

**IN THE SUPREME COURT OF OHIO**

**EDWARD J. THOMPSON, et al.,**

Plaintiffs-Appellants,

v.

**NATHAN J. CUSTER, et al.,**

Defendants-Appellees,

Ohio Supreme Court Case No. 2015-0195

On Appeal from the Trumbull County Court of Appeals, Eleventh District Court of Appeals

Court of Appeals Case No. 2014-T-0052

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**MEMORANDUM IN RESPONSE OF APPELLEES, NATHAN J. AND NOELLE M. CUSTER**

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**STATEMENT AS TO WHETHER THIS CASE IS OF PUBLIC OR GREAT  
GENERAL INTEREST**

Appellants' failure to explain why this case should be accepted for review speaks volumes. The Court should rely upon that silence and the thorough and thoughtful analyses of the appellate courts that have addressed the issues presented herein to deny review of this appeal. In 1989, Ohio adopted the Ohio Dormant Mineral Act (R.C. 5301.56 (in effect prior to June 30, 2006)) ("1989 DMA") as a statute of abandonment focusing on unused and neglected severed mineral interests. To retain an otherwise dormant mineral interest, one of the following must occur within the preceding twenty years:

1. The mineral interest must have been subject to a title transaction that has been filed or recorded with the county recorder's office in the county in which the property is located;
2. The holder of the mineral interest obtained actual withdrawal or production of minerals from the mineral interest, i.e. from lands specifically associated with the mineral interest;
3. The mineral interest has been used in underground storage;
4. A drilling permit has been issued to the holder;
5. An appropriate claim to preserve has been filed with the county recorder's office; or
6. A separate tax identification number has been issued to the severed mineral interest.

R.C. 5301.56(B)(1)(c)(i)-(vi) (in effect prior to June 30, 2006). Appellants do not dispute the mineral interest at issue was not subject to a preserving event under the 1989 DMA. Appellants dispute only the application of the 1989 DMA to those facts.

To date, three Ohio appellate districts have thoroughly examined the issues raised by Appellants and have all come to the same conclusions: the 1989 DMA was a statute of automatic abandonment, relying upon the inaction of mineral holders like the Appellants, and that once a

severed mineral interest was abandoned and vested with the affected surface estate, a change in the statute, including those that occurred in 2006, could not retroactively divest surface owners of their vested property rights. *Walker v. Shondrick-Nau*, 7th Dist. Noble No. 13 NO 402, 2014-Ohio-1499 (Apr. 3, 2014); *Swartz v. Householder*, 7th Dist. Nos. 13 JE 24 and 13 JE 25, 2014-Ohio-2359 (June 2, 2014); *Dahlgren v. Brown Farms Properties L.L.C.*, 7th Dist. Case No. 13 CA 896, 2014-Ohio-4001 (Sep. 9, 2014); *Wendt v. Dickerson*, 5th Dist. No. 2014 AP 01 0003, 2014-Ohio-4615 (Oct. 16, 2014); and *Thompson v. Custer*, 11<sup>th</sup> Dist. Trumbull No. 2013 CV 2358, 2014-Ohio-5711 (Dec. 19, 2014). As a result, there is a clear consensus in Ohio as to the operative effect of the 1989 DMA and the 2006 changes made thereto. And based upon the plain language of the 1989 DMA, specifically the use of the phrase “deemed abandoned and vested,” the only reasonable interpretation is that advanced by those appellate courts and Appellants have not advanced any ground sufficient to cause this Court to reject those courts’ analyses and holdings. As Appellants have aptly stated, there is no reason to reinvent the wheel by ignoring the thorough analyses of the Fifth, Seventh, and Eleventh appellate districts.

