate a transfer of the mineral interests until after the June 30, 2006 effective date of the 2006 version of the DMA.

If the Court *does* reach Propositions IV and V, however, Appellant submits that they are so inherently intertwined that they must be considered together. And, for the reasons set forth below, the appellate court erred in ignoring R.C. 5301.49 and concluding that the phrase "subject of" requires an actual transfer of the mineral rights in order to qualify as a "savings event."

One of the first steps required under either the 1989 or 2006 version of the DMA is that the surface owner confirm whether certain statutory savings events occurred during the relevant 20-year look-back period. *See* R.C. 5301.56(B) (2006 version); R.C. 5301.56(B)(1)(c) (eff. March 22, 1989). The presence of any one of these statutory savings events would prevent a surface owner from claiming abandonment of the severed mineral interests under the DMA.

The most frequently litigated savings event is found in R.C. 5301.56(B)(3)(a), and is the same in both versions of the DMA. In short, a mineral interest owner will retain his or her rights if the oil and gas mineral interest "has been the subject of" a recorded title transaction during the relevant look-back period. *Id.* Importantly, the phrase "title transaction" is not defined in the DMA. Rather, one must look to the definition set forth in the Ohio Marketable Title Act.

Specifically, R.C. 5301.47(F) defines a title transaction as "any transaction affecting title to any interest in land, including title by will or descent," as well as warranty deed, quit claim deed, or mortgage. R.C. 5301.47(F). When that definition is inserted into the language in R.C. 5301.56(B)(3)(a), it becomes clear that a statutory savings event occurs when:

The "mineral interest has been the subject of ["any transaction affecting title to any interest in land, including title by will or descent," as well as warranty deed, quit claim deed, or mortgage] that has been filed or recorded in the office of the county recorder of the county in which the lands are located."

The key to this "savings event" is that the mineral rights were the subject of a transaction "affecting title to any interest in property." Yet, the Seventh District Court of Appeals has

mischaracterized this savings event and improperly concluded that "[i]n order for the mineral interest to be the 'subject of' the title transaction the grantor must be conveying that interest or retaining that interest." *Dodd v. Croskey*, 2013-Ohio-4257, ¶ 48 (7th Dist.); see *Walker v. Shondrick-Nau*, 2014-Ohio-1499 (7th Dist.), ¶¶ 26–27. The decision below should be reversed, in light of: (i) the interplay of R.C. 5301.55 and R.C. 5301.49; (ii) the legislative history of the DMA; (iii) longstanding principles of statutory interpretation; and (iv) important public policy considerations (including those expressed in R.C. 5301.55).

1. **The interplay between R.C. 5301.55 and R.C. 5301.49 requires that a transfer of the surface which specifically references the severed oil and gas mineral interest constitute a "savings event" under R.C. 5301.56.**

R.C. 5301.55, which is part of the Ohio Marketable Title Act, 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 transactions 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 5301.49 of the Revised Code.**" (Emphasis added.) R.C. 5301.48. It is clear that this statute expressly applies to the DMA (R.C. 5301.56). As a result, the DMA is "subject . . . to such limitations as appear in section 5301.49 of the Revised Code."

One of the most important limitations in R.C. 5301.49(A) states that record title is subject to "[a]ll interests and defects which are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more." This means that a deed recorded during the applicable look-back period which specifically references the severed oil and gas mineral interest bars a claim under either version of the DMA. The only way to harmonize the statutes is to adopt the Appellant's proposition of law, thereby reaching the unavoidable conclusion that the limitation set forth in R.C. 5301.49(A) applies to the DMA.

2. The legislative history of the DMA supports the conclusion that a severed oil and gas mineral interest is the "subject of" any subsequent title transaction which specifically restates the mineral reservation regardless of whether the mineral interest is actually transferred.

When the DMA was first *introduced* before the Ohio Senate in 1987 as Senate Bill 223, the description of the "title transaction" savings event looked much different. In fact, the Savings Event in the as-introduced bill did not use the phrase "title transaction." Instead, the as-introduced language required a situation where the "interest had 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."¹⁶

This language, however, was completely transformed in the *amended* bill, which was known as Substitute Senate Bill 223. Specifically, the as-introduced language was entirely removed and replaced with the following savings event: when the "mineral interest has been the subject of a title transaction filed or recorded in the office of the recorder of the county in which the land is located."¹⁷ The new savings event in Substitute Senate Bill 223 not only replaced the provision in the as-introduced bill, but also ended up being the language unanimously passed by the Senate. That language remains in the current version of the DMA. R.C. 5301.56(B)(3)(a).

