Supreme Court of Ohio Clerk of Court - Filed May 20, 2016 - Case No. 2014-1966

In the
Supreme Court of Ohio

VERNON L. TRIBETT, et al.,	:	Case No. 2014-1966
	:	
Plaintiff-Appellees,	:	On Appeal from the
	:	Belmont County
v.	:	Court of Appeals,
	:	Seventh Appellate District
BARBARA SHEPHERD, et al.,	:	
	:	Court of Appeals
Defendants-Appellants.	:	Case No. 13 BE 22
	:	

MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF APPELLEES

MATTHEW W. WARNOCK* (0082368)
**Counsel of Record*
DANIEL E. GERKEN (0088259)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
614-227-2300; 614-227-2390 fax
mwarnock@bricker.com

Counsel for Appellants

GREGORY W. WATTS* (0082127)
**Counsel of Record*
MATTHEW W. ONEST (0087907)
Krugliak, Wilkins, Griffiths & Dougherty
4775 Munson St., NW, P.O. Box 36963
Canton, Ohio 44735-6963
330-497-0700; 330-497-4020 fax
gwatts@kwgd.com

Counsel for *Amici Curiae* Jeffco, et al.

CRAIG E. SWEENEY (0087841)
Yoss Law Office
122 N. Main Street
Woodsfield, Ohio 43793
740-472-0707; 740-472-0770 fax
yosslaw.craig@gmail.com

Counsel for *Amici Curiae* David and Carolyn T. Stanley

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON (0081432)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae* State of Ohio

RICHARD A. MYSER* (0007462)
**Counsel of Record*
ADAM L. MYSER (0090942)
Myser & Davies
320 Howard Street
Bridgeport, Ohio 43912
740-635-0162
740-635-1601 fax
myser@belmontlaw.net

Counsel for Appellees

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF AMICUS INTEREST 4

STATEMENT OF THE CASE AND FACT 5

A. For hundreds of years, adverse possession has served as an important tool for regulating property ownership and for eliminating errors and ambiguities in titles. 5

B. In part because the traditional adverse possession doctrine does not apply to severed mineral interests, the General Assembly adopted R.C. 5301.56 (1989) to further the same goals of identifying and eliminating abandoned property interests. 6

C. The mineral interests underlying the surface property owned by the Appellees were severed from the surface estate in 1962. 8

D. The surface owners brought a quiet title action, and both the trial court and court of appeals determined that the mineral rights had vested in them under the 1989 version of the Dormant Mineral Act. 8

E. The Court granted review and first held the appeal for pending cases interpreting R.C. 5301.56, but later sua sponte ordered briefing on Appellants' constitutional challenge to the Act. 9

ARGUMENT 10

***Amicus* Ohio Attorney General's Proposition of Law I:**

The self-executing version of the Dormant Mineral Act that the General Assembly originally adopted did not violate the Ohio Constitution. 10

1. The self-executing version of R.C. 5301.56 that took effect in 1989 did not violate the Retroactivity Clause, Ohio Const. art. II, § 28. 11

   a. The version of R.C. 5301.56 that took effect in 1989 was a prospective statute. 12

   b. The version of R.C. 5301.56 that took effect in 1989 was a remedial statute. 15

c. Appellants' arguments in support of their claim that the statute is unconstitutionally retroactive are unpersuasive. 18

2. The additional constitutional challenges that Appellants present for the first time in this Court lack merit. 20

a. The version of R.C. 5301.56 that took effect in 1989 did not violate the Takings Clause, Ohio Const. art. I, § 19. 21

b. The version of R.C. 5301.56 that took effect in 1989 did not violate the due process guarantees of the Ohio Constitution. 23

c. The version of R.C. 5301.56 that took effect in 1989 was not vague. 25

3. Appellants' arguments, if accepted, would have far-reaching consequences and create uncertainty in many areas of settled law. 27

***Amicus* Ohio Attorney General's Proposition of Law II:**

The statute of limitations found in R.C. 2305.04 does not bar a quiet title action which claims that a mineral interest was abandoned and vested in the surface owner under R.C. 5301.56 (1989). 29

CONCLUSION 31

CERTIFICATE OF SERVICE

APPENDIX:

Proponent Testimony on behalf of S.B. 223 and H.B. 521, Ohio Dormant Mineral Act A-1

Ohio Farm Bureau letter to Sen. Pfeifer, Feb. 5, 1988 ..... A-4

Uniform Dormant Mineral Interests Act, Aug. 1-8, 1986 ..... A-6

TABLE OF AUTHORITIES

Cases **Page(s)**

Bielat v. Bielat,
87 Ohio St. 3d 350 (2000) 11, 15

Carney v. Shockley,
No. 2015-0235 4

Chicago & N.W. Transp. Co. v. Pedersen,
259 N.W.2d 316 (Wisc. 1977).....19

City of Norwood v. Horney,
110 Ohio St. 3d 353 (2006) ..... *passim*

Clark v. Potter,
32 Ohio St. 49 (1876).....6, 18, 29

Contos v. Herbst,
278 N.W.2d 732 (Minn. 1979).....19

Cook v. Matvejs,
56 Ohio St. 2d 234 (1978) 17

Corban v. Chesapeake Exploration,
No. 2014-0804 10

Eisenbarth v. Reusser,
No. 2014-1767 10

Evanich v. Bridge,
119 Ohio St. 3d 260, 2008-Ohio-3820..... *passim*

Fletcher v. Fuller,
120 U.S. 534 (1887).....5

Gill v. Fletcher,
74 Ohio St. 295 (1906).....6

Gregory v. Flowers,
32 Ohio St. 2d 48 (1972) 17

Groch v. Gen. Motors Corp,
117 Ohio St. 3d 192, 2008-Ohio-546.....17, 24

Haight v. Minchak,
___ Ohio St. 3d ___, 2016-Ohio-1053.....11

Hawkins v. Barney's Lessee,
30 U.S. 457 (1831)..... *passim*

In re Application of Columbus S. Power Co.,
134 Ohio St. 3d 392, 2012-Ohio-5690.....27

In re B.C.,
141 Ohio St. 3d 55, 2014-Ohio-4558..... *passim*

Jackman v. Rosenbaum Co.,
260 U.S. 22 (1922).....25

Kolender v. Lawson,
461 U.S. 352 (1983).....26

Longbottom v. Mercy Hosp. Clermont,
137 Ohio St. 3d 103, 2013-Ohio-4068.....11, 15

Minnesota ex rel. Alexander v. Block,
660 F.2d 1240 (8th Cir. 1981) 27

Mominee v. Scherbarth,
28 Ohio St. 3d 270 (1986) 17

Montoya v. Gonzales,
232 U.S. 375 (1914).....21

Nat'l Mut. Ins. Co. v. Whitmer,
70 Ohio St. 2d 149 (1982) 19

Pavey v. Vance,
56 Ohio St. 162 (1897).....5

Peterson v. Sanders,
806 N.W.2d 566 (Neb. 2011).....20

Pinkney v. Southwick Investments, L.L.C.,
8th Dist. Cuyahoga Nos. 85074 and 85075, 2005-Ohio-4167 (Aug. 11, 2005) 16

State ex rel. A.A.A. Investments v. City of Columbus,
17 Ohio St. 3d 151 (1985) ..... *passim*

State ex rel. Bouse v. Cickelli,
165 Ohio St. 191 (1956).....19

State ex rel. Dickman v. Defenbacher,
164 Ohio St. 142 (1955).....11

State ex rel. Michaels v. Morse,
165 Ohio St. 599 (1956).....15

State ex rel. Plavcan v. School Emp. Ret. Sys. of Ohio,
71 Ohio St. 3d 240 (1994) 19

State v. Consilio,
114 Ohio St. 3d 295, 2007-Ohio-4163.....12

State v. Quarterman,
140 Ohio St. 3d 464, 2014-Ohio-4034.....3, 11

Straits v. Shepler,
5th Dist. Holmes No. CA 332, 1982 WL 2919 (Feb. 10, 1982).....13, 14

Texaco v. Short,
454 U.S. 516 (1982)..... *passim*

Thompson v. Custer,
2014-Ohio-5711 (11th Dist.) 13, 27

Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.,
___ Ohio St. 3d ___, 2016-Ohio-2806.....11

Tribett v. Shepherd,
142 Ohio St. 3d 1447, 2015-Ohio-1591.....9

Tribett v. Shepherd,
144 Ohio St. 3d 1474, 2016-Ohio-467.....9

Tribett v. Shepherd,
145 Ohio St. 3d 1432, 2016-Ohio-1455.....9

United Eng'g & Foundry Co. v. Bowers,
171 Ohio St. 279 (1960).....19

United States v. Locke,
471 U.S. 84 (1985).....23

Van Fossen v. Babcock & Wilcox Co.,
36 Ohio St. 3d 100 (1988) 11, 12, 13

Vance v. Vance,
108 U.S. 514 (1883).....17

Walker v. Shondrick Nau,
No. 2014-0803 10

Walker v. Shondrick-Nau,
2014-Ohio-1499 (7th Dist.) 27

Wellston Iron Furnace Co. v. Rinehart,
108 Ohio St. 117 (1923).....15

Wendt v. Dickerson,
2014-Ohio-4615 (5th Dist.) 27

Wheelock v. Heath,
272 N.W.2d 768 (Neb. 1978).....19

Wilson v. Bishop,
412 N.E.2d 522 (Ill. 1980) 19

Wilson v. Iseminger,
185 U.S. 55 (1902).....14, 18

Yetzer v. Thoman,
17 Ohio St. 130 (1866).....6, 24

Statutes, Rules, and Constitutional Provisions

Ohio Const. art. I, § 16.....3, 20, 23, 24

Ohio Const. art. I, § 19..... *passim*

Ohio Const. art. II, § 28 ..... *passim*

Prefatory Note, Uniform Dormant Mineral Interests Act.....6, 7, 28, 29

R.C. 1.47(A).....11

R.C. 1.48 12

R.C. 2305.04 .....4, 18, 29, 30

R.C. 5301.53, 110 Am. S. B. 267 (1973).....16

R.C. 5301.53(E), 104 Am. H. B. 81 (1961) 16

R.C. 5301.56, 110 Am. S. B. 267 (1973).....16

R.C. 5301.56 (1989)..... *passim*

R.C. 5301.56(B)(1) (1989).....7, 25

R.C. 5301.56(B)(1)(c).....13, 25

R.C. 5301.56(B)(1)(c)(v) (1989) 7, 26

R.C. 5301.56(B)(2) (1989).....7, 12, 18, 30

Other Authorities

Constitutionality of Marketable Title Legislation, 47 Iowa L. Rev. 413 (1962) 28

Fenner L. Steward, *When the Shale Gas Hit Ohio: The Failures of the Dormant Mineral Act, Its Heroic Interpretations, and Grave Choices Facing the Supreme Court*, 43 Cap. U. L. Rev. 435 (2015) 10, 27

Henry W. Ballantine, *Title By Adverse Possession*, 32 Harv. L. Rev. 135 (1918).....1, 5

John L. McCormack, *Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage*, 42 Val. U. L. Rev. 461 (2008).....5

Lewis M. Simes & Clarence B. Taylor, *The Improvement of Conveyancing by Legislation* (1960).....12, 17

INTRODUCTION

"What is the evidence of an individual having abandoned his rights or property? It is clear that the subject is one over which every community is at liberty to make a rule for itself." *Hawkins v. Barney's Lessee*, 30 U.S. 457, 467 (1831). The General Assembly did just that when it adopted the original version of the Dormant Mineral Act. It exercised its power to make such a rule. Whatever the merits of the pending statutory interpretation questions, resolution of the *constitutional* challenges to the original version of R.C. 5301.56 (also known as the Dormant Mineral Act) should therefore be relatively straightforward.

