

IN THE SUPREME COURT OF OHIO

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

**APPENDIX TO MERIT BRIEF OF
APPELLEE, JON D. WALKER, JR.**

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Respectfully submitted,

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A copy of the foregoing Appendix to Merit Brief was served by regular U.S. mail this 1st day of December, 2014, to:

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TERMINATION OF DORMANT MINERAL INTERESTS

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.

(2) "Drilling or mining permit" means a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code to the holder to drill an oil or gas well or to mine other minerals.

(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, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located;

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

(iv) A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 of the Revised Code, in the office of the county recorder of the county in which the lands are located;

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

(vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

(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.

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

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

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

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

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

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

(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, successive filings of claims to preserve mineral interests under division (C) of this section.

(2) The filing of a claim to preserve a mineral interest under division (C) of this section does not affect the right of a lessor of an oil or gas lease to obtain its forfeiture under section 5301.332 of the Revised Code.

(1988 S 223, eff. 3-22-89)

5301.56

REAL PROPERTY

Historical and Statutory Notes

Ed. Note: Former 5301.56 repealed by 1988 S 223, eff. 3-22-89; 1974 H 1231; 1973 S 267; 130 v H 1; 129 v 1040.

Cross References

Records to be kept by county recorder, 317.08, 317.18, 317.20, 317.201

Library References

Vendor and Purchaser ⇔ 130(2), 231(1).
WESTLAW Topic No. 400.

C.J.S. Vendor and Purchaser §§ 191 et seq., 334 et seq.

Hausser and Van Aken, Ohio Real Estate Law and Practice (2d Ed.), Text 1.08, 7.40(B), 9.07, 9.08(A)(B), 9.10(A)(C), 9.11(B)(E)(F), 9.17, 9.20; Forms 9.01

Law Review and Journal Commentaries

Mixon v. One Newco, Inc.: A Look at Dormant Mineral Acts, Comment. 6 J Mineral L & Policy 119 (1990-91).

Ohio Dormant Mineral Act—R.C. § 5301.56, effective March 22, 1989., Robert L. Hausser. 56 Title Topics 3 (May 1989).

Surface Use and Damages Statutes: "Cloud"ed Constitutionality, Comment. 6 J Mineral L & Policy 87 (1990-91).

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.

A subsurface mineral interest in coal or one held by the United States, Ohio, or their political subdivisions cannot be the subject of deemed abandonment and vesting. Additionally, deemed abandonment and vesting will not occur under the act if any of the following exceptional circumstances occurred within the preceding 20-year period:

Ohio Legislative Service
Commission, December 1988

(1) The interest was the subject of a filed or recorded title transaction in the county;

(2) Its holder actually produced or withdrew minerals from specified lands, used the interest in underground gas storage operations, or filed or recorded a specified affidavit with the county recorder in connection with a drilling or mining permit relating to the interest;

(3) Its holder filed a claim to preserve the interest with the county recorder in the form specified in the act and the claim then was filed and recorded in accordance with the County Recorder and Marketable Title Laws. If such a claim complies with the act's form, filing, and recording requirements, it will preserve the rights of all holders of a mineral interest in the same lands. However, such a claim does not affect the right of a lessor to obtain a forfeiture and cancellation of an oil or gas lease.

(4) A separately listed tax parcel number was created for a separated mineral interest in the county auditor's tax list and treasurer's duplicate.

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.

Secs. 317.08, 317.18, 317.20, 317.201, 5301.53, and 5301.56.

* * *

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, OHIO

2014 JAN 22 PM 2:13

BETH ANN ROSE
CLERK OF COURTS

David M. Blackstone, et al.

Plaintiffs,

vs.

Case No. 2012-166

Susan E. Moore, et al.

Defendants.

JUDGMENT ENTRY
(Incorporating Findings of Fact and Conclusions of Law)

This matter is before the Court for a non-oral hearing on Plaintiffs' and Defendants' Motions for Summary Judgment. All parties were given reasonable time to file responses and replies to the Summary Judgment Motions.

Based on the facts herein, the arguments of counsel and the applicable law, this Court hereby makes the following Findings and Orders.

Facts and Background

On April 3, 1915, Nick Kuhn and Flora Kuhn conveyed the property at issue to W. D. Brown. The instrument reflecting this transaction is the Reservation Deed. The Reservation Deed contained the following reservation language:

Except Nick Kuhn and Flora Kuhn, their heirs and assigns, reserve one-half interest in oil and gas royalty in the above described sixty acres.

Plaintiff, David M. Blackstone, first acquired title to the Property by Deed dated July 30, 1969, filed for recording on July 30, 1969, and recorded at Volume 155, Page 329 of

Monroe County
Common Pleas
Court

Julie R. Selmon
Judge

FINAL APPROVED
CASE

Appendix 3

the Deed Records of Monroe County, Ohio. It is undisputed that the July 30, 1969 Deed in favor of David M. Blackstone is Plaintiffs' Root of Title for purposes of the Ohio Marketable Title Act, as defined in Revised Code § 5301.47(E).

Subsequently, David M. Blackstone, married, conveyed the Property to David M. Blackstone and Nicolyn D. Blackstone, husband and wife, by Deed dated January 8, 2001 ("2001 Deed"), and filed for recording March 20, 2001 at Volume 71, Page 465 of the Official Records of Monroe County, Ohio.

Defendants are the heirs of Nick Kuhn and Flora Kuhn and are claiming title to the Severed Royalty, as reserved in the Reservation Deed.

Plaintiffs, pursuant to the prior version of R. C. § 5301.56, effective March 22, 1989 to June 30, 2006 (hereinafter the " Former DMA "), seek to have the Severed Royalty declared abandoned and vested in Plaintiffs as surface owners. On May 9, 2012, in accordance with the Former DMA , Plaintiffs recorded an Affidavit of Facts Related to Title ("Affidavit"), pursuant to R. C. § 5301.252. In the Affidavit, Plaintiffs testified that none of the occurrences identified in division (B)(1)(c) of the Former DMA ("Savings Events") occurred in the 20-year period prior to June 30, 2006, the last day the Former DMA was in effect.

On or about July 6, 2012, Defendant, Susan Moore, filed a claim to preserve the Severed Royalty in the Monroe County Recorder's Office, claiming that Defendants, Susan E. Moore, Carolyn Kohler, Rebecca Englehart and Charles Franklin Yontz, owned an interest in the Severed Royalty (hereinafter referred to as the "Claim to Preserve"). The Claim to Preserve was filed and recorded at Volume 222, Page 178 of the Official Records

of Monroe County, Ohio. Defendants, J. K. Larrick and Ila Carpenter, never filed or recorded a claim to preserve. The status of the Severed Royalty is the subject of this litigation.

In their First Claim of Plaintiffs' First Amended Complaint, Plaintiffs seek an Order from this Court declaring that the one-half interest in the oil and gas royalty ("Severed Royalty") has become dormant and has vested in Plaintiffs, pursuant to R. C. § 5301.56.

In their Third Claim of Plaintiffs' First Amended Complaint, Plaintiffs seek an Order from this Court declaring that the Severed Royalty has been extinguished and is vested in Plaintiffs, pursuant to the Ohio Marketable Title Act.