This history confirms the General Assembly's deliberate decision to eliminate the requirement that the mineral interest itself be conveyed or transferred in order to qualify as a savings event. In fact, nowhere in the statute is there a requirement that the mineral estate actually be transferred. Rather than require an actual transfer or conveyance of the mineral

¹⁶ Ohio S.B. 223 (1987) (as introduced) at 2, § 2(a). For the Court's convenience, a copy of Ohio S.B. 223 (1987) (as introduced) is provided in the attached Appendix.

¹⁷ Ohio Sub. S.B. 223 (1987) (as passed by the Senate) at 2, § 2. For the Court's convenience, a copy of Ohio Sub. S.B. 223 (1987) (as passed by the Senate) is provided in the attached Appendix.

interest itself, the General Assembly broadened the savings event to include any situation in which the mineral interest was the "subject of" a title transaction involving any interest in land.

3. Principles of statutory interpretation support Appellant's position.

Undoubtedly, Appellee will argue that the mineral interest must not merely be referenced, but must be the "subject" of the transaction, and will rely on the Seventh District Court of Appeals' decision in *Dodd v. Croskey*. In that case, the lower appellate court incorrectly concluded:

[The phrase] "subject of" is not defined in the statute. Therefore, the phrase must be given its plain, common, ordinary meaning and is to be construed "according to the rules of grammar and common usage." The common definition of the word "subject" is topic of interest, primary theme or basis for action. *Webster's II New Riverside University Dictionary* 1153 (1984). Under this definition the mineral interests are not the "subject of" the title transaction. Here, the primary purpose of the title transaction is the sale of surface rights. While the deed does mention the oil and gas reservations, the deed does not transfer those rights. In order for the mineral interest to be the "subject of" the title transaction the grantor must be conveying that interest or retaining that interest.

Dodd, 2013-Ohio-4257, ¶ 48. But, this reference fails to acknowledge two principles of statutory interpretation which shift the analysis in favor of Appellant.

First, "[i]n interpreting statutory language, a court's paramount concern is legislative intent." *Smith v. Landfair*, 135 Ohio St.3d 89, 2012-Ohio-5692, 984 N.E.2d 1016, ¶ 18. As set forth in detail above, the legislative history (and legislative intent) behind the DMA confirms the General Assembly's deliberate decision to specifically *eliminate* the requirement that the mineral interest itself be conveyed or transferred in order to qualify as a savings event. The General Assembly was clearly aware of the distinction between a requirement that the severed mineral interest actually be transferred and the requirement that the interest merely be *the subject of* a recorded transaction—and it chose the latter.

This legislative intent is further confirmed by looking at the savings event identified in R.C. 5301.56(B)(3)(e), which allows for the preservation of a severed mineral interest by merely filing a claim to preserve, so long as it includes certain identifying information and a statement of intent to preserve. In doing so, the General Assembly clearly contemplated the preservation of severed mineral interests without requiring that they actually be transferred so long as the preservation of the mineral interest is made clear in the record chain of title during the relevant look-back period. It would be anomalous to conclude that the General Assembly supported retention of mineral interests *via* mere preservation claims but opposed retention of the same mineral interests if the exact same information were contained in an actual transactional document.

Second, "[w]ords and phrases *shall be read in context* and construed according to the rules of grammar and common usage." (Emphasis added.) R.C. 1.42. The use of the phrase "subject of" must be read as used in R.C. 5301.56(B)(3). When read in the context of this definition, the savings event actually requires that the "mineral interest has been the subject of [any transaction affecting title to *any interest* in land]." R.C. 5301.47(F); R.C. 5301.56(B)(3)(a). The key is the General Assembly's use of the words "any interest." If the Court adopts the lower appellate court's decision, then these words are read out of the statute because the savings event would not allow for a transaction affecting title to "any interest" in land, but rather, only a transaction "affecting title to" *the mineral interest itself*. That is not what the law says.

4. Rejecting Appellant's propositions of law runs contrary to the express purpose of the DMA and critical public policy considerations.

The lower appellate court's decision violates the very purpose of the DMA as expressly stated in R.C. 5301.55—namely: "Sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land

title transactions by allowing persons to rely on a record chain of title as described in section 5301.48 of the Revised Code." (Emphasis added.)

By adopting Appellant's construction of the savings event in question, this Court would allow the law to accomplish its enumerated goal, while rejecting it would result in an interpretation of the DMA that subverts it. Indeed, reliance on the record chain of title is premised on understanding the ownership of various real property interests. As one trial court explained:

The identification of 'exceptions' to the property conveyed is an essential part of any deed because *the exceptions are as critical as the metes and bounds description in defining the specific bundle of rights, i.e. property, conveyed by the instrument.* Furthermore, the warranty covenants provided by the deed are specifically limited by the exceptions set forth with the instrument.