In many respects, the version of the Act that took effect in 1989 was little more than a variation on a familiar and well-settled principle of property law: the doctrine of adverse possession. For well over 150 years, adverse possession has played a role in identifying and clarifying title to abandoned or unused property in Ohio. *See Evanich v. Bridge*, 119 Ohio St. 3d 260, 2008-Ohio-3820 ¶ 13. As this Court has recognized, adverse possession has a "venerable place in the regulation of the use and ownership of real property." *Id.* ¶ 14. Although the doctrine "sounds, at first blush, like title by theft or robbery," Henry W. Ballantine, *Title By Adverse Possession*, 32 Harv. L. Rev. 135, 135 (1918), there is no legitimate debate that adverse possession passes constitutional muster under both federal and state law, *see Texaco v. Short*, 454 U.S. 516, 525-30 (1982); *State ex rel. A.A.A. Investments v. City of Columbus*, 17 Ohio St. 3d 151, 152-53 (1985).

The grounding of dormant mineral acts like R.C. 5301.56 in adverse possession was one of the reasons that the U.S. Supreme Court upheld Indiana's dormant mineral law in *Texaco*. In that case, the Court rejected due process and takings challenges to Indiana's statute, holding that "[t]he requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a 'taking.'" 454 U.S. at 530.

That decision reflected the longstanding principle that "[t]he right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law: it existed in a state of nature, and is only modified by society, according to the discretion of each community." *Hawkins*, 30 U.S. at 467.

It is the absence of historical context then, not the statute itself, that is likely responsible for the questions the Court now faces about the meaning and operation of R.C. 5301.56 (1989). While it is merely a mineral-specific version of adverse possession, Ohio's Dormant Mineral Act dates only to 1989 and therefore lacks the historical pedigree of its close legal relative. In many ways, the recent challenges to the law (particularly the constitutional challenges presented here) are the equivalent of the "first blush" reactions to adverse possession that Professor Ballantine discussed in 1918. But, as with concerns about adverse possession itself, those challenges can be easily dispatched upon closer examination. For at least three reasons, the Court should reject Appellants' challenges and should uphold the constitutionality of the self-executing version of the Dormant Mineral Act that the General Assembly originally adopted.

First, the version of R.C. 5301.56 that took effect in 1989 was not retroactive. No property rights were affected when the original version of the Dormant Mineral Act became effective in 1989 and no mineral interest changed hands because of the statute itself. Instead, the statute was forward-looking; a severed mineral interest was determined to be abandoned under the Act only if an interest holder did nothing to preserve that interest for *at least* three years *after* the statute took effect. Contrary to what Appellants now claim, *see* Appellants Br. at 9-10, the Seventh District rejected their retroactivity argument because of this forward-looking aspect of the statute, *not* simply because of the U.S. Supreme Court's decision in *Texaco*. *See Tribett v. Shepherd*, 2014-Ohio-4320 (7th Dist.) ("App. Op.") ¶ 57. To the extent that the appellate court

referred to the U.S. Supreme Court's decision in *Texaco*, it was largely to correct the Appellants' mistaken understanding about the operation of R.C. 5301.56 (1989). *See id.* at ¶ 55 (citing *Texaco* for the proposition that it was the mineral interest holder's "failure to make any use of the property, rather than the state's action, that caused the lapse of the property right").

Second, no constitutional challenge other than retroactivity is properly before the Court. In the proceedings below Appellants raised a retroactivity challenge under the Ohio Constitution's Retroactivity Clause, Ohio Const. art. II, § 28, and stated that "[t]his state constitutional issue [was] the only one germane to [their] appeal." Shepherd 7th Dist. Reply Br. at 9-10. They expressly disclaimed all other constitutional challenges. *See id.* Having not just failed to raise such claims, but also expressly *waived* them in the court below, the Appellants cannot assert them now. *See State v. Quarterman*, 140 Ohio St. 3d 464, 2014-Ohio-4034 ¶¶ 15-20 (declining to address constitutional challenges that had not been properly raised or presented).

Third, even if Appellants *could* raise new constitutional claims for the first time in their brief, it would not help them: Their newly presented challenges are without merit. To begin with, it is not entirely clear what the foundations for their remaining constitutional challenges are. Although they assert a due process claim, Appellants primarily cite Section 19, Article I of the Ohio Constitution (governing takings) rather than Section 16, Article I (which is the constitutional provision that the Court has interpreted as the state equivalent to the federal Due Process Clause). *See In re B.C.*, 141 Ohio St. 3d 55, 2014-Ohio-4558 ¶ 17.

Whatever the legal basis for Appellants' new claims, they fail. The Court's precedent precludes a takings claim in this instance; it has held that property which has been lost though inaction has not been "taken" in violation of the Ohio Constitution's Takings Clause. *State ex rel. A.A.A. Investments*, 17 Ohio St. 3d at 152-53. Any due process claim meets a similar fate.

The Court has held that state and federal due process protections are coextensive. *See In re B.C.*, 141 Ohio St. 3d 55 ¶ 17. And *City of Norwood v. Horney*, 110 Ohio St. 3d 353 (2006), does not hold otherwise. Although the Court recognized greater state constitutional protections against *takings* in *Norwood*, it did not do the same for *due process*. The Court's due process analysis in that case was grounded almost exclusively in federal constitutional law. *See id.* at ¶¶ 81-89. Thus, to the extent that Appellants now raise a due process claim, *Texaco* makes short work of it as both a federal *and* state matter. To hold otherwise would upset settled state law in a variety of other areas including, but not limited to, traditional adverse possession.

Finally, the statute of limitations argument presented in Appellant's seventh Proposition of Law is based on a fundamental misunderstanding of the law *and* fails on its own terms. The 21-year statute of limitations contained in R.C. 2305.04 is not, as Appellants claim, a limit on bringing a quiet title action. It is instead Ohio's adverse possession statute and sets out the amount of time that a property owner has to eject a trespasser and prevent the loss of ownership through inaction. *See State ex rel. A.A.A. Investments*, 17 Ohio St. 3d at 152. Even *assuming* that the 21-year statute of limitations applies, however, Appellants' argument is untenable in light of the plain language of R.C. 5301.56 (1989). That statute provided that no property would be declared abandoned until 1992, three years after its effective date. Twenty-one years from 1992 is 2013. But the quiet title action here was filed in 2012—well within the 21-year period.

STATEMENT OF AMICUS INTEREST

First and foremost, the State is interested in this case because Appellants challenge the constitutionality of a legally enacted statute. The State is also interested because it is party to a pending case that raises questions about how to interpret R.C. 5301.56. *See Carney v. Shockley*, No. 2015-0235. The Court's resolution of the constitutional questions at issue here may affect its decision in that case. Finally, as in other Dormant Mineral Act cases before the Court, the

State has interests in both public-interest and landowner capacities. From a public-interest perspective, the State has an interest in "remedy[ing] uncertainties in titles and . . . [facilitating] the exploitation of energy sources and other valuable mineral resources." *See Texaco, Inc. v. Short*, 454 U.S. 516, 524 n.15 (1982) (citation omitted). From a property-owner perspective, the State's interest in obtaining a clear interpretation of the Dormant Mineral Act is similar to the interests of any other property owner throughout Ohio.

STATEMENT OF THE CASE AND FACT

A. For hundreds of years, adverse possession has served as an important tool for regulating property ownership and for eliminating errors and ambiguities in titles.

Despite the fact that adverse possession "sounds, at first blush, like title by theft or robbery," Henry W. Ballantine, *Title By Adverse Possession*, 32 Harv. L. Rev. 135, 135 (1918), the doctrine has nevertheless long played an essential role in regulating property ownership by helping to establish clear titles and correct errors in conveyancing. Even though it at times can reward bad actors at the expense of true owners, such results are tolerated "for the repose of meritorious titles generally." *Id.* at 136.

The principles underlying adverse possession transcend specific legal traditions. Some have traced the modern adverse possession doctrine to early English statutes of limitations. *Fletcher v. Fuller*, 120 U.S. 534, 547 (1887); *Pavey v. Vance*, 56 Ohio St. 162, 171-72 (1897); *see also* Ballantine, 32 Harv. L. Rev. at 137-39. But similar abandonment doctrines can be found in Roman law and in the Babylonian Code of Hammurabi. *See* John L. McCormack, *Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage*, 42 Val. U. L. Rev. 461, 468 n.32 (2008). The doctrine's lengthy legal pedigree reflects the fact that "no class of laws is more universally sanctioned by the practice of nations,

and the consent of mankind, than those laws which give peace and confidence to the actual possessor and tiller of the soil." *Hawkins v. Barney's Lessee*, 30 U.S. 457, 466 (1831).

This Court has recognized that adverse possession has a "venerable place in the regulation of the use and ownership of real property in Ohio" specifically. *Evanich v. Bridge*, 119 Ohio St. 3d 260, 2008-Ohio-3820 ¶ 14. For at least 150 years, the Court has relied on the doctrine of adverse possession to resolve disputes over property ownership. *See Yetzer v. Thoman*, 17 Ohio St. 130 (1866); *Clark v. Potter*, 32 Ohio St. 49 (1876); *Gill v. Fletcher*, 74 Ohio St. 295 (1906). Significantly, the Court has made clear that the Takings Clause, Ohio Const. art. I, § 19, does not bar adverse possession claims; in such cases, it has held, property is *abandoned* and not taken. *State ex rel. A.A.A. Investments v. City of Columbus*, 17 Ohio St. 3d 151, 152-53 (1985). The Court has declined invitations to eliminate adverse possession, noting that "[t]o do so would drastically upset settled law." *Evanich*, 119 Ohio St. 3d 260 ¶ 14.

B. In part because the traditional adverse possession doctrine does not apply to severed mineral interests, the General Assembly adopted R.C. 5301.56 (1989) to further the same goals of identifying and eliminating abandoned property interests.

