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## STATEMENT OF THE CASE

This intra-family dispute is the sixth case before this Court to be fully briefed on issues involving Ohio's Dormant Mineral Act, Ohio Revised Code Section 5301.56 (the "DMA").<sup>1</sup> In fact, both propositions of law accepted by the Court in this case are already fully briefed in two other cases: (i) *Walker v. Shondrick-Nau*, Supreme Court of Ohio Case No. 2014-0803 (Proposition of Law No. 3 examines the relevant 20-year look-back under the 1989 version of the DMA, if that statute still applies); and (ii) *Chesapeake v. Buell*, Supreme Court of Ohio Case No. 2014-0067 (the first certified question from the United States District Court for the Southern District of Ohio looks at whether a recorded oil and gas lease qualifies as a savings event under the DMA). Rather than inundate the Court with repetitive arguments, Appellees will focus on: (i) the application of the unique facts of this case to the two propositions of law; (ii) countering the arguments raised by Appellants and their supporting amici; and (iii) explaining how the resolution of the pending propositions of law will not change the judgment of the Seventh District Court of Appeals—namely, that Appellees are the rightful holders of one-half of the oil and gas mineral rights underlying the property at the heart of this case.

To guide the Court's analysis in this case, Appellees emphasize three fundamental background legal principles. First, the purpose of the DMA is clearly set forth in R.C. 5301.55. In fact, the General Assembly expressly defines the "legislative purpose" of the DMA as "simplifying and facilitating land title transactions by allowing persons to rely on a record chain

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<sup>1</sup> The other five fully briefed cases are: (i) *Walker v. Shondrick-Nau*, Sup. Ct. Ohio No. 2014-0803; (ii) *Corban v. Chesapeake Exploration, L.L.C.*, Sup. Ct. Ohio No. 2014-0804; (iii) *Chesapeake Exploration, L.L.C. v. Buell*, Sup. Ct. Ohio No. 2014-0067; (iv) *Dodd v. Croskey*, Sup. Ct. Ohio No. 2013-1730; and (v) *Dahlgren v. Brown Farm Properties LLC*, Sup. Ct. Ohio No. 2014-1655. It is also worth noting that the jurisdictional memorandum in *Wendt v. Dickerson*, Sup. Ct. Ohio No. 2014-2051 raises similar issues as this case, although the Court has not yet accepted or denied jurisdiction.

of title." Any interpretation of the 1989 version of the DMA must "effect" this "legislative purpose." See R.C. 5301.55.

Second, it is unquestioned that the State of Ohio recognizes a public policy favoring the development of mineral resources, including oil and gas. See Appellants' Merit Brief at 5 (citing *Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St. 387, 389, 583 N.E.2d 302 (1992)). Contrary to statements made in the briefs of Appellants and supporting amici, this public policy is: (i) not the objective of the DMA, *Eisenbarth v. Reusser*, 2014-Ohio-3792, 18 N.E.3d 477 (7th Dist.), ¶ 96; and, (ii) irrelevant to the analysis in this case (and other DMA cases). The reason is simple: that the oil and gas mineral rights will be leased and developed regardless of who wins, and regardless of whether the 1989 version of the DMA is held to be self-executing. In fact, in this case and *Chesapeake v. Buell*, the mineral rights have already been leased and developed with producing shale wells. The only debate involves who should receive the per-acre lease bonus payment and/or royalties from those already-producing wells. As a result, the focus of such DMA cases must remain on the statutory purpose of the DMA—namely, simplifying and facilitating property transactions by allowing people to rely on the record chain of title.

Finally, this Court cannot ignore the fact that the 2006 version of the DMA exists. Appellants continue to argue that certain interpretations of the 1989 version of the DMA result in it becoming "dead letter law." This could not be more accurate. The 1989 version of the DMA is exactly what the Appellants and their supporting amici say it is—a dead and superseded statute. It was replaced by the 2006 version of the DMA which offers surface owners a multistep approach to reacquiring severed oil and gas mineral interests, replete with important due process

protections.<sup>2</sup> This Court must view the 1989 version of the DMA through this lens, and recognize that a reasonable tool already exists for surface owners to reclaim severed mineral interests, albeit through a process Appellants do not prefer.

For the reasons set forth below, and keeping in mind the three important background principles highlighted above, this Court should affirm the decision of the Seventh District Court of Appeals.

### **STATEMENT OF FACTS**

None of the facts in this case are, or ever have been, in dispute. At the heart of this case is the ownership of the oil and gas mineral rights underlying two tracts of land in Monroe County, Ohio covering approximately 153 acres (collectively, the "Property").<sup>3</sup> *Eisenbarth*, 2014-Ohio-3792 at ¶ 5.

#### **1. The severance of one-half the oil and gas mineral rights.**

William and Ella Eisenbarth had two children, Paul Eisenbarth (the father of the Appellants) and Mildred Reusser (the mother of the Appellees). *Eisenbarth v. Reusser*, Monroe C.P. No. 2012-292 (June 6, 2013), at 2. In early 1954, William and Ella Eisenbarth transferred the surface rights to the Property to their son and daughter-in-law, Paul and Ida Eisenbarth, by deed recorded on February 3, 1954 (the "Severance Deed"). *Eisenbarth*, 2014-Ohio-3792 at ¶ 5.

The Severance Deed included the following language:

There is reserved however by the Grantor William H. Eisenbarth one half of all Oil and Gas and all other minerals underlying said lands together with all rights to

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<sup>2</sup> Appellants, like most surface owners, go to great lengths to avoid raising this point because they either unsuccessfully tried to utilize the 2006 version of the DMA (as in this case), or could not as a matter of law. Appellants should not be rewarded for their own inaction under the superseded 1989 version of the DMA, and their failure to successfully utilize the 2006 version of the DMA.

<sup>3</sup> More specifically, the first tract totals approximately 126.4530 acres (hereinafter "Tract I") and the second approximately 26.797 acres (hereinafter "Tract II").

develope [sic] any or all of said the one half of Oil, Gas and other Mineral and to remove the same from the premises.<sup>4</sup>

The right to lease however is given to Paul Eisenbarth and Ida Eisenbarth the grantees in this deed.

*Eisenbarth*, 2014-Ohio-3792 at ¶ 58. Just several months later, William Eisenbarth transferred the Reserved 1/2 Mineral Interest to his daughter, Mildred Reusser, via a Royalty Deed dated April 2, 1954. *Id.* at ¶ 5. The royalty deed from William H. Eisenbarth to Mildred Reusser was recorded on February 12, 2009 (the "2009 Reusser Deed").

Before moving on, it is essential to understand the fundamental principles of mineral ownership. Specifically, "[t]here are five essential attributes of a severed mineral estate: (1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, (5) the right to receive royalty payments." *Lesley v. Veterans Land Bd. Of the State of Tex.*, 352 S.W.3d 479 (Tex. 2011); *Eisenbarth*, 2014-Ohio-3792 at ¶ 60 (citing "five attributes of a severed mineral estate" and quoting *Lesley*). The executive "right to lease is merely 'one stick in the bundle' of the five attributes of a severed mineral estate[.]" *Eisenbarth*, 2014-Ohio-3792 at ¶ 60. Appellants agree with this description of the incidents of mineral rights ownership. (Appellants' Merit Brief at 28.) And, Appellants agree that following the recordation of the Severance Deed and transfer of the Reserved 1/2 Mineral Interest to Mildred Reusser, the ownership of the Property was as follows:

- Ida and Paul Eisenbarth owned (i) all of the surface of the Property; (ii) one-half of the oil and gas mineral rights under the Property; and (iii) the executive right to lease all of Property.