In their Second Claim of Plaintiffs' First Amended Complaint, Plaintiffs seek an Order from this Court quieting title to the Severed Royalty in favor of the Plaintiffs and against Defendants.

Applicable Law and Analysis

Pursuant to Ohio Rule of Civil Procedure 56, Summary Judgment is appropriate when 1) there is no genuine issue of material fact; 2) the moving party is entitled to judgment as a matter of law; and 3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor. *State ex rel. v. Davila v. City of E. Liverpool*, 7th Dist. No. 10CO16, 2011 Ohio 1347, ¶13 (March 14, 2001) (citing *Horton v. Harwick Chemical Corp.*, 73 Ohio St. 3d 679, 1995 Ohio 286, ¶3 of the syllabus (1995)).

First, this Court will analyze the parties' claims and arguments under the Ohio Dormant Mineral Act.

Plaintiffs rely on a number of decisions from this Court, as well as other Trial Court opinions and argue that the 1989 version of the Dormant Mineral Act applies. The Court is also mindful of the recent Seventh District Court of Appeals decision in *Dodd v. Croskey*, 2013-Ohio-4257.

This Court finds it necessary to briefly discuss and reconcile any confusion or misunderstanding concerning the current DMA and the Former DMA and the effect of the Seventh District's holding in *Dodd* .

First, there 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 become "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 (April 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.*

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.

If Defendants fail to present evidence of any savings events, the Severed Royalty shall be declared abandoned and vested in the Plaintiffs, under the Former DMA .

The Current DMA does not expressly state that property rights, vested under the

Former DMA , are affected by the Current DMA . If the General Assembly intended the 2006 amendment to affect the rights vested in Plaintiffs under the Former DMA , this Court finds that such intent must be expressly stated.

Many courts across the State of Ohio have recognized that title to a mineral interest can be quieted in favor of the surface owner of property under the Former DMA , even after the 2006 amendment. These cases include *Wendt v. Dickerson*, Tuscarawas C.P., No. 2012-CV-020135 (February 21, 2013), *Wiseman v. Potts*, Morgan C.P., No. 08-CV-0145 (June 29, 2010), *Walker v. Noon*, Noble C.P., No. 2012-0098 (March 20, 2013), *Bender v. Morgan*, Columbiana C.P., No. 2012-CV-378 (March 20, 2013) and *Marty v. Dennis*, Monroe C.P., No. 2012-203 (April 11, 2013). All of these cases state that a Severed Mineral Interest can be declared abandoned under the Former DMA , even after the enactment of the 2006 amendment.

Additionally, there may be instances where a Severed Mineral Interest, although not extinguished by the Marketable Title Act, is nevertheless abandoned under the Former DMA . As this Court held in *Pletcher v. Brown*, Monroe C.P. 2012-069 (February 7, 2013), the Ohio Marketable Title Act and Dormant Mineral Act are alternate means to extinguishing an interest in minerals. *Pletcher*, at 5. In *Farnsworth v. Burkhart*, Monroe C.P. 2012-133, this Court held that a Severed Mineral Interest was abandoned under the Former DMA even though it would not have been extinguished under the Marketable Title Act. The mineral interest at issue in that case was severed in 1980. The two statutes have different tests and examinations to determine if a Severed Mineral Interest may be extinguished or abandoned.

Meanwhile, the issue before the Appellate Court in *Dodd* was whether the statutory abandonment process described in division (H) has been effectively completed.

In *Dodd* , the surface owners filed an action against the holders of a Severed Mineral Interest after having served their notice of intent to claim abandonment, by publication, under division (E)(1). One of the Severed Mineral Interest Holders subsequently recorded a deed and an affidavit preserving minerals. The surface owners alleged that the deed was not properly completed, that it did not conform to the recording statute, and that it did not appear in the chain of title. The surface owners further alleged that the affidavit preserving minerals was not signed by all the Severed Mineral Interest Holders and that the affiant was not acting as their agent.

The surface owners in *Dodd* believed that they had fulfilled the requirements of the DMA . They asked the Court to strike the deed and the affidavit preserving minerals. The surface owners asked the Court to find that the affidavit was ineffective, and that the statutory abandonment process described in division (H)(2) had been successfully completed. After both parties filed Motions for Summary Judgment, the Trial Court rejected the surface owners' arguments and held in favor of the Severed Mineral Interest Holders.

On appeal, the surface owners argued that the Severed Mineral Interest Owner's affidavit preserving minerals was not a "savings event," referring to the filing of a claim to preserve or an affidavit under division (H)(1).

The Seventh District Court of Appeals issued its decision on September 23, 2013. The issue before the Court on appeal concerned the process by which mineral interest may

be deemed abandoned and deemed to have vested to the owner of the surface rights.

The Seventh District Court of Appeals rejected the surface owners' argument. Since division (H)(1) expressly states that its filings may be made "after the date on which notice was served or published," the Court held that it allows "a present act" by the mineral interest holder. *Dodd* , ¶28. The Court held that this present act "prevents the interest from being determined to be abandoned." *Id.* The Court was referring to an abandonment under the statutory process described in division (H); it did not address, and the surface owners did not argue, whether, the filing of a claim under division (H)(1), the mineral interest might nevertheless be deemed abandoned in an action to quiet title, based on the operation of division (B).

This Court finds that Defendants' reliance on *Dodd* and Defendants' understanding of the effect of the Former DMA is misplaced.

In this case, after careful analysis, this Court finds that from March 22, 1969, 20 years prior to the effective date of the Former DMA , to June 30, 2006, the last day the Former DMA was in effect, there has been no savings event under division (B)(1)(c).

First, there is no evidence that a well was ever drilled on the Property or pursuant to any Lease encompassing the Property. Accordingly, without a well drilled on the subject Property, this Court finds that there has been no production of oil or gas on the Property.

Next, to constitute a savings event under (B)(1)(c)(i) , the three (3) requirements which must be met are as follows: (1) the Severed Mineral Interest itself must be the subject of a title transaction; (2) the title transaction must affect title to an interest in land; and (3) the title transaction must be recorded in the office of the County Recorder in the

County in which the lands are located.

This Court finds that Plaintiffs signed an Oil and Gas Lease with Chief Petroleum Corporation ("Chief") on August 16, 1976. At the time this Lease was executed, Plaintiffs did not hold title to the Severed Royalty. Thus, the Court finds that the only interest that was the "subject of" the Chief Lease was Plaintiffs' own interest. Since the Severed Royalty was not conveyed or retained by virtue of the Chief Lease, this Court finds that the Severed Royalty was not the "subject of" said Lease. In order for a mineral interest to be the "subject of" the title transaction, the interest must be "conveyed or retained" by the parties to the transaction. See Dodd v. Croskey, 7th Dist. No. 12 HA 6, 2013-Ohio-4257 (September 23, 2013).

Additionally, the Chief Lease was executed on August 16, 1976. Therefore, it did not occur within the 20 year period prior to the final day on which the Former DMA was in effect, June 30, 2006. Accordingly, this Court finds that the Chief Lease was not a savings event under division (B)(1)(c)(i).

Moreover, this Court finds that neither the Root of Title Deed nor the 2001 Deed were savings events as the subject of these two (2) deeds was the surface of the Property, and the grantors in the Root of Title Deed and the 2001 Deed owned no interest in the Severed Royalty and thus could not convey it.