The same concerns about identifying abandoned property and remedying defects in title that underlie the doctrine of adverse possession apply with equal, if not greater, force to mineral interests that have been severed from the overlying surface estate. But, as this Court has recognized, traditional adverse possession cannot effectively address them. That is because one of the key requirements of traditional adverse possession—open and notorious possession—is difficult, and in many cases impossible, to establish with respect to mineral rights alone. *See Gill*, 74 Ohio St. 295 at syl. ¶ 3.

Because existing law was inadequate to address the issue, supporters of the original Dormant Mineral Act emphasized that a new statute was needed to solve the problems faced by property owners attempting to obtain clear title to their land. The preface to the Uniform

Dormant Mineral Interests Act, which largely inspired Ohio's Dormant Mineral Act, addressed the need for such statutes generally. It emphasized that "[a]n extensive body of legal literature demonstrates the need for an effective means of clearing land titles of dormant mineral interests." Prefatory Note, Uniform Dormant Mineral Interests Act, State's Appendix at A-10. Supporters of the Ohio-specific legislation made similar arguments. The Ohio Farm Bureau, in a letter to then-Senator Paul Pfeifer, noted that the proposed statute "would go a long way in solving some of the problems that farmers have in trying to clear land titles." Ohio Farm Bureau letter, State's Appendix at A-4. And William Taylor, a member of the Ohio State Bar Association Natural Resources Committee testified that "companies engaged in the development of minerals as well as owners of property subject to title defects not cured by the Marketable Title Act" would benefit from the legislation. Taylor Testimony, State's Appendix at A-3.

The Dormant Mineral Act that the General Assembly originally adopted, R.C. 5301.56 (1989), addressed those concerns. In relevant part, the statute stated that a severed mineral interest would be "deemed abandoned and vested in the owner of the surface" unless one of several savings events had occurred within twenty years. R.C. 5301.56(B)(1) (1989). The statute identified the ministerial act of filing claim to preserve a severed interest as one such event. R.C. 5301.56(B)(1)(c)(v) (1989). The statute also provided that a mineral interest would not be deemed abandoned "until three years from the effective date" of the statute. R.C. 5301.56(B)(2) (1989). Thus under the original version of the Act, property owners were given a minimum of three years and a maximum of 20 within which to file a claim to preserve their severed interests (or take one of the other statutorily identified steps).

C. The mineral interests underlying the surface property owned by the Appellees were severed from the surface estate in 1962.

The mineral rights at issue in this case were severed from the surface estate in 1962. App. Op. ¶ 3. The surface property then changed hands several times. App. Op. ¶¶ 4 and 5. Although the transfer documents noted the prior severance of the mineral estate, the mineral rights themselves were never sold or otherwise transferred. App. Op. ¶ 22. Furthermore, the mineral interests were not leased and no oil and gas production on the property in question has ever occurred. *See* App. Op. ¶ 61. Indeed, *no* action was taken with respect to the mineral interests until 2011. That year, the current owners of the surface estate (Appellees in this case) published a notice of abandonment in a Belmont County newspaper. App. Op. ¶ 6. In response, the Appellants, who also lay claim to the mineral interests at issue, recorded an affidavit purporting to preserve their interests. App. Op. ¶ 6.

D. The surface owners brought a quiet title action, and both the trial court and court of appeals determined that the mineral rights had vested in them under the 1989 version of the Dormant Mineral Act.

The surface owners brought a quiet title action in the Belmont County Court of Common Pleas in 2012, seeking a declaration that ownership of the mineral interests had reverted to them under the 1989 version of the Dormant Mineral Act. The Appellants, in turn, sought to preserve what they contended were their own interests arguing, among other things, that the transfer of the surface property constituted a savings event, that the 1989 version of the Act was not self-executing, and that the surface owners' interpretation of the Act violated the prohibition on retroactive laws found in Section 28, Article II of the Ohio Constitution.

The common pleas court rejected those arguments and quieted title in favor of the surface owners. Appellants' App'x at A-61. It found that the original version of the Act was self-executing and that no savings event had occurred to restart the abandonment clock. *See id.* at

A-60. It rejected the Appellants' constitutional retroactivity challenge, concluding that the General Assembly delayed abandonment for three years following the statute's passage "[i]n order to negate the retroactive effect of the Act." *Id.* at A-55.

The Seventh District Court of Appeals affirmed. App. Op. at ¶ 77. Like the trial court, it found that the 1989 version of the Act applied, that no savings event had occurred, and that the Appellants had therefore abandoned the mineral interests at issue. *Id.* The appellate court similarly held that the statute was not retroactive because it "provided notice of three years within which the mineral owners could save their interest before any abandonment would vest." App. Op. ¶ 56. That three-year period, the court found, meant that the statute operated prospectively and therefore did not violate Section 28, Article II of the Ohio Constitution. App. Op. ¶ 57. Just as the U.S. Supreme Court had held in *Texaco*, the Seventh District found that the abandonment of the mineral interest was not the result of state action, but was instead caused by the mineral interest holders' *inaction* after the statute was adopted. App. Op. ¶ 55.

E. The Court granted review and first held the appeal for pending cases interpreting R.C. 5301.56, but later sua sponte ordered briefing on Appellants' constitutional challenge to the Act.

The Appellants sought review in this Court, which granted their appeal and held it for several pending cases that raised statutory interpretation questions identical to the ones included in the Appellants' Memorandum in Support of Jurisdiction. *See Tribett v. Shepherd*, 142 Ohio St. 3d 1447, 2015-Ohio-1591 (holding the case for W*alker v. Shondrick Nau*, No. 2014-0803). Several months later, the Court sua sponte lifted the hold and ordered briefing in this case to proceed. *Tribett v. Shepherd*, 144 Ohio St. 3d 1474, 2016-Ohio-467. It later clarified that briefing was required only for those legal questions not presented in the other cases. *Tribett v. Shepherd*, 145 Ohio St. 3d 1432, 2016-Ohio-1455.

ARGUMENT

The Court need only confront the legal questions presented in this case if it first concludes in *Walker v. Shondrick Nau*, No. 2014-0803, *Corban v. Chesapeake Exploration*, No. 2014-0804, and *Eisenbarth v. Reusser*, No. 2014-1767, that the 1989 version of the Dormant Mineral Act was self-executing, that the 20-year dormancy period is rolling not fixed, and that the mere recitation of a prior mineral interest reservation in a subsequent transfer of just the surface estate does not constitute a savings event. The State has argued for those conclusions in the pending cases. At least one expert in energy law has agreed with the State's interpretation of the statute, concluding that "[a] plain reading of the 1989 version [of the Act] supports automatic vesting," that "[n]o one would seriously challenge" a rolling dormancy period, and that for a transaction to qualify as a savings event under the Act, a mineral interest "ought to be the central, essential, or fundamental subject of [the] transaction." *See* Fenner L. Steward, *When the Shale Gas Hit Ohio: The Failures of the Dormant Mineral Act, Its Heroic Interpretations, and Grave Choices Facing the Supreme Court*, 43 Cap. U. L. Rev. 435, 455, 461-62, and 473 (2015). Assuming that the Court *also* agrees, it should reject Appellants' constitutional challenges to the 1989 version of the Dormant Mineral Act for the reasons that follow.

<u>*Amicus* Ohio Attorney General's Proposition of Law I:</u>

> *The self-executing version of the Dormant Mineral Act that the General Assembly originally adopted did not violate the Ohio Constitution.*

Although Appellants make a variety of constitutional arguments in their brief before this Court, they made only *one* argument in the proceedings below. In the Seventh District they exclusively argued that the original version of the Dormant Mineral Act was "unconstitutional under Section 28, Article II of the Ohio Constitution," and contended that "[t]his state constitutional issue [was] the only one germane to [their] appeal." Shepherd 7th Dist. Reply Br.

at 9-10. Their express waiver of all other constitutional claims means that the *only* constitutional challenge properly before the Court involves questions about retroactivity. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034 ¶¶ 15-20 (declining to address constitutional challenges that had not been properly raised or presented). That challenge lacks merit.

A party "challenging the constitutionality of [a] statute bears the burden of proving its constitutional infirmity." *Haight v. Minchak*, ___ Ohio St. 3d ___, 2016-Ohio-1053 ¶ 11. That burden is an exceedingly heavy one. *Id.* That is because "[a]n enactment of the General Assembly is presumed to be constitutional." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, syl. ¶ 1 (1955); *see also* R.C. 1.47(A).

1. The self-executing version of R.C. 5301.56 that took effect in 1989 did not violate the Retroactivity Clause, Ohio Const. art. II, § 28.

Section 28, Article II of the Ohio Constitution bars the General Assembly from adopting retroactive laws that impair vested rights. Not every retroactive law is unconstitutional. *See Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, ___ Ohio St. 3d ___, 2016-Ohio-2806 ¶ 18. A statute will run afoul of the Ohio Constitution's retroactivity prohibition only if it is both retroactive *and* substantive (as opposed to remedial). *Bielat v. Bielat*, 87 Ohio St. 3d 350, 352-53 (2000). Substantive laws, the Court has said, are those that "impair[] vested rights, affect[] an accrued substantive right, or impose[] new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St. 3d 103, 2013-Ohio-4068 ¶ 22 (citations omitted). Remedial laws, by comparison, affect only the remedy provided; they "merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 107-08 (1988).

In this case, the self-executing version of the Dormant Mineral Act that took effect in 1989 survives Appellants' constitutional challenge both because it was prospective *and* because

it was remedial. In that respect, it is similar to the Marketable Title Act. The drafters of the model Marketable Title Act described that legislation as "both prospective and retrospective. Insofar as it is prospective, no one would question its constitutionality. Insofar as it is retroactive, its constitutionality is justified." Lewis M. Simes & Clarence B. Taylor, *The Improvement of Conveyancing by Legislation* 271-72 (1960).

a. The version of R.C. 5301.56 that took effect in 1989 was a prospective statute.

Courts must determine whether the General Assembly expressly made a statute retroactive before they consider a constitutional challenge based on Section 28, Article II of the Ohio Constitution. *See Van Fossen*, 36 Ohio St. 3d at 106. R.C. 1.48 states that a statute must be "presumed to be prospective in its operation unless expressly made retrospective." Overcoming that presumption requires an explicit statement of retroactivity. *State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163 ¶ 15. The Court has emphasized that "[r]etroactivity is not to be inferred." *Id.* In this case, the absence of an explicit statement of retroactivity from R.C. 5301.56 (1989) is just one of three reasons why the Court should hold that it was a prospective statute.