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<sup>4</sup> The reservation of "the one half of Oil, Gas and other Mineral" in the Severance Deed will hereinafter be referred to as the "Reserved 1/2 Mineral Interest."

- Mildred Reusser owned the Reserved 1/2 Mineral Interest, which included the right to develop the minerals, the right to receive bonus payments, the right to receive delay rental payments, and the right to receive royalty payments, but not the executive right to lease.

**2. Paul and Ida Eisenbarth exercised the executive right to lease.**

Between 1954 and 1974, Paul and Ida Eisenbarth exercised the executive right to sign an oil and gas lease four times, each of which leased 100% of the oil and gas mineral rights underlying the Property. The last of the four oil and gas leases was signed in late 1973 and recorded on January 23, 1974 (the "1974 Lease"). *Eisenbarth*, 2014-Ohio-3792 at ¶ 5.

**3. The Property is subdivided.**

Paul and Ida Eisenbarth continued to own the Property until the late 1980s. In 1989, they transferred Tract II (including the surface, their ownership of one-half of the oil and gas mineral rights, and the executive right to lease Tract II) to their son, Keith Eisenbarth, via warranty deed (the "1989 Deed"). *Eisenbarth*, 2014-Ohio-3792 at ¶ 6. This transfer necessarily included an interest in the Reserved 1/2 Mineral Interest because the executive right to lease the entirety of Tract II was conveyed in the 1989 Deed.

Paul and Ida Eisenbarth continued to own Tract I until Paul's death in 1989. *Id.* A Certificate of Transfer was recorded on February 21, 1990 confirming Ida's sole ownership of Tract I (the "1990 Certificate of Transfer"). *Id.* Notably, the 1990 Certificate of Transfer included a specific, word-by-word recitation of the reservation language from the Severance Deed. *Id.* This transfer also necessarily included an interest in the Reserved 1/2 Mineral Interest because the executive right to lease the entirety of Tract I was transferred to Ida.

Ida Eisenbarth owned Tract I until her death in 1998. A Certificate of Transfer recorded on September 9, 1998 (the "1998 Certificate of Transfer") transferred Ida's interest in Tract I to the three Appellants, her sons. *Id.* Shortly thereafter, Appellants transferred Tract I to

themselves via a joint and survivorship deed recorded on October 30, 1998 (the "1998 Deed"). Both the 1998 Certificate of Transfer and 1998 Deed included the exact same reservation language included in the Severance Deed. *Id.* And, again, these transfers necessarily included an interest in the Reserved 1/2 Mineral Interest because the executive right to lease the entirety of Tract II was transferred to the Appellants.

Thus, as of October 30, 1998, the ownership of the Property was as follows:

- Keith Eisenbarth owned (i) all of the surface of Tract II; (ii) one-half of the oil and gas mineral rights under Tract II; and (iii) the executive right to lease all of the oil and gas mineral rights underlying Tract II, including those owned by his aunt, Mildred Reusser.
- Keith, Leland, and Michael Eisenbarth collectively owned: (i) all of the surface of Tract I; (ii) one-half of the oil and gas mineral rights under Tract I; and (iii) the executive right to lease all of the oil and gas mineral rights underlying Tract I, including those owned by their aunt, Mildred Reusser.
- Mildred Reusser still owned the Reserved 1/2 Mineral Interest, which included the right to develop the minerals, the right to receive bonus payments, the right to receive delay rental payments, and the right to receive royalty payments, but not the executive right to lease.

#### **4. Appellees inherited the Reserved 1/2 Mineral Interest.**

Mildred Reusser held the Reserved 1/2 Mineral Interest from 1954 until her death in 2002. Upon her death, the Reserved 1/2 Mineral Interest passed to Dean Reusser, Marilyn Ice, Wilda Fetty, Martha Rose Maag, Vernon Reusser, Paul Reusser, David Reusser, and Dennis Reusser via the residuary clause in her will.<sup>5</sup> *Eisenbarth*, 2014-Ohio-3792 at ¶ 7. Thus, the Appellees have owned the Reserved 1/2 Mineral Interest since 2002.

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<sup>5</sup> Undersigned counsel learned last week that Appellee Wilda Fetty passed away in 2014, leaving her portion of the mineral interest to her husband, Roy Fetty. Appellee Martha Rose Maag died in 2003, leaving her portion of the mineral interest to her husband, Robert Maag, via the residuary clause in her will. Undersigned counsel is currently collecting documents relating to these deaths from Appellees and the relevant probate courts, and will make any appropriate filings relating to substitution of parties pursuant to the Supreme Court of Ohio Rules of Practice and App. R. 29(A) as soon as practicable.

**5. Appellants unsuccessfully attempted to use the 2006 version of the DMA.**

On January 1, 2009, the Appellants published notice of abandonment in the Monroe County *Beacon*. See *Eisenbarth*, 2014-Ohio-3792 at ¶ 8. Contrary to the requirements in R.C. 5301.56(E), Appellants did not attempt to serve certified mail notice upon their cousins. The Appellants recorded an affidavit of abandonment in the Monroe County Recorder's Office on February 16, 2009. *Eisenbarth*, Monroe C.P. No. 2012-292 (June 6, 2013), at 4.

Pursuant to R.C. 5301.56(H)(1), Appellees timely recorded a claim to preserve the Reserved 1/2 Mineral Interest on February 19, 2009 in the Monroe County Recorder's Office (the "2009 Claim to Preserve")—approximately 49 days after receiving the notice of abandonment and well within the 60-day time frame provided in R.C. 5301.56(H). *Id.*

**6. The recent oil and gas leases and this lawsuit.**

Just four years later, on March 15, 2012, Appellants—the only persons with the executive right to lease the Property—signed an oil and gas lease with Northwood Energy Corporation ("Northwood") (the "2012 Lease"). *Eisenbarth*, Monroe C.P. No. 2012-292 (June 6, 2013), at 4; see *Eisenbarth*, 2014-Ohio-3792 at ¶ 8. The 2012 Lease, for which a memorandum was recorded on May 2, 2012 in the Monroe Court Recorder's Office, covered the entire Property including the Reserved 1/2 Mineral Interest. Northwood, however, refused to pay Appellants all of the per-acre lease bonus payment, totaling \$766,250, because of Appellees' rightful claim to one-half of the bonus money. *Eisenbarth*, 2014-Ohio-3792 at ¶ 8 (noting half of the signing bonus "is being held in escrow").

On September 13, 2012, after unsuccessfully attempting to use the 2006 version of the DMA, the Appellants filed a complaint against their cousins under the 1989 version of the DMA seeking to divest them of the Reserved 1/2 Mineral Interest. This is the first time Appellants even attempted to use the 1989 version of the DMA.

On June 6, 2013, the Monroe County Court of Common Pleas issued a decision granting judgment in favor of the Appellees, quieting title in their favor as to the Reserved 1/2 Mineral Interest, and awarding them one-half of the per-acre lease bonus payment. *Eisenbarth*, Monroe C.P. No. 2012-292 (June 6, 2013), at 14; *Eisenbarth*, 2014-Ohio-3792 at ¶ 10. In finding in favor of Appellees, the trial court applied the 1989 version of the DMA and concluded that the 1974 Lease was a savings event falling within the relevant 20-year look-back period, thereby barring Appellants' claims. *Eisenbarth*, Monroe C.P. No. 2012-292 (June 6, 2013), at 11; *Eisenbarth*, 2014-Ohio-3792 at ¶ 10.