Additionally, there is no evidence that the Property or the Severed Royalty were used at any time for the underground storage of gas. Moreover, from June 30, 1986 to June 30, 2006, no drilling or mining permits were issued for wells that encompassed this Property or the Severed Royalty.

Defendants admitted that no Claims to Preserve the Severed Royalty were recorded in the Monroe County Recorder's Office from March 22, 1969 to June 30, 2006, and no separately listed tax parcel numbers were created for the Severed Royalty from March 22, 1969 through June 30, 2006.

Based on the above, this Court finds there are no issues of material fact and Plaintiffs are entitled to judgment as a matter of law. Defendants have failed to produce any evidence of any savings events under (B)(1)(c) that would have prevented an abandonment under the Former DMA . Thus, pursuant to the Former DMA , Summary Judgment is hereby granted in favor of Plaintiffs and against Defendants on Plaintiffs' First Claim in Plaintiffs' First Amended Complaint.

Next, this Court will analyze the parties' claims pursuant to the Ohio Marketable Title Act.

The Ohio Marketable Title Act, outlined in Ohio Revised Code §§ 5301.47 through 5301.56, was created in order to simplify and facilitate land title transactions. Revised Code § 5301.55. The Marketable Title Act operates to extinguish any interest existing prior to the Root of Title unless that interest is:

- 1) Specifically stated or identified in the Root of Title;
- 2) specifically stated or identified in one of the muniments of record title within 40 years after the Root of Title;
- 3) recorded pursuant to Revised Code §§ 5301.51 and 5301.52;
- 4) one of the other exceptions provided for in Revised Code § 5301.49; or
- 5) one of the rights that cannot be extinguished by the Marketable Title Act as

provided for in Revised Code § 5301.53. *Semachko v. Hopko*, 35 Ohio App. 2d 205, 211 (1973).

In this case before the Court, it is undisputed that the Root of Title Deed was recorded on July 30, 1969. Additionally, there is no dispute that the Severed Royalty Interest existed prior to the effective date of the Root of Title. Thus, this Court finds that in order to preserve an interest existing prior to the effective date of the Root of Title (July 30, 1969), one of the savings conditions in R. C. § 5301.50 (as set forth above), must have occurred prior to July 30, 2009.

In this case, Defendants' claim to the Severed Royalty is based on whether the interest reserved in the Reservation Deed is 1) specifically stated or identified in the Root of Title; 2) specifically stated or identified in one of the muniments in the chain of record title within 40 years after the Root of Title; 3) recorded pursuant to R.C. § 5301.51 and § 5301.52; or 4) one of the exceptions provided for in R. C. § 5301.49 apply.

R. C. § 5301.49 provides that a general reference to a severed interest in the chain of title, created prior to the Root of Title, is not sufficient to preserve the severed interest. Rather, a specific reference to the interest is necessary to preserve it.

The Seventh District Court of Appeals, in *Landefeld v. Keyes*, 7th Dist. No. 548, 1982 Ohio App. LEXIS 13378 (June 17, 1982), distinguished between specific and general references to a severed oil and gas interest. In *Landefeld*, the Defendants appealed a judgment from this Court which extinguished certain oil and gas rights existing prior to the Root of Title. The Defendants claimed title to one-half of the oil and gas in and under 132 acres that was severed from the surface of the property. The

surface was subsequently split, and two separate chains of title were created, but both chains remained subject to the one-half oil and gas reservation. *Id.* One tract contained 49.25 acres and the other tract contained the remaining 83 acres. *Id.*

The deeds in the chain of title for the 49.25 acre tract contained the following reference to the original reservation: "Also subject to all coal, and oil and gas reservations heretofore made." *Id.* The subsequent deeds in the chain of title for the 83 acres contained the following reference to the reservation: "Excepting the coal and oil and gas rights as reserved by C. E. Ketterer and wife, in deed to Geo. J. Egger dated March 26, 1914 in Deed Book 81, Pages 194-95, Monroe County, Ohio." *Id.* at 2.

The Seventh District held that the references to the reservation for the 83 acres were specific. *Id.* at 2. The references for the 83 acres cited to the volume and page of the original reservation. However, the deeds in the chain of title for the 49.25 acres (the acreage that was the subject of the action) were general because they did not reference the volume and page number of the original reservation, and failed to meet the requirements of R. C. § 5301.49(A). *See Id.* The Seventh District affirmed this Court's decision that the Severed Mineral Interest was extinguished as it pertained to the 49.25 acre tract pursuant to the Marketable Title Act, but was not extinguished as to the 83 acres that contained the specific reference.

In the present case, this Court finds that Plaintiffs' Root of Title Deed contains the following language:

Excepting the one-half interest in oil and gas royalty previously excepted by Nick Kuhn, their heirs and assigns in the above described sixty (60) acres.

This exact reservation language also appears in the next deed in the chain of title following the Root of Title, the 2011 Deed.

This Court finds that the aforementioned reservation language herein does not contain a specific reference that would enable a title examiner to locate the Reservation Deed without checking the indexes. There is no reference to a volume and page number. This Court has previously held that a reference will be deemed specific if a title examiner may locate the prior conveyance by examining the records of the Recorder's Office without checking the conveyance indexes. *See Pletcher v. Brown*, Monroe C.P. Case No. 2012-069 (February 7, 2013) (citing *Duvall v. Hibbs, et al.*, 5th Dist. No. CA-709, 1983 Ohio App. LEXIS 13042 (July 8, 1983)).

Accordingly, this Court finds that the Severed Royalty Interest created in the Reservation Deed was not specifically stated, identified or referred to in either the Root of Title Deed or in the subsequent 2011 Deed. Such general references cannot prevent the extinguishment of the Severed Royalty at issue.

Additionally, the Court finds that the Severed Royalty was not preserved by Defendants pursuant to R. C. §§ 5301.51 and 5301.52, as Defendants have acknowledged that no preserving notices were filed during the forty year period immediately following the effective date of the Root of Title.

The Court finds that Defendants, Susan E. Moore, Carolyn Kohler, Rebecca Englehart, and Charles Franklin Yontz, filed a Claim to Preserve pursuant to R. C. § 5301.52, on July 6, 2012. However, the Claim to Preserve was filed approximately

three (3) years after the expiration of the forty year period required by R. C. § 5301.51(A). The Claim to Preserve was therefore not effective in preserving the Severed Royalty.

Furthermore, this Court finds that none of the other exceptions provided for in R. C. § 5301.49 apply to the Severed Royalty Defendants are claiming herein.

Accordingly, the Court hereby finds that the Ohio Marketable Title Act has extinguished Defendants' interest in the Severed Royalty. As there remain no genuine issues of material fact herein, Plaintiffs are entitled to judgment as a matter of law on Plaintiffs' Third Claim in Plaintiffs' First Amended Complaint.