First, the General Assembly did more than omit any statement of retroactively from the original version of the Dormant Mineral Act; it expressly indicated that the statute was to operate *prospectively*. It did so by declaring that a mineral interest would not be deemed abandoned "until three years from the effective date" of the Act. *See* R.C. 5301.56(B)(2) (1989). The Seventh District pointed to this three-year period when it rejected Appellants' retroactivity challenge below. The appellate court held that the Act was not retroactive because the "three year period provide[d] holders the opportunity to take action to preserve their mineral interests" and R.C. 5301.56 (1989) was therefore forward-looking. App. Op. ¶ 57. The Eleventh District

Court of Appeals has reached a similar conclusion. Likewise pointing to R.C 5301.56 (1989)'s three-year grace period, it succinctly stated that: "Contrary to appellants' argument, former R.C. 5301.56(B)(1)(c) did not operate in a retroactive manner." *Thompson v. Custer*, 2014-Ohio-5711, ¶ 25 (11th Dist.). Because of the three-year delay, the statute did not, that court wrote, "negate as a matter of law one's mineral interest upon its effective date." *Id.*

Second, the Act had only prospective effects. This is not a case where the statute purported to "operate[] in futuro" but, in reality, had the effect of eliminating vested rights. *See Van Fossen*, 36 Ohio St. 3d at 105. The original version of the Dormant Mineral Act eliminated nothing; no property interest changed hands when R.C. 5301.56 took effect in 1989. It was not until three years *after* the statute's effective date that mineral interest holders could abandon their interests under the Act. Even then, whether a specific mineral interest was deemed abandoned turned *not* on the statute itself, but on the action (or inaction) of the interest holder in the years between 1989 and 1992. The *effect* of R.C. 5301.56 (1989) therefore matched its text: both were entirely prospective in nature.

Third, the General Assembly followed well-established precedent when it adopted a three-year waiting period to ensure that the original version of the Dormant Mineral Act would operate only prospectively. Among other things, it had relied on a similar three-year waiting period to avoid constitutional problems when, in 1973, it made the Marketable Title Act applicable to mineral interests for the first time. The Fifth District Court of Appeals blessed that approach and rejected a Retroactivity Clause challenge to the 1973 version of the statute. In doing so, the appellate court held that "[t]he grace period after the Ohio act became applicable to mineral interests was three years and two weeks, which gave the [mineral interest holders] ample time to file a notice [of preservation]." *Straits v. Shepler*, 5th Dist. Holmes No. CA 332, 1982

WL 2919, *10 (Feb. 10, 1982). It found that because of the delay built into the statute, it was "only the *prospective* action or inaction of the owners of real property interests after the effective date of the act which influence[d] their rights." *Id.* (emphasis added). Almost 80 years earlier, the U.S. Supreme Court had reached a similar conclusion when it too addressed the difference between retroactive and prospective statutes. It affirmed a Pennsylvania Supreme Court decision that found a statute eliminating unused or abandoned ground rents (a specific type of property interest) was not retroactive because it "did not go into effect for three years, and gave ample time to all owners of ground rents to make claims and demands for the same, so as to prevent the bar of the statute." *Wilson v. Iseminger*, 185 U.S. 55, 64 (1902) (quotation omitted). "This prospective commencement," the Pennsylvania court had concluded "[made] the retrospective bar not only reasonable but strictly constitutional." *Id.*

Should the Court have any remaining doubts about the statute's prospective nature, they can be easily dispelled by approaching the Dormant Mineral Act in a different way. Instead of using the language in question, imagine that the statute had stated that "a severed mineral interest will be deemed abandoned unless the interest holder takes action to preserve it within three years of the statute's effective date or within twenty years of the last savings event, whichever is later." Had it done so, no one could seriously dispute that the statute operated prospectively. But although the *words* used in this hypothetical statute might be different than those in R.C. 5301.56 (1989), the *effect* is the same—in both instances, beginning on the statute's effective date, parties had between three and 20 years to take some action to preserve their interests. That prospective *effect* is what matters for purposes of a retroactivity analysis. (Lest Appellants claim that the foregoing example is an attempt to rewrite the law, the point of the hypothetical is merely to

demonstrate that R.C. 5301.56 (1989) *as written* included no retroactive language and had no retroactive effect.)

b. The version of R.C. 5301.56 that took effect in 1989 was a remedial statute.

Appellants' Retroactivity Clause challenge to the original version of the Dormant Mineral Act must also fail because the version of the Act that took effect in 1989 was a remedial statute. Remedial laws share a few key characteristics. "All statutes relating to procedure are remedial in their nature." *Wellston Iron Furnace Co. v. Rinehart*, 108 Ohio St. 117, syl. ¶ 1 (1923). The Retroactivity Clause does not "prohibit legislation that merely affect the methods and procedure by which rights are recognized, protected and enforced." *Longbottom*, 137 Ohio St. 3d 103 ¶ 25 (citation omitted). Laws that "merely substitute a new or more appropriate remedy for the enforcement of an existing right" are remedial laws that do not violate Section 28, Article II of the Ohio Constitution. *Bielat*, 87 Ohio St. 3d at 354-55. The General Assembly may change or amend remedial laws without fear of running afoul of the Ohio Constitution; "[a] party has no vested right in the forms of administering justice that precludes the Legislature from altering or modifying them and better adapting them to effect their end and objects." *State ex rel. Michaels v. Morse*, 165 Ohio St. 599, 605-06 (1956).

Statutes like the Dormant Mineral Act satisfy the definition of remedial laws because they do little more than create a set of procedures designed to guide courts in the application of existing rights. That property can be abandoned through non-use cannot be seriously challenged. It has long been settled that "[t]he right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law: it existed in a state of nature, and is only modified by society, according to the discretion of each community." *Hawkins*, 30 U.S. at 467. Statutes like R.C. 5301.56 (1989) are the means by which society *exercises* its power to shape

universal abandonment principles. Abandonment statutes therefore do not create *new* rights or obligations; they establish a process for exercising and enforcing *existing* ones. That statutes terminating abandoned property interests are remedial laws is supported by the decision of at least one Ohio appellate court which has rejected a retroactivity challenge to the Marketable Title Act on that basis. *See Pinkney v. Southwick Investments, L.L.C.*, 8th Dist. Cuyahoga Nos. 85074 and 85075, 2005-Ohio-4167 ¶ 37 (Aug. 11, 2005) ("To the extent that the [Marketable Title Act] operates retrospectively, we find that it is merely remedial.").

The original Dormant Mineral Act is also an example of a statute that substitutes a new remedy and process for an existing one. The original version of the Dormant Mineral Act was not the first statute to address abandonment and elimination of severed mineral interests; the Marketable Title Act had done so 15 years earlier. When the General Assembly first adopted the Marketable Title Act in 1961, it did not apply to severed mineral interests. *See* R.C. 5301.53(E), 104 Am. H. B. 81 (1961) (stating that the Marketable Title Act would not "bar or extinguish any right, title, estate, or interest in and to minerals"). Several years later, in 1973, the legislature amended the Act and removed that restriction. *See* R.C. 5301.53, 110 Am. S. B. 267 (1973). That amendment made mineral interests subject to extinguishment under the Act like any other property interest. The legislature provided a three-year grace period before the change would take effect, however. *See* R.C. 5301.56, 110 Am. S. B. 267 (1973) ("Regardless of when the forty-year period specified in sections 5301.47 to 5301.56 expires, for the purpose of filing a notice under division (A) of section 5302.51 of the Revised Code . . . such period shall not be considered to expire until after December 31, 1976.") So when the legislature adopted the original version of the Dormant Mineral Act, the idea that a mineral interest could be lost through inaction was not new. The only thing that was new was the process; the General

Assembly merely substituted one method of identifying and eliminating abandoned mineral interests (the general Marketable Title Act) for another (the specific Dormant Mineral Act). Like the Marketable Title Act before it, the original version of the Dormant Mineral Act fell "clearly within the principle that the legislature can require a recording or re-recording to give notice of existing interests, and can extinguish claims of those who fail to record." Simes & Taylor, *The Improvement of Conveyancing by Legislation* at 271-72.

Finally, treating the Dormant Mineral Act as a remedial statute is consistent with this Court's precedent. The Court has "delineated between the operation of an amended statute of limitations which [t]otally obliterates an existing substantive right and one which merely shortens the period of time in which the remedy can be realized." *Cook v. Matvejs*, 56 Ohio St. 2d 234, 237 (1978). It has upheld the General Assembly's power to modify the statute of limitations applicable to existing claims as long as "a prospective claimant is still afforded a reasonable time in which to enforce his right." *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 278 (1986); *see also Gregory v. Flowers*, 32 Ohio St. 2d 48, 56 (1972) ("[W]hile the court recognized a statute of limitation as remedial, it conceded that when a new limitation is made to apply to existing rights or causes of actions, a reasonable time must still be allowed in which such rights may be asserted."); *Groch v. Gen. Motors Corp*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶¶ 196. The U.S. Supreme Court has long done the same. *Vance v. Vance*, 108 U.S. 514, 517 (1883) ("[I]t is elementary that the state may establish, alter, lengthen, or shorten the period of prescription of existing rights, provided that a reasonable time be given in future for complying with the statute.").

The same rule should apply in this case. The Dormant Mineral Act is, in effect, a statute of limitations focused specifically on severed mineral interests. As the U.S. Supreme Court held

in upholding a Pennsylvania statute that eliminated old ground rents, "[t]he theory of this remedial act is that upon which all statutes of limitation are based,—a presumption that, after a long lapse of time, without assertion, a claim, whether for money or for an interest in land, is presumed to have been paid or released." *Wilson*, 185 U.S. at 60-61. In Ohio as well, abandonment statutes and statutes of limitations share the same legal foundation. Ohio's adverse possession statute, for example, is phrased in terms of a statute of limitations. It gives property owners 21 years to bring an action to eject a trespasser. R.C. 2305.04. If they do not, then their property is lost because their claim to it is barred by the statute of limitations. *Clark*, 32 Ohio St. at 63-64. Because the Court's existing precedent permits the General Assembly to modify the statute of limitations applicable to an accrued and existing claim without violating the Retroactivity Clause, Ohio Const. art. II, § 28, it may, for the same reasons, require mineral interest holders to take some action to preserve their interests or abandon them if they do not.

c. Appellants' arguments in support of their claim that the statute is unconstitutionally retroactive are unpersuasive.