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

This case involves a reservation of oil and gas rights (“Reservation”). The Reservation was created in 1950. From 1950 to 2012, Appellants took no action relating to the Reservation. Thus, Appellants allowed the Reservation to remain dormant for over 60 years. At no time between 1950 and the present were Appellants conveyed, of record, any right in the Reservation; instead, they rely upon their status as heirs to the original reserving parties. During that sixty-two-year period (1950-2012), Appellants and/or their predecessors failed to take a single action to use the Reservation. That inaction resulted in the Reservation’s abandonment, as a matter of law. However, when Appellants were unable to lease the Reservation in 2012, they brought suit

against Appellants in hopes of avoiding their over six decades of inaction. That attempt failed throughout every level of this case and Appellants now ask this Court to excuse their decades of inaction.

## **ARGUMENTS AGAINST PROPOSITIONS OF LAW**

### **I. PROPOSITION OF LAW NO. I: The 2006 version of the Dormant Minerals Act (“DMA”) is the only version of the Act to be applied after its 6/30/06 effective date.**

The Court should decline to accept Appellants’ Proposition of Law No. I because Appellants have failed to provide any analysis or argument as to why their position should be accepted. *See* S.Ct.Prac.R. 7.02(C)(4). The quoted portion of the trial court decision to which Appellants’ cite offers no legal, substantive support for Proposition of Law No. I, and as a result, Appellants have failed to seek this Court’s jurisdiction on that proposition.

Regardless, Appellants’ Proposition of Law Number I erroneously presumes that the 1989 DMA was not an automatic abandonment and reversion statute. It is precisely because the 1989 DMA is self-executing that the 2006 amendments to the statute can have no effect on Appellees’ property rights. *Swartz*, 2014-Ohio-2359, ¶ 34; *Wendt*, 2014-Ohio-4615. Despite this fact, Appellants ask that the 2006 amendments be applied retroactively against any surface owner who acquired rights under the 1989 DMA’s prior operation. Appellants’ desired result violates Ohio law and must be rejected.

When determining whether a repeal or amendment of a statute may be applied retroactively, Ohio courts follow a two-prong test. *State of Ohio v. Consilio*, 114 Ohio St.3d 295, 871 N.E.2d 1167 (2007). The first prong, created in accordance with R.C. 1.48, asks whether the statute was “expressly made” retroactive. R.C. 1.48; *Hyle v. Porter*, 117 Ohio St.3d 165, 882 N.E.2d 899 (2008). Only if the answer is “yes” can one then proceed to the second prong, which

focuses upon whether the statute affects substantive rights or is remedial in nature. *Consilio*, 114 Ohio St.3d 295. The second prong asks whether the Legislature was “empowered to do so.” *Id.*

**A. The 2006 amendments did not expressly provide for retroactive application.**

The default rule is that statutes are applied prospectively. *Id.* If the retroactivity of a statute is not expressly stated in plain terms, the presumption in favor of prospective application controls and ends the analysis. *Id.*, paragraph one of the syllabus (“A statute must clearly proclaim its own retroactivity to overcome the presumption of prospective application. Retroactivity is not to be inferred.”); R.C. 1.48. A court can never infer that a statute is to be applied retroactively. *Id.*; *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 231, 897 N.E.2d 1118 (2008) (“The General Assembly’s failure to clearly enunciate retroactivity ends the analysis, and the relevant statute may be applied only prospectively.”)

The 2006 amendments to the 1989 DMA did not include any statement that they were to be applied retroactively. *Swartz*, 2014-Ohio-2359, at ¶ 34 (“[T]he 2006 DMA contains no language eliminating property rights that were previously expressly said to be vested, i.e. it contains no statement that its new requirements for surface owners and the new rights for mineral holders apply retrospectively.”); *Walker*, 2014-Ohio-1499, at ¶ 51. Therefore, the presumption in favor of prospective application controls and ends the analysis. *Hyle*, 117 Ohio St.3d 165; *Consilio*, 114 Ohio St.3d 295; *Walker*, 2014-Ohio-1499 (“[T]he 2006 version of R.C. 5301.56 does not specifically provide for retroactive application. Thus, the 1989 version, which was in effect at the relevant time to render the mineral interest vested in the surface owner, controls here.”); *Swartz*, 2014-Ohio-2359. Based on the plain language of the two versions of the statute and the controlling precedent of this Court, the Court should deny review of this matter.