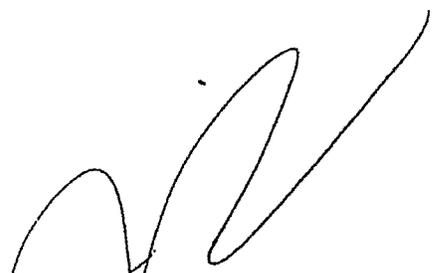
Consistent with the above findings, judgment is granted in favor of Plaintiffs on their Second Claim in Plaintiffs' First Amended Complaint and the Court hereby quiets title to the Severed Royalty Interest in favor of Plaintiffs David M. and Nicolyn D. Blackstone and against Defendants, Susan E. Moore, Carolyn Kohler, Rebecca Englehart, and Charles Franklin Yontz, Tharcilla Larrick Smith, her unknown heirs, devisees, executors, administrators, relicts, next of kin and assigns, J. K. Larrick, and Ila Carpenter.

Defendants' counterclaims are hereby dismissed with prejudice.

The Court further finds that there is no just reason for delay, and that this "Judgment Entry Incorporating Findings of Fact and Conclusions of Law" is a final appealable order, as defined under Civil Rule 54.

The costs of this proceeding are assessed to the Defendants. Judgment is hereby granted the Clerk of this Court to collect on her costs.

IT IS SO ORDERED.



Honorable Julie R. Selmon
Enter as of the date of filing

Copies to: James S. Huggins, Esquire and Kristopher O. Justice, Esquire
THEISEN BROCK

Mark W. Stubbins, Esquire
STUBBINS, WATSON & BRYAN CO., LPA

Stephanie Mitchell, Esquire
TRIBBIE, SCOTT, PLUMMER & PADDEN

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 APR 11 PM 1:32

BETH ANN ROSE
CLERK OF COURTS

NEAL D. MARTY, *etal*,

Plaintiffs,

v.

Case No. 2012-203

LINDA DENNIS (WINKLER), *etal*,

Defendants.

JUDGMENT ENTRY

This matter is before the Court for non-oral hearing on the following motions:

- (1). Plaintiffs' Motion for Summary Judgment;
- (2). Defendants' Motion for Summary Judgment;
- (3). Plaintiffs' Memorandum Contra to Defendants' Motion for Summary Judgment.

Based on the filings of the parties and the applicable law, the Court makes the following findings and orders.

The Court first notes that both parties acknowledge that there is no dispute as to the facts in this case.

Neal D. Marty and Diana L. Marty, Trustees under the Diana L. Marty Trust Agreement dated the 25th day of June 2010 (hereinafter "Plaintiffs") are the fee owners of 107.39 acres, more or less, situated in Adams Township, Monroe County, Ohio. The subject property is described as Tract I and Tract II in the deed conveying the property to Plaintiffs, dated June 25, 2010, filed July 30, 2010, and recorded in Volume 193, Page 509

Monroe County
Common Pleas Court

Julie R. Selmon
Judge

**FINAL APPEALABLE
ORDER**

Appendix 4

A20

of the Official Records of Monroe County, Ohio.

That part of the Plaintiffs' property that is in Section 24 is approximately sixty-eight (68) acres. This property is contained in Tract II of the above-referenced deed. This sixty-eight (68) acre parcel, or Tract II, is the only parcel in the above-referenced deed that is in dispute in this case. The sixty-eight (68) acres shall hereinafter be referred to as the "Property."

Plaintiffs' predecessors in title, John J. Winkler and Mary M. Winkler, conveyed the Property to Carl W. Ambler and Alice Mae Ambler. The instrument reflecting this transaction is the deed dated August 24, 1949, filed August 25, 1949 and recorded in Volume 123, Page 186 of the Deed Records of Monroe County, Ohio (hereinafter the "Reservation Deed"). The Reservation Deed contained the following language:

"Also excepting and reserving unto the grantors herein, their heirs and assigns, the one-half (1/2) of the oil and gas royalty, same being one-sixteenth (1/16) of all the oil and one-half (1/2) of all monies received from the sale of gas from the east half of the south east quarter of Section 24, Township 3 of Range 4, containing sixty-eight (68) acres."
(Hereinafter the "Severed Mineral Interest").

Defendants in this case are the heirs of John J. Winkler and Mary M. Winkler and are claiming title to the Severed Mineral Interest as reserved in the Reservation Deed.

On February 3, 2012, the Plaintiffs filed an Affidavit with the Monroe County Recorder's Office declaring that the reserved royalty interest of the Defendants was abandoned and vested in the Plaintiffs. This Affidavit was filed pursuant to R.C. 5301.56 as it existed prior to its most recent amendment on June 30, 2006.

On February 9, 2012, the Plaintiffs published a notice in the *Monroe County Beacon* again declaring that the reserved royalty interest of the Defendants was abandoned and vested in the Plaintiffs. This publication was made pursuant to the current version of R.C. 5301.56.

On March 14, 2012, the Plaintiffs filed another Affidavit of Abandonment again declaring that the reserved royalty interest was abandoned and vested in the Plaintiffs. This second Affidavit was filed purportedly pursuant to the current version of R.C. 5301.56.

On April 5, 2012, the Defendants filed their Notice to Preserve Mineral Interests with the Monroe County Recorder.

As set forth above, there is no dispute as to the facts in this case. The Plaintiffs are asking the Court to declare that any royalty interest of the Defendants in the Property has been forfeited under the current version of R.C. 5301.56 as well as the version of the statute as it existed prior to its amendment in 2006. The Defendants assert that their purported interest is only the right to receive a royalty payment and is not a mineral interest that can be forfeited under R.C. 5301.56 and that even if it is such an interest subject to forfeiture, the interest has been preserved by the filing of Defendants' Notice to Preserve Mineral Interest.

Certain requirements must be met before the Court can find that a party is entitled to Summary Judgment as a matter of law.

Civil Rule 56(C) specifically provides that before Summary Judgment may be granted, it must be determined that:

- (1). No issue as to any material fact remains to be litigated;
- (2). The moving party is entitled to judgment as a matter of law; *and*
- (3). It appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for Summary Judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. , 50 Ohio St. 2d 317 (1977).

The Dormant Minerals Act (" DMA "), as enacted on March 13, 1989, is set forth below in its entirety:

§5301.56 Mineral Interests in Realty.

(A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives the person's 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.

(2) "Drilling or mining permit" means a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code to the holder to drill an oil or gas well or to mine other minerals.

(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 [5301.25.2] 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.

(B)(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.

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by

its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 [317.20.1] and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:

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

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

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

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

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

(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, successive filings of claims to preserve mineral interests under division (C) of this section.

(D)(2) The filing of a claim to preserve a mineral interest under division (C) of this section does not affect the right of a lessor of an oil or gas lease to obtain its forfeiture under section 5301.332 [5301.33.2] of the Revised Code.

HISTORY: 142 v S 223. Effective Date: 03-22-1989

The current version of the Dormant Minerals Act, amended effective June 30, 2006, is virtually identical to the previous version set forth above, with the exception that a

"notice" requirement (ORC §5301.56[E]) has been added, whereby the surface owner of the land subject to the Severed Mineral Interest may utilize a statutory process of abandonment. That process requires the surface owner to give notice, (by certified mail, if possible, or by publication) of the intent to have the mineral interest abandoned, to the "holder" of the mineral interest or each holder's successors or assignees "before the mineral interest becomes vested" in the surface owner. (ORC 5301.56[E]). The surface owner (after thirty, but not more than sixty days) then files an Affidavit of Abandonment putting on record the fact that none of the savings conditions outlined in ORC §5301.56(B) have occurred, and therefore the interest is deemed abandoned. The surface owner must then wait an additional thirty (but not more than sixty) days, and if nothing is filed under ORC §5301.56(H), the surface owner may send a letter to the recorder instructing him/her to note on the "Reservation Deed" that the interest has been abandoned.