Appellants point to R.C. 5301.56 (1989)'s 20-year dormancy period as evidence that the version of the statute that took effect in 1989 was impermissibly retroactive. But not only do they ignore the three-year grace period and the statute's prospective operation, *see* Appellants' Br. at 10-14, they also misunderstand its effect. The 20-year dormancy period did not divest any vested rights. Instead, it merely determined how much time mineral interest holders had to preserve their interests *in the future*. It established that if the mineral interest in question had not been the subject of a savings event within the past 20 years, then interest holders had three years to preserve it after the statute took effect. *See* R.C. 5301.56(B)(2) (1989). But if the minerals had more recently been the subject of a savings event, then the interest holders had 20 years from the date of that event. *See id.*

The fact that the original version of the Act gave some mineral interest holders three years to preserve their interest if there had been no savings event in the prior 20 years does not mean that the statute was retroactive. At most, the amount of time a mineral interest holder had to preserve their interest under the original version of the Dormant Mineral Act was "established in the present based on past events." *State ex rel. Plavcan v. School Emp. Ret. Sys. of Ohio*, 71 Ohio St. 3d 240, 243 (1994). "Statutes that reference past events to establish current status have been held not to be retroactive." *Id.* at 242-43; *see also Nat'l Mut. Ins. Co. v. Whitmer*, 70 Ohio St. 2d 149, 152-53 (1982) ("A statute, in Ohio, is not prohibited constitutionally simply because some of the conditions precedent to liability occurred before its enactment."); *United Eng'g & Foundry Co. v. Bowers*, 171 Ohio St. 279, 282 (1960) ("A statute is not retroactive merely because it draws on antecedent facts for a criterion in its operation."); *State ex rel. Bouse v. Cickelli*, 165 Ohio St. 191, 192 (1956) (A statute "is not retroactive simply because the test involves a time factor extending prior to the effective date of the amendment.").

In the proceedings below, Appellants argued that their retroactivity argument was supported by decisions from other States, claiming that many state supreme courts had invalidated similar statues "on the grounds of retroactivity." Shepherd 7th Dist. Appellant Br. at 19 n. 63. That is not so. Of the four decisions that Appellants cited below, three of them invalidated statutes as matter of combined state and federal due process. *See Chicago & N.W. Transp. Co. v. Pedersen*, 259 N.W.2d 316, 571 n.1 (Wisc. 1977); *Contos v. Herbst*, 278 N.W.2d 732, 742-46 (Minn. 1979); *Wilson v. Bishop*, 412 N.E.2d 522, 524-25 (Ill. 1980). Those decisions predated *Texaco* and are obviously no longer good law in light of the U.S. Supreme Court's subsequent rejection of similar due process claims. Only the Nebraska Supreme Court invalidated a statute on the basis of retroactivity. *See Wheelock v. Heath*, 272 N.W.2d 768, 772-

74 (Neb. 1978). Unlike Ohio's original Dormant Mineral Act, however, the Nebraska statute did not provide an easy way for mineral interest holders to preserve their interests; it instead offered only a limited affirmative defense should a surface owner assert a claim to the minerals under the statute. *Id.* Even then, the continuing validity of that decision is in doubt; the Supreme Court of Nebraska in 2011 questioned, but found unnecessary to decide, whether its earlier decision remained good law after *Texaco*. *Peterson v. Sanders*, 806 N.W.2d 566, 571 (Neb. 2011).

2. The additional constitutional challenges that Appellants present for the first time in this Court lack merit.

As discussed above, the only constitutional challenge presented below alleged that the original version of the Dormant Mineral Act was impermissibly retroactive in violation of Section 28, Article II of the Ohio Constitution. Appellants explicitly waived all other challenges, stating that retroactivity was the only state constitutional issue "germane to this appeal." Shepherd 7th Dist. Reply Br. at 9-10. And although they now rely heavily on the Court's decision in *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, not a single citation to that decision appeared in their briefs below. If the Court is willing, however, to overlook the Appellants' express waiver of all other constitutional claims, then it should reject those claims on the merits.

An additional barrier to considering Appellants' new claims is the significant ambiguity about the legal theories behind them. Although Appellants now assert a due process claim, their argument relies most heavily on Section 19, Article I of the Ohio Constitution, which restricts the State's exercise of its eminent domain power. Nowhere do they cite Section 16, Article I which the Court has interpreted as the state equivalent of the federal Due Process Clause. *See In re B.C.*, 141 Ohio St. 3d 55, 2014-Ohio-4558 ¶ 17. In the end, it does not matter whether

Appellants are now asserting a takings claim or a due process claim, however. Either claim must fail. The reasons why will be discussed independently.

a. The version of R.C. 5301.56 that took effect in 1989 did not violate the Takings Clause, Ohio Const. art. I, § 19.

The Court has already rejected a state constitutional challenge to Ohio's adverse possession law, concluding that the loss of property to a trespasser is not a taking for purposes of Section 19, Article I of the Ohio Constitution. *State ex rel. A.A.A. Investments*, 17 Ohio St. 3d at 152-53. Quoting the U.S. Supreme Court's *Texaco* decision, it held in *A.A.A Investments* that, *as a matter of state law*, there was no violation of the Takings Clause, Ohio Const. art. I, § 19 because it was "the owner's failure to make any use of the property-and not the action of the State-that cause[d] the lapse of the property right; there [was] no 'taking' that requires compensation." 17 Ohio St. 3d at 152-53 (quoting *Texaco*, 454 U.S. at 530). That holding was consistent with long-settled principles of property law. *See Montoya v. Gonzales*, 232 U.S. 375, 378 (1914) (a form of adverse possession was not a taking without due process of law). Because statutes like the Dormant Mineral Act are close legal relatives of adverse possession, the Court need only apply *A.A.A Investments* to reach a similar conclusion here. As with adverse possession, mineral interests that are lost under the terms of the original Dormant Mineral Act were abandoned and not taken.

The Court in *A.A.A. Investments* did not rely on *Texaco* because it felt compelled to interpret the Ohio Constitution as merely coextensive with the federal constitution. Instead, it quoted that decision because it was persuasive; the U.S. Supreme Court in *Texaco* articulated a basic and universal legal principle of property law in a clear and direct way. That principle is part of Ohio's legal tradition; it predates Section 19, Article I of the Ohio Constitution. *See Hawkins*, 30 U.S. at 467-68 (from "the early settlement of the country, the man who received a

grant of land and failed, at first in three, and afterwards in five years, to seat and improve it was held to have abandoned it."). That the Court was citing *Texaco* for its general analysis, not as binding authority, is confirmed by the fact that it went on to cite decisions from four other States, which had likewise held that the abandonment of property is not a taking. *See State ex rel. A.A.A. Investments*, 17 Ohio St. 3d at 152-53. Thus having examined long-standing property law principles, the Court in *A.A.A. Investments* found that the adverse possession doctrine does not violate the Ohio Constitution's Takings Clause. It should now, for similar reasons, do the same with respect to the original version of the Dormant Mineral Act.

The Court's *Norwood* decision does not compel a different result. The legal question at issue in *Norwood* involved the Taking Clause's "public use requirement." *See City of Norwood*, 110 Ohio St. 3d 353 ¶ 42. That requirement is not at issue here, and Appellants cite to *Norwood* for little more than the basic principle that "Ohio has always considered the right of property to be a fundamental right." Appellants' Br. at 14 (quoting *City of Norwood*, 110 Ohio St. 3d 353 ¶ 38). That is true, but it is irrelevant. The importance Ohio places on private property rights is no different in the context of the Dormant Mineral Act than it is in the context of the Marketable Title Act or adverse possession. But, as discussed above, the Court has held that adverse possession does not violate the Takings Clause. *State ex rel. A.A.A. Investments*, 17 Ohio St. 3d at 152-53. And, even after *Norwood*, it has emphasized that adverse possession still holds a "venerable place in the regulation of the use and ownership of real property in Ohio." *Evanich*, 119 Ohio St.3d 260 ¶ 14. Thus, despite Appellants' new appreciation for *Norwood*, nothing in that decision supports their claim that the self-executing version of the Dormant Mineral Act that took effect in 1989 violated the Takings Clause, Ohio Const. art. I, § 19.

b. The version of R.C. 5301.56 that took effect in 1989 did not violate the due process guarantees of the Ohio Constitution.

The primary due process guarantee in the Ohio Constitution can be found in Section 16, Article I. *See In re B.C.*, 141 Ohio St. 3d 55 ¶ 17. Appellants do not cite this provision when making their due process argument. But, even assuming that the provisions they *do* cite provide independent due process protections, the legal theory behind Appellants' due process challenge is still unclear. While appellants spend considerable time discussing uncontested background legal principles related to property ownership, they dedicate little to explaining how they believe the original version of the Dormant Mineral Act violated those principles. To borrow a phrase from the appellate court, "the most [one] can construe from [their] argument" is that Appellants may believe that due process required that they receive individual notice before the mineral interests at issue were deemed abandoned under to the original version of the Act. *See* Appellants' Br. at 16. If that is the case, they are wrong.

The U.S. Supreme Court rejected a similar challenge to Indiana's dormant mineral statute in *Texaco*. It emphasized that there is a significant "difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur." *Texaco*, 454 U.S. at 533-34. Likening Indiana's statute to a statute of limitations, it held that just as "[t]he Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run," it does not require notice that a mineral interest is about to lapse. *Id.* at 536. Finally, it concluded that if a State "may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of claim" then it may also "impose on him the lesser burden of keeping informed of the use or nonuse of his own property." *Id.* at 537-38; *see also United States v. Locke*, 471 U.S. 84, 108-09 (1985). The U.S. Supreme Court emphasized that a quiet title action to determine whether an interest had indeed

been abandoned provided the necessary due process protections. It held that "before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause-including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard-must be provided." *Texaco*, 454 U.S. at 533-34.

Although the Court has repeatedly held that Section 16, Article I of the Ohio Constitution and the federal Due Process Clause are coextensive, *In re B.C.*, 141 Ohio St. 3d 55 ¶ 17, it should reject Appellants' due process claim in this case not simply because the *Texaco* decision is controlling, but because it was correct. The Court's decisions upholding the General Assembly's power to amend the statutes of limitations applicable to accrued claims provide one reason why. None of the statutes at issue in those cases required notice prior to the expiration of the limitations period, yet the Court never found that an amended statute violated the Ohio Constitution's due process guarantees on that basis. *See Groch*, 117 Ohio St. 3d 192 ¶¶ 196-97 (considering only whether the amended statute provided a reasonable time to assert accrued causes of action). The long history of adverse possession in Ohio provides another reason. For over 150 years, the Court has held that adverse possession requires only possession of property for the requisite period of time. *See Evanich*, 119 Ohio St. 3d 260 ¶ 13 and *Yetzer*, 17 Ohio St. 130. It has never required specific notice to the property owner whose land is possessed—only a quiet title action to determine whether the principles of adverse possession have been satisfied. *See id.* It is hard to believe that this practice violates Section 16, Article I of the Ohio Constitution if the Appellants are the first to notice it since that section was adopted in 1851. As the U.S. Supreme Court has held in the context of the Due Process Clause, "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth

Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). The same is true under Ohio's Constitution.

Finally, the Court's *Norwood* decision again does nothing to help Appellants. Indeed, that decision is even *less* helpful to them in the due process context than it was in the taking context. It is true that the Court in *Norwood* held that the Takings Clause, Ohio Const. art. I, § 19, provides greater protection for private property than does the Fourteenth Amendment. *See City of Norwood*, 110 Ohio St. 3d 353 ¶ 65. It did so, however, as a matter of takings law—it adopted a more restrictive definition of what constitutes a permissible public use for purposes of state constitutional law. *Id.* at ¶¶ 57-80. To the extent that it discussed due process concepts, the Court in *Norwood* was concerned only with the federal Due Process Clause. *Id.* at ¶¶ 81-89.

c. The version of R.C. 5301.56 that took effect in 1989 was not vague.