Another important issue to examine is the difference between a statute that reviews past conduct and the analysis of whether the legislature intended to retroactively subject accrued

rights to new burdens. The Fifth District Court of Appeals, in *Heifner v. Bradford*, distinguished a statute which examines past conduct, but applies prospectively (which is appropriate), with a statute which examines past conduct and operates based solely upon that inaction without a prospective ability to preserve one's rights (which is inappropriate without a grace period). *Heifner v. Bradford*, 5th Dist. Case No. CA-81-10, 1982 WL 2902, \*8 (Jan. 29, 1982). In *Heifner*, the appellate court was examining changes to the Marketable Title Act which brought mineral interests under its purview. *Id.* Those changes did not become self-executing until the end of a grace period. *Id.* As such, it operated prospectively. Thus, the 2006 amendments, while examining actions which predate their enactment date, were not expressly intended to apply to rights vested under the 1989 DMA.

**B. Even if the General Assembly intended the 2006 version of the 1989 DMA to apply retroactively, it cannot be applied against Appellees because they obtained a substantive vested property right to the Real Estate's oil and gas.**

The legal effect of conduct (or the lack thereof) should ordinarily be assessed under the law that existed when the conduct took place. Because the 2006 version of the 1989 DMA does not expressly indicate that it was intended to apply retroactively, there is no need to analyze the second prong of the retroactivity test. *Hyle*, 117 Ohio St.3d 165; *Consilio*, 114 Ohio St.3d 295. However, even if the Court were to analyze the second prong, it would find that Appellants' position is not supported.

Application of the 2006 law's requirements on surface owners who previously obtained vested title to severed minerals under the 1989 DMA's automatic operation would violate the second prong because to do so would undoubtedly impair substantive rights. The changes in the law, if applied retroactively, do not merely provide a new procedure to recognize abandoned interests, but would change and divest those interests already "abandoned and vested" under the

express terms of the 1989 DMA and would recast them as inchoate claims with new burdens and obligations.

A statute is substantive, and thereby runs afoul of Ohio's constitutional ban on retroactive laws, if it "impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation[s], or liabilities as to a past transaction or creates a new right." *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 224, 883 N.E.2d 377 (2008). The plain language of the 1989 DMA created vested property rights in surface owners. *Walker*, 2014-Ohio-1499, ¶40; *Swartz*, 2014-Ohio-2359, at ¶29. Based upon this precedent, the 2006 changes cannot be applied against Appellees because they obtained ownership of the oil and gas rights at issue by automatic operation of the 1989 DMA and applying those changes against Appellees would defeat and divest their vested ownership of those rights. *Swartz*, 2014-Ohio-2359; *Walker*, 2014-Ohio-1499. More so, if the General Assembly had intended the 2006 statute to affect property rights previously vested under the 1989 DMA, it would have been required to provide a reasonable grace period before Appellees lost their property rights (just as the original 1989 DMA had a three-year grace period from March 22, 1989 until March 22, 1992, for any "holder" to preserve their interest). See *Gregory v. Flowers*, 32 Ohio St.2d 48, 290 N.E.2d 181 (1972) citing *Smith v. New York Central Rd. Co.*, 122 Ohio St. 45, 170 N.E. 637 (1930).

The plain language of the 1989 DMA provides for automatic abandonment of dormant mineral interests and their reversion to the surface estate. The 2006 amendments cannot affect those vested, substantive rights because those amendments were not expressly made retroactive and cannot affect substantive property rights. As a result, Proposition of Law No. I should undoubtedly be answered in the negative, and therefore, this Court should decline to entertain Appellants' arguments.