By its very terms, and in comparison with the current version of the DMA , the previous version of the DMA was self-executing in the sense that nothing was required of the surface owner before the mineral interest was deemed abandoned, except to show that none of the savings conditions set forth in paragraphs/subparagraphs (B)(c)(i)(ii)(iii)(iv)(v)(vi) had occurred within "the preceding twenty years...". The only other qualifications to have the mineral interest deemed abandoned was that the mineral interest could not involve coal (B)(a) and was not a mineral interest "held by the United States, this state, or any political subdivision..." (B)(b). The previous version of the DMA also provided that no mineral interest could be deemed abandoned based upon the absence of the

savings conditions set forth in (B)(1) until three years from the effective date of the law (B)(2).

Defendants assert that the Severed Mineral Interest that is the subject of this action "is not a 'mineral interest' as contemplated by the statute and therefore the Plaintiffs have no right to ask the Court to declare the [abandonment] of this right under the Dormant Minerals Act."

This Court addressed the very issue of whether a royalty interest is subject to the provisions of the previous version of the Dormant Minerals Act in *Cyril T. Burkhart v. George A. Burkhart*, Monroe C.P. CVH 92-278. The Defendants in *Burkhart* argued that because the statute does not provide a definition of "mineral interest", the statute, if read as a whole, should preclude the abandonment of a royalty interest. This Court explicitly rejected that argument, holding "[t]he Court finds that the oil and gas rights, including the royalty interest, in and under the real estate described in Paragraph 1 of the Complaint [...] are owned by the Plaintiffs and that any interests of the Defendants have been abandoned pursuant to the Dormant Minerals Act (ORC 5301.56)." *Cyril T. Burkhart v. George A. Burkhart*, Monroe C.P. CVH 92-278 at 1.

In this case, Defendants claim that "there is clearly a difference between a right to receive a royalty payment and an actual mineral interest in property." Plaintiffs agree that there is a difference, however, a royalty interest remains an interest in realty until the minerals are removed from the ground and materialized as personal property. See 68 O.Jur 3d, Mines and Minerals, Section 8.

This Court finds that the issue of whether a royalty interest may be extinguished by the previous version of the DMA has been previously decided by this Court and that decision is favorable to Plaintiffs' position and contrary to Defendants' argument.

Additionally, the Court further finds that a royalty interest is subject to abandonment under the current version of the Ohio Revised Code §5301.56.

More specifically, the current version of the Dormant Minerals Act, added a definition of "Mineral Interest". ORC §5301.56(A)(3) provides:

"Mineral Interest" means a fee interest in at least one mineral regardless of how the interest is created and the form of the interest, which may be absolute or fractional or divided or undivided.

This Court finds that the definition of a "Mineral Interest" includes an oil and gas royalty interest, as a royalty interest remains an interest in realty until the minerals are removed from the ground and materialized as personal property. See 68 O.Jur 3d, Mines and Minerals, Section 8.

Moreover, the *Buegel* Court noted that "[a]n oil and gas 'royalty' has been described as that fractional interest in the production of oil and gas that was created by the owner of land, either by reservation when the mineral lease was entered into, or by direct grant to a third person." See *Buegel v. Amos*, 1984 WL 7725 (7th District, 1984), citing 38 American Jurisprudence 2d 670, Gas and Oil, Section 189.

Because a royalty interest is a fractional interest of the oil and gas estate, this Court finds that such an interest falls within the definition of "Mineral Interest" outlined by ORC

§5301.56(A)(3).

In the present case, the Court finds that the undisputed facts of this case reflect that during 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) [quoted above] occurred to keep the Severed Mineral Interest from being deemed abandoned. Defendants are unable to show any evidence to the contrary. The Severed Mineral was then deemed abandoned as of March 13, 1992, allowing for the three year grace period. Accordingly, the Court finds that the Defendants no longer have any right, title or interest in and to the mineral estate under Plaintiffs' property.

Furthermore, notwithstanding the above analysis, this Court further finds that the amended version of the DMA (effective after June 30, 2006) also operates to extinguish Defendants' interest. As outlined above, the amended version of Ohio Revised Code §5301.56 added a notice requirement. The amended version provides that the holder of a Severed Mineral Interest may file a claim at some point after he receives a notice of abandonment to stop the statutory process. See ORC §5301.56(H).

More specifically, Ohio Revised Code §5301.56(H)(1) provides:

If a holder or a holder's successors or assigns claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned, the holder or the holder's successors or assignees, not later than sixty days after the date on which the notice was served or published, as applicable, shall file in the office of the County Recorder of each County where the land that is subject to the mineral interest is located one of the following:

(a) A claim to preserve the mineral interest in accordance with division (C)

of this section;

(b) An affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section.

The holder or the holder's successors or assignees shall notify the person who served or published the notice under division (E) of this section of the filing under this division.

Accordingly, this Court finds that if a severed interest holder files a notice under paragraph (H) above, the landowner's statutory remedy to abandon a Severed Mineral Interest has been exhausted, requiring the filing of a lawsuit. At that point, the severed interest holder must be required to show why the severed interest has not been abandoned. A preservation notice itself cannot be the basis for establishing that the mineral interest has not been abandoned. The holder must show the existence of one of the savings conditions under ORC §5301.56(B).

Again, the Court finds that Defendants in this case have not shown that existence of any of the savings conditions provided for in ORC §5301.56(B).

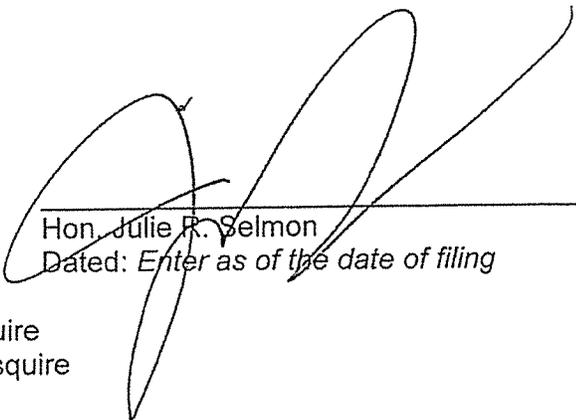
Accordingly, the Court finds that the Severed Mineral Interest in the within case is hereby deemed abandoned under the current version of the Dormant Minerals Act as well.

Based on all of the foregoing, the Court finds that no genuine issue of material fact exists in the within matter and Plaintiffs are entitled to judgment as a matter of law under both the prior and current version of the Dormant Minerals Act, Ohio Revised Code §5301.56.

Plaintiffs' Motion for Summary Judgment is granted. The Clerk shall note the same on both the Reservation Deed (Volume 123, Page 186, Deed Records of Monroe County, Ohio) and the Claim to Preserve (Monroe County, Ohio Official Records, Volume 217, Pages 263-265).

