

IN THE SUPREME COURT OF OHIO

Vernon L. TRIBETT , et al. <i>Appellees</i> ,	I	On Appeal from the Ohio Seventh District
v.	I	Court of Appeals and the Common Pleas
	I	Court of Belmont County, Ohio
	I	
Barbara SHEPHERD , et al. <i>Appellants</i> .	I	Ohio Supreme Court Case No. 2014-1966
	I	Seventh District Case No. 13 BE 22

MERIT BRIEF OF *AMICI CURIAE* DAVID R. STANLEY
AND CAROLYN T. STANLEY IN SUPPORT OF APPELLEES

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II. INTEREST OF AMICI CURIAE

Amici Curiae David R. Stanley and Carolyn T. Stanley (the “Stanleys” or “Amici”) are the owners of the surface of 56.3118 acres located in Warren Township, Belmont County, Ohio. The Stanleys’ predecessors in title, Jesse R. Doudna and Eliza J. Doudna, excepted and reserved certain oil and gas rights in the warranty deed to Edward Doudna, dated May 7, 1904, filed May 9, 1904 and recorded in Volume 150, Page 398 of the Deed Records of Belmont County, Ohio (the “1904 Deed”). The 1904 Deed contains the following reservation of oil and gas:

“...except all the coal underlying said Premises Deeded to W.K. Rowland Trustee May the 5th 1903 and Reserves one half interest in all the oil and gas and Rentals for same.” (the “1904 Mineral Interest”).

The deed in the chain of title immediately following the 1904 Deed is the deed from Edward S. Doudna and Katherine Doudna to John P. Jefferis dated April 15, 1905, filed April 18, 1905 and recorded in Volume 151, Page 384 of the Deed Records of Belmont County, Ohio (the “1905 Deed”). The 1905 Deed contains the following language:

“Excepting herefrom and from this conveyance all the coal lying under said premises deeded to W.J. Rowland trustee on the 5th day of May 1903, and also the undivided one half of all the oil and gas in and under said premises and rentals for the same.” (the “1905 Mineral Interest”).

On August 2, 2013, the Stanleys filed in the Office of the Belmont County Recorder, an Affidavit pursuant to Ohio Revised Code Section 5301.252, recorded in Volume 410, Page 252 of the Official Records of Belmont County, Ohio. Said Affidavit declared that none of the savings conditions outlined in R.C. 5301.56(B)(1) occurred in the 20-year period prior to June 30, 2006. The Stanleys set forth that because none of those savings conditions occurred in that 20 year period, both the 1904 Mineral Interest and the 1905 Mineral Interest (hereinafter collectively referred to as the “Mineral Interests”) were abandoned and vested in owners of the

surface as of that date, due to the self-executing nature R.C. 5301.56, as originally enacted on March 22, 1989 and effective until June 30, 2006 (the “1989 ODMA”).

On November 26, 2013, Linda Dick executed and recorded an Affidavit of Claim to Preserve Mineral Interest in Volume 435, Page 455 of the Belmont County Official Records claiming to be an heir of the grantors in the 1904 Deed and the 1905 Deed. The Stanleys then brought an action for a declaratory judgment pursuant to Ohio Rule of Civil Procedure Rule 57 seeking a declaration that they are also the fee owners of the oil and gas rights in and under the Property pursuant to the provisions of the 1989 DMA. The Belmont County Court of Common Pleas granted summary judgment in favor of the Stanleys. Dick appealed to the Seventh District Court of Appeals setting forth issues identical to those presented for review in the case *sub judice*: that the 1989 ODMA is unconstitutional and that the statute of limitations outlined in R.C. 2305.04 precluded the Stanleys from bringing a declaratory judgment action under the 1989 ODMA. The Seventh District stayed the action on its own motion pending the outcome of several cases currently pending before this Honorable Court.

The whole point of the 1989 DMA when enacted by the General Assembly was to encourage the development of long-abandoned mineral interests, consistent with the public policy of the State of Ohio and the Constitution of the State of Ohio, by removing uncertainty about the ownership of those interests. The Stanleys therefore join Appellees in asking this Court to restore certainty by affirming the Seventh District’s decision in the case *sub judice* by holding that the 1989 DMA is constitutional and that a present action does not violate any applicable statute of limitations.

