Supreme Court of Ohio Clerk of Court - Filed December 01, 2014 - Case No. 2014-0803

IN THE SUPREME COURT OF OHIO

JON D. WALKER, JR.,	)	CASE NO. 2014-0803
	)	
Appellee,	)	
	)	
vs.	)	
	)	
PATRICIA J. SHONDRICK-NAU, EXECUTRIX OF THE ESTATE OF JOHN R. NOON AND SUCCESSOR TRUSTEE OF THE JOHN R. NOON TRUST,	)	On Appeal from the Noble County Court of Appeals, Seventh Appellate District Court of Appeals Case No. 13 NO 402
	)	
Appellant.	)	

MERIT BRIEF OF APPELLEE, JON D. WALKER, JR.

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STATEMENT OF FACTS

Appellee, Jon D. Walker, Jr. ("Walker"), filed this suit for the purpose of confirming his ownership of oil and gas interests under the Ohio Dormant Mineral Act ("DMA"). An old severance of the oil and gas underlying appellee's property existed stemming from an instrument recorded on July 26, 1965. (Opinion, ¶2). The lower courts confirmed, by judgment, that the previously-severed mineral interests had merged, by operation of law, in accordance with the DMA (1989). Consequently, the oil and gas interests in and to the appellee's property were "vested" with the appellee.

The appellee Walker is the owner of real property located in Enoch Township, Noble County, Ohio which is described in two separate deeds. In both of those deeds, there is no recitation of any specific, prior reservation of, or exception for, oil and gas. There existed, however, a reservation of oil and gas interests in the property, previously severed from the surface estate as set forth in a Quitclaim Deed dated July 26, 1965, recorded in the Noble County Records. Appellant's predecessor, John R. Noon ("Noon"), claimed that the reservation was preserved over the passage of time by way of mere references to same in later deeds. However, those later deeds actually conveyed *only the surface estate* in the subject property. Because the transactions relied upon by Noon do not represent title transactions *in the mineral interest*, those transactions did not operate as a "savings event" for purposes of the DMA which was effective March 22, 1989 to June 30, 2006. The 1970 and 1977 deeds transpired before the severed mineral interests merged with the surface estate, by operation of law, no later than March 22, 1992. Thus, the 1970 and 1977 deeds conveyed nothing but the surface.

In the absence of any other evidence of a lawful savings event, and the appellant offered no such evidence for the record, the severed mineral interests merged with the surface estate no later than March 22, 1992. The 1989 version of the DMA was subject to a three-year "saving provision" or tolling provision. R.C. 5301.56(B)(2).

The record developed and argued in this case fully supports the determination that the previously-severed mineral interest merged with the surface estate, automatically, under the 1989 version of R.C. 5301.56. Both the trial court and the appellate court properly construed R.C. 5301.56, and then applied that construction to the facts of this case. Thus, the appellee respectfully submits that this case was fairly and correctly decided by the Court of Appeals, and appellee's judgment should be affirmed.

ARGUMENT

Response to Proposition of Law No. I:

The Common Pleas Court and Court of Appeals correctly applied the 1989 version of the DMA in determining that the oil and gas interests "vested" with the surface ownership under the express provisions of that enactment.

Both Ohio appellate districts covering the territory with the most-active, current Utica Shale development have held that the 1989 enactment of the Dormant Mineral Act produced the automatic, self-executing, vesting of oil and gas mineral rights. Severed oil and gas interests when dormant (meaning none of the DMA's specified exceptions applies) are deemed abandoned by operation of law, and the interests are then vested in the surface owner by law. *Walker v. Shondrick-Nau (fka Noon)*, 2014-Ohio-1499 (7th Dist.); *Swartz v. Householder*, 2014-Ohio-2359 (7th Dist.), appeal accepted, Case No. 2014-1208; *Tribett v. Shepherd*, 2014-Ohio-4320 (7th Dist.); and *Wendt v. Dickerson*, 2014-Ohio-4615 (5th Dist.).

The appellant requests that the Court look beyond the text of the 1989 enactment of the DMA in order to glean insight into its utility. Appellant, however, has not offered for consideration the Comments set forth in the Ohio Legislative Service Commission Report, December 1988, for Sub. S.B. 223. That Commission Report, like the statute itself, does identify when a severed oil and gas interest became abandoned:

Sub. S.B. 223

Sens. Cupp, Schafrath, Nettle, Drake, Burch.

Provides that, in the absence of certain specified occurrences within the preceding 20-year period, a subsurface mineral interest that is not in coal or not of a governmental entity is deemed to be abandoned and its title vested in the surface owner. (Effective: March 22, 1989).

> The act modifies the Marketable Title Law to prescribe when the holder of a subsurface mineral interest, who is not also the surface owner, is deemed to have abandoned the interest. If deemed abandonment occurs, the act provides that the interest will vest in the surface owner.
>
> Deemed abandonment and vesting will occur if none of the act's specified exceptions applies to a particular subsurface mineral interest. However, the act states that deemed abandonment cannot so occur until three years from its effective date.
>
> . . .

(Appendix 2).

The General Assembly could have written the DMA (1989) to create a right of action for a surface owner to claim an abandoned oil and gas interest. It did not, however, draft R.C. 5301.56 in such a fashion. The DMA contains no provision that can reasonably be interpreted to "require" a surface owner to take some form of "legal action" in order to effectuate the abandonment and vesting. The words of the statute do not support such an interpretation; and the Report of the Ohio Legislative Service Commission does not support such an interpretation.

In the absence of a "savings event" after the severance and preceding the statutory period of abandonment, the interests were "deemed abandoned ***and vested*** in the owner of the surface." R.C. 5301.56(B)(1) (Emphasis added). That is how specifically the 1989 DMA operated. Thus, no one had to serve or file any form of notice, did not have to record any type of instrument, and did not have to somehow claim the vested rights through a "cause of action" or otherwise. The 1989 version of the statute actually used that word to describe the merger of the mineral interest – it "vested" in the surface owner.

The provisions of the Marketable Title Act may well have been enacted to, generally, simplify and facilitate land title transactions. The "object sought to be attained" by the Dormant

Mineral Act is, however, different and specific. The DMA "modifies the Marketable Title Law to prescribe when the holder of a subsurface mineral interest, who is not also the surface owner, is deemed to have abandoned the interest." (Appendix 2). The DMA was designed to do more than facilitate title transactions – it was intended to provide that, when deemed abandonment occurs, "the interest will vest in the surface owner." (*Id.*). The interest will vest not after some form of legal action has been filed to assert or claim the abandoned interest but, instead, by operation of law when the severed oil and gas interest is deemed abandoned.