R.C. 5301.56 (1989) cannot be described as vague regardless of the level of scrutiny that the Court applies in connection with its review of the statute. Due process requires that a law afford "a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law." *Norwood*, 110 Ohio St. 3d 353 ¶ 86. "A statute is not void simply because it could be worded more precisely or with additional certainty." *Id.* Here, R.C. 5301.56 (1989) did more than just provide guidance about what the statute required, it set forth those requirements in an explicit, numbered list. *See* R.C. 5301.56(B)(1) (1989) (listing savings events). The Court should reject Appellants' void-for-vagueness argument for at least three reasons.

First, the original version of the Dormant Mineral Act provided clear and explicit instructions about how to preserve mineral interests and how to identify abandoned ones. Mineral interest holders who wished to preserve their interests needed to look no further than the savings events listed in R.C. 5301.56(B)(1)(c) (1989) for instructions on how to do so. The

statute listed six events that would prevent the mineral interests from being deemed abandoned under the statute. One of the options, filing a claim to preserve the interest, was a minimally burdensome ministerial act. *See* R.C. 5301.56(B)(1)(c)(v). An interest holder who had even the slightest residual doubt about whether one of the other savings events had occurred could put his or her mind at rest simply by filling such a notice. Courts as well were given clear direction. The statute provided a standard that was "specific enough to prevent official arbitrariness or discrimination in its enforcement." *Norwood*, 110 Ohio St. 353 ¶ 84 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

Second, the U.S. Supreme Court's *Texaco* decision should be dispositive of Appellants' claim that the original version of the Dormant Mineral Act was impermissibly vague in violation of the Due Process Clause. Appellants primarily cite to *Norwood* as the legal basis for their vagueness challenge, *see* Appellants Br. at 17-20, but the Court's due process analysis in that case relied on *federal*, not state, constitutional law. *See City of Norwood*, 110 Ohio St. 353 ¶¶ 81-89. And there can be no doubt that R.C. 5301.56 (1989) was constitutional as a matter of federal law. The U.S. Supreme Court in *Texaco* held that Indiana's version of the Dormant Mineral Act did not violate the Due Process Clause of the Fourteenth Amendment. Significantly, the *Texaco* court had no trouble identifying what the law required. It discussed the specific requirements of the Indiana statute and found that they were not arbitrary. *Texaco*, 454 U.S. at 528-29. Instead, it found that they were relatively common and ordinary, concluding that the "Indiana statute [was] similar in operation to a typical recording statute." *Id.* at 528. Ohio's statute was, for all relevant purposes, the same as the one at issue in *Texaco*. *Compare Texaco*, 454 U.S. 519 n.7 with R.C. 5301.56 (1989). If anything, there should be *fewer* due process concerns about Ohio's original Dormant Mineral Act because it provided a three-year grace

period before declaring a mineral interest abandoned, while the Indiana statute at issue in *Texaco* provided only two.

Third, a statute is not vague simply because courts are called on to interpret it; "[m]any statutes require administrative and judicial construction to clarify specific language. Such statutes are not unconstitutionally vague." *In re Application of Columbus S. Power Co.*, 134 Ohio St. 3d 392, 2012-Ohio-5690 ¶ 20 (quoting *Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240, 1255 n.35 (8th Cir. 1981)). But a need for judicial construction is the only evidence Appellants offer in support of their vagueness claim. Even then, that evidence is exceedingly weak. Appellants point primarily to the dissenting opinions of a single judge, while ignoring the fact that Ohio appellate courts have consistently rejected a majority of their constitutional and statutory claims (to say nothing of the U.S. Supreme Court, which in *Texaco* rejected constitutional challenges to Indiana's statute). *Compare* Appellant Br. at 19-20 *with Wendt v. Dickerson*, 2014-Ohio-4615 (5th Dist.), *Walker v. Shondrick-Nau*, 2014-Ohio-1499 (7th Dist.), and *Thompson v. Custer*, 2014-Ohio-5711 (11th Dist.); *see also* Steward, 43 Cap. U. L. Rev. 435, 477 (concluding that the original Dormant Mineral Act had a "plain and obvious interpretation"). So even if disagreement about how to interpret a statute can be evidence of vagueness, Appellants have failed to provide sufficient and persuasive evidence of such a disagreement here.

3. Appellants' arguments, if accepted, would have far-reaching consequences and create uncertainty in many areas of settled law.

When it affirmed the continuing viability of the adverse possession doctrine in Ohio, the Court emphasized that to do otherwise "would drastically upset settled law." *Evanich*, 119 Ohio St. 3d 260 ¶ 14. That is just as true here. Accepting Appellants' arguments in this case would

affect more than just the ownership of a handful of mineral interests. It would call into question a variety of longstanding doctrines and create significant uncertainty in many areas of state law.

As discussed above, the original Dormant Mineral Act was based on the "the power to permit unused or abandoned interests in property to revert to another after the passage of time." *Texaco*, 454 U.S. at 526. That same principle provides the basis for several other significant legal doctrines including: statutes of limitations, adverse possession, marketable title acts, and recording statutes. The constitutionality of these doctrines has long been settled. *Hawkins*, 30 U.S. at 466 ("It is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the lex fori of every country: they are laws for administering justice; one of the most sacred and important of sovereign rights and duties."); *Constitutionality of Marketable Title Legislation*, 47 Iowa L. Rev. 413, 431 (1962) ("The constitutionality of imposing a duty to record preserving notices would seem to have been settled by decisions sustaining retroactive recording statutes."); *State ex rel. A.A.A. Investments*, 17 Ohio St. 3d at 152-53 (rejecting constitutional challenge to adverse possession). If, for the first time, the Court concludes that the legislature may not constitutionally establish criteria for abandonment, then it will call into question the many other legal doctrines that rest upon that same foundation.

Even in the mineral-specific context, the effects of such a decision could be far-reaching. Although the cases involving R.C. 5301.56 that are pending before this Court involve debates between parties each seeking to benefit from ownership of oil and gas interests themselves, such disputes represent only a small subset of property owners affected by the original version of the Dormant Mineral Act. One of the primary reasons the General Assembly adopted original Act was to create a process by which *surface* owners could obtain a clear and freely alienable title to their own property. As the preface to the Uniform Dormant Mineral Act noted, "[t]he greatest

value of a dormant mineral interest to the mineral owner may be its effectual impairment of the surface estate, which may have hold-up value when a person seeks to assemble an unencumbered fee." Prefatory Note, Uniform Dormant Mineral Interests Act, State's Appendix at A-10. Accepting Appellants' arguments now would disadvantage surface owners who care little for the mineral interests underlying their property but who relied on the original version of the Dormant Mineral Act to provide them a clear and unencumbered title to their surface estate.

***Amicus* Ohio Attorney General's Proposition of Law II:**

> *The statute of limitations found in R.C. 2305.04 does not bar a quiet title action which claims that a mineral interest was abandoned and vested in the surface owner under R.C. 5301.56 (1989).*

Appellants' claim that the quiet title action at the heart of this case was barred by R.C. 2305.04 fundamentally misunderstands that statute. Even under their flawed reading of the statute, however, Appellants' claim must fail because the action here was brought within 21 years of the date that the cause of action accrued.

In Ohio, adverse possession is given effect not through the creation of a right, but through the withdrawal of a remedy. That is the role of the statute of limitations contained in R.C. 2305.04. "The principle upon which the limitation operates, is, that the adverse claim is accompanied by such an invasion of the rights of the opposite party as to give him a cause of action, which he has failed to prosecute within the time limited by law, and which he is therefore presumed to have surrendered or abandoned." *Clark*, 32 Ohio St. at 63-64. R.C. 2305.04 is merely the modern statutory authority for the ancient doctrine of adverse possession. It restricts the amount of time a property owner has to take action and prevent the loss of property through adverse possession, not the time to address whether such a loss has occurred.

The 21-year statute of limitations found in R.C. 2305.04 is inapplicable here because the surface owners are not attempting to recover property. Because the original version of the

Dormant Mineral Act was self-executing, title to the mineral interests reverted to them by operation of law. They therefore seek not to recover property, but to remove a cloud on the title to the property that they already possess. In that respect, they are akin to an adverse possessor who has acquired title as a result of the original owner's inaction and who seeks a declaration to that effect. *See State ex rel. A.A.A. Investments*, 17 Ohio St. 3d at 152 ("once the statutory period enunciated in R.C. 2305.04 has expired, the former titleholder has lost his claim of ownership and the adverse possessor is thereafter maintaining its possession, not taking property").

Even accepting Appellants' interpretation of R.C. 2305.04, their statute of limitations claim is without merit. Under R.C. 5301.56(B)(2) (1989), no cause of action accrued until March, 22 1992—three years after the statute's effective date. The quiet title action at issue here was filed in 2012, within 21 years of that date. The Seventh District pointed out the error in Appellants' analysis below, noting that the cause of action did not accrue until 1992 and that 21 years after 1992 was 2013 not 2012. App. Op. ¶ 53. Appellants now assert an identical claim here, but do not address or respond to the Seventh District's correction of their arithmetic. That they have failed to do so, while acknowledging elsewhere in their brief that a cause of action did not accrue under R.C. 5301.56 (1989) until 1992, *see* Appellants Br. at 16 (identifying March 22, 1992 as the relevant date on which mineral interests could be deemed abandoned under the statute), transforms what would be merely a weak claim into a clearly erroneous one.

CONCLUSION

For the foregoing reasons, the Court should hold that the self-executing version of the Dormant Mineral Act that the General Assembly that took effect in 1989 was constitutional.

Respectfully submitted,
MICHAEL DEWINE
Attorney General of Ohio

/s Eric E. Murphy
ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON (0081432)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellees was served by U.S. mail this 20th day of May, 2016, upon the following counsel:

Matthew W. Warnock
Daniel E. Gerken
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291

Counsel for Appellants

Richard A. Myser
Adam L. Myser
Myser & Davies
320 Howard Street
Bridgeport, Ohio 43912

Counsel for Appellees

/s Eric E. Murphy
Eric E. Murphy
State Solicitor

APPENDIX

PROPONENT TESTIMONY ON BEHALF OF
SENATE BILL 223 AND HOUSE BILL 521,
AN OHIO DORMANT MINERAL ACT

Ohio presently has a Marketable Title Act, R.C. §5301.47 et seq., which became effective September 29, 1961. It was amended September 30, 1974 to exclude any right, title, estate or interest in coal and coal mining rights from operation of the Act. Section 5301.48 of the Act states that a person has a marketable title to an interest in land if he has an unbroken chain of record title for a period of not less than 40 years. Chain of title is then defined by two clauses, the first of which states the case where the chain of title consists of only a single instrument or transaction and the second where it consists of two or more instruments or transactions. The Act provides that the requisite chain of title is only effective if nothing appears of record purporting to divest the claimant of the marketable title.