III. INTRODUCTION AND SUMMARY

It is the public policy of the State of Ohio to “encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio.” *Newbury Township Board of Township Trustees v. Lomak Petroleum (Ohio) Inc.*, 62 Ohio St.3d 387, 389, 583 N.E.2d 302, 304 (1992). Ohio Revised Code Section 5301.56 (hereinafter the “ODMA”) accomplishes this objective by having dormant, stale, and diluted mineral interests deemed abandoned and re-vested with the surface owner to facilitate feasible oil and gas production. In the absence of such a statute, every mineral owner of a fractionalized mineral estate would be required to sign an oil and gas lease. To the contrary, the ODMA provides a mechanism whereby the individual landowner is the only person that must execute an oil and gas lease to facilitate production.

As originally enacted on March 22, 1989, the ODMA did not require any action by the surface owner. Rather, the 1989 DMA was based solely on the inaction of the mineral holder and simply provided that if none of the requisite savings events occurred in the preceding twenty years, then the severed oil and gas interest was “deemed abandoned and vested in the owner of the surface.” R.C. 5301.56(B). The Fifth District, Seventh District, and Eleventh District Courts of Appeal (as well as numerous common pleas courts) have characterized the 1989 DMA as “self-executing”. See *Wendt v. Dickerson*, 2014-Ohio-4615 (5th Dist.2014); *Walker v. Shondrick-Nau*, 2014-Ohio-1499 (7th Dist.2014) (Supreme Court Case No. 2014-0803); *Thompson v. Custer*, 2014-Ohio-5711, 26 N.E.3d 278 (11th Dist.2014) [holding the 1989 DMA did not involve a retroactive application that would have stripped mineral rights owners of their rights upon its effective date].¹ “Self-executing means that [a] section is ‘effective immediately

¹ In fact, every Court of Appeals in this State to address the 1989 DMA has held that the statute is both “self-executing” and constitutional.

² Even if this Court concludes that Appellants are issuing a facial challenge to the 1989 DMA’s constitutionality,

without the need of any type of implementing action.” State ex rel. Vickers v. Summit Cty. Council, 97 Ohio St. 3d 204, 209, 777 N.E.2d 830, 835 (2002) citing BLACK’S LAW DICTIONARY (7th Ed.1999) 1364; citing also, *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 151, 101 N.E.2d 289 (1951). (Emphasis added).

While the issues of whether the 1989 DMA can be utilized after the statute’s amendment in 2006 (see *Corban v. Chesapeake Exploration, LLC*, 139 Ohio St.3d 1482, 2014-Ohio-3195, 12 N.E.3d. 1228 (2014) (Supreme Court Case No. 2014-0804); see also *Walker v. Shondrick-Nau*, 2014-Ohio-1499 (7th Dist.2014) (Supreme Court Case No. 2014-0803)), and how the applicable look-back period operates (see *Eisenbarth v. Reusser*, 2014-Ohio-3792 (7th Dist. 2014)(Supreme Court Case No. 2014-1767)) are already before this Court, those issues are not the subject of this appeal. The narrow issues before this Court are a) whether the 1989 DMA is constitutional; and b) whether the statute of limitations set forth in R.C. 2305.04 is applicable to this action. Just as with every other court in this State, this Honorable Court should hold that the 1989 DMA is both constitutional and “self-executing,” thereby affirming the decision reached by the Seventh District Court of Appeals.

IV. LAW AND ARGUMENT

a. Proposition of Law No. III: The 1989 DMA is constitutional.

As a threshold matter, statutes are presumed to be constitutional and courts are required to liberally construe statutes to “save them from constitutional infirmities.” *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538, 706 N.E.2d 323 (1999). “In enacting a statute, it is presumed that [c]ompliance with the constitutions of the state and of the United States is intended.” R.C. 1.47(A). See also *State v. Carswell*, 114 Ohio St.3d 210, 871 N.E.2d 547 (2007) at ¶6. When the constitutionality of legislation is attacked, this Court must interpret the applicable constitutional

provisions and acknowledge, “a court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power.” *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St. 3d 568, 573, 2006-Ohio-5512, ¶ 20, 857 N.E.2d 1148, 1155 (2006) quoting *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.*, 139 Ohio St. 427, 438, 22 O.O. 494, 40 N.E.2d 913 (1942).