The Appellants timely appealed to the Seventh District Court of Appeals. *Eisenbarth*, 2014-Ohio-3792 at ¶ 11. On August 28, 2014, the Seventh District affirmed the trial court's decision, holding that: (i) the 1974 Lease qualifies as a title transaction and savings event under R.C. 5301.47 (*id.* at ¶ 32); (ii) because the 1974 Lease fell within the relevant 20-year period starting with the effective date of the 1989 version of the DMA, the Reserved 1/2 Mineral Interest was preserved (*id.* at ¶¶ 36, 51); and (iii) the Appellees' right "to share in the bonus payment was retained with the grantor's half of the minerals" (*id.* at ¶ 63). This appeal arises from that decision.

### **ARGUMENT AGAINST APPELLANTS' PROPOSITIONS OF LAW**

#### **I. Proposition of Law No. 2 Is Wrong as a Matter of Law: A Recorded Oil and Gas Lease is a Savings Event Under R.C. 5301.56(B)(3)(a).**

The issue of whether an oil and gas lease constitutes a savings event under the DMA has been fully briefed and argued in *Chesapeake Exploration, L.L.C. v. Buell*, Sup. Ct. Ohio No. 2014-0067. Rather than restate the persuasive arguments raised by the mineral owners in that case, Appellees provide the Court with a brief analysis of the lower appellate court's reasonable

conclusions in this case (with references to Ohio case law further supporting the lower appellate court's conclusion) to demonstrate the fundamental flaws in Appellants' arguments.

**A. A brief overview of the "title transaction" savings event in R.C. 5301.56(B)(3)(a).**

One of the first steps required under both versions of the DMA is that the surface owner confirm whether certain statutory savings events occurred during the relevant 20-year look-back period. *See* R.C. 5301.56(B) (eff. June 30, 2006). The presence of any one of these statutory savings events would bar a surface owner's claims under the DMA.

The most frequently litigated savings event is found in R.C. 5301.56(B)(3)(a), and is the same in both versions of the DMA. In short, a mineral interest owner will retain his or her rights if the oil and gas mineral interest "has been the subject of" a recorded title transaction during the relevant look-back period. *Id.* Importantly, the phrase "title transaction" is not defined in the DMA. Rather, one must look to the definition set forth in the Ohio Marketable Title Act. Specifically, R.C. 5301.47(F) defines a title transaction as "any transaction affecting title to any interest in land," and includes a non-exhaustive list of examples (e.g., a deed or mortgage).<sup>6</sup> When that definition is inserted into the language in R.C. 5301.56(B)(3)(a), the statutory savings reads as follows:

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

As a result, the only three questions relevant to the analysis are: (i) Was the title transaction recorded?; (ii) Was the mineral interest the subject of the title transaction (e.g., an oil and gas lease)?; and (iii) Does the title transaction affect title to any interest in land? The answers to

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<sup>6</sup> *See Eisenbarth*, 2014-Ohio-3792 at ¶ 29 (noting the list of examples of title transactions in the definition is non-exhaustive).

these three questions make it abundantly clear that a recorded oil and gas lease (e.g., the 1974 Lease) constitutes a savings event under R.C. 5301.56(B)(3)(a).

**B. Recorded oil and gas leases are savings events under R.C. 5301.56(B)(3)(a).**

**1. The 1974 Lease and 2012 Lease, like most oil and gas leases, were recorded.**

There is no dispute that the 1974 Lease and 2012 Lease both were recorded in the Monroe County Recorder's Office. *Eisenbarth*, 2014-Ohio-3792 at ¶ 3 (referencing the "1974 recorded lease"); *id.* at ¶ 5 (noting the lease was "signed in 1973 and recorded on January 23, 1974"); *see* Appellants' Merit Brief at 2.

**2. A severed mineral interest is the subject of a recorded oil and gas lease.**

As one Ohio federal court has explained, "[i]t is difficult for the Court to conceive of a broader definition [of a title transaction] than the one chosen by Ohio law. By its plain language, the statute does not require a conveyance or transfer of real property in order to constitute a title transaction. Rather, the statute simply requires a transaction that affects title to any interest in the land." *McLaughlin v. CNX Gas Co.*, 2013 U.S. Dist. LEXIS 174698, \*7–8 (N.D. Ohio Dec. 13, 2013). The Seventh District Court of Appeals clearly and unambiguously agreed in their decision below, holding: (i) "the statutory question under the 1989 DMA is not whether a fee was transferred," *Eisenbarth*, 2014-Ohio-3792 at ¶ 25; and (ii) the "mineral interest must be the subject of a transaction affecting title to any interest in land without limiting the title transaction to the total conveyance of title." *Eisenbarth*, 2014-Ohio-3792 at ¶ 29.

As noted in the seminal oil and gas treatise, *Williams & Meyers*, the "basic document of the oil and gas industry is the lease which authorizes an operator, the lessee or his assignee to enter upon described premises for the purpose of exploring for and developing the mineral resources." 2 H. Williams and C. Meyers, *Oil and Gas Law* § 601 (2012). In essence, the

mineral rights are the topic of interest, primary theme, and thing being discussed in an oil and gas lease. Appellants concede this point. *See* Appellants' Merit Brief at 27, n. 8 (noting several times that the owner of the mineral estate signs an oil and gas lease); *id.* at 28 (noting that the mineral estate owner transfers to the lessee the temporary right to exploit the mineral estate for a determinable amount of time).<sup>7</sup>

Yet, Appellants mischaracterize the statute by arguing that an "oil and gas lease executed only by the Appellants (surface owners) cannot be a title transaction . . . under the 1989 DMA because the Appellants' interest was not the subject of that title transaction." This is absurd. The 1974 Lease (and any other oil and gas lease executed by the Appellants and/or their predecessors) necessarily involved 100% of the mineral rights underlying the Property. The reason is simple—Appellants (and Appellants only) retained the executive right to lease all of the mineral rights underlying the Property, including the Reserved 1/2 Mineral Interest. Neither Mildred Reusser nor Appellees had any right to sign an oil and gas lease. As a result, 100% of the oil and gas mineral interests under the Property (including the Reserved 1/2 Mineral Interest) were the subject of the 1974 Lease and 2012 Lease.

It is also important to note that, contrary to Appellants' arguments, whether an oil and gas lease should be treated as a conveyance of a fee simple determinable estate or as a license is irrelevant to the DMA. The Seventh District Court of Appeals below aptly concluded that the

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<sup>7</sup> Appellants also conceded this point before the Seventh District Court of Appeals. *See Eisenbarth v. Reusser*, 7th Dist. No. 13-MO-10, Brief of Plaintiffs-Appellants Leland Eisenbarth, et al. (filed July 23, 2013) at 11 (stating that the "owner of the mineral interest has a greater interest than merely a 'possibility of reverter'—he has all the rights and benefits enumerated in the oil and gas lease"); *Eisenbarth v. Reusser*, 7th Dist. No. 13-MO-10, Reply Brief of Appellants / Brief of Cross-Appellees (filed Sept. 12, 2013) at 2 (indicating they "do not dispute the holdings in *Brenner* or *Kramer* that hold that an oil and gas lease confers upon a lessee a limited right to the real property itself").

characterization of an oil and gas lease should be treated as a conveyance of a fee simple determinable interest in the mineral rights or a license is irrelevant to the DMA. *Eisenbarth*, 2014-Ohio-3792 at ¶ 25 ("[I]f an oil and gas lease is considered a determinable fee, it may be easier to categorize as a savings event; however, the statutory question under the 1989 DMA is not whether a fee was transferred."). As a result, the analysis above should control.