Deemed abandonment occurs "if none of the act's specified exceptions applies to a particular subsurface mineral interest." (Appendix 2). In other words, severed oil and gas interests which have not been the subject of at least one of the specified occurrences (a savings event), after the passage of a 20-year period ("within each preceding 20-year period"), are dormant and deemed abandoned. (Appendix 2). Deemed abandonment does not occur only upon any form of legal action declaring such to have occurred.

The Court routinely recognizes that its "role in statutory construction is to determine legislative intent by looking to the language of the statute and the purpose to be accomplished by the statute." *In re Foreclosure of Liens for Delinquent Land Taxes v. Parcels of Land Encumbered with Delinquent Tax Liens*, ____ Ohio St. 3d ____, 2014-Ohio-3656, ¶12. "Where the statute's meaning is clear and unambiguous, we apply the statute as written." *Id.* "This court must give effect to the words used, refraining from inserting or deleting words." *Id.* "[C]ourts do not have the authority to ignore the plain and unambiguous language in a statute in the guise of statutory interpretation." *State v. Krutz* (1986), 28 Ohio St. 3d 36, 38.

The essential words of R.C. 5301.56 (1989) at issue in this case are as follows:

5301.56 Abandonment and preservation of mineral interests

(A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives his rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

. . .

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

(a) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53 of the Revised Code;

(b) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code;

(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, from a mine a portion of which is located beneath the lands, 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 mineral 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.

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

. . . (Emphasis added).

Effective Date: 03-22-1989. The effective date was subject to the three-year tolling clause set forth in R.C. 5301.56(B)(2). The full text of the statute can be found at Appendix 1. As the Court is aware, the six category of events which may operate to avoid the operation of R.C. 5301.56(B)(1) are commonly known or referred to as Savings Events.

As the Court of Appeals perhaps best summarized:

When the 2006 version of R.C. 5301.56 was enacted, Noon's mineral interest had already been abandoned and the mineral interest had been vested with the surface owner for 14 years. Once the mineral interest vested in the surface owner, it was reunited with the surface estate. Noon did not have any mineral interest in the subject property after March 22, 1992, because on that date the interest automatically

> vested in the surface owner by operation of the statute. And once the mineral interest vested in the surface owner, it "completely and definitely" belonged to the surface owner.

(Opinion, ¶41). The Fifth District has similarly recognized, in *Wendt*, that "under the language of the 1989 DMA, the mineral rights automatically vested with the surface owners on March 22, 1992." *Wendt v. Dickerson*, supra at ¶37. There was no basis for application of the 2006 amendment of the DMA to the facts of this case. Once vesting occurred, no severed oil and gas interest remained extant for application of any dormancy rules.

The General Assembly drafted the 1989 DMA with clear and specific wording. The DMA did not merely provide that severed mineral rights were "abandoned" but, moreover, provided that such interests "**shall be** deemed abandoned" and then "vested" in the surface owner:

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

R.C. 5301.56(B)(1). This statute operated to automatically deem (that is, have occur as a function of law) un-used, un-preserved dormant mineral rights "abandoned" *and* "vested" in the owner of the surface as a matter of law.

The use of the word "vested" by the General Assembly is significant. "[I]t is axiomatic that an unambiguous statute means what it says." *Hakim v. Kosydar* (1977), 49 Ohio St. 2d 161, 164. A vested right is a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent. *In re Hensley*, 154 Ohio App. 3d 210, 2003-Ohio-4619, ¶23. A "vested" right will not be affected or disturbed by the later amendment of the subject statute under which the right has vested.

As the Court of Appeals observed, a series of other courts have, similarly, held that rights which vested under the 1989 version of the DMA merged previously-severed oil and gas interests with the surface owner, by operation of law. See, *Marty v. Dennis*, Monroe C.P. Case No. 2012-203 (Apr. 11, 2013); See also, *Hendershot v. Korner*, Belmont C.P. Case No. 12-CV-453 (Oct. 28, 2013). In *Hendershot*, the plaintiffs sought to quiet title to an undivided one-half interest in oil and gas. The interests at issue had previously been reserved by a transferor in a deed dating back to 1932. While, over the years, various property transfers had made reference to the reservation, there were no actual transfers of the one-half mineral interests. Utilizing the 1989 DMA, the plaintiffs maintained that the interest was abandoned and vested in the surface estate owner no later than March 23, 1992. The Court granted the plaintiffs' motion for summary judgment, concluding in pertinent part:

> **The 1989 version of the Ohio Dormant Mineral Act vests the surface owner with ownership in severed mineral interest without the need for any notice, recordation of any document, assertion of any claim of filing of any action**. Ohio Revised Code Section 1.58 sets forth that the amendment of a statute does not disturb a vested or required (sic) right.
>
> (A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:
>
> (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder; . . . .
>
> Without the protection of a "Saving Event," the undivided one-half mineral interest in the parcel in question vested in the Plaintiffs on March 23, 1992. This Court finds that the Plaintiff did not waive the right to claim abandonment by operation of law under the 1989 version of the statute. Rather, the Plaintiffs asserted their abandonment claim and placed the same upon the record. This Court finds that Plaintiff's actions were not an election of remedies which would deny them the mineral rights which vested on March 23, 1992. "A 'vested right' is a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." In re: Hensley, 154 Ohio App. 3d 210, 2003-Ohio-4619, para. 27. Having so found, any further discussion of Revised Code 5301.56 effective June 30, 2006 is hereby rendered moot. (Emphasis added).

The oil and has rights which were abandoned and vested with the surface estate, at issue in this case, were complete and cannot be impaired under the amended, 2006 version of the statute. Accord, *Blackstone v. Moore*, Monroe C.P. Case No. 2012-166 (Jan. 22, 2014),

Nothing about the recognition of rights under the 1989 version of the DMA runs contrary to any purpose of the Marketable Title Act. The self-executing effect of the 1989 DMA was not contrary to "simplifying and facilitating" land transactions, as appellant suggests. A title examiner, versed in the DMA, may determine ownership of oil and gas rights as easily from the absence of any recorded transaction in a severed mineral right (and lapse of the requisite time period) as from some form of recording "claiming" an abandoned interest. Moreover, the 1989 DMA actually placed the burden or obligation on a severed mineral rights holder to take affirmative action (including recording of a claim or title transaction) in order to preserve a severed mineral right from becoming dormant and vesting with the surface owner. The code did not place any obligations whatsoever upon the surface owner who acquired vested oil and gas interests by operation of the law. Within a chain of title, one can determine whether the mineral holder has done anything to preserve an interest.

The Court should apply the 1989 version of the DMA as written; it provided expressly that severed oil and gas interests that were un-used or un-preserved for a dormancy period of twenty years *shall be deemed abandoned and vested* in the surface owner. The 2006 version of the statute is not applicable to the analysis of previously abandoned and vested interests.