There are two (2) types of constitutional challenges: facial challenges and challenges to the application of a particular statute. See *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St. 3d 568, 2006-Ohio-5512, 857 N.E.2d 1148 (2006). The two types of challenges require different standards of proof. To prevail on a facial constitutional challenge, the challenger must prove the constitutional defect using the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt. See *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59 (1955). To prevail on a constitutional challenge to the statute as applied, the challenger must present clear and convincing evidence of the statute's constitutional defect. See *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 28 O.O. 295, 55 N.E.2d 629 (1944). Before this Court will declare a statute unconstitutional, “it must appear *beyond a reasonable doubt* that the legislation and constitutional provisions are *clearly incompatible*.” *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 47, 554 N.E.2d 97, 98 (1990) quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59 (1955) (emphasis added).

While the Appellants are not explicit in which type of constitutional challenge that they are issuing, it can be reasonably inferred that they are challenging the self-executing application

of the 1989 DMA and are not issuing a facial challenge. Pursuant to the controlling case law then, Appellants must, by clear and convincing evidence, prove that the 1989 DMA is unconstitutional.² The standard of “clear and convincing evidence” is the measure or degree of proof which is more than a mere “preponderance of the evidence,” but not to the extent of such certainty as is required “beyond a reasonable doubt.” *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). Clear and convincing evidence is the measure or degree of proof that produces in the mind of the trier of facts a firm belief or conviction as to the constitutionality of a given statute. *See Id.*

For the reasons more fully set forth below, Appellants fail to meet the clear and convincing burden standard in each of their contentions. Appellants’ contend that: 1) the only controlling opinion is not actually controlling; 2) construing the 1989 DMA to be self-executing violations Article II, Section 28 of the Ohio Constitution’s prohibition on retroactive laws; or 3) the self-executing feature of the 1989 DMA violates due process protections outlined by Article I, Sections 1 and 19 of the Ohio Constitution. Because Appellants fail to meet their burden, each of Appellants’ arguments must fail and this Court should uphold the constitutionality of the 1989 DMA.

1. The decision in *Texaco* is controlling in the present case.

For obvious reasons, at the outset of their brief, Appellants attempt to subvert the applicability of the only case that is controlling on the issue of the 1989 DMA’s constitutionality. State statutes substantively identical to the 1989 DMA have already been declared constitutional by the Supreme Court of the United States (“SCOTUS”) in *Texaco, Inc. v. Short*, 454 U.S. 516,

² Even if this Court concludes that Appellants are issuing a facial challenge to the 1989 DMA’s constitutionality, then Appellants fail to meet that burden even more so than the clear and convincing standard as “beyond a reasonable doubt” is the “highest standard of proof.” *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59 (1955).

102 S. Ct. 781 (1982). In *Texaco*, SCOTUS was reviewing the constitutionality of an Indiana Statute “providing that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property.” *Texaco* at 518. The Indiana Statute provided that an unused interest shall be “extinguished” and that its “ownership shall revert to the then owner of the interest out of which it was carved” when none of the requisite “uses” had occurred.³ See *Id.* at 518. “The statute, which became effective on September 2, 1971, contained a 2-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office.” *Id.* at 518-519. The appellants (the mineral owners) in *Texaco* argued both that 1) “the lack of prior notice of the lapse of their mineral rights deprived them of property without due process of law” and that 2) “the statute effected a taking of private property for public use without just compensation.” *Id.* at 522.