To the extent this Court chooses to address the nature of an oil and gas lease, however, the appropriate conclusion (that an oil and gas lease is a conveyance of a fee simple determinable) also results in the Appellees prevailing in this case. For this reason, Appellees strongly agree with the arguments raised by the severed mineral owners in *Chesapeake v. Buell*: that an oil and gas lease involves the actual conveyance of a fee simple determinable interest in the mineral estate, and thereby an interest in real property. This is supported by statute (R.C. 5301.09 states that oil and gas "leases and licenses create an interest in real estate") and longstanding Ohio case law. *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129–130 (1897) (explaining that an oil and gas lease "in such form is more than a mere license; it is a lease of the land for the purpose and period limited therein, and the lessee has a vested right to the possession of the land to the extent reasonably necessary to perform the terms of the instrument on his part"); *Brenner v. Spiegle*, 116 Ohio St. 631, 634–635 (1927) ("a lease constitutes a conveyance of an interest in real property" that "must also be regarded as creating an estate in the lessee"); *Kramer v. PAC Drilling Oil & Gas, L.L.C.*, 197 Ohio App. 3d 554, 2011-Ohio-6750, 968 N.E.2d 64, ¶ 11 ("In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee"); see *Tisdale v. Walla*, 11th Dist. Ashtabula No. 94-A-0008, 1994 Ohio App. LEXIS 5941, \*4 (Dec. 23, 1994). As noted above, this may make

the analysis easier under the DMA, but it is certainly not a finding the Court needs to make to rule in favor of Appellees.

For all of the foregoing reasons, recorded oil and gas leases (e.g., the 1974 Lease) are savings events under R.C. 5301.56(B)(3)(a).

**3. An oil and gas lease affects title to both the surface and mineral estates.**

Appellants misguidedly argue that they "do not believe that an oil and gas lease is a transaction that affects title to a Mineral Interest." Appellants' Merit Brief at 28–29. This position, however, completely ignores the language of the statute, longstanding Ohio case law, and common sense.

From a statutory perspective, the language in R.C. 5301.56(B)(3)(a) clearly and unambiguously uses the phrase "any interest in property." (Emphasis added.) As a result, the analysis is not whether the oil and gas lease affects the mineral estate (as Appellants seem to contend). Instead, the statute broadly requires that the oil and gas lease affect "any interest" in property, which would include the surface estate (where oil and gas development actually occurs) and the mineral rights (which includes the executive right to lease). Not surprisingly, an oil and gas lease impacts both.

This Court long ago recognized an oil and gas lease as an encumbrance on title to the entirety of the property (surface and minerals). *See e.g., Karas v. Brogan*, 55 Ohio St.2d 128, 129 (recognizing that an "oil lease is an encumbrance" on real property in the context of a contract offer to purchase land that promised title would be "free and clear of all liens and encumbrances"). Following that longstanding precedent, the Seventh District Court of Appeals aptly noted below that a "recorded oil and gas lease is a transaction that . . . affects title to an interest in land" because "[i]t remains with the realty if title is transferred during its terms; it

would not only follow the surface estate but would also follow the mineral estate upon any transfer. . . . As such a lease is considered an encumbrance on title." *Eisenbarth*, 2014-Ohio-3792 at ¶ 30.

In terms of the mineral estate, Appellants concede that an oil and gas lease necessarily affects the mineral estate. They note that "where the grantor holds the property which is subject to a lease that has been previously recorded, the grantee [of that property] takes title to the property (including the mineral estate) subject to the lease." (Appellants' Merit Brief at 27, n. 1.) Further, Appellants readily admit that, if a recorded oil and gas lease is a title transaction, it "affects title to the right to lease," which is one of the rights inherent in the ownership of mineral rights. *See id.* at 29. Appellants also conceded this point before the Seventh District Court of Appeals.<sup>8</sup>

Finally, an oil and gas lease, especially one involving severed surface and mineral estates necessarily affects the surface as a result of the express terms of the lease (providing for development of the surface) or the accommodation doctrine. A recent decision from the Texas Supreme Court explains the accommodation doctrine as follows: in the context of severed mineral ownership, the severed mineral owner or its lessee retains the "right to use as much of the surface as is reasonably necessary to extract and produce the minerals," subject to certain accommodations if there is an existing use of the surface which would be impaired, and there are reasonable (industry-accepted) alternatives available to develop the minerals. *See Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248–249 (Tex. 2013). As a result, there is a direct impact between an oil and gas lease and the surface estate, especially in the case of a severed mineral estate.

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<sup>8</sup> *See supra*, n. 7.

As a result, oil and gas leases, including the 1974 Lease, and any other oil and gas lease signed by Appellants or their predecessors in interest, undoubtedly affected title to the surface of the Property and the mineral rights underlying the Property.

**4. The fact that Appellees did not sign various oil and gas leases involving the Property has no bearing on the analysis above.**

In their Merit Brief, Appellants misguidedly argue that: (i) the Reserved 1/2 Mineral Interest should be deemed abandoned under the 1989 Act because Appellees did not "do anything" with it; and (ii) Appellants could not lease/convey the Reserved 1/2 Mineral Interest of Appellees based on their relationship as cotenant owners of the mineral rights under the Property. *See* Appellants' Merit Brief at 27–29. These arguments fail, however, because they ignore the facts of this case and the nature of the executive right to lease.

First, and as noted above, only the Appellants retained the executive right to lease. As a result, the execution of each of the five leases signed by the Appellants and/or their parents included all of the mineral rights under the Property, including the Reserved 1/2 Mineral Interest. That should be the end of the analysis.

Second, such an argument violates the long-recognized duty of the owner of the executive right to deal with the nonexecutive using a duty of utmost fair dealing. "A major reason for placing a duty upon the holder of the executive right is . . . [the nonexecutive] has no right to execute any leases." *Welles v. Berry*, 434 So. 2d 982, 984 (Fla. App. 1983). "The law has never left non-executive interest owners wholly at the mercy of the executive." *Id.* Allowing Appellants to use the executive right, to benefit from it (receiving per-acre delay rental and/or lease bonus payments, including more than \$383,000 under the 2012 Lease), and then argue that the same oil and gas leases should be used against Appellees (the non-executives with had no right to lease) violates this duty.

Third, Appellants' argument misconstrues the nature of the executive right, which is similar to a limited power of attorney to lease minerals. *See, e.g., Day & Co., Inc. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669 (Tex. 1990) (noting the similarities of an executive right governed by property law and a power governed by agency law). The holder of the executive right can sign an oil and gas lease on behalf of another, even if does not own an interest in the minerals being leased. Here, Appellants and their predecessors signed the oil and gas leases in their capacity as the holder of the executive right to lease, not in their capacity as co-tenants. Thus, Appellants' co-tenancy analysis is incorrect and irrelevant.