II. **PROPOSITION OF LAW NO. II: The 1989 version of the DMA impliedly required some form of implementation before finally settling the subsurface owners' and surface owners' competing mineral interests, either by recorded abandonment claim permitting the subsurface owner to challenge its validity or by appropriate court proceedings to confirm the abandonment.**

Appellants' sole argument in support of Proposition of Law No. II is that the decisions of two trial courts, which are in direct conflict with the binding precedent of the Seventh District, should control. One of the decisions, *Dahlgren*, has been overruled by the Seventh District Court of Appeals and the other's holding has been repudiated by the Seventh District Court of Appeals on numerous occasions. *Dahlgren*, 2014-Ohio-4001. As a result, Appellants have presented no relevant and reasonable argument to support Proposition of Law No. II and this Court should decline to review the same. Regardless, the holdings in those cases, including the portion quoted by Appellees, have no basis in law and provide another reason to deny review of this case.

A. **The 1989 DMA was self-executing and therefore, operated automatically to cause severed oil, gas, and other mineral interests to become abandoned and vested with the related surface estates.**

Under the 1989 DMA, a severed mineral interest was deemed abandoned and reunited with the surface estate unless it was preserved by one of the 1989 DMA's enumerated "savings events." *Dahlgren*, 2014-Ohio-4001; *Wendt*, 2014-Ohio-4615; and *Thompson*, 2014-Ohio-5711; R.C. 5301.56 (B)(1)(c)(i)-(vi). The plain language of the 1989 DMA provides that a severed mineral interest which is not subject to a preserving event during a relevant twenty-year period "shall be deemed **abandoned and vested** in the owner of the surface." R.C. 5301.56(B)(1) (emphasis added). The 1989 DMA operates automatically, meaning the surface owner need not take any action to effectuate the abandonment and title vesting. *Walker*, 2014-Ohio-1499, ¶ 41 ("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.

Further, once the mineral interest vested in the surface owner, it ‘completely and definitely’ belonged to the surface owner.”).

Once abandoned, the mineral interest becomes one with the surface estate. *Id.* This is the only reasonable interpretation of the plain language of the 1989 DMA. As a result, the Court is duty bound to apply the text, as written. *Sugarcreek Twp. v. Centerville*, 133 Ohio St.3d 467, 979 N.E.2d 261 (2012) (finding that a court must apply statutory language consistent with the plain language unless the statutory language is ambiguous); *In re T.R.*, 120 Ohio St.3d 136, 138, 896 N.E.2d 1003 (2008) (“When we engage in statutory interpretation, we must first examine the plain language of the statute.”) Any interpretation of the 1989 DMA which would impose an obligation on the surface owner ignores the plain text of the statute and cannot be sustained.

Even if one were to entertain the argument that the 1989 DMA’s abandonment mechanism is ambiguous, which it is not, the legislative history of the 1989 DMA affirmatively supports the creation of an automatic abandonment mechanism. (*See* Fiscal Note Sub. S.B. 223, pp. 48-50). The 1989 DMA was introduced to work parallel to the Marketable Title Act by “terminating unused mineral interests not preserved by operations, transfers or a filing of notice of an intent to preserve interest.” (Fiscal Note Sub. S.B. 223, pp. 48-50). In addition, the drafters of the 1989 DMA reviewed the Uniform Dormant Mineral Interests Act, as drafted in 1986 by the National Conference of Commissioners of Uniform State Laws. (Fiscal Note Sub. S.B. 223, pp. 48-50). The Uniform Dormant Mineral Interests Act would have expressly required action by the surface owner, but noted that some jurisdictions did not require any judicial action. (Fiscal Note Sub. S.B. 223, p. 60). The General Assembly did not adopt that portion of the uniform act. Instead of giving the surface owner the right to “maintain an action” when the statutory requirements were met, the General Assembly expressly stated that the mineral interest “shall be

deemed abandoned and vested in the owner of the surface.” As a result, the 1989 DMA was enacted as an automatic abandonment statute and in no way imposed any implementation action by surface owners.