SCOTUS rejected both arguments, reasoning:

- 1) “A legislature need do nothing more than enact and publish the law, and *afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, the 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms...*” *Id.* at 532.
- 2) The State of Indiana has defined a severed mineral estate as a “vested property interest,” entitled to “the same protection *526 as are fee simple titles.” Through its Dormant Mineral Interests Act, however, *the State has declared that this property interest is of less than absolute duration; retention is conditioned on the performance of at least one of the actions required by the Act.* We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, *the State has the power to condition the*

³ Similar to the 1989 DMA the Indiana Statute provided that the “use” of a mineral interest that is sufficient to preclude its extinction includes the actual or attempted production of minerals, the payment of rents or royalties, and any payment of taxes; a mineral owner may also protect his interest by filing a statement of claim with the local recorder of deeds. The statute contains one exception to this general rule: if an owner of 10 or more interests in the same county files a statement of claim that inadvertently omits some of those interests, the omitted interests may be preserved by a supplemental filing made within 60 days of receiving actual notice of the lapse. See *Texaco* at 519.

permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.” Id. at 525-526.

(Emphasis added).

The 1989 DMA (B)(2) explicitly provides that “[a] mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, *until three years from the effective date of this section.*” (Emphasis added). Quite clearly, similar to the Indiana Statute that was the subject of *Texaco*, the 1989 DMA provides for a 3-year notice period whereby the citizenry was afforded a reasonable opportunity (even more of an opportunity than under the Indiana Statute) to “familiarize itself with its terms and to comply”. Unfortunately for Appellants in this case, none of the requisite savings conditions occurred within the 20-year period immediately preceding March 22, 1989 (the date of the 1989 DMA’s enactment), or within the 20-year period immediately preceding March 22, 1992. Quite clearly, the 1989 DMA itself gave the Appellants adequate notice according to the Supreme Court in *Texaco*, *supra*.

Likewise, the State of Ohio conditioned the permanent retention of a mineral right on the performance of just one of six simple acts every 20 years. In examining Appellants’ attempt to classify the operation of the 1989 DMA as a “deprivation of property” similar to the state’s taking of real property without just compensation, *Amici* note a subtle attempt by Appellants, throughout their brief, to classify the operation of the 1989 DMA as a “forfeiture” or a “taking” rather than as an “abandonment”. By their very definitions, the terms are not synonymous. “Abandonment” is defined as:

Abandonment, n. (1809) 1. The relinquishing of a right or interest with the intention of never reclaiming it....2. Property. The relinquishing of or departing from a homestead, etc., with the present, definite, and permanent intention of never returning or regaining possession. Black’s Law Dictionary (8th Ed. 2004) 2.

By contrast, the definition of forfeiture as it applies to real property is:

Forfeiture, m. (14c) 1. The divesture of property without compensation. 2. The loss of a right, privilege or property because of a crime, breach of obligation, or neglect of duty...4. A destruction or deprivation of some estate or right because of the failure to perform some contractual obligation or condition. BLACK'S LAW DICTIONARY (8th Ed. 2004) 677.

It is well established in the State of Ohio that when a court “engag[es] in statutory interpretation, courts will give the words in a statute their plain and ordinary meaning absent a contrary legislative intent.” *State v. Conyers*, 87 Ohio St. 3d 246, 249-50, 719 N.E.2d 535, 539 (1999) citing *Coventry Towers, Inc. v. Strongsville*, 18 Ohio St.3d 120, 122, 480 N.E.2d 412, 414 (1985); see, also, *Lake Cty. Natl. Bank of Painesville v. Kosydar*, 36 Ohio St.2d 189, 191, 305 N.E.2d 799, 801 (1973). In Ohio, “abandonment in terms of property law, [] may be defined as “relinquishing of all title, possession, or claim; a virtual intentional throwing away of property.” *First Fed. S. & L. Assn. of Warren v. A & M Towing & Road Serv., Inc.*, 127 Ohio App.3d 46, 52, 711 N.E.2d 755 (1998), quoting BLACK'S LAW DICTIONARY (6th Ed.1990) 3. In the present case, the 1989 DMA provides that the subject oil and gas interest “shall be deemed abandoned and vested in the owner of the surface” if none of the savings events outlined by (B)(1) occurred in the preceding 20 years. In other words, a plain reading of the 1989 DMA's language makes the legislative intent clear: if none of the requisite savings events occurred in the preceding 20 years, the permanent intention of the severed interest owner was a relinquishment or virtual “throwing away” of all title to that interest. Because of this fact, the Appellants were “deprived” of nothing, because they relinquished those rights voluntarily pursuant to the terms of the statute. Only now, because these rights have exponentially increased in value, have Appellants asserted rights to an interest that they abandoned more than 25 years ago.