Costs assessed in full to the Defendants. Judgment granted the Clerk of Courts to collect on her costs.

IT IS SO ORDERED.



Hon. Julie R. Selmon
Dated: *Enter as of the date of filing*

Copies to: Craig E. Sweeney, Esquire
Stephen R. McCann, Esquire

C:\ General Entries \
marty - dennis entryonSummaryJudgmentMotions
April 10, 2013 (2:38PM)Jay

FILED
CLERK OF COURT
BELMONT CO., OHIO

IN THE COURT OF COMMON PLEAS, BELMONT COUNTY, OHIO

DAVID M. HENDERSHOT, et al.

Plaintiffs

v.

MARIE A. KORNER, et al.

Defendants

2013 OCT 28 PM 1 23
Case No. 12-CV-453
CYNTHIA K. Mc GEE
CLERK OF COURT
JUDGMENT ENTERED

This matter having come on before this Court upon Defendants' Motion For Summary Judgment having been filed with this Court on May 6, 2013 and Plaintiffs' Motion For Summary Judgment having been filed on May 17, 2013. Thereafter, the parties both filed Responses and Replies and this matter proceeded to Oral Hearing on October 10, 2013. After having considered the same, this Court makes the following ruling.

STATEMENT OF FACTS

The case at bar concerns the ownership of an undivided one-half interest in the petroleum, oil and natural gas rights under approximately 24 acres situated in York Township, Belmont County, Ohio. In 1932, Lawrence N. Walter and Eva Walter, husband and wife, and Herman H. Walter and Elizabeth Walter, husband and wife, sold the acreage in question to Edward O. Hendershot and Hazel Hendershot. The deed was recorded at Volume 269, Page 456 in the records of the Belmont County Recorder. Said deed contained the following reservation: "There is also expressly reserved to the

grantors herein the equal undivided one-half of all petroleum, oil and natural gas in and underlying said described premises.” {Walter Reservation} There were no further transfers of the mineral interest to date. In 1939, Edward O. Hendershot and Hazel Hendershot, husband and wife, conveyed the parcel to Herman and Iva Phillips at Volume 299, Page 453 and made reference to the Walter Reservation. In 1971, Iva M. Phillips conveyed the parcel to Herman W. Phillips and again subject to the Walter Reservation. Additional transfers occurred in 1975, 1977 and 1984 all making reference to the Walter Reservation. The Plaintiffs acquired their interest in the parcel in question by way of a survivorship warranty deed dated August 6, 1986 and recorded in Volume 635, Page 139. Once again, this deed contained the Walter Reservation.

The Plaintiffs served Defendant a Notice of Abandonment by Publication on April 25, 2012, and filed an Affidavit of Abandonment on May 25, 2012. The Defendants timely filed an Affidavit of Claim to Preserve a Mineral Interest on June 18, 2012. On June 28, 2012, Plaintiffs forwarded a Notice Letter to the Belmont County Recorder requesting the mineral interest to be deemed abandoned. The Plaintiffs had previously signed an oil and gas lease with Gulfport Energy Corporation on July 1, 2011. Gulfport has not paid a portion of the bonus money due to the question of ownership of the severed one-half mineral interest.

SUMMARY JUDGMENT STANDARD

Ohio Rule of Civil Procedure Rule 56 provides that summary judgment is warranted when “it appears from the evidence or stipulation, and only from the evidence

or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Ohio Rule of Civil Procedure 56(c).

Pursuant to Temple v. Wean United Inc., 50 Ohio St. 2d 317, 327, 364 N.E. 2d 267, 274 (1977) summary judgment is appropriate when the moving party demonstrates that (1) no genuine issues of material fact remain to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion that is adverse to the party against whom the motion is made.

PLAINTIFF'S POSITION

The Plaintiffs argue that the undivided one-half interest underlying the acreage in question is subject to the 1989 version of the Ohio Dormant Mineral Act. As a result of the application of the Act to the facts herein, the Plaintiffs claim that the severed mineral rights have vested in the Plaintiffs effective March 23, 1992.

DEFENDANT'S POSITION

The Defendants argue that the Walter Reservation set forth in the severance deed of 1932 and that is contained in a number of transfers in the chain of title including 1971, 1975, 1984 and 1986 represent "title transactions" which prevent the mineral rights from vesting in the name of the Plaintiffs. All of the deeds from 1971-1986 are within the 20

year look back period referenced in the 1989 Ohio Dormant Mineral Act; being 1989-1969.

The Defendants further argue in that the Plaintiffs chose to proceed under the 2006 version of the Ohio Dormant Mineral Act, they are foreclosed from relying on the 1989 version. Additionally, the Defendants can rely on their Affidavit of Claims to Preserve Mineral Interest to protect their rights to the undivided one-half interest in the petroleum, oil and natural gas at issue herein.

TITLE TRANSACTIONS

The 1989 version of the Ohio Dormant Mineral Act provides for a number of “Saving Events.” The Events protect those, holding a severed mineral interest, from a surface owner abandonment claim. Of the nine (9) “Saving Events” found in 5301.56 (B), only one is relevant in the case at bar. Revised Code 5301.56 (B) (3) (a) states:

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

There is a 20 year look back period from March 22, 1989 during which the “Saving Event” must have occurred plus a 3 year grace period to March 22, 1992. In the case at bar, the Defendants point to deeds filed in 1971, 1975, 1984 and 1986 as “Saving Events.” Each of these deeds in the chain of title contains a reference to the “Walter Reservation” which severed the undivided one-half mineral interests. None of the above referenced deeds contain language wherein the one-half mineral interest is the subject of

the title transaction. “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 v. Croskey, 2013-Ohio-4257, (7th Dist.) 2013. No such conveying nor retaining occurred herein. Wherefore, the Defendants cannot rely on the above referenced deeds as “Savings Events” in the case at bar. The Defendants do not claim that an additional “Saving Event” occurred under the 1989 version of the Ohio Dormant Mineral Act.

APPLICATION OF THE 2006
OHIO DORMANT MINERAL ACT

The Plaintiffs served the Defendants by means of a Notice of Abandonment by Publication in accordance with the requirements of the 2006 Ohio Dormant Mineral Act. The Defendants argue that the Plaintiffs have selected a remedy through the 2006 Act and are therefore foreclosed from relying on any benefits they may be entitled to under the 1989 Act. The Defendants refer the Court to Berry v. Javitch, Block & Rathbone, L.L.P., 127 Ohio St. 3d 480, 483-84 (2010), citing Frederickson v. Nye, 110 Ohio St. 459 (1924) where it was held: “Where the remedies afforded are inconsistent, it is the election of one that bars the other...It is the inconsistency of the demands that makes the election of one remedial right an estoppel against the assertion of the other.”

The Affidavit of Abandonment filed by the Plaintiffs under the 2006 version of the statute actually makes reference to both versions of the statute and states the following. “The surface owner is going through the abandonment process merely to place

on record these facts and avoid a quiet title.”

The 1989 version of the Ohio Dormant Mineral Act vests the surface owner with ownership in severed mineral interests without the need for any notice, recordation of any document, assertion of any claim or 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 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; ...

{Division (B) regarding reduction of penalties and punishments is not applicable herein}.