Response to Proposition of Law No. II:

The words "shall be deemed abandoned" cannot be isolated from the immediately following words "and vested" under the 1989 version of the DMA, and no words can be read into the statute requiring a surface owner to have "taken some action" to capture his vested rights.

The DMA (1989) did not, as appellant suggests, merely create some "opportunity" for a surface owner to claim and acquire dormant oil and gas interests. To the contrary, the DMA identified when severed oil and gas interests were dormant, and deemed abandoned, and specifically established by statute that such interests vested with the surface owner by operation of law.

Appellant, for obvious reasons, would have the Court gloss over the presence of the words "and vested" in the 1989 enactment of the DMA. There was absolutely nothing "inchoate" or conditional about the operation of the 1989 DMA. *Swartz v. Householder*, supra at ¶38. A "vested" right – the word used in the statute – is full and complete; it is the polar opposite of some inchoate interest. (Opinion, ¶43). Vesting under the 1989 version of the DMA was by operation of law, automatic if you will, and there was no action required on the part of the surface estate owner to trigger or activate the "vested" right to the merged oil and gas interests. When no savings event is demonstrated, by operation of law, the previously-severed interests were deemed abandoned and ownership vested in the surface owner. Consequently, the 1989 DMA was self-executing.

The only trial court rationale to hold otherwise has been rejected upon review. In *Dahlgren*, the trial court ignored the words "and vested" set forth in the DMA and concluded that the 1989 DMA created only some inchoate right. The Court of Appeals rejected this conclusion and reversed. *Dahlgren v. Brown Farm Properties*, LLC, 2014-Ohio-4001 (7th Dist.). The DMA deemed dormant mineral interests abandoned and vested with the surface owner. "[D]eem" means "to treat [a thing]

as being something that it is not, or as possessing certain qualities that it does not possess." *Id.*, ¶29. In the absence of a savings event within a twenty year period, the severed oil and gas interests were deemed abandoned and vested with the surface owner. "[O]nce 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." *Id.*, ¶30.

Recognizing the Ohio DMA (1989) as self-executing merely recognizes how the statute operates, as written. The DMA contains not one single word which required a surface owner to file suit, within some period of time or any time for that matter, in order for the surface owner to effectuate his interests. "The Mineral Lapse Act . . . is self-executing and does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs." *Short v. Texaco, Inc.*, 273 Ind. 518, 522, 406 N.E. 2d 625. See also, *Van Slooten*, *infra*, 410 Mich at 50, 51.

The 1989 DMA does not operate as a forfeiture statute; rather, it is by its terms an abandonment law. The law did not operate as a forfeiture by state action for a non-occurrence of a savings event but, instead, established that a twenty-year lapse, by inaction of the severed mineral interest holder, was deemed abandonment. Abandonment is a relinquishment of a right or interest. E.g., *Labay v. Caltrider*, 2005-Ohio-1282, ¶22 (9th Dist.). Under the DMA (1989), the General Assembly recognized the lapse of 20-years of non-use or non-preservation of a severed oil and gas interest as abandonment – or relinquishment – of same. Upon abandonment, the interest does not pass to the state as any form of penalty but, instead, is "vested" with the surface owner. The abandonment of dormant interests, and vesting of same with the surface owner, promotes the state policy of advancing development of oil and gas resources by freeing them for development.

Ohio, like its sister states, has a legitimate interest in advancing the development of natural resources, and a dormant mineral law facilitates such interest. In *Short v. Texaco*, for instance, the Indiana Supreme Court recognized the following:

> The purposes of this Act . . . are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the state and does not unconstitutional impair the obligation of contracts.

Short v. Texaco, 273 Ind. at 526.

When the US Supreme Court affirmed the Indiana judgment, the Court endorsed automatic abandonment by operation of a mineral lapse statute:

> Each of the actions required by the State to avoid an abandonment of the mineral estate furthers a legitimate state goal. Certainly the State may encourage owners of mineral interests to develop the potential of those interests; similarly, the fiscal interest in collecting property taxes is manifest. The requirement that a mineral owner file a public statement of claim furthers both of these goals by facilitating the identification and location of mineral owners, from whom developers may acquire operating rights and from whom the county may collect taxes. The State surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State.

Texaco v. Short, 454 U.S. at 529-30.

Similarly, the Michigan Supreme Court recognized the self-executing provisions of Michigan's dormant mineral act as constitutional:

> [T]he dormant mineral act was passed to reduce the likelihood that the presence of unknown or unlocatable owners or fractionalized ownership of severed interests would unnecessarily hinder or prevent the development of these resources by requiring an owner to do certain specified acts indicating ownership or record a claim of interest every 20 years. It places no undue burden upon owners. Without such a requirement, knowledge of ownership could be lost in time. Potential resources go undeveloped in the absence of viable ownership.
>
> The recording provision of the act provides a simple method by which owners of undeveloped severed mineral interests can preserve them.

Van Slooten, *infra*, 410 Mich. at 46-47.

In *Swartz*, the Seventh District Court of Appeals recently held that:

> To some, the result reached by the trial court in *Dahlgren* may seem fair, equitable and practical under the theory that it is the initial forfeiture that should be abhorred by law rather than the later forfeiture of a property right obtained by forfeiture in the first place. However, legislatures around the country found such initial abandonment and unification with the surface to be important to the state, and the United States Supreme Court agreed that the state has such legitimate interests.

Swartz, 2014-Ohio- 2359, ¶36. Further,

> The 1989 DMA is the type of statute characterized by automatic lapsing and reversion to the surface owner known as a self-executing statute. *See Texaco* 454 U.S. 516. The United States Supreme Court stated that the Indiana DMA was self-executing as it provided the mineral interest shall be extinguished and that the ownership shall revest upon the non-occurrence of savings event within the pertinent time period. *Id.* (and stating that notice to avoid automatic abandonment besides a two-year grace period was not required and the only required notice involved the ability to prove a savings event in fact occurred in the pertinent period).

Swartz, 2014-Ohio-2359, ¶27. See also, *Thompson v. Custer*, Trumbull C.P. Case No. 2013, p. 2 CV 2358 (June 16, 2014). (Appendix A42).

Not a single provision of the 1989 DMA required the surface owner to affirmatively assert some claim to the vested rights, record any such claim, or file any form of suit or other declaration of the vested interests. "There were no obligations placed upon the surface owner prior to the

statutory abandonment and vesting." *Swartz v. Householder*, 2014-Ohio-2359 at ¶13. Because the statute did not require any action on the part of the surface owner to be vested with the abandoned interest, no such provision can be read into the 1989 DMA. "In interpreting a statute, [the courts] are bound by the language enacted by the General Assembly, and it is [the court's] duty to give effect to the words used in a statute." *Hall v. Banc One Mgmt. Corp.*, 114 Ohio St. 3d 484, 2007-Ohio-4640, ¶24. As the Court stressed in *Hall*, "[w]e are free neither to disregard or delete portions of the statute through interpretation, nor to insert language not present." *Id.* Citing, *Whitaker v. M.T. Auto., Inc.*, 111 Ohio St. 3d 177, 2006-Ohio-5481, ¶15. Rights vested by law in the title of the surface owner then passed, by deed or other instrument, to successive owners.