Finally, it is important to note that the minerals at no time sat dormant. Multiple leases were signed and recorded, and each provided the relevant lessee with the ability to develop the Reserved 1/2 Mineral Interest. The fact that those lessees failed to drill any wells (until recently) under those leases does not matter for purposes of the DMA. All that matters is that the executed oil and gas leases (including the 1974 Lease and 2012 Lease) are recorded title transactions affecting the mineral rights, which have now resulted in the actual development of those rights.<sup>9</sup>

## **II. Proposition of Law No. 1 Should Be Rejected Because It Is the Least Reasonable Interpretation of the Look-Back Period Under the 1989 Version of the DMA.**

The 1989 version of the DMA provided that a severed mineral interest "shall be deemed abandoned and vested in the owner of the surface, if none of the following applies. . . Within the preceding twenty years, one or more of the following has occurred: [listing the so-called "savings events"]." R.C. 5301.56(B)(1)(c) (eff. March 22, 1989). Although designed to provide a surface owner with the opportunity to acquire title to previously-severed mineral rights that remained "dormant" for an unidentified 20-year time period, the 1989 version of the DMA

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<sup>9</sup> The fact that wells were not drilled under the old oil and gas leases signed by Appellants' parents demonstrates the unique nature of mineral development—it only makes sense when economical and the technology exists to extract the resource.

proved to be flawed in that it: (i) failed to define the applicable 20-year look-back period; and (ii) proved impractical and unworkable due to ambiguities regarding whether it was self-executing. Both the General Assembly and the Ohio State Bar Association recognized this ambiguity during the legislative process surrounding the enactment of the 2006 and current version of the DMA. See *Eisenbarth*, 2014-Ohio-3792 at ¶ 108 (DeGenaro, P.J., concurring in judgment only) (citing H.B. 288 Rep. Mark Wagoner, Sponsor Testimony before the Ohio House Public Utilities Committee); Ohio State Bar Association, *Report of the Natural Resources Committee* (hereinafter, the "2006 OSBA Report").<sup>10</sup>

In the context of the look-back under the 1989 version of the DMA, the patently ambiguous language made it impossible for surface owners, mineral rights owners, and Ohio courts to answer the critical question: Preceding what? As a result, three different proposals emerged. In fact, each answer was contemplated in the 2006 OSBA Report: "the original statute [the 1989 version of the DMA] provided for the lapse to occur if no specified activities took place within 'the preceding twenty years.' Questions arose as to whether that language meant [i] 20 years preceding enactment of the statute, [ii] 20 years preceding commencement on an action to obtain the minerals or [iii] any 20-year period in the chain of title [i.e., the rolling look-back, or more accurately, the roll forward]."

To the extent this Court deems the 1989 version of the DMA to be self-executing, it must remedy the inherent ambiguity regarding the look-back period. To do so, this Court must adopt an interpretation that: (i) gives meaning to the critical term "preceding"; and (ii) allows for the possibility of successive 20-year periods of nonuse, as contemplated in the statute. As set forth

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<sup>10</sup> Available at <https://www.ohiobar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx> (accessed May 20, 2015).

in detail below, only an interpretation which ties the commencement of the 20-year look-back period to some "implementing action" by the surface owner does both.<sup>11</sup> Thus, the 20-year look-back period must be calculated starting on the date a complaint is filed which first raises a claim under the 1989 version of the DMA.

If the Court, however, chooses to focus on the other alternatives set forth in the OSBA Report, the fixed look-back period is the next best alternative because it: (i) answers the question, "Preceding what?"; (ii) achieves the purpose of the DMA set forth in R.C. 5301.55; and (iii) takes into account the reality that the 1989 version of the DMA was superseded nearly nine years ago with an improved version.

**1. Tying the 20-year look-back period to the date on which a surface owner takes legal action under the 1989 version of the DMA is the best interpretation.**

Appellants and their supporting amici focus solely on two alternatives: (i) their preferred rolling look forward; and (ii) the fixed look-back period adopted by the appellate court below. Their primary argument is that a "fixed" look-back period does not adequately account for the language in R.C. 5301.56(D)(1) that provides for "successive" filings of claims to preserve mineral interests. (Appellants' Merit Brief at 17; Brief of Amici Curiae Farnsworth, et al. at 16–17; Merit Brief of Amici Curiae Schucht, et al. at 4; Merit Brief of Amici Curiae Jeffco Resources, Inc., et al. at 6–9; Merit Brief of Amicus Curiae State of Ohio at 6, 10.) From a purely textual perspective, Appellants and amici are correct. But they completely ignore the fact that: (i) their preferred "rolling" look back/look forward fails to answer the critical question, "Preceding what?"; and (ii) the best (and most textually consistent) interpretation of the look-

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<sup>11</sup> This is the second alternative under the 2006 OSBA Report.

back period is the "20 years preceding commencement on an action to obtain the minerals." *See* 2006 OSBA Report.

First and foremost, tying the 20-year look-back to the date a surface owner files a claim under the 1989 version of the DMA requires the least supplementation of the ambiguous statutory text. In addition to preserving the common sense understanding of the term "preceding" (and the indisputably *backward*-looking operation it implies), it also allows for the prospective application of the statute to "successive" 20-year periods. Specifically, it makes clear that the relevant twenty years are those that "precede" the commencement of a legal action by the surface owner. And, it also allows for the possibility of abandonment where a period of nonuse of the severed mineral rights does not reach twenty years until sometime after March 22, 1989. No other construction of the appropriate look-back period accounts for both the terms "preceding" *and* "successive" better than this interpretation.

To be sure, none of the interpretations emerges from the unambiguous text of the 1989 version of the DMA. The difference is that this preferred construction interprets the law in a manner that is the most consistent with the overall statutory scheme while doing the least violence to the words that the General Assembly actually adopted. Indeed, as shown above, interpreting the statute so the 20-year period looks back from the date a surface owner files a claim to the mineral rights requires the least supplementation of the ambiguous statutory text while ensuring a document (a court order or settlement paperwork) is actually recorded. As a result, it has the added benefit of achieving the objective of the statute, thereby clarifying the public record and facilitating title transactions by clearly identifying the owner of the mineral rights.

In this case, the application of the preferred interpretation would result in a look-back period from September 13, 1992 through September 13, 2012. During that period of time, there were at least five savings events: (i) the 1998 Certificate of Transfer; (ii) the 1998 Deed; (iii) 2009 Reusser Deed (involving an actual transfer of the Reserved 1/2 Mineral Interest); (iv) the 2009 Claim to Preserve (a separate savings event under the DMA); and (v) the 2012 oil and gas lease with Northwood Energy Corporation. As a result, the Appellees would remain the rightful owners of the Reserved 1/2 Mineral Interest.

It is also worth noting that Appellants and Amicus Curiae Murray Energy Corporation ("Murray Energy") spend a great deal of time arguing that six statutes in the Ohio Revised Code "use the phrase 'within the preceding [insert amount of time],' and are obviously not interpreted to apply only to the period immediate preceding that statute's enactment." (Appellants' Merit Brief at 14–15; *see* Brief of Murray Energy Corporation Amicus Curiae at 8–9.) But instead of supporting Appellants' rolling look-back/look forward theory, each of these statutes either supports Appellees' arguments or is completely inapplicable in this context.

Notably, three of the referenced statutes actually define the specific event in the statute triggering the answer to the preceding what question. First, Appellants cite R.C. 2101.15 (requiring probate judges to file itemized accounts of fees) to reach the "absurd" conclusion that the requirement would only apply to "fees received or charged by the judge in the year preceding January 13, 2012[.]" (Appellants' Merit Brief at 15.) Such a conclusion ignores the language of the statute, which unequivocally states that the filing shall be made "[o]n the first day of January, in each year," and shall include "all fees received by the judge during the preceding year." (Emphasis added.) R.C. 2101.15. The statute could not be clearer that the filing applies to fees received during the year immediately preceding January 1 "in each year" the report is filed.