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 Plaintiffs did not waive their 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.

CONCLUSION

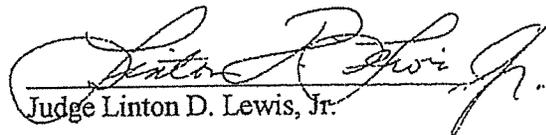
After having considered Plaintiffs' and Defendants' Motions For Summary Judgment and after construing the evidence most strongly in favor of the nonmoving party and having determined that there is no genuine issue as to any material fact and that reasonable minds can come to but one conclusion and further that there is no just reason for delay, this Court makes the following order.

This Court finds for the Plaintiffs, against the Defendants, grants Plaintiffs' Motion For Summary Judgment and denies Defendants' Motion For Summary Judgment. Costs assessed to the Defendants. This is a final appealable order.

IT IS SO ORDERED.

ENDED

CLERK SERVED COPIES ON
ALL THE PARTIES OR
THEIR ATTORNEYS *PLM/MS*


Judge Linton D. Lewis, Jr.

✓
WITHIN THREE (3) DAYS OF ENTERING THIS JUDGMENT UPON THE JOURNAL, THE CLERK SHALL SERVE NOTICE OF THIS JUDGMENT AND ITS DATE OF ENTRY UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR. SERVICE SHALL BE MADE IN A MANNER PRESCRIBED IN CIVIL RULE 5 (B) AND SHALL BE NOTED IN THE APPEARANCE DOCKET. CIVIL RULE 58.

IN THE COMMON PLEAS COURT OF JEFFERSON COUNTY, OHIO

TODD H. CARNEY

Plaintiff,

vs.

RONNIE LEE SHOCKLEY, et al.

Defendants.

CASE NO.: 12CV00514

JUDGE: Joseph J. Bruzzese, Jr.

FILED 2 10 2014

JUDGMENT ENTRY

This matter is before the Court on competing motions for summary judgment filed by Plaintiff Todd H. Carney ("Carney") and Intervenor/Defendant Ohio Attorney General ("Attorney General"), on one hand, and Defendants Ronnie Lee Shockley and Bonnie Sue Shockley (the "Shockleys"), on the other hand. Both sets of motions address the sole remaining claim in this action, that being the Shockleys' counterclaim for a declaratory judgment that former R.C. §5301.56 (the Ohio Dormant Mineral Act of 1989) is unconstitutional, which Carney and the Attorney General oppose. Having reviewed and considered the complete briefing of the parties' motions and the oral hearing before the Court on February 3, 2014, the Court hereby finds that the Ohio Dormant Mineral Act of 1989 is constitutional and that Plaintiff's and Intervenor/Defendant's Motions should be GRANTED and the Defendants' Motion should be DENIED.

This case concerns the disputed ownership of oil and gas underlying 45 acres of property in Jefferson County known as Parcel No. 01-00118-001 (the "Property"). Plaintiff Carney owns the surface of the Property. Defendants Shockleys claim to own a portion of the oil and gas rights as heirs to parties who reserved the rights in 1972. On November 4, 2013, the Court decided Plaintiff Carney and Defendants Shockleys' Cross-Motions for Summary Judgment (the

“Cross-Motions”) filed in August 2013, and held that the reserved oil and gas was abandoned by operation of the 1989 Dormant Mineral Act, R.C. 5301.56. In response to the Court’s ruling, the Shockleys filed an additional Motion for Summary Judgment, consistent with Count Three of their Counterclaim, contesting the constitutionality of the Dormant Mineral Act of 1989. Defendants Shockleys’ Motion, along with Plaintiff Carney and Intervenor/Defendant Attorney General’s contrary Motions, are now before the Court.

According to the Shockleys, the Dormant Mineral Act of 1989 is unconstitutional based on due process grounds. At the outset, the Court notes that the United States Supreme Court has determined that a dormant mineral act similar to the 1989 Act did not violate due process. *See Texaco v. Short* (1982), 54 U.S. 516. In *Texaco*, the Supreme Court considered Indiana’s dormant mineral act and held that the owner of a severed mineral interest was presumed to know the law of the state, and, therefore, the law did not violate due process despite the fact that it did not require advance notice from the surface owner prior to extinguishment of his or her rights. In an apparent effort to distinguish their case from *Texaco*, the Shockleys argue that the 1989 Act violated due process only because the 1989 Act was ambiguous as to whether the twenty year look-back period set forth within the law applied on a “rolling” basis (meaning, any twenty-year period of dormancy which passed during the effective period of the 1989 Act triggered abandonment) or a “static” basis (meaning, the only period which a court may consider under the 1989 Act is the twenty-year period immediately preceding March 22, 1989 or March 22, 1992). The Shockleys argue that this alleged ambiguity rises to the level of unconstitutional vagueness.

In considering whether a law is unconstitutionally vague, the “critical question in all cases is whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law.” *Norwood v.*

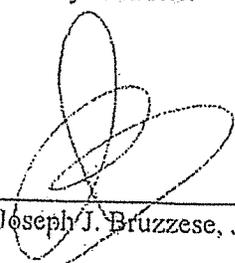
Horney, 110 Ohio St.3d 353, 380, 2006 Ohio 3799. This Court has determined that the 1989 Act applies on a rolling basis, not a static basis. The 1989 Act provided mineral interest holders with the opportunity to preserve their interests indefinitely by filing successive preservation claims. See R.C. 5301.56(D)(1). The language permitting successive filings would have had no meaning were the 1989 Act to have operated only on a single-static look-back period. The Court finds that the rolling look-back period is not only the correct reading of the 1989 Act, it is the only reasonable interpretation of the Act. A reasonable individual of ordinary intelligence would have understood that the 1989 Act operated on a rolling basis.

Based upon the foregoing, the Court finds that the Dormant Mineral Act of 1989 is not unconstitutionally vague and did not violate due process.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff Todd H. Carney and Intervenor/Defendant Ohio Attorney General's Motions for Summary Judgment are GRANTED.
2. Defendants Ronnie Lee Shockley and Bonnie Sue Shockley's Motion for Summary Judgment is DENIED.
3. Count Three of Defendants Shockleys' Counterclaim, being the only claim which remains pending in this case, is hereby DISMISSED with prejudice.
4. Costs of this action are assessed to Defendants Ronnie Lee Shockley and Bonnie Sue Shockley and Defendants Mary Katherine Kerns and Beverly Lamotte.
5. This is a final appealable order.

SO ORDERED.



Judge Joseph J. Bruzzese, Jr.

cc: All counsel

JUN 19 2014

IN THE COURT OF COMMON PLEAS
- GENERAL DIVISION -
TRUMBULL COUNTY, OHIO

CASE NUMBER: 2013 CV 2358

EDWARD THOMPSON, et al.

PLAINTIFFS,

vs.

JUDGE W. WYATT McKAY

NATHAN J. CUSTER, et al.,

DEFENDANTS.

JUDGMENT ENTRY

This matter comes before the Court on all Motions for Summary Judgment: 1) the Plaintiffs' Motion for Summary Judgment; 2) the Custer Defendants' Motion for Summary Judgment; 3) Defendant BP America Production Company's Cross Motion for Summary Judgment; and 4) Defendant Ohio Attorney General's Motion for Summary Judgment. The Court has reviewed all of the Motions, Responses, Replies, and all of the evidence.