In *Blackstone*, supra, the court examined competing claims to mineral rights relating to a 1915 reservation of a one-half interest in oil and gas royalties. The court expressed the following, regarding the 1989 version of the DMA:

> [T]here is a difference between a statute that is self-executing and one that is not. Under the Former DMA, rights to a Severed Mineral Interest became "vested in the owner of the surface" of the property by operation of law upon the lapse of 20 years without the occurrence of a savings event identified in division (B)(1)(c). This Court has previously held that the Former DMA is self-executing. See, Marty v. Dennis, Monroe C.P. 2012-203 (Apr. 11, 2013). **It does not contain any requirement that the surface owner of property take any action before the mineral interest is deemed abandoned**. Id. (Emphasis added).
>
> Accordingly, **under the Former DMA, a mineral interest is deemed abandoned and vested in the surface owner of the property if none of the savings events set forth in (B)(1)(c)(i) through (vi) occurred within any period of 20 years while the former DMA was in effect**, so long as the Severed Mineral Interest is not in coal or held by the United States, this State or any political subdivision. (Emphasis added).

(Appendix A6, at p. A9).

In the drafting of the DMA (1989), " [T]hat the legislature chose the statutory structure and language it did is telling." *In re S.N.V.*, infra at ¶9. The statute was intended to be self-executing, and there was no suit or action requirement set forth in the law to formalize the abandonment and vesting. *Dahlgren*, supra at ¶29. Rights to merged or re-united oil and gas interests vested under the 1989 version of the DMA by operation of law. The surface owner was not required to complete any action to ratify or make such vested right whole. Consequently, appellant's second proposition of law should be rejected.

Response to Proposition of Law No. III:

> The 20-year look-back period in this case was from March 22, 1992 (the expiration of the tolling period under the 1989 version of the DMA).

As addressed above, not a single provision of the 1989 enactment of the DMA required a surface owner to file an action to "claim" or assert his "vested" right to an abandoned, severed mineral interest. Thus, it would be illogical to utilize the date of filing suit to determine the operative 20-year look-back for purposes of the statute.

Once again, the statute was self-executing and the previously-severed oil and gas interests were (they "**shall be**") "deemed abandoned and vested" in the surface owner unless there was a "savings event" established within the 20 year period prior to vesting. The statute was not amended until June 30, 2006. The vesting of rights, under the 1989 DMA, could occur at any time prior to the amendment, upon the lapse of a 20 year period of non-use or non-preservation. Here, one only need "look back" 20 years prior to the passage of the code and expiration of the savings period of the 1989 DMA (March 22, 1992), because the reservation under consideration dated back to July 26, 1965. The significance of the 1989 version of the DMA is bolstered by the General Assembly's use

of the word "shall," to reenforce the effect of the statute. Shall conveys mandatory; the reuniting of the severed interest with the surface was mandatory, "shall be . . . vested."

The appellant would have the provision of R.C. 5301.56(B)(1)(c) restricted to read "within the preceding twenty years *before a suit is filed*, ..." Of course, the italicized words do not appear in the actual text of the law and, thus, cannot be imposed upon the provision.

As applied in this case, the severed Noon interest could not be deemed abandoned "until three years from the effective date of this section." R.C. 5301.56(B)(2). At the date three years from the effective date of the statute (March 22, 1989), in the absence of a savings event within the twenty years preceding the enactment, the Noon interest was deemed abandoned and vested in the surface title. The DMA not only operated in this fashion, but it operated over the course of any twenty year period of non-use or non-preservation as well. A savings event, one of the "exceptional circumstances" set forth in the statute, was required "within each preceding 20-year period" in order to avoid abandonment. (Appendix 2).

This case can be determined by applying the DMA (1989) by its own terms, at its earliest operative date, March 22, 1992. The DMA was not, however, applicable for that single, fixed reference point in time but, rather, intended to operate prospectively. The "rolling period" of operation, as it has become know, is only at issue in this case if the 1970 and 1977 surface deeds relied upon by the appellant were to be recognized as savings events. Section (D)(1) would make no sense if the DMA operated for a fixed period. That portion of the statute read:

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

If the statute only addressed a single, 20-year period pre-dating the enactment of the statute, there would never be a need to file "successive" claims to preserve under division (C). A single "claim to preserve" filed anytime with 20 years before the effective date of the statute (or within the tolling period) would suffice, again, if the statute involved only a single, fixed 20-year period.

It is obvious from the reference to the use of "successive" claims to preserve, that a single 20-year period was not envisioned by the General Assembly. Instead, a mineral rights holder may need to file "successive . . . claims to preserve" to avoid an interest being deemed abandoned throughout the passage of time. "In enacting a statute, it is presumed that: . . . (B) The entire statute is intended to be effective." R.C. 1.47. Simply, a statute which only recognized a saving event between the years 1969 and 1989 (and within the tolling period) would have no use for a provision allowing for the indefinite preservation of a mineral interest through successive filings of claims to preserve.

This analysis is consistent with the comments set forth in the Ohio Legislative Service Commission report relating to the 1989 enactment of R.C. 5301.56. Therein, the Commission observed:

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

(Ohio Legislative Service Commission, December, 1988, p. 38). The description "each preceding 20-year period" clearly understood and expressed that more than one period of time was to be examined, for determining the abandonment of a mineral interest for non-use or non-preservation.

It is fundamental that no part of a statute is to be "treated as superfluous" and, thus, the courts are to "avoid that construction which renders a provision meaningless or inoperative." *State ex rel.*

Carna v. Teays Valley Schools, 131 Ohio St. 3d 478, 483, 2012-Ohio-1484; *State ex rel. Overholser v. Clark County Commissioners*, 2008-Ohio-6338 (2nd Dist.); *In re S.N.V.*, 2009-Ohio-4219 (10th Dist.), ¶9. An interpretation of the DMA as applying only to a fixed point in time would violate these rules of statutory construction, by rendering Section D(1) of the 1989 statute meaningless. Consequently, such construction must be rejected by the Court.