Second, Appellants cite R.C. 122.08(B)(7) (setting Office of Small Business reporting requirements), and conclude that the reporting requirement would apply "only during the calendar year preceding September 26, 2003[.]" (Appellants' Merit Brief at 14.) This conclusion also ignores the statute, which expressly requires that the report be prepared *annually* "for inclusion in the department of development's *annual report* to the governor and general assembly[.]" (Emphasis added.) R.C. 122.08(B)(7). The fact that the statute must include certain events "*during the preceding calendar year*" clearly and unambiguously applies to the 365-day calendar days preceding the department of development's annual report.

Finally, Appellants contend that R.C. 3324.03 (setting guidelines for boards of education to identify gifted students) requires school districts to "only examine the 24 month period prior to September 11, 2001" to identify gifted students. (Appellants' Merit Brief at 14.) This is completely wrong. The statute states that gifted students are identified by determining whether the student accomplished certain academic achievements "within the preceding twenty-four months" (R.C. 3324.03) of when "[e]ach school district . . . submit[s] *an annual report* . . . specifying the number of students . . . identified as gifted[.]" R.C. 3324.05 (setting out annual reporting requirement—and omitted from Appellants' discussion). So, again, this statute specifically defines the event—here, the submission of an annual gifted student report—that triggers the 24-month look-back period.

All of the statutes referenced above, as well as the others cited by Appellants and supporting amici,<sup>12</sup> also fail to support Appellants' arguments under Proposition of Law No. 1.

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<sup>12</sup> See R.C. 1322.031(B)(4) (establishing certain licensing requirements for mortgage loan originators); R.C. 2919.225(A)(2) (requiring home day-cares to disclose past injuries before accepting new children); R.C. 145.112 (setting restrictions on who the Ohio Public Retirement System's (OPERS) can make investments with)

First, each of the statutes involve administrative and/or licensing issues, not the loss of constitutionally-protected real property rights. Second, and more importantly, each links the answer to the question, "Preceding what?" to a specific, affirmative action in the future—the filing an account statement (R.C. 2101.15), an application for a license (R.C. 1322.031), enrollment of a child in a home day care (R.C. 2919.225), making an investment (R.C. 145.112), or submitting a report (R.C. 122.08 and R.C. 3324.05). From this standpoint, these statutes actually support Appellees' argument that the 20-year look-back period should be tied to a specific, affirmative act by a surface owner: the filing of a complaint raising a claim under the 1989 version of the DMA.

**2. The fixed look-back period adopted by the Seventh District Court of Appeals is the second-best interpretation of the look-back period.**

The interpretation adopted by the Seventh District Court of Appeals below, and the first one described in the 2006 OSBA Report, utilizes a fixed, 20-year period starting on March 22, 1989 (the effective date of the 1989 version of the DMA). *See Eisenbarth*, 2014-Ohio-3792 at ¶ 51 (holding "the trial court properly applied a fixed look-back period"). In essence, only those mineral interests which already were dormant for at least twenty years as of March 22, 1989 could be deemed abandoned and vested (assuming the mineral interest owners failed to take advantage of the three-year grace period). Although Appellants repeatedly chide the lower appellate court for adopting this look-back period, Appellants themselves championed such a fixed look-back period before the trial court.<sup>13</sup> Only now, upon receiving a decision they do not agree with, have Appellants conveniently moved on to an alternative theory.

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<sup>13</sup> *See, e.g., Eisenbarth*, Monroe C.P. No. 2012-292 (Pls.' Mot. for Summ. J. at 9–10; Pls.' Mem. Contra Defs.' Mot. for Summ. J. at 9 (arguing the "Court should look to 'the twenty years immediately preceding March 13, 1989 (the effective date of the previous version)')").

There is no dispute that a "fixed" look-back period tied to the effective date of the 1989 version of the DMA has the virtue of giving meaning to the term "preceding" (by tying the look-back to the date of the effective date of the statute). Under this reasonable interpretation, the 1989 version of the DMA operated only once with respect to severed mineral interests that had been dormant for at least twenty years as of March 22, 1989, thereby eliminating ancient interests. See *Eisenbarth*, 2014-Ohio-3792 at ¶ 50.

As Appellants point out, and Appellees acknowledge, the minor drawback with this interpretation is that it does not account for the "successive filings" language in R.C. 5301.56(D)(1) (eff. March 22, 1989) (allowing for "successive filings of claims to preserve mineral interests . . . [indefinitely]"). Appellants, however, fail to acknowledge the inherent weakness in their own proposal—namely, that it fails to answer the more fundamental question, "Preceding what?" Although flawed, the fixed look-back period does achieve the all-important goal of aligning with the purpose of the DMA, as it would require persons reviewing the record chain of title to review a specific, easily defined 20-year time period. On the other hand, Appellants' roll forward proposal would require a review of a much longer 37-year time period (from March 22, 1969 through June 30, 2006).

Two amici also argue that any "fixed" 20-year look-back period would lead to an "absurd" result because a conveyance that occurred twenty years ago would be a savings event, while a conveyance twenty years and one day ago would not be. (Merit Brief of Amici Curiae Jeffco Resources, Inc., et al. at 5; Merit Brief of Amici Curiae Schucht, et al. at 6–7.) The Court should reject this argument for two simple reasons. First, *every* marketable title act—and indeed every dormant mineral act—necessarily establishes a bright-line time period under which there are clear winners and losers. That is the very nature of such statutes. Second, the "rolling" 20-

year look-back period that Appellants and their supporting amici propose itself establishes a bright line that yields certain results for conveyances within the applicable 20-year period, and other results for conveyances outside of it. As a result, this argument is unpersuasive.

**3. The "rolling look-back" period proposed by Appellants and their supporting amici is the interpretation least consistent with the text of the 1989 version of the DMA.**

Appellants and their supporting amici prefer the third alternative identified in the 2006 OSBA Report, which also happens to be the least plausible. Often referred to as a "rolling" 20-year look-back, this interpretation allows a surface owner to "choose any random date . . . that exists between March 22, 1989 and June 30, 2006 and then look back 20 years from that date." *Eisenbarth*, 2014-Ohio-3792 at ¶¶ 37, 39. Thus, with the benefit of hindsight, the surface owner gets to choose whatever 20-year period is most advantageous for the surface owner. The Seventh District Court of Appeals correctly rejected the use of the rolling look-back period. *Eisenbarth*, 2014-Ohio-3792 at ¶¶ 48–51; *see id.* ¶ 123 (DeGenaro, P.J., concurring in judgment only) (noting that the "arbitrary selection of some random date to put a savings event outside the 20-year look back period is so violative of due process it does not warrant further discussion"). And, as set forth in detail below, the lower appellate court's decision was entirely reasonable based on the reality that the rolling look-back is actually a roll forward, in direct contradiction of the text of the statute.