2. The U.S. Constitution and the Ohio Constitution are substantively identical.

Notwithstanding the fact that the due process requirements outlined in *Texaco* have been satisfied, Appellants attempt to distinguish the Ohio Constitution from the Constitution of the United States, thereby rendering the U.S. Supreme Court's decision in *Texaco* inapplicable. However, inviolability of real property rights and the requirements of due process under the Ohio Constitution and the United States Constitution are substantially identical. See *Wagner v. Armbuster*, 108 Ohio App.3d 719, 728, 671 N.E.2d 630 (9th Dist., 1996). "In providing that no state shall 'deprive any person of life, liberty, or property, without due process of law,' the Fourteenth Amendment to the United States Constitution requires that substantial procedural safeguards be provided in our legal system before one may be deprived of a property right. *Peebles v. Clement*, 63 Ohio St. 2d 314, 317, 408 N.E.2d 689, 691 (1980). "When read in conjunction with Sections 1 and 19 of Article I, Section 16 [of the Ohio Constitution] provides substantially the same safeguards as does the Fourteenth Amendment." *Id. citing State ex rel. Heller v. Miller*, 61 Ohio St.2d 6, 399 N.E.2d 66 (1980).

In arguing that the Ohio Constitution confers greater protections on individual property rights than the U.S. Constitution, Appellants rely heavily on *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 853 N.E.2d 1115 (2006) and similar cases that deal with the legal ramifications of *eminent domain*.⁴ Obviously, the issue of a government's taking of an individual's property without just compensation is easily distinguishable from due process with respect to the issue of

⁴ This includes Appellants' entire analysis regarding the void-for-vagueness doctrine. As provided above, in order for this Court to find that the 1989 DMA is unconstitutional, the Appellants are held to a "clear and convincing evidence" standard. A statute should not be declared unconstitutional "unless it 'appear[s] beyond a reasonable doubt that the legislation and constitutional provision are clearly incompatible.'" *Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St.3d 375, 2002-Ohio-4930, 775 N.E.2d 489, ¶ 10 (2002), quoting *State ex rel. *574 Dickman v. Defenbacher*, 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59 (1955). Furthermore, a statute "must be enforced unless it is in clear and irreconcilable conflict with some express provision of the constitution." *Spivey v. Ohio* (N.D. Ohio 1998), 999 F.Supp. 987, 999.

abandoned real property. In fact, they are two entirely separate and distinct legal concepts. *Norwood*, supra, focused on the state's taking of private property without just compensation and weighing that taking with the "public good."⁵ To the contrary, the provisions of the 1989 DMA do not constitute a "taking" by a governmental entity. Rather, the Ohio Legislature, pursuant to the powers granted to it by its constitution and the Constitution of the United States, reinforced the principle that people who abandon their property are not entitled to due process protections (whereas with eminent domain, they are). Therefore, once a mineral interest is, or has been "abandoned", the former owner is "deprived" of nothing. See *Texaco*, supra at 530. The State of Ohio is well within its power to condition the permanent retention of a reserved interest upon the use of that interest. See *Texaco*, supra at 518.

As demonstrated above, the constitutionality of the 1989 DMA has already been decided by the United States Supreme Court. However, Amici would be remiss if they did not address the similarities of the 1989 DMA to the Marketable Title Act (hereinafter the "OMTA") when read in conjunction with the Ohio Constitution. The 1989 DMA is no different than the OMTA from a standpoint of due process; both automatically extinguish property rights without advance notice to the holder (other than the holder's knowledge of the existence of the statute and its operation). The OMTA was originally enacted September 29, 1961. The OMTA operates to extinguish *any* interest in real property existing prior to the root of title automatically and by operation of law, provided that the interest is not: (a) specifically stated or identified in the root of title; (b) specifically stated or identified in one of the muniments of the chain of record title within forty years after the root of title; (c) preserved pursuant to ORC §5301.51 and §5301.52; (d) one of the other exceptions provided for in ORC §5301.49 apply; or (e) one of the rights that

⁵ Although, as Appellees adequately outline, the abandonment of the Appellants' property in this case *does*, in fact, serve a public good.

cannot be barred by the Marketable Title Act provided for in ORC §5301.53. See *Semachko v. Hopko*, 35 Ohio App.2d 205, 205-206 (8th Dist., 1973). (Emphasis added).