The operation of the DMA was not, and is not, complicated. First, one determines whether or not a saving event occurred within the 20 years prior to the effective date of the statute (March 22, 1989; March 22, 1992 – factoring the three-year tolling period). If there was no saving event, then the interest lapsed and was automatically abandoned and merged. Second, if there was some saving event within that time frame, then one determines, looking forward from the date of such saving event, whether a subsequent saving event has occurred within 20 years. If no subsequent saving event occurred in the 20 years since the last saving event, the mineral interest is, again, automatically abandoned, and ownership of the interest is merged and vested with the surface owner.

These issues were thoughtfully examined and determined in the case of *Taylor v. Crosby*, Belmont C.P. Case No. 11-CV-422 (Sept. 16, 2013). In Taylor, the plaintiffs sought to retain what they claimed was an undivided one-half interest in oil and gas, adverse to the surface owners. That interest had been reserved by a grantor in a 1971 deed. The surface owners maintained that the interest in question had been abandoned pursuant to the DMA. Addressing the positions asserted by the surface owners under the 1989 version of the DMA, the Court found:

> The Ohio Dormant Mineral Act was enacted in its original form on March 22, 1989. The act has been characterized as a "use it or lose it" statute. The Ohio Legislature attempted to balance the interests of property owners and the compelling public interest in drilling, producing and marketing the mineral interests of this state. Dormant and abandoned mineral interests were viewed as of no benefit to the state,

while making use of the state's mineral resources was for the public good.

In order to negate the retroactive effect of the Act, the following language was inserted at 5301.56(B)(2).

(2) A mineral interest shall not be abandoned under division (B)(1) of this section . . . until three years from the effective date of this section.

The oil and gas owners thereby were given 3 years to meet one of the "Savings Events" provisions. A similar statute was enacted in Indiana and provided for a two year grace period. This act was upheld by the United States Supreme Court in Texaco, Inc. v. Short, 454 U.S. 516 (1982). In Texaco, it was held that, "There was no constitutional right for a mineral interest owner to receive individual notice that his right will expire."

Based upon Texaco, this Court finds the 1989 Ohio Dormant Mineral Act to be constitutional.

. . .

The Ohio Dormant Mineral Act has been characterized as a "use it or lose it" statute. In order to preserve one's interest in a severed mineral right one must meet the requirements of ORC 5301.56. In accordance with (B)(1) the mineral interest held by any person, other than the owner of the surface, shall be deemed abandoned and vested in the owner of the surface unless: the interest is in coal or the interest is held by the government. ORC 5301.56 also provides protection if within the preceding 20 years the mineral interest has been the subject of a title transaction, there has been actual production or withdrawal of the minerals, underground gas storage has taken place, a drilling or mining permit has been issued, a claim to preserve the interest has been filed or a separately listed tax parcel has been created for the mineral interest.

. . . Applying the requirements of the 1989 Ohio Dormant Mineral Act, we must first look to the years 1992 back to 1969. The act provides for a 20 year look back period from March 22, 1989, but also allows for a three year grace period to March 22, 1992.

The Plaintiffs argue that the 1989 Act is a static 20 years plus the grace period. The Defendants take the position that the look back period is a rolling 20 years. The Plaintiffs rely on Riddell v. Layman, 94 CA 114, 5th District, Licking County (1995). Riddell was presented with the question of whether a 1965 deed recorded in 1973 qualified as a title transaction. A rolling look back period was not an issue.

ORC 5301.56(D)(1) provides:

> A mineral interest may be preserved indefinitely from being deemed abandoned under division (B)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(C) of this section, including, but not limited to successive filings of claims to preserve mineral interests under division (C) of this section. (Emphasis original).
>
> A static 20 years back period would have no need for a provision providing for indefinite preservation of mineral interests through successive filings of preservation claims. Based upon the same, **this Court finds the 1989 Ohio Dormant Mineral Act to provide for a "rolling look back period."** (Emphasis added).
>
> . . .
>
> Pursuant to the 1989 version of ORC 5301.56, as of 1995 the oil and gas interest held by Mr. Belt was deemed abandoned and vested in the owner of the surface. As to ORC 5301.56 effective June 30, 2006, any discussions regarding the same are moot in that any oil and gas interest of Mr. Belt and the Plaintiffs had been abandoned and vested in the Defendants prior to that date. See, Wendt v. Dickerson, Tuscarawas County C.P. Case No. 2012 CV 020135, 2/21/2013), Walker v. Noon, Noble County C.P. Case No. 2012-0098, March 20, 2013.

These positions represent a sound application of the DMA and should be adopted by the Court accordingly. As expressed in *Marty*, "[D]uring the twenty (20) year period immediately preceding every date in which the previous version of ORC §5301.56 was effective, none of the savings conditions outlined by ORC §5301.56()B) . . . occurred to keep the Severed Mineral Interest from being deemed abandoned." *Marty*, supra at p. 10. See also, *Carney v. Shockley*, Jefferson C.P. Case No. 12 CV 514, p. 3 (2014).

If the 1989 version of the DMA were to be applied to a fixed period only (affecting only the period prior to 20 years before the effective date of the code), then the statute would produce arbitrary and absurd results. The statute should not be interpreted in such a manner. "In enacting a statute, it is presumed that: . . . (C) A just and reasonable result is intended." R.C. 1.47. Under

Ohio law, it is a "well-established principle that statutes should be interpreted in a manner avoiding unreasonable or absurd results." *PFC Lamont Hill Garrison v. Ohio State Liquor Comm.*, 2008-Ohio-943 (10th Dist.), ¶13, citing *State ex rel. Dispatch Printing v. Wells* (1985), 18 Ohio St. 3d 382, 384. *Accord*, *Jung v. Davies*, 2011-Ohio-1134 (2nd Dist.), ¶20.

For instance, if a mineral holder's interests were created on March 21, 1969, and no "saving event" occurred in the 20 years immediately following such transaction, such interests would be deemed abandoned and merged with the surface owner, automatically on March 22, 1992. Again, the effective date of the statute was March 22, 1989, but that date was subject to the three-year tolling clause set forth in R.C. 5301.56(B)(2). The mineral holder's rights would be abandoned for non-use, or non-preservation, after 20 years and 1 day. Let's examine another set of facts, where the only difference is that the mineral interests were created on March 23, 1969, by a title transaction. If the 1989 statute is applied *only* with a fixed analysis, then even in the absence of any saving event, there would be no abandonment and merger with the surface owner at any time under the 1989 statute. Thus, the time could continue to run through June 30, 2006, when the statute was amended – a period of over 37 years of non-use or non-preservation, without loss or merger of the interest. This could not have been intended by the legislature. Again, the general assembly is presumed to have "intended a just and reasonable result" through the 1989 enactment of R.C. 5301.56. *Clark v. Scarpelli*, 91 Ohio St. 3d 271, 2001-Ohio-39; R.C. 1.47(C).