(Emphasis added.) *Dodd v. Croskey*, Harrison C.P. No. CVH-2011-0019 (Oct. 29, 2012), at 7.

Amidst the current shale boom in eastern Ohio, this is especially true.

Perhaps most important is the implicit principle of notice. The development of mineral rights development cannot even commence unless individual property owners, oil and gas companies, abstractors, and title attorneys know who owns the oil and gas mineral rights. The reason is simple: the owner of the oil and gas mineral rights generally carries with it the right to lease and receive large, per-acre lease bonus payments. Specific references to severed mineral interests, even in a deed transferring only the surface, simplify the title search process by providing pointed and detailed information regarding the record owners of the mineral rights and the exceptions and limitations applicable to the surface estate.

Reading the 1989 DMA to exclude such references from the list of savings events doesn't just make them superfluous—it actually makes the record chain of title substantially *less* reliable. For example, the record chain of title could include a series of surface transfers, some prior to the

mysteriously unidentified 20-year, automatic divestiture date (under Appellee's interpretation) and some shortly thereafter, all of which reference the severed mineral interests. According to Appellee, while the references made before the 20-year nonuse period ended were valid and legally accurate, they did nothing to preserve the mineral interests from abandonment, so that the references made *after* the conclusion of the 20-year nonuse period were invalid and legally inaccurate, and should not be relied upon to accurately reflect title. Appellee's interpretation of a statute designed to make the record chain of title more reliable does precisely the opposite.

Moreover, it is entirely unclear what public policy is served by requiring that severed mineral interests be affirmatively transferred in order to be preserved. Indeed, as noted above, the General Assembly explicitly included a means of preserving such interests by the mere filing of a preservation claim. Nothing is gained by obligating a mineral interest owner to convey his or her interest back and forth simply to put the world on notice that they do not intend to give it up by abandonment. As a result, the very purposes of the DMA (and the broader Ohio Marketable Title Act) are best served by acknowledging an express reference to a mineral rights reservation in a title transaction for what it is—a savings event pursuant to R.C. 5301.56(B)(3)(a).

Proposition of Law No. VI: The 2006 version of the DMA applies retroactively to severed mineral interests created prior to its effective date.

The Seventh District inaccurately stated that "the 2006 version of R.C. 5301.56 does not specifically provide for retroactive application," thereby rendering it inapplicable to severed mineral interests created prior to June 30, 2006 (its effective date). *Walker v. Shondrick-Nau*, 2014-Ohio-1499 (7th Dist.), ¶ 51. The Seventh District, however, failed to extend this same logic to the 1989 version of the DMA. Under the court's view of retroactivity, the Appellee (and all other severed mineral interest owners) should be unable to utilize *either* version of the DMA

for severed mineral interests created prior to March 22, 1989 (the effective date of the 1989 version of the DMA).

If this Court chooses to accept the logic of the Seventh District, then the Appellant is the rightful owner of the oil and gas mineral rights underlying the Property because the severed mineral interest was created in 1965. If the Court determines that the DMA applies retroactively, then *both* versions of the DMA apply to severed mineral interests created prior to their respective effective dates, and the Appellee was required to comply with the 2006 version of the DMA. Under either option, the Seventh District's analysis was flawed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court adopt each of the foregoing Propositions of Law and reverse the decision of the Seventh District.

Respectfully submitted,

/s/ Matthew W. Warnock

Matthew W. Warnock (0082368)*

**Counsel of Record*

Daniel C. Gibson (0080129)

Daniel E. Gerken (0088259)

Bricker & Eckler LLP

100 South Third Street

Columbus, Ohio 43215-4291

Telephone: (614) 227-2300

Facsimile: (614) 227-2390

E-mail: mwarnock@bricker.com;

dgibson@bricker.com; dgerken@bricker.com

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was filed through the Supreme Court of Ohio's e-Filing Portal pilot project and was sent by ordinary U.S. mail to counsel for Appellee, at the following addresses, on October 29, 2014:

Kenneth Cardinal
758 North 15th Street
P.O. Box 207
Sebring, Ohio 44672

James F. Mathews
Baker, Dublikar, Beck, Wiley & Mathews
400 South Main Street
North Canton, Ohio 44720

/s/ Matthew W. Warnock
Matthew W. Warnock
COUNSEL FOR APPELLANT