Interestingly, the OMTA does not provide a notice provision to the owner of a severed interest in real property that his or her interest is about to be extinguished. Despite this fact, in the 55 years since its enactment, no court in the State of Ohio has *ever* held the OMTA to be unconstitutional. Rather, Ohio courts have consistently held the OMTA to be constitutional. See *Pinkney v. Southwick Invs., LLC*, 2005-Ohio-4167 (8th Dist., 2005). Under the 1989 DMA, mineral rights are automatically abandoned after a period of 20 years if no savings events occur. From a due process perspective, the OMTA and 1989 DMA are identical in this respect: use the reserved interest or it will be subject to extinguishment and/or abandonment. Unless this Court is prepared to conclude that the OMTA is unconstitutional, it must uphold the constitutionality of the 1989 DMA.

3. Appellants are charged with knowledge of laws affecting their real property.

Ohio law makes clear that “[l]and stands accountable to the demands of the State, and owners are charged with knowledge of laws affecting it, and the manner in which their demands may be enforced. Whether provisions as to notice and service in a state statute have been complied with is wholly for the state court to determine.” *Rosenberg v. Hall*, Not Reported in N.E. 2d., 1980 WL 351210 (6th Dist., 1980) citing *Ballard v. Hunter*, 204 U.S. 241, 262 (1907) at headnote 5. The *Ballard* Court goes on to hold that:

The law cannot give personal notice of its provisions or proceedings to everyone. It *charges everyone with knowledge of its provisions*; of its proceedings *it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate*. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property

to be universal, if it would give efficiency to many of its exercises. *Ballard v. Hunter*, 204 U.S. 241, 262, 27 S. Ct. 261, 269, 51 L. Ed. 461 (1907).

(Emphasis added).

The concept of indirect notice as propounded by the *Ballard* Court was originally discussed in *Huling v. Kaw. Valley R. & Improv. Co.* 130 U. S. 559, 9 Sup. Ct. Rep. 603 (1889), where it was declared to be the “duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.” (Emphasis added).⁶ It is well established in both this state and by SCOTUS that indirect notice is sufficient when dealing with real estate.

The notice provision outlined by (B)(2) clearly and definitively provided the Appellants with an opportunity to preserve the mineral interest at any time from March 22, 1989 through March 22, 1992. However, the Appellants (and their predecessors) failed to do so. Appellants’ predecessors clearly reserved a property right in this state. Because of this reservation, Appellants’ predecessors accepted the affirmative duty to “take measures that in some way [they] shall be represented when [their] property [was] called into requisition.” This concept has remained an established legal concept in that “equity aids the vigilant, not those who slumber on their rights.”⁷ At the enactment of the 1989 DMA on March 22, 1989, Appellants’ and their

⁶ Additionally, in *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925), the United States Supreme Court held:

“All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding.”

⁷ Moreover, “[a] Court of equity will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them.” *Speidel v. Henrici*, 120 U.S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718 (1887).

predecessors were required to take one of the measures outlined by (B)(1) within the three (3) year notice period provided by (B)(2). It is undisputed that neither Appellants nor their predecessors in title did anything from the date of the reservation to March 22, 1992. Accordingly (and despite arguments to the contrary), all of Appellants' right, title and interest in and to the subject real estate was "deemed abandoned" as of March 22, 1992.

Appellants have clearly failed to meet the clear and convincing burden set forth by this Court so as to find that the 1989 DMA is unconstitutional. Accordingly, this Court should uphold that constitutionality of the 1989 DMA and its application as a "self-executing" statute that facilitates the abandonment of a stale, unused mineral interest.