The obvious purpose of the Marketable Title Act is to simplify land title transactions by making it possible to determine marketability through limited title searches over some reasonable period thus avoiding the necessity of examining the record back to the patent for each new transaction. This is obviously a legitimate and desirable objective but in the absence of specific statutory authority, interests created and interests appearing in titles prior to that period would not necessarily be eliminated and would continue to be an impediment to marketability. Marketable Title Acts do not cure and validate errors or irregularities in conveyancing instruments but bar or extinguish interests which have been created by or result from irregularities in instruments recorded prior to the period prescribed by the statute and thereby free present titles from the effect of those instruments. In this very general sense, the Marketable Title Act is curative in character.

The Ohio Marketable Title Act was based on the model Marketable Title Act which was drafted by Professor Lewis M. Simes and Clarence B. Taylor as part of the Michigan research project, a comprehensive study undertaken to set up standard statutory language to provide for the simplification of real estate conveyances. At the time of that study in 1959, there were ten Marketable Title Acts in effect, including Michigan's. The Michigan Act, which had been in effect for 15 years and subjected to considerable testing and experience, appeared to be the best piece of draftsmanship and embodied the most practical approach for attaining the desired objective. The Michigan Act served as the basis for drafting the model Act. The Ohio Marketable Title Act was the tenth Marketable Title Act enacted after the Michigan study and was patterned directly from the model Act.

It is apparent from the legislative history of the Ohio Marketable title Act and subsequent interpretation by courts and

practitioners since its enactment that it was the general intent of the act to apply to mineral interests except coal. Simes and Taylor, in their Model Act, pointed out that the single principal provision in the Marketable Title Act which makes it ineffective to bar dormant mineral interests is the provision that the record title is subject to such interest and defects as are inherent in the muniments of which the chain of record title is formed. This provision is included in the Model Act, as well as the Michigan and Ohio Acts. From a practical standpoint, any reference in the recorded chain of title to previously-created mineral interests may serve to keep those interests alive. This issue was the subject of Heifner v. Bradford, 4 O.S. 3d 49 (1983). In that case, the trial court upheld the validity of a severed mineral interest which was based upon transactions in a chain of title separate from the title claimed by the possessor of the surface interest. The severed mineral chain, however, contained transactions recorded during the 40-year period prescribed by the Act and the court held that transactions inherent in muniments of title during the period constituted a separate recognizable chain of title entitled to protection under the Act. The Appellate Court reversed in a decision acknowledging the fact that a precise reading of the statute upheld the trial court's decision but relied on legislative history to the effect that it was the intent of the drafters to extinguish severed mineral interests.

The Ohio Supreme Court overruled the Court of Appeals based upon a strict reading of the statute. Due to this obvious limitation in the Act, recognized by Simes and Taylor and highlighted by Heifner, it would appear that the Ohio Marketable Title Act is not generally effective as a means of eliminating severed mineral interests.

As a general principle, minerals are not deemed to be capable of being abandoned by a non-user unless they are actually possessed. Ohio is in the majority of jurisdictions which hold that a severed interest in undeveloped minerals does not constitute possession. Michigan's legislators recognized the importance of including minerals in those defects and errors which should be eliminated by operation of time and non-use. The Michigan Act and the Model Act provide an additional mechanism for the elimination of dormant mineral interests which, when used in conjunction with the Marketable Title Act, is effective in accomplishing this goal. Under the Michigan Act, owners of severed mineral interests are required to file notice of their claims of interest within 20 years after the last use of the interest. A three-year grace period was provided for initial filing under the Michigan Act. Any severed mineral interest deemed abandoned or extinguished as a result of the application of the Michigan Act vests in the owner of the surface.

The major distinction between the proposed bill for consideration by the Ohio legislature and the Michigan Act is that the Michigan Act applies only to interests in oil and gas. It is apparent from the 1974 amendment of the Ohio Marketable Title Act

that the Ohio Legislature has deemed it advisable for the Marketable Title Act to apply to all mineral interests except coal. The proposed Ohio Dormant Mineral Act has been drafted to conform to the Ohio Marketable Title Act and apply to any mineral interest except an interest in coal as defined by §5301.53(E) of the Marketable Title Act. The proposed Bill, if passed, would have lead to the desired result as stated by the Appellate Court in Heifner of terminating unused mineral interests not preserved by operations, transfers or a filing of notice of an intent to preserve interest.

The proposed bill also contains the essential elements recommended by the National Conference of Commissioners on Uniform State Laws at its annual conference in Boston in August, 1986. I have enclosed a copy of the Uniform Dormant Mineral Interests Act with prefatory notes and comments for your review.

California, Illinois, Indiana, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, Washington and Wisconsin all have adopted Dormant Mineral Acts. All but Pennsylvania, Virginia and Tennessee have companion Marketable Title Acts.

I believe that enactment of the Dormant Mineral Act will encourage the development of minerals in Ohio which have been previously ignored due to defects in title. The development of minerals would lead to severance tax revenues and enhance the economy of areas of the state which may have no other source of revenue production.

I feel that companies engaged in the development of minerals as well as owners of property subject to title defects not cured by the Marketable Title Act would benefit from the enactment of the proposed dormant minerals statute.

This testimony was prepared and presented by William J. Taylor, attorney and partner in Kincaid, Cultice & Geyer, 50 North Fourth Street, Zanesville, Ohio 43701, (614) 454-2591. Mr. Taylor's practice involves extensive mineral title work and his firm represented the prevailing party in Heifner v. Bradford, the leading Ohio Supreme Court case dealing with the Ohio Marketable Title Act. He frequently lectures and writes articles involving mineral title topics, including "Practical Mineral Title Opinions" and "The Effects of Foreclosing on Oil and Gas Leases" published by the Eastern Mineral Law Foundation. He is a member of the Ohio State Bar Association Natural Resources Committee, the Federal Bar Association Committee on Natural Resources, and the Legal Committee of the Ohio Oil and Gas Association.

OHIO FARM BUREAU

35 East Chestnut Street • P.O. Box 479 • Columbus, Ohio 43216 • (614) 249-2400

February 5, 1988

Senator Paul Pfeifer, Chairman
Senate Judiciary Committee
State House
Columbus, Ohio 43215

Dear Paul:

Your support for Senate Bill 223 would go a long way in solving some of the problems that farmers have in trying to clear land titles and resolve their differences with oil and gas producers and to reduce the problems that oil and gas producers have with misunderstandings when the surface owner doesn't own the mineral rights. It reduces the problems that title attorneys and others have when they have no way to provide a clear title and the mineral rights have been separated from the surface and not properly transferred to successors or heirs.

You will recall in testimony last week that Bill Taylor of the Natural Resources Committee of the Bar Association explained the need to have a way of clearing titles and the need to have a companion piece of legislation to go with the marketable titles act. A copy of Taylor's testimony was provided for you. Included was the fact that 15 states have a dormant mineral rights act including Michigan, Indiana, Illinois, Pennsylvania, Virginia, and Tennessee. All but Pennsylvania, Viriginia and Tennessee have a marketable titles act. The amendments that were recommended by the Bar Association, we wholeheartedly support with the exception of the amendment that was proposed by Mr. Sider which would have included the lease hold interests. Therefore, we are recommending that the 5 amendments proposed by Mr. Taylor be incorporated in the Bill.

To outline what we are trying to do with this legislation:

A. Return the mineral rights that have been separated from the surface either by reservation during the sale of a property or by outright purchase of mineral rights sometime in the past to the surface owner providing there has not been any activity and the mineral rights have remained dormant for 20 years.

B. Any mineral right owner can preserve his right by:

1. Transferring the title of the mineral rights and recording such transfer in the County Recorder's Office;

2. Having actual production or withdraw of minerals by the holder of the mineral rights;

3. Being used in underground storage of gas by the holder;

4. A drilling or mining permit being issued to the holder and recorded in the County Recorder's Office;

5. A claim to preserve the mineral interest has been filed and recorded in the notice index that is in the Recorder's Office.

Any of the above will begin a new 20 year period at any time the transaction is recorded.

The 5 amendments that have been proposed by the Ohio Bar Association Natural Resources Committee are to make sure that the action taken by a person to preserve their interest is recorded in the Recorder's Office. This appropriate filing will permit anyone who traces a title to find that record and know the mineral rights are preserved by the mineral rights owner.

While the bill is not easily read, I hope that this summary clarifies any questions that you may have. In the event you have additional questions, please feel free to call either myself at 249-2414, Bill Taylor (614) 454-2591, or Bob Fletcher 221-6983.

We hope that at the next hearing held by the committee that the amendments could be adopted and the bill recommended for passage. Your help in doing this would be very much appreciated.

Sincerely,

Bob

Robert E. Bash
Director of Public Affairs, Natural and
Environmental Resources and Utilities

cc: Bill Taylor
Bob Fletcher

UNIFORM DORMANT MINERAL INTERESTS ACT*

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL TE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIFTH YEAR
IN BOSTON, MASSACHUSETTS

August 1-8, 1986

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
New Orleans, Louisiana, February 16, 1987

* The Conference changed the designation of the Dormant Mineral Interests Act from Uniform to Model as approved by the Executive Committee on January 17, 1999.

UNIFORM DORMANT MINERAL INTERESTS ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Dormant Mineral Interests Act was as follows:

W. JOEL BLASS, P.O. Box 160, Gulfport, MS 39501, *Chairman*
JOHN H. DeMOULLY, Law Revision Commission, Suite D-2, 4000, Middlefield Road, Palo Alto, CA 94303, *Drafting Liaison*
OWEN L. ANDERSON, University of North Dakota, School of Law, Grand Forks, ND 58202
RICHARD J. MACY, Supreme Court Building, Cheyenne, WY 82002
JOSHUA M. MORSE, III, P.O. Box 11240, Tallahassee, FL 32302
GLEE S. SMITH, P.O. Box 360, Larned, KS 67550
NATHANIEL STERLING, Law Revision Commission, Suite D-2, 4000, Middlefield Road, Palo Alto, CA 94303, *Reporter*
PHILLIP CARROLL, 120 East Fourth Street, Little Rock, AR 72201, *President (Member Ex Officio)*
WILLIAM J. PIERCE, University of Michigan, School of Law, Ann Arbor, MI 48109, *Executive Director*
ROBERT H. CORNELL, 25th Floor, 50 California Street, San Francisco, CA 94111, *Chairman, Division E (Member Ex Officio)*

Review Committee

EUGENE F. MOONEY, 209 Ridgeway Road, Lexington, KY 40502, *Chairman*
HENRY M. GRETHER, JR., University of Nebraska, College of Law, Lincoln, NE 68583
JAMES N. REEVES, Suite 600, 510 L Street, Anchorage, AK 99501

Advisors to Special Committee on Uniform Dormant Mineral Interests Act

FRANK H. MORISON, *American Bar Association*
LYMAN A. PRECOURT, *American College of Real Estate Lawyers*

Final, approved copies of this Act are available on 8-inch IBM Displaywriter diskettes, and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
Chicago, Illinois 60611
(312) 321-9710

UNIFORM DORMANT MINERAL INTERESTS ACT

TABLE OF CONTENTS

PREFATORY NOTE

SECTION 1. STATEMENT OF POLICY.