This conundrum is resolved by recognizing the presumption of prospective operation to which the DMA was and is entitled. The tacking of time prior to the enactment of the statute with time extending after the effective date is the only rational application of the 1989 DMA. The obvious intent behind the Dormant Mineral Act was to eliminate severed, non-coal mineral interests

after 20 years of non-use or non-preservation. "Use it or lose it" was the clear import behind the law. Any continuous, 20-year period in the record triggered the automatic merger of such abandoned interest in the name of the surface owner, by operation of law. The "20-year" period recognized in Ohio law is consistent with laws enacted throughout the United States. "The dormancy period . . . 20 years – a not uncommon period among the various jurisdictions." Uniform Dormant Mineral Interests Act, p. 9 (August, 1986).

Regardless, as to the appellant's proposition, it is certainly possible to construct a dormant mineral law which operates to vest an abandoned mineral interest only after a suit is filed and measures the duration of non-use or non-preservation from the time suit is filed. However, and importantly, that is not how the Ohio General Assembly drafted and enacted the 1989 version of the DMA. In contrast, the focus of Nebraska law is on the filing of suit instead of the automatic, self-executing abandonment and vesting of a dormant mineral interest. In the Nebraska code, a surface owner "may sue" for termination of a severed mineral interest, and such an interest shall be abandoned unless the interest has been developed or preserved "within the twenty-three years immediately prior to the filing of the action provided for in sections 57-228 to 57-231." Neb. Rev. Stat. 57-228, 57-229. Under the Nebraska statutory scheme, the abandoned interest only vests after the action for abandonment. Neb. Rev. Stat. 57-230. See also, *Peterson v. Sanders*, 806 S.W. 2d 566 (Neb. 2011). The structure of Nebraska's dormant mineral law is entirely different – indeed the opposite – from that created under the DMA (1989), and the Ohio DMA would have to be substantially re-written to include any provision or suit requirement remotely akin to that contained in Nebraska law. The Court should decline the appellant's invitation in this case to re-write the 1989 version of the DMA under the guise of statutory construction.

Response to Proposition of Law No. IV:

A severed oil and gas mineral interest is not the "subject of" any title transaction involving only the surface estate of the property.

The only purported "savings events" relied upon by the appellant were three transactions of the surface estate in the property at issue. "[N]oon's mineral interest was not the subject of any title transactions that would trigger the title transaction event. And appellant has not alleged any other savings events." (Opinion, ¶39). "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." See, *Dodd v. Croskey*, 2013-Ohio-4257 (7th Dist.), at ¶48 (Emphasis added); (discretionary appeal pending, 2013-1730). (Opinion, ¶25). Accord, *Blackstone*, supra at p. 8; *Hendershot v. Korner*, supra at p. 5.

For purposes of R.C. 5301.56(B)(3)(a), in order for a "title transaction" to qualify as a savings event, the mineral interest must be "the subject of" such title transaction. When there is a conveyance of the surface interest in land – that is, the mineral interest was previously severed and remains in the name of another – the severed interest cannot be "a subject of" the surface transaction let alone "*the* subject of" such conveyance. Consequently, transactions in the surface do not constitute any form of savings event under the Ohio Dormant Mineral Act, regardless of any surplusage that may refer to a prior reservation of mineral interest in some other party.

A conveyance of surface rights, in which a mineral reservation is simply restated, is not a savings event under the DMA. *Tribett v. Shepherd*, 2014-Ohio-4320 at ¶22; *Dodd v. Croskey*, 2013-Ohio-4257 at ¶48.

The intent of a statute is presumed to rest in the words used by the General Assembly. Here, the operative words are "the subject of a title transaction." When the grantor of an instrument

conveying the surface interest in real property does not possess any right to affect a severed mineral interest, any reference to the mineral interest contained in the deed neither conveys nor otherwise protects the mineral interest. The holder of the severed mineral interest is a stranger to any transaction in the surface alone and cannot be affected or benefitted by such transaction. Reservations or exception purporting to be in favor of a stranger are ineffective and void. E.g., *Lighthorse v. Clinefelter*, 36 Ohio App. 3d 204 (1987); *In re Allen*, 415 B.R. 310 (N.D. Ohio, 2009).

The 1989 version of R.C. 5301.56 did not provide for just any title transaction to act as a savings event; instead, the mineral interest itself had to be *the subject of* the title transaction under consideration. The word "only" did not need to be in the statute, since use of the word "the" (in the phrase "the subject of") conveys that meaning. Mere reference to a prior reservation of mineral rights by another, in a later deed which does not itself create, convey or reserve any interest in the minerals, does not represent a title transaction in the mineral interest. The exception is only satisfied if the mineral interest is "***the*** subject of a title transaction," (emphasis added) as opposed to simply "a" passive reference to some transaction regarding other interests between others.

The DMA operates to reunite previously-severed oil and gas interests with the fee ownership in the surface, in the absence of a savings event. Each savings event is directed to some effort or action of the mineral holder to utilize or preserve the interest in order to avoid the abandonment of such interest. The appellant, who took no timely effort to use or preserve the mineral interest at issue in this case, seeks to take advantage of the surface transactions, and ride the coattails of those transactions, as a savings event under the DMA. However, if the General Assembly intended for surface interest transactions to operate as savings events, then the legislature would have expressly provided for that result. Instead, R.C. 5301.56(B)(3)(a) is triggered only when the mineral interest

is *the subject* matter of a title transaction. The Court of Appeals correctly recognized 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 (7th Dist.), ¶48. *Accord*, *Walker v. Nau (Noon)*, 2014-Ohio-1499 (7th Dist.), ¶27.

Under the ordinary meaning of "subject of," a mineral interest is not the subject of a title transaction when the interest is merely stated in a deed transferring the surface estate. A deed for the surface has no impact on the oil and gas interest. The mineral interest is not acted on. "The common definition of the word 'subject' is topic of interest, primary theme or basis for action." *Dodd*, supra at ¶¶48-49; *Tribett*,supra at ¶22. The ordinary meaning given to the term "subject" is otherwise stated as "one concerning which something is said or done," or to "be acted upon;" "one that is acted on." American Heritage Dictionary (Houghton Mifflin Harcourt, 2014); Merriam-Webster.com (Merriam-Webster, 2014). "Subject" has otherwise been defined as "one considered the object of an agreement" and "something over which a right is exercised." Oxford English Dictionary (Oxford Univ. Press, 2013). The "matter over which something is created." Black's Law Dictionary, 1465 (2004). Applying any of these common meanings to the word "subject," and applying the DMA as written, leads to the unescapable conclusion that a severed mineral interest is not the subject of a transaction involving the surface estate.

To allow a surface transaction to qualify as a savings event would frustrate the purposes of the DMA. Transfers of the surface estate do not advance use of the oil and gas interests and do not reflect any effort on the part of the severed-interest holder to maintain or preserve same. The Court should reject Proposition of Law IV accordingly.