**B. The 1989 DMA created vested property rights.**

The plain and express language of the 1989 DMA provides that unused severed mineral interests were legally deemed abandoned, automatically, without the need for the surface owners to take any action. The 1989 DMA did not create inchoate rights, as the *Dahlgren* trial court held. *Walker*, 2014-Ohio-1499, ¶ 12 (“Thus, the *Dahlgren* court’s characterization of the mineral rights under the 1989 version is contrary to the statute itself, which states that the mineral rights are vested.”). An inchoate right is “[a] right that has **not** fully developed, matured, or **vested**.” Garner, *Black’s Law Dictionary* (9th Ed. 2009) (emphasis added). The 1989 DMA statutory language provides that the surface owner had a “vested” interest if the statutory requirements (mineral rights holder’s inactivity) were met. The term “inchoate” and “vested” are opposite terms. See e.g., *Bauman v. Hogue*, 160 Ohio St. 296, 301, 116 N.E.2d 439 (1953); *Swartz*, 2014-Ohio-2359, at ¶ 38 (“We conclude that it is contrary to the plain language of the statute to hold that the surface owner’s right to the abandoned mineral interests are inchoate even though the statute expressly stated that the right vested upon the lack of a savings event within the pertinent time period.”)

One of the most common examples of an inchoate right is a spouse’s right to dower. The right to dower is inchoate because it is expressly contingent upon one spouse surviving the other. *Goodman v. Gerstle*, 158 Ohio St. 353, 358, 109 N.E.2d 489 (1952) (“During the lifetime of both spouses, dower is a contingent inchoate right and becomes vested in the surviving spouse only upon the death of the other spouse.”) Thus, once a spouse passes away and the dower right vests, a change in Ohio’s dower statutes cannot divest that surviving spouse’s rights. See *id.* Severed

mineral interests which were not preserved under the 1989 DMA vested based upon the severed mineral interests' dormancy for twenty-plus years, just as the right to dower would become vested on the date of death of one's spouse. At that exact moment in time the surface owners for the affected real property became the owner of those rights, without any further action needed or without the fulfillment of any additional condition.

**C. The 1989 DMA operated in the same manner as the Ohio Marketable Title Act and promotes title certainty.**

The 1989 DMA is not unique in its use of automatic abandonment and extinguishment of real property interests. Ohio's Marketable Title Act operates in the exact same manner. Under the Marketable Title Act, a real property interest which is not preserved by an enumerated preservation event during a specified time period is deemed ineffective. R.C. 5301.47, *et seq.* The Marketable Title Act does not require the party seeking extinguishment to take any action. *Evans v. Cormican*, 5th Dist. Licking No. 09 CA 76, 2010-Ohio-541, (Jan. 5, 2010) (finding that the Marketable Title Act operates, **automatically**, to remove clouds from title that pre-date the root of title); *see Heifner v. Bradford*, 4 Ohio St.3d 49, 446 N.E.2d 440 (1983); *see Collins v. Moran*, 7th Dist. Mahoning No. 02 CA 218, 2004-Ohio-1381 (March 17, 2004). Importantly, the Marketable Title Act does not require advance notice to the interest holder before extinguishment occurs. *See id.*

Just like the 1989 DMA, the Marketable Title Act provides the interest owner with the ability and opportunity to preserve his or her interest by simply filing a notice to preserve. *See* R.C. 5301.51. However, if no such preservation notice was filed during the applicable period and the interest was extinguished automatically by the Marketable Title Act, then the Marketable Title Act provides that an extinguished interest cannot be revived by the filing of a notice to preserve after the fact. R.C. 5301.49(D). Thus, the Marketable Title Act explicitly provides that

once an interest is extinguished by failure of the owner to timely preserve his or her interest, the former owner forever and irrevocably loses his or her interest.