SECTION 2. DEFINITIONS.

SECTION 3. EXCLUSIONS.

SECTION 4. TERMINATION OF DORMANT MINERAL INTEREST.

SECTION 5. PRESERVATION OF MINERAL INTEREST BY NOTICE.

SECTION 6. LATE RECORDING BY MINERAL OWNER.

SECTION 7. EFFECT OF TERMINATION.

SECTION 8. SAVINGS AND TRANSITIONAL PROVISIONS.

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

SECTION 10. SHORT TITLE.

SECTION 11. SEVERABILITY CLAUSE.

SECTION 12. EFFECTIVE DATE.

SECTION 13. REPEALS.

UNIFORM DORMANT MINERAL INTERESTS ACT

Prefatory Note

Nature of Mineral Interests

Transactions involving mineral interests may take several different forms. A *lease* permits the lessee to enter the land and remove minerals for a specified period of time; whether a lease creates a separate title to the real estate varies from state to state. A *profit* is an interest in land that permits the owner of the profit to remove minerals; however, the profit does not entitle its owner to possession of the land. A fee title or other interests in minerals may be created by *severance*.

A severance of mineral interests occurs where all or a portion of mineral interests are owned apart from the ownership of the surface. A severance may occur in one of two ways. First, a surface owner who also owns a mineral interest may *reserve* all or a portion of the mineral interest upon transfer of the surface. In the deed conveying the surface of the land to the buyer, the seller reserves a mineral interest in some or all of the minerals beneath the surface. Certain types of sellers, such as railroad companies, often include a reservation of mineral interests as a matter of course in all deeds.

Second, a person who owns both the surface of the land and a mineral interest may *convey* all or a portion of the mineral interest to another person. This practice is common in areas where minerals have been recently discovered, because many landowners wish to capitalize immediately on the speculative value of the subsurface rights.

Severed mineral interests may be owned in the same manner as the surface of the land, that is, in fee simple. In some jurisdictions, however, an oil and gas right (as opposed to an interest in nonfugacious minerals) is a nonpossessory interest (an incorporeal hereditament).

Potential Problems Relating to Dormant Mineral Interests

Dormant mineral interests in general, and severed mineral interests in particular, may present difficulties if the owner of the interest is missing or unknown. Under the common law, a fee simple interest in land cannot be extinguished or abandoned by nonuse, and it is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals. Thus, it is possible that the only document appearing in the public record may be the document initially creating the mineral interest. Subsequent mineral owners, such as the heirs of the original mineral owner, may be unconcerned about an apparently valueless mineral interest and may not even be aware of it; hence their interests may not appear of record.

If mineral owners are missing or unknown, it may create problems for anyone interested in exploring or mining, because it may be difficult or impossible to obtain rights to develop the minerals. An exploration or mining company may be liable to the missing or unknown owners if exploration or mining proceeds without proper leases. Surface owners are also concerned with the ownership of the minerals beneath their property. A mineral interest includes the right of

reasonable entry on the surface for purposes of mineral extraction; this can effectively preclude development of the surface and constitutes a significant impairment of marketability.

On the other hand, the owner of a dormant mineral interest is not motivated to develop the minerals since undeveloped rights may not be taxed and may not be subject to loss through adverse possession by surface occupancy. The greatest value of a dormant mineral interest to the mineral owner may be its effectual impairment of the surface estate, which may have hold-up value when a person seeks to assemble an unencumbered fee. Even if one owner of a dormant mineral interest is willing to relinquish the interest for a reasonable price, the surface owner may find it impossible to trace the ownership of other fractional shares in the old interest.

An extensive body of legal literature demonstrates the need for an effective means of clearing land titles of dormant mineral interests. Public policy favors subjecting dormant mineral interests to termination, and legislative intervention in the continuing conflict between mineral and surface interests may be necessary in some jurisdictions. More than one-fourth of the states have now enacted special statutes to enable termination of dormant mineral interests, and some of the nearly two dozen states that now have marketable title acts apply the acts to mineral interests.

Approaches to the Dormant Mineral Problem

The jurisdictions that have attempted to deal with dormant mineral interests have adopted a wide variety of solutions, with mixed success. The basic schemes described below constitute some of the main approaches that have been used, although many states have adopted variants or have combined features of these schemes.

Abandonment. The common law concept of abandonment of mineral interests provides useful relief in some situations. As a general rule, severed mineral interests that are regarded as separate possessory estates are not subject to abandonment. But less than fee interests in the nature of a lease or profit may be subject to abandonment. In some jurisdictions the scope of the abandonment remedy has been broadened to extend to oil and gas rights on the basis that these minerals, being fugacious, are owned in the form of an incorporeal hereditament, and hence are subject to abandonment.

The abandonment remedy is limited both in scope and by practical proof problems. Abandonment requires a difficult showing of *intent* to abandon; nonuse of the mineral interest alone is not sufficient evidence of intent to abandon. However, the remedy is useful in some situations and should be retained along with enactment of dormant mineral legislation.

Nonuse. A number of statutes have made *nonuse* of a mineral interest for a term of years, e.g., 20 years, the basis for termination of the mineral interest. Such a statute in effect makes nonuse for the prescribed period conclusive evidence of intent to abandon.

The nonuse scheme has advantages and disadvantages. Its major attraction is that it enables extinguishment of dormant interests solely on the basis of nonuse; proof of intent to abandon is unnecessary. Its major drawbacks are that it requires resort to facts outside the record

and it requires a judicial proceeding to determine the fact of nonuse. It also precludes long-term holding of mineral rights for such purposes as future development, future price increases that will make development feasible, or assurance by a conservation organization or subdivider that the mineral rights will not be exploited.

The nonuse concept should be incorporated in any dormant mineral statute. Even a statute based exclusively on recording, such as the Uniform Simplification of Land Transfers Act (USLTA) discussed below, does not terminate the right of a person who has an active legitimate mineral interest but who through inadvertence fails to record.

Recording. Another approach found in several jurisdictions, as well as in USLTA, is based on passage of time without recording. Under this approach a mineral interest is extinguished a certain period of time after it is recorded, for example 30 years, unless during that period a notice of intent to preserve the interest is recorded. The virtues of this model are that it enables clearing of title on the basis of facts in the record and without resort to judicial action, and it keeps the record mineral ownership current. Its major disadvantages are that it permits an inactive owner to preserve the mineral rights on a purely speculative basis and to hold out for nuisance money indefinitely, and it creates the possibility that actively producing mineral rights will be lost through inadvertent failure to record a notice of intent to preserve the mineral rights. The recording concept is useful, however, and should be a key element in any dormant mineral legislation.

Trust for unknown mineral owners. A quite different approach to protecting the rights of mineral owners is found in a number of jurisdictions, based on the concept of a trust fund created for unknown mineral owners. The basic purpose of such statutes is to permit development of the minerals even though not all mineral owners can be located, paying into a trust the share of the proceeds allocable to the absent owners. The usefulness of this scheme is limited in one of the main situations we are concerned with, which is to enable surface development where there is no substantial mineral value. The committee has concluded that this concept is beyond the scope of the dormant mineral statute, although it could be the subject of a subsequent act.

Escheat. A few states have treated dormant minerals as abandoned property subject to escheat. This concept is similar to the treatment given personal property in the Uniform Unclaimed Property Act. This approach has the same shortcomings as the trust for unknown mineral owners.

Constitutionality. Constitutional issues have been raised concerning retroactive application of a dormant mineral statute to existing mineral interests. The leading case, *Texaco v. Short*, 454 U.S. 516 (1982), held the Indiana dormant mineral statute constitutional by a narrow 5-4 margin. The Indiana statute provides that a mineral right lapses if it is not used for a period of 20 years and no reservation of rights is recorded during that time. No prior notice to the mineral owner is required. The statute includes a two-year grace period after enactment during which notices of preservation of the mineral interest may be recorded.

A combination nonuse/recording scheme thus satisfies federal due process requirements. Whether such a scheme would satisfy the due process requirements of the various states is not

clear. Comparable dormant mineral legislation has been voided by several state courts for failure to satisfy state due process requirements. Uniform legislation, if it is to succeed in all states where it is enacted, will need to be clearly constitutional under various state standards. This means that some sort of prior notice to the mineral owner is most likely necessary.

Draft Statute

A combination of approaches appears to be best for uniform legislation. The politics of this area of the law are quite intense in the mineral producing states, and the positions and interests of the various pressure groups differ from state to state. It should be remembered that the dormant mineral portion of USLTA was felt to be the most controversial aspect of that act.

A statute that combines a number of different protections for the mineral owner, but that still enables termination of dormant mineral rights, is likely to be the most successful. Such a combination may also help ensure the constitutionality of the act from state to state. For these reasons, the draft statute developed by the committee consists of a workable combination of the most widely accepted approaches found in jurisdictions with existing dormant mineral legislation, together with prior notice protection for the mineral owner.

Under the draft statute, the surface owner may bring an action to terminate a mineral interest that has been dormant for 20 years, provided the record also evidences no activity involving the mineral interest during that period, the owner of the mineral interest fails to record a notice of intent to preserve the mineral interest within that period, and no taxes are paid on the mineral interest within that period. To protect the rights of a dormant mineral owner who through inadvertence fails to record, the statute enables late recording upon payment of the litigation expenses incurred by the surface owner; this remedy is not available to the mineral owner, however, if the mineral interest has been dormant for more than 40 years (i.e., there has been no use, taxation, or recording of any kind affecting the minerals for that period). The statute provides a two-year grace period for owners of mineral interests to record a notice of intent to preserve interests that would be immediately or within a short period affected by enactment of the statute.

This procedure will assure that active or valuable mineral interests are protected, but will not place an undue burden on marketability. The combination of protections will help ensure the fairness, as well as the constitutionality, of the statute.

The committee believes that clearing title to real property should not be an end in itself and should not be achieved at the expense of a mineral owner who wishes to retain the mineral interest. In many cases the interest was negotiated and bargained for and represents a substantial investment. The objective is to clear title of worthless mineral interests and mineral interests about which no one cares. The draft statute embodies this philosophy.