Nathan and Noelle Custer are the owners of nearly 100 acres of real estate in Vernon Township on State Route 7, Trumbull County parcel IDs#08-47770, 08-477800, inclusive. They purchased this property in 2011. In 1950, the owners of the same property executed a deed transferring the property, but reserved 1/2 of the oil and gas rights. Over the next sixty plus years, nothing was done to protect those rights. In 2012, the Plaintiffs herein attempted to lease the reserved oil and gas rights to BP. In 2013, the Plaintiffs recorded a claim to preserve the reserved oil and gas rights relating all the way back to the 1950 deed.

The instant action seeks a declaration of the true ownership of these mineral rights. The Plaintiff also seeks a declaration that R.C. §5301.56, eff. 3/22/89, is unconstitutional. That statute was later amended in 2006, which creates further issues that are discussed herein. The Defendants and BP both assert that the Custers are entitled to the full mineral rights by virtue of

their current ownership of the property. The Attorney General also asserts that the referenced statute is constitutional. Having reviewed this matter, the Court agrees with the Defendants.

The recent decision of the Seventh District Court of Appeals of *Swartz v. Householder* Slip Copy, 7th Dist. Nos. 13 JE 24, 13 JE 25, 2014 WL 2548092 (June 2, 2014) is directly on point with this case. The Seventh District summarized the law as follows:

DORMANT MINERAL ACTS

{¶ 12} The 1989 Dormant Mineral Act became effective on March 22, 1989 in R.C. 5301.56 as an addition to the Ohio Marketable Title Act, which is contained within R.C. 5301.47 through R.C. 5301.56. The 1989 DMA provides that a mineral interest held by one other than the surface owner "shall be deemed abandoned and vested in the owner of the surface" if no savings event occurred within the preceding twenty years. R.C. 5301.56(B)(1)(c) (unless the mineral interest is (a) in coal or (b) held by the government). The six savings events are as follows: (i) the mineral interest was the subject of a title transaction that has been filed or recorded in the recorder's office, (ii) there was actual production or withdrawal by the holder, (iii) the holder used the mineral interest for underground gas storage; (iv) a mining permit has been issued to the holder; (v) a claim to preserve the mineral interest was filed; or (vi) a separately listed tax parcel number was created. R.C. 5301.56(B)(1)(c)(i)-(vi).

{¶ 13} The statute provided the following grace period: "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." R.C. 5301.56(B)(2). There were no obligations placed upon the surface owner prior to the statutory abandonment and vesting.

{¶ 14} On June 30, 2006, amendments to the DMA became effective. The three year grace period in (B)(2) was eliminated. And now, the language in division (B), "shall be deemed abandoned and vested in the owner of the surface," operates only if none of the savings events apply and "if the requirements established in division (E) of this section are satisfied." R.C. 5301.56(B).

{¶ 15} Now, "Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface of the lands subject to the interest shall do both of the following:" (1) provide a specific notice; and (2) file a timely affidavit of abandonment with the county recorder. R.C. 5301.56(E). See R.C. 5301.56(E)(1)

(notice by certified mail return receipt requested to each holder or each holder's successors or assignees, at the last known address, but if service of notice cannot be completed to any holder, then notice by publication), (E)(2) (affidavit of abandonment must be filed at least 30 but not later than 60 days after the date on which the notice is served or published), (F), (G) (specifying what the notice and affidavit must contain).

¶ 16. The 2006 DMA also adds that a mineral holder who claims an interest has not been abandoned may file with the recorder: (a) a claim to preserve or (b) an affidavit containing a savings event within 60 days after the notice of abandonment is served or published. R.C. 5301.56(H)(1). If no such timely document is recorded, then the surface owner "who is seeking to have the interest deemed abandoned and vested in the owner" shall file with the recorder a notice of the failure to file. R.C. 5301.56(H)(2) (was called memorialization; changed to "notice of failure to file" on January 31, 2014). "Immediately after" such recording, "the mineral interest shall vest in the owner of the surface * * *." *Id.*

Pursuant to the 1989 DMA, a mineral interest held by a person other than the surface owner of the land subject to the interest "shall be deemed abandoned and vested in the owner of the surface" if no savings event occurred within the preceding twenty years. Former R.C. 5301.56(B)(1)(c) (unless the mineral interest is (a) in coal or (b) held by the government). See also Former R.C. 5301.56(B)(2) (a mineral interest shall not be "deemed abandoned" due to lack of savings events until three years from the March 22, 1989 effective date of the act). *Id.* at ¶25. As none of the savings events happened under the 1989 version of the statute within the relevant time, and because the Plaintiffs 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.

Pursuant to R.C. 1.58(A), the reenactment, amendment, or repeal of a statute does not affect the prior operation of the statute or any prior action taken thereunder. R.C. 1.58(A)(1). In addition, the reenactment, amendment, or repeal of a statute does not affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder. R.C. 1.58(A)(2). Plus, the reenactment, amendment, or repeal of a statute does not

affect any proceeding or remedy in respect of any such privilege, obligation, or liability and the proceeding or remedy may be instituted, continued, or enforced as if the statute had not been repealed or amended. R.C. 1.58(A)(4). See *Swartz v. Householder*, supra, at ¶30. The Court finds that the 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.

The Court finds that reasonable minds can only come to one conclusion: the Custers are the rightful owners of all of the mineral rights to the subject parcels of land and any lease they may execute with BP is not affected by any of the Plaintiffs' claims. Having weighed matters in a light most favorable to the Plaintiffs, the Court finds that Summary Judgment is appropriate in favor of the Defendants, Nathan and Noelle Custer and Defendant BP America Production Company.

The Court has also reviewed all of the arguments made by the Plaintiffs concerning the constitutionality of the 1989 DMA. The Plaintiffs' arguments that said statute was unconstitutional are hereby rejected in their entirety. As stated before, the Plaintiffs had three years to create a savings event, including filing a claim to preserve their interest, and they failed to do so. The 2006 version of the statute does not revive a claim that was already abandoned and vested in the 1992 surface owners of the property (predecessors in title to the Defendants).

For all reasons stated by the Attorney General, the Court finds that reasonable minds can only conclude that Summary Judgment is appropriate in favor of the Ohio Attorney General. Summary Judgment is therefore also granted in the Ohio Attorney General's favor.

Plaintiffs' Motion for Summary Judgment is DENIED. Summary Judgment in favor of all of the Defendants is hereby GRANTED. Costs to the Plaintiffs. This is a final appealable order and there is no just cause for delay.

SO ORDERED.

W. Wyatt McKay

JUDGE W. WYATT MCKAY
6/16/14

TO THE CLERK OF COURTS:
YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT
ON ALL COUNSEL OF RECORD OR UPON THE PARTIES
WHO ARE UNREPRESENTED FORTHWITH
BY ORDINARY MAIL.

W. Wyatt McKay

JUDGE W WYATT MCKAY

FILED
COURT OF COMMON PLEAS

JUN 16 2014

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

6-16-14
Copies to:
Atty G. Watts
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Atty P. Kusenhop
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