Response to Proposition of Law No. V:

Appellant only asserted alleged "title transactions" as savings events in an effort to avoid the result called for under the vested rights analysis of the 1989 DMA.

The appellant has argued in this case that transactions in the surface estate of the property, by others and not Noon himself, operated to protect appellant from operation of the self-executing provisions of the 1989 DMA. "And appellant has not alleged any other savings events." (Opinion, ¶39). Now, the appellant suggests that R.C. 5301.49 provides some safe harbor; it does not.

There are differences between the two statutes, the Marketable Title Act and the DMA. *Tribett v. Shepherd*, 2014-Ohio-4320 at ¶33. The words "subject of" are used in the DMA "to modify the title transaction" that must exist to qualify as a savings event. *Id.* Those "modifiers are not used in the Ohio Marketable Title Act." *Id.* The specific statute relating to dormant and lapsed oil and gas interests – the DMA – controls over the general statute. *Tribett v. Shepherd*, supra at ¶34; *Swartz*, supra at ¶¶19-20. Reliance upon R.C. 5301.49(A) was likewise rejected in *Swartz v. Householder*, 2014-Ohio-2359, at ¶¶18-20.

R.C. 5301.56(B)(1) required, succinctly, that in order to prevent the abandonment and vesting of rights under the DMA, through reliance upon a title transaction, the mineral interest must have 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." (Emphasis added). In the interplay of statutes, the "more specific statutory provision" must be deemed to control. *Summerville v. City of Forest Park*, 128 Ohio St. 3d 221, 2010-Ohio-6280, ¶¶ 25, 26. The appellant did not demonstrate any transaction where the severed mineral interest was "the subject of" that transaction. Consequently, no savings event under the specific provisions of the DMA was proven.

5301.49(A) is not set forth in 5301.56 as a savings event, and its general provisions must not then be read into the DMA. "[T]he ODMA has a higher standard. It requires the mineral interest to be subject of the title transaction" to be protected from lapse by a savings event. *Tribett*, supra, at ¶36.

Likewise, the term muniment of title or any derivation of that phrase is not contained in the DMA. To the contrary, in order for a title transaction to act as a savings event the mineral interest must not simply be inherent in the muniments of title but, as addressed above, must be the actual subject of some title transaction. Had the general assembly intended to allow a simple passive recitation of a severed mineral interest to preserve a severed oil and gas interest, presumably it would have referenced R.C. 5301.49 as a separate savings event. The General Assembly used the phrase title transaction, drawn from R.C. 5301.47(F), but did not draw from the phrase muniments of title found in R.C. 5301.49(A).

The DMA was enacted to reunite ownership of oil and gas interests with the surface, to advance or encourage resource development. A surface owner may not have held title to a severed mineral interest however, as a consequence of the mineral owner's abandonment, ownership is then reunited by law. The focus of R.C. 5301.56 remains on what mineral interest owners have done, or not done, to preserve a severed interest. If twenty year has passed, with no saving event, then the interest is deemed abandoned and vested. The vesting expands the surface owner's title to include the previously-severed interest – now re-united with the surface owner.

Response to Proposition of Law No. VI:

The 2006 version of the DMA was not made specifically retroactive and, regardless, cannot be applied to disturb or strip "vested" interests already accrued under the 1989 version of the DMA.

Dormant Mineral Acts "solve the problem of fractionalized and unproductive mineral estates by terminating severed mineral interests after a specified period of non-use." *Dormancy Mineral Legislation*, 16 Eastern Mineral Law Institute, Chapter 12 (1997). The state clearly has a policy rationale for enacting DMA legislation; to avoid the unproductive severance of oil and gas rights. "It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." *Newbury Township Board of Township Trustees v. Lomak Petroleum (Ohio), Inc.* (1992), 62 Ohio St. 3d 387, 389. Given this clearly-stated public policy, the Ohio legislature acted within its authority in enacting the DMA. "The 1989 DMA was enacted to solve the title problems associated with severed mineral rights and to further the public policy interests in developing Ohio's minerals." *Wendt*, supra, ¶24.

When the appellant (Noon) sought summary judgment in the trial court, appellant asserted that the "language of R.C. 5301.56 is clear. No words need to be added or subtracted from the statute to give effect to its meaning." (Noon Motion, p. 3). While otherwise commenting that private property rights are fundamental, the appellant did not offer any demonstration that the DMA (1989) was unconstitutional. Appellant did not demonstrate any notice of a constitutional challenge to the Ohio Attorney General. See, *Swartz v. Householder*, supra at ¶44. Appellant argued, instead, that the DMA allowed a "private taking." (Noon Motion, p. 6). The Court of Appeals correctly observed that the appellant did not preserve litigation of any constitutional issue in this case.

(Opinion, ¶57).

Appellant does not directly present a constitutional challenge to the DMA in this appeal either. Instead, the appellant has buried a due process and retroactive prohibition argument under Proposition of Law No. II (which expressly addresses appellant's contention that the DMA somehow required a surface owner to have "taken some action to establish abandonment" prior to the 2006 amendment). Frankly, the only point of constitutional contention ripe for consideration in this case is that addressed herein below – the constitutional prohibition against the amendment or reenactment of a statute from disturbing a previously vested right or interest.

To the extent the appellant has advanced that the DMA was unconstitutional, the appellant has failed to demonstrate any such contention. A statute is entitled to the strong presumption of constitutionality under Ohio law. E.g., *Wilson v. Kasich*, ___ Ohio St. 3d ___, 2012-Ohio-5367, ¶18. A party challenging the constitutionality of a statute bears the burden of "establishing beyond a reasonable doubt that the statute is unconstitutional." *Id.* The appellant has not carried such burden in this case.

The DMA (1989) was self-executing, and procedural due process does not attach to the mechanism of automatic abandonment. An automatic abandonment or lapse statute is constitutional. *See*, *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) ("[S]evered mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property."). *Id.*, 518. Moreover, a statutory grace period, which provides "an adequate opportunity for citizens to become familiar with a new law" is a matter of deference for a state legislature, and affords persons time to "take any action deemed appropriate to protect existing interests." *Id.*, 532-33. Here, the General Assembly included a three-year grace or tolling provision as part of the 1989

enactment of R.C. 5301.56, which rationally protects that provision from a due process challenge.

It was the inaction of the appellant (Noon) which produced the lapse or abandonment of his oil and gas interests reserved in 1965, but not used or preserved after that point in time. Once property is deemed abandoned, the former owner is deprived of nothing. E.g., *Van Slooten v. Larsen*, 410 Mich. 21, 299 N.W. 2d 704, 716 (1980) (Michigan Dormant Mineral Act). Abandoned property is not a property interest that is entitled to due process. See also, *Texaco*, at 526.