Despite the Seventh District Court of Appeals' sound rejection of the so-called "rolling look-back" period, Appellants rely upon certain cherry-picked comments from Judge DeGenaro's concurring opinion to allegedly support their argument for a "rolling look-back."<sup>14</sup> *See*

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<sup>14</sup> It is interesting that Appellants and their supporting amici rely on this concurring opinion, which strongly urges the rejection of any interpretation of the 1989 version of the DMA as self-executing. To the extent the Appellants and their amici support this holding, the Appellees

*Eisenbarth*, 2014-Ohio-3792 at ¶ 72 (DeGenaro, P.J., concurring in judgment only), and *Farnsworth v. Burkhardt*, 2014-Ohio-4184, ¶ 92 (7th Dist. 2014) (DeGenaro, P.J., concurring in judgment only). In reality, however, this interpretation is actually a roll forward. See *Eisenbarth*, 2014-Ohio-3792 at ¶ 72 (DeGenaro, P.J., concurring in judgment only); *Farnsworth*, 2014-Ohio-4184 at ¶ 92 (same) ("Pursuant to the 1989 ODMA, the original severance of the mineral rights . . . in 1980 was . . . a savings event which preserved the mineral rights . . . until 2000.") (emphasis added). As the surface owner in the *Walker v. Shondrick-Nau* case explained, the "rolling look-back" actually works as a "roll forward" from the date of the last savings event:

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

*Walker v. Shondrick-Nau*, Sup. Ct. Ohio No. 2014-0803 (Appellee's Merit Brief at 19). In essence, the Appellants cite to Judge DeGenaro's concurring opinion for the proposition that the relevant 20-year period commences on the date of the last statutory "savings event," and rolls *forward*. This explanation reveals the significant textual problem with this interpretation, regardless of whether it is described as a "rolling look-back" or, more accurately, as a roll forward.

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wholeheartedly agree that the 2006 version of the DMA should be the only version of the statute to control the outcome of this proceeding—an outcome under which the Appellees also would prevail because: (i) Appellants failed to even attempt certified mail service, thereby rendering their affidavit of abandonment invalid as a matter of law; (ii) Appellees timely recorded a preservation claim; and (iii) there were numerous savings events during the 20 years before notice was provided.

While Appellants' interpretation allows for the prospective application of the law to successive periods of nonuse, it simply ignores the term "preceding" altogether (as well as the backward looking operation that it implies). In its place, Appellants write in a new, *forward*-looking 20-year period beginning with the last statutory savings event. The General Assembly certainly could have created such a *forward*-looking period for purposes of the analysis. For example, the General Assembly could have adopted: (i) the language of the 2006 OSBA Report ("any 20-year period in the chain of title"); (ii) Judge DeGenaro's description (specifying that the 20-year period runs *forward* in time from the date of the last savings event); (iii) the language from the Ohio Marketable Title Act (40 years from the "time the marketability is to be determined"); or (iv) the language from Michigan's dormant mineral statute, which is relied upon by Amicus Curiae Murray Energy<sup>15</sup> (*see, e.g.*, Mich. Compiled Laws 554.291(1)), referencing dormancy or nonuse "for a period of 20 years" without use of the term "preceding"). The General Assembly, however, did not.

Appellants' interpretation constitutes a wholesale replacement of the statutory language and scheme that is prohibited under basic principles of statutory interpretation. *See e.g., Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus (1988) (concluding that "it is the duty of the court to give effect to the words used in a statute, not to insert words not used"). Indeed, Appellants' interpretation of the statute is based almost entirely on what the law does *not* contain, rather than the words that the General Assembly actually employed.

Making matters worse, Appellants' interpretation of the 1989 version of the DMA turns on its head this Court's longstanding principle that courts should "favor individual property rights

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<sup>15</sup> Brief of Murray Energy Corporation, Amicus Curiae in Support of Appellants, at 12–14.

when interpreting forfeiture statutes." *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 605 N.E.2d 368 (1992). Here, the application of this principle also requires the Court to reject the "rolling look-back" in order to protect the Reserved 1/2 Mineral Interest—a long vested and constitutionally protected private property right.

Yet, Appellants and their supporting amici misguidedly claim that the 1989 version of the DMA is an abandonment law, rather than a forfeiture statute. (Appellants' Merit Brief at 20–22; Brief of Amici Curiae Farnsworth, et al. at 7; Merit Brief of Amicus Curiae State of Ohio at 10.) One amicus curiae even argues that by interpreting the 1989 version of the DMA as a forfeiture statute, the Seventh District Court of Appeals somehow committed reversible error. (Merit Brief of Amici Curiae Jeffco Resources, Inc., et al. at 10–11). These arguments miss the mark.

Although the 1989 version of the DMA uses the word "abandoned," such use does not actually describe the nature of the statute. Indeed, this Court has observed that the word "abandon" means "to relinquish or give up with intent of never again resuming one's right or interest. . . . To give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert." (Emphasis added.) *Fulmer v. Insura Property & Casualty Co.*, 94 Ohio St.3d 85, 95, 460 N.E.2d 392 (2002) (citing Black's Law Dictionary (6th Ed. 1990)). But the 1989 version of the DMA requires no intent on the part of the severed mineral interest owners to forever and absolutely relinquish their vested ownership of the mineral rights. Here, the Appellees did not intend to forever and absolutely forsake the Reserved 1/2 Mineral Interest. Instead, they actually did the exact opposite by taking affirmative steps to preserve their ownership of the severed oil and gas mineral rights (e.g., recording the timely 2009 Claim to Preserve which specifically states Appellees' intent not to abandon the Reserved 1/2 Mineral Interest, and then adamantly fighting for those rights in this proceeding).

Further, there is no doubt that the DMA is a forfeiture statute. The word "forfeiture" is defined in Black's Law Dictionary 722 (9th Ed. 2009) as follows: "1. The divestiture of property without compensation. 2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." See *Ohio Transport, Inc. v. Pub. Utilities Comm.*, 164 Ohio St. 98, 106, 128 N.E.2d 22 (1955) (noting "forfeiture has been defined as a divestiture of property without compensation in consequence of some default or act forbidden by law"). Appellants and supporting amici completely ignore this definition.

Under the "self-executing" theory of abandonment that Appellants advocate, the 1989 version of the DMA results in both the "divestiture of property [the Reserved 1/2 Mineral Interest] without compensation," and the loss of a vested private "property" right interest based on the alleged "neglect of duty" of the severed mineral owner. As a forfeiture statute, the DMA is thus subject to this Court's holding that "[f]orfeitures . . . are not favored in law or equity and statutory provisions therefor must be strictly construed." *State ex rel. Lukens v. Indus. Comm. of Ohio*, 143 Ohio St. 609, 611, 56 N.E.2d 216 (1944). And, in light of the inherent ambiguity in the 1989 version of the DMA, its operation as a forfeiture statute obligates this Court to heed the admonition to "[w]henever possible" find a construction designed to "avoid a forfeiture of property." (Emphasis added.) *State v. Lilliock*, 70 Ohio St.2d 23, 26, 434 N.E.2d 723 (1982), *superseded on other grounds*.

Here, the application of these principles means the rejection of the "rolling look-back" supported by Appellants. The reason is simple—with the benefit of hindsight, the Appellants get to choose the date(s) of the 20-year look-back period that allows for the forfeiture of the Reserved 1/2 Mineral Interest. This encourages the forfeiture of severed mineral interest, and makes it earlier surface owners to succeed on such claims. As a result, even if tying the look-

back period of the 1989 version of the DMA to formal legal action taken by the surface owner, or the effective date of the statute, were not the interpretations most consistent with the statutory text—which they are—the mere fact that it is *possible* to construe the 1989 version of the DMA in such a manner to avoid the forfeiture of property requires this Court to do so.