The 1989 DMA fundamentally operates in the same manner by requiring the severed mineral holders to take simple steps to preserve their mineral interests, except it looks at a twenty-year period, rather than 40 years from the “root of title”. Similarly to the Marketable Title Act generally, R.C. 5301.56(B)(1) provides that any severed mineral interest which is not subjected to one of the enumerated “savings events” “shall be **deemed abandoned** and **vested** in the owner of the surface.” (Emphasis added). Any argument to the contrary ignores the plain language of the 1989 DMA.

The automatic vesting under the 1989 DMA is also similar to Ohio’s adverse possession statute. An adverse possessor is not required to bring a quiet title lawsuit before title is vested in him or her; instead, the adverse possessor need only meet all elements of adverse possession for a continuous period of 21 years. *State ex rel. A.A.A. Investments v. City of Columbus*, 17 Ohio St.3d 151, 152, 478 N.E.2d 773 (1985) (“[O]nce the statutory period enunciated in R.C. 2305.04 has expired, the former titleholder has lost his claim of ownership and the adverse possessor is thereafter maintaining its possession, not taking property.”); *Heider v. Unknown Heirs, Devisees & Personal Representatives of Frances Brenot*, 6th Dist. Wood Nos. WD-05-012, WD-05-020, 2006-Ohio-122 (Jan. 13, 2006). R.C. 2305.04 places the burden of action on the title holder of the real property, as he or she must act to eject the adverse possessor before the twenty-year period has run. *Id.* Similarly, the 1989 DMA required the severed mineral holder to take one of several, simple actions every 20 years in order to preserve his or her interest. Once the statutory period under the 1989 DMA expired without a savings event, the former mineral interest holder lost his or her claim of ownership and the surface owner is thereafter maintaining its possession.

Additionally, this Court has expressly held that a statute which vests real property rights of one party, based upon that party's inaction, to another party is not a taking. *State ex rel. A.A.A. Investments*, 17 Ohio St.3d at 152. When construing Ohio's adverse possession statute, R.C. 2305.04, this Court held that the vesting of title to real property in favor of the adverse possessor is not a taking because such vesting does not occur based upon state action, but instead, is based upon the title holder's inaction. *Id.* In so holding, this Court relied on *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781 (1982), which found that Indiana's dormant mineral statute, which is substantially similar to the 1989 DMA, did not constitute a taking. *Id.*

**D. The 1989 DMA simplifies and facilitates oil and gas transactions.**

The 1989 DMA's automatic abandonment mechanism promotes the oft-stated policy goal of promoting efficient use of oil, gas, and other mineral rights and simplifying the chain of title. The 1989 DMA is concerned with the absence of events contained within the public record, such as the presence of recorded title documents identifying the owners of the interest or the presence of producing oil and gas wells on property. As a result, a landman who is attempting to ascertain the rightful owner of oil and gas rights need only review the public records associated with a severed mineral interest rather than attempt to locate the potentially numerous fractional and unnamed heirs of an interest reserved decades before. If none of the enumerated "savings events" have occurred within any of the relevant twenty-year periods, then the landman is safe to lease those rights from the surface owner of the once-affected real property. Such a procedure makes land transactions more efficient, a conclusion which was reached by the United States Supreme Court in *Texaco*. 454 U.S. 516, fn. 34 ("Moreover, if a mineral interest has been inactive for a sufficient period of time, a developer may well decide that notice is entirely unnecessary. Title opinions and title insurance, based normally on a thorough search of county records, may be sufficient to assure a potential developer that an ancient and dormant mineral estate, like other

possible clouds on title, is without legal significance.”) The 1989 DMA promoted this policy by operating in a manner similar to the Marketable Title Act: automatic removal and/or abandonment of dormant real property interests.