In *Tribett v. Shepherd*, the Ohio Court of Appeals rejected a constitutional challenge advanced on the basis of Art. II, Section 28 of the Ohio Constitution. "Ohio's 1989 ODMA provided notice of three years within which the mineral owners could save their interest before any abandonment would vest." *Tribett v. Shepherd*, supra at ¶56. Addressing the argument specific to the Ohio statute and constitution, the Court held that "we find that the 1989 version of the statute is not unconstitutional." *Id.*, ¶57. Accord, *Wendt v. Dickerson*, supra at ¶42, citing *Swartz*, supra at ¶41 and *Texaco*; *Carney v. Shockley*, supra at p. 3 ("[T]he Dormant Mineral Act of 1989 is not unconstitutionally vague and did not violate due process.)"

R.C. 5301.56 (1989) was a valid enactment of a self-executing, "automatic" form of lapse statute regulating oil and gas interests. By virtue of that statute, the previously-severed mineral interest at issue in this case merged with the surface rights no later than March 22, 1992. The appellant has no right to such interest in this case. Accord, *Thompson*, supra at p. 3 ("As none of the savings events happened under the 1989 version of the statute within the relevant time, and because the [interest holders] did not do anything in the three years given to them under that statute to continue the reservation, the reserved mineral rights were abandoned by operation of law on March 22, 1992."). (Appendix A42).

Precisely because appellee's rights vested (the oil and gas interests in the property vested), automatically, under the 1989 version of the code, those rights are not affected or disturbed by the 2006 amendment to R.C. 5301.56, as a matter of law. Ohio law, R.C. 1.58, recognizes that the amendment of a statute cannot disturb a vested or acquired right, and provides as follows:

> (A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:
>
> . . .
>
> (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder; . . . .

[Division (B), regarding reduction of penalties and punishments, is not applicable here]. Because the appellee's predecessor in title acquired the mineral interest at issue in this case, by the merger of same with the surface estate under the 1989 version of the statute, the amendment of that statute in 2006 does not affect such rights. "[T]he enactment of the 2006 law is of no effect because the mineral rights on the subject properties were already abandoned. This case is really that simple." *Thompson*, supra at p. 4.

The 2006 amendment to the DMA is presumed to operate prospectively. R.C. 1.48. Under R.C. 1.48, "a statute is presumed to be prospective in its operation." See, *In re Hensley*, 154 Ohio App. 3d 210, 2003-Ohio-4619, ¶23. Moreover, "There is no language in the 2006 version of R.C. 5301.56 to suggest that it is to be applied retroactively." Thus, it is only to apply prospectively." (Opinion, ¶37). *Tribett*, supra at ¶44.

A "<u>vested right</u>" can "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 <u>a property right</u>." *Washington Cty. Taxpayers Assn. v. Peppel* (1992), 78 Ohio App. 3d 146, 155 (Emphasis

added). Here, the "vested" right for the surface owner was expressly created by operation of the 1989 version of the DMA; that vested right being the property right, the ownership, of the previously–severed oil and gas interests in the properties. Such vested rights cannot be affected, limited, stripped, or burdened by application of the 2006 version of the code. See, Art. II, Sec. 28, Ohio Constitution; R.C. 1.58. A statute is substantive, and therefore unconstitutionally applied retroactively, if it "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Smith v. Smith* (2006), 109 Ohio St. 3d 285, 354.

"The retroactivity clause nullifies those new laws that 'reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time the statute becomes effective.'" *Smith v. Smith*, supra at ¶6. Thus, the provisions of the 2006 DMA, relating to notice and recording, cannot be applied to burden the previously-acquired, complete and vested rights under the 1989 version of the DMA.

It is fundamental that the 2006 amendment cannot be applied retroactively to impair or take away vested rights. "A statute is 'substantive' if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right." *Hensley*, ¶26; citing *Van Fossen v. Babcock & Wilcox*, 36 Ohio St. 3d 100, 107 (1988). The oil and gas rights here vested – automatically – under the former version of the statute, no later than March 22, 1992 (after the exhaustion of the tolling period). The amended version of the code cannot be applied to have a substantive effect (impair or take away) those accrued rights to the mineral interest. Similarly, the amended version of the code cannot be applied to impose any new or additional burden (any notice or other requirement) as to the

previously-vested rights. The 2006 version of the DMA cannot be applied retroactively to claw back oil and gas interests previously abandoned and vested with surface ownership. "[A]ny mineral interest that was 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 . . . ." *Tribett*, supra at ¶46; *Swartz*, supra at ¶34. See also, *Thompson*, supra at p. 4. See also, *Nationwide Ins. v. Ohio Dept. of Transp.*, 61 Ohio Misc. 2d 761, 765 (1990), ("[T]he . . . amendment of a statute will not destroy, affect, or impair rights.").

Noon's effort to "preserve" the severed mineral interest under the 2006 version of R.C. 5301.56, was without merit. As previously-stated, after the severed interest was already merged out of existence and vested in the surface title, there was no longer any severed oil and gas interest to evaluate or assess. The intent of the statute remains clear; namely, to effectuate the merger of dormant, unused severed mineral interests with the surface interests. The 2006 version of R.C. 5301.56 must not be interpreted as a measure intended to provide mineral interest holders some mechanism to renew or reinstate, unused, already dormant and expired interests. Such an interpretation would defeat the very purposes of the act. As the Court is well-aware, as statutory intent in paramount, a statute is to achieve reasonable results. *State v. Best*, 2005-Ohio-4375 (7th Dist), ¶64; R.C. 1.47(C).

Under the 1989 version of the DMA, abandoned mineral interests were, by law, "<u>vested</u> in the owner of the surface." Specific use of the word "vested" by the General Assembly simply cannot be ignored. The meaning of a "vested" right cannot be ignored. Here, vested rights were "created by . . . statute" – when dormant mineral interests were deemed abandoned – and the vesting of such right is not affected by later amendment. *Washington Cty. Taxpayers Assn. v. Peppel* (1992),supra

at p. 155. The "vested" right for the surface owner was expressly created by operation of the 1989 version of the DMA; that vested right being the property right, the ownership, of the previously–severed oil and gas interests in the properties. Such vested rights cannot be affected, limited, stripped, or burdened by application of the 2006 version of the code. See, Art. II, Sec. 28, Ohio Constitution; R.C. 1.58.

CONCLUSION

For all of these reasons, the "1989 DMA can still be used after the 2006 amendments because the prior statute was self-executing and the lapsed right automatically vested back to the surface owner." *Walker* and *Swartz*.

WHEREFORE, appellee, Jon D. Walker, Jr., respectfully requests that the judgment of the Seventh District Court of Appeals be affirmed.

Respectfully submitted,

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