For the reasons set forth above, and because Appellants' interpretation constitutes a wholesale replacement of the statutory language and backward-looking nature of the DMA, it must be rejected.

### **III. Appellees Also Prevail Because this Court Must Affirm the Lower Court's Decision Even If It Resolves the Case on Different Legal Grounds.**

Even if the Seventh District Court of Appeals applied the incorrect look-back period under the 1989 version of the DMA, it does not follow that its judgment should be reversed. This Court has "consistently held that a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof." *Joyce v. General Motors Corp.*, 49 Ohio St. 3d 93, 96, 551 N.E.2d 172, 174 (1990), citing *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E. 2d 658, 663 (1944). It "has been long established" that a reviewing court may affirm a legally correct judgment on other grounds. *State v. Allen*, 77 Ohio St. 3d 172; 672 N.E.2d 638, 639 (1996); *Myers v. Garson*, 66 Ohio St. 3d 610, 614-615, 614 N.E.2d 742, 745 (1993); *State ex rel. Keenan v. Calabrese*, 69 Ohio St. 3d 176, 179, 631 N.E.2d 119, 122 (1994); *Wright v. Ghee*, 74 Ohio St. 3d 465, 467, 659 N.E.2d 1261, 1263 (1996).

By applying this long established principle, the decision of the Seventh District Court of Appeals remains valid, regardless of the 20-year look-back period adopted by this Court. Simply put, there is no 20-year period during which the 1989 version of the DMA was in effect where there was not a valid savings event under R.C. 5301.56(B)(3)(a). For the reasons set forth

below, the 1990 Certificate of Transfer, 1998 Certificate of Transfer,<sup>16</sup> 1998 Deed, 2009 Reusser Deed, 2009 Claim to Preserve and 2012 Lease all qualify as savings events under R.C. 5301.56(B)(3)(a), and bar Appellants' claims.

**A. The 1990 Certificate of Transfer, 1998 Certificate of Transfer and 1998 Deed constitute savings events regardless of this Court's holdings in *Dodd v. Croskey* and *Walker v. Shondrick-Nau*.**

Two cases pending before this Court present an issue similar to Appellants' Proposition of Law No. 2—namely, whether a deed transferring the surface that specifically references the mineral reservation constitutes a savings event under the DMA. *Dodd v. Croskey*, Sup. Ct. Ohio No. 2013-1730; *Walker v. Shondrick-Nau*, Sup. Ct. Ohio No. 2014-0803. Specifically, both cases involve challenges to the Seventh District Court of Appeals' conclusion that, "[i]n order for the mineral interest to be the 'subject of' the title transaction the grantor must be conveying that interest or retaining that interest." *Dodd v. Croskey*, 2013-Ohio-4257, ¶ 48 (7th Dist.); *see Walker v. Shondrick-Nau*, 2014-Ohio-1499 (7th Dist.), ¶¶ 26–27. Even if this Court affirms that conclusion (which Appellees in no way advocate), Appellees still prevail because: (i) the mineral rights *actually were conveyed* as part of the 1990 Certificate of Transfer, 1998 Certificate of Transfer, and 1998 Deed, as well as the 2009 Reusser Deed; and (ii) the Seventh District Court of Appeals explicitly rejected that holding in this case.

Appellants themselves readily acknowledged before the Seventh District Court of Appeals that the mineral rights *were actually conveyed* as part of the 1990 Certificate of Transfer, 1998 Certificate of Transfer, and 1998 Deed, stating: "Paul and Ida Eisenbarth conveyed the exclusive right to lease the premises to the Appellants in the deeds of

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<sup>16</sup> A "certificate of transfer . . . qualifies as a title transaction" under Ohio's Marketable Title Act. *Morgenstern v. Nat'l City Bank of Cleveland*, 4th Dist. Washington No. 85 CA 33, 1987 Ohio App. LEXIS 5677, \*16–17 (Jan. 27, 1987).

conveyance[.]" *Eisenbarth*, 7th Dist. Monroe No. 13-MO-10, Brief of Appellants (July 23, 2013) at 21. As noted above, the executive right to lease is one of the five real property rights comprising the mineral estate. *Lesley*, 352 S.W.3d at 480–81. "Even when it is severed from the other rights or attributes incident to the mineral estate, [the executive right to lease] remains an interest in property." *Day & Co., Inc. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669 (Tex. 1990). By definition, the mineral interest is necessarily the subject of a title transaction when any of those five real property rights is conveyed from one person to another. Thus, the Reserved 1/2 Mineral Interest was the subject of the 1990 Certificate of Transfer, 1998 Certificate of Transfer, and 1998 Deed because the executive right to lease the Reserved 1/2 Mineral Interest was affected, and in fact, conveyed as part of each of these duly-recorded title transactions.

Applying this conclusion to the relevant look-back periods under the DMA, the Appellees prevail regardless of the look-back period adopted by this Court. If the look-back period is determined to be the 20 years prior to the date on which a surface owner commences legal action under the 1989 version of the DMA, the only relevant time period would be the 20 years prior to the filing of Appellants' complaint on September 13, 2012. During that time period there were at least three savings events: (1) the 2009 Reusser Deed (actually transferring the Reserved 1/2 Mineral Interest); (2) the 2009 Claim to Preserve (an independent savings event under the DMA); and (3) the 2012 Lease.

On the other hand, if the Court chooses to affirm the fixed look-back period adopted by the Seventh District Court of Appeals in this case, the look-back period would be the 20 years

prior to the effective date of the 1989 version of the DMA—or, from March 22, 1969 through March 22, 1989. Under this scenario, the 1974 Lease constitutes a title transaction.<sup>17</sup>

Finally, if the Court adopts Appellants' proposal and interprets the 1989 version of the DMA as having a "roll forward," Appellees still prevail because of savings events during any relevant 20-year period that the 1989 version of the DMA remained in effect. Specifically, the following recorded documents constitute savings events (with the corresponding 20-year periods in parentheses): (1) the 1974 Lease (preserving the Reserved 1/2 Mineral Interest from 1974 to 1994); (2) the 1990 Certificate of Transfer (preserving the Reserved 1/2 Mineral Interest from 1990 to 2010, or after the effective date of the 2006 version of the DMA); and (3) both the 1998 Certificate of Transfer and 1998 Deed (preserving the Reserved 1/2 Mineral Interest from 1998 to the present).<sup>18</sup>

For the foregoing reasons, Appellants prevail regardless of whether the 1989 version of the DMA is self-executing and regardless of the look-back period adopted.

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<sup>17</sup> It is also worth noting that the 1989 Deed from Paul and Ida Eisenbarth to Keith Eisenbarth (which transferred the executive right to lease Tract I) and the 1990 Certificate of Transfer (which transferred the executive right to lease Tract II) qualify as additional savings events during the three year grace period under the 1989 version of the DMA.

<sup>18</sup> Of course, Appellees also prevail if this Court adopts the arguments of the severed mineral owners in *Dodd and Walker*—namely that a transfer of the surface which specifically references a severed mineral interest should qualify as a savings event—because of the references in the 1990 Certificate of Transfer, 1998 Certificate of Transfer and 1998 Deed to the exact language utilized in the Severance Deed, including the name of the reserving party.

**CONCLUSION**

For the foregoing reasons, Appellees respectfully request that the Court affirm the judgment of the Seventh District Court of Appeals in its entirety.

Respectfully submitted,

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