**E. The 1989 DMA did not require a surface owner to take any action.**

Any interpretation of the 1989 DMA which finds that the surface owner was required to take action to finalize abandonment and vesting ignores the statute’s plain and unambiguous language. The plain and unambiguous language of the 1989 DMA imposed no obligation on the surface owner; instead, it required severed mineral owners to take minimal steps to preserve their interests. And the Court is required to hold in that manner because the Court is duty bound to apply the text, as written. *Sugarcreek Twp.*, 133 Ohio St.3d 467 (finding that a court must apply statutory language consistent with the plain language unless the statutory language is ambiguous); *In re T.R.*, 120 Ohio St.3d at 138 (“When we engage in statutory interpretation, we must first examine the plain language of the statute.”) Any interpretation of the 1989 DMA which would impose an obligation on the surface owner ignores the plain text of the 1989 DMA and cannot be sustained. *Swartz*, 2014-Ohio-2359; *Walker*, 2014-Ohio-1499.

**F. The 1989 DMA did not impose a forfeiture, but merely provided for statutory abandonment unless the mineral right holder has timely preserved his or her interest.**

The 1989 DMA places the burden to act upon the mineral right holders, or their interest is statutorily abandoned. The United States Supreme Court upheld this automatic abandonment in *Texaco*, above, in reviewing the self-executing feature of an Indiana statute, substantially similar to the 1989 DMA. Any assertion that the 1989 DMA is a forfeiture statute is wrong. The 1989 DMA did not impose any forfeiture or taking upon mineral holders. Instead, it provided a statutory framework for determining whether those holders have abandoned their interests. It gave the mineral holders ample opportunity to act to avoid abandonment, specifically by

providing a three-year grace period from March 22, 1989 to March 22, 1992, during which a mineral holder could take one of several actions to preserve their interest including the simple filing of a claim to preserve. Thereafter, the mineral holder could simply file a claim to preserve once every 20 years, a very minimal burden. It is the inaction of the severed mineral interest holders that resulted in abandonment, not the actions of the state or the surface owners.

There is no public policy against abandonment of real property rights, which go neglected and unused for decades. In fact, the public policy of Ohio, as enacted in the 1989 DMA, is that public policy favors subjecting dormant, severed mineral interests to abandonment and termination. The 1989 DMA is no more repugnant than the Marketable Title Act (or statutes of limitation generally), both of which operate to automatically abandon and extinguish old dormant real estate interests. Further, this purpose and public policy of Ohio is to be liberally construed in favor of the surface owner. *See* R.C. 5301.55.

As previously discussed, this Court has expressly held that a statute which vests real property rights of one party, based upon that party's inaction, to another party is not a taking. *State ex rel. A.A.A. Investments*, 17 Ohio St.3d at 152. When construing Ohio's adverse possession statute, R.C. 2305.04, this Court held that the vesting of title to real property in favor of the adverse possessor is not a taking because such vesting does not occur based upon state action, but instead, is based upon the title holder's inaction. *Id.* In so holding, this Court relied on *Texaco*, which found that Indiana's dormant mineral statute, which is substantially similar to the 1989 DMA, did not constitute a taking. *Id.* As a result, the 1989 DMA did not result in a taking or forfeiture, but rather abandonment, based upon the prior title holder's inaction.

## CONCLUSION

The 1989 DMA placed a minimal burden of action upon the owners of severed mineral interests. Their failure to use or preserve their severed mineral interest conclusively and irrevocably caused the severed mineral interests to be abandoned and reverted into the surface estate. As a result, any changes to the law, including those in 2006, could not divest Appellees of those vested rights. Based on these facts, both Proposition of Law No. I and Proposition of Law No. II must be answered in the negative. Going further, the answers to the questions presented in this case are so clear that the Court should decline to accept this case for review and should instead allow the precedent of the Fifth, Seventh, and Eleventh appellate districts to stand.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent via regular U.S. Mail this

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