- b. Proposition of Law No. VII: The statute of limitations does not apply to a self-executing statute.

R.C. 2305.04 is inapplicable to the 1989 DMA and the facts of this case. As provided in other cases currently before this Court, the 1989 DMA is "self-executing". See *Walker v. Shondrick-Nau*, 2014-Ohio-1499 (7th Dist., 2014); *Swartz v. Householder*, 2014-Ohio-2359 (7th Dist., 2014); *Dahlgren v. Brown Farm Properties, LLC*, 2014-Ohio-4001 (7th Dist., 2014); *Eisenbarth v. Reusser*, 2014-Ohio-3792 (7th Dist., 2014); and *Farnsworth v. Burkhardt*, 2014-Ohio-4184 (7th Dist., 2014). "Self-executing means merely that [a] section is 'effective immediately without the need of any type of implementing action.'" *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St. 3d 204, 209, 777 N.E.2d 830, 835 (2002) citing Black's Law Dictionary (7th Ed.1999) 1364; citing also, *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 151, 101 N.E.2d 289 (1951). In analyzing the operation of the 1989 DMA, "it is essential to recognize the difference between the self-executing feature of [a] statute and a subsequent

judicial determination that a particular lapse did in fact occur.” *Texaco, Inc. v. Short*, 454 U.S. 516, 533, 102 S. Ct. 781, 794 (1982).

R.C. 2305.04 provides:

An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause of action accrued, but if a person entitled to bring the action is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person, after the expiration of twenty-one years from the time the cause of action accrues, may bring the action within ten years after the disability is removed.

By arguing that R.C. 2305.04 provides a statute of limitations for the subject case, Appellants again misunderstand the self-executing operation of the 1989 DMA. No implementing *action to recover title to or possession of real property* was necessary or required on the part of the surface owners for the 1989 DMA to operate. The present action is simply a declaratory judgment action to indicate in the record that 1) that the particular lapse (just as in *Texaco*, supra, *Walker*, supra, and the other above-cited cases) did occur and 2) to clear the cloud on Appellees’ title that was caused by the Appellants’ filing of their claim to preserve on October 28, 2011. In fact, this action did not even become necessary until after Appellants filed a claim to preserve an interest that had already vested in Appellees.⁸

Accordingly, no statute of limitations argument is applicable to this case because the subject oil and gas interest has already been vested in Appellees by operation of law. In fact, Appellees have owned the oil and gas rights under the Property for more than twenty-five (25) years.⁹ Appellants’ argument regarding the statute of limitations is disingenuous, at best. Despite the fact that neither Appellants, nor any of their predecessors-in-title took any action whatsoever with respect to the Mineral Interests for more than *50 years*, Appellants argue that it is Appellees

⁸ As a matter of simple arithmetic, it has not been twenty-one (21) years since October 28, 2011.

⁹ It follows, then, that if R.C. 2305.04 applies in this case, then it is Appellants who are barred from asserting an action to recover title of a property right that was previously vested in the Appellees.

who have failed to take any timely action concerning the minerals. Such a position not only runs contrary to all controlling authority in this state, but also runs contrary to the express purpose of the 1989 DMA.

IV. CONCLUSION

The Appellants fail to meet their burden of proof in establishing that the 1989 DMA is constitutional. Because the U.S. Constitution and the Ohio Constitution are “substantively identical” with respect to real property rights and due process, then this Court is bound by SCOTUS’s decision in *Texaco* and should uphold the constitutionality of the 1989 DMA. The statute is expressly unambiguous on what a severed mineral owner must do to preserve his/her interest and avoid a “deemed” abandonment. The Appellants in this case failed to take any of those necessary steps. Accordingly, the subject oil and gas interest has been deemed abandoned and vested in Appellees as owners of the surface. Accordingly, this Honorable Court should *affirm* the decision of the Seventh District Court of Appeals and the Belmont County Court of Common Pleas.

Respectfully Submitted,



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V. CERTIFICATE OF SERVICE

A copy of the foregoing document was sent via US Mail and Electronic Mail on May 20,

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