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In The Supreme Court of Ohio

HANS MICHAEL CORBAN, Petitioner, vs. CHESAPEAKE EXPLORATION, L.L.C., et al., Respondents.	)	Case No. 2014-0804 On Certified Questions of State Law from the United States District Court for the Southern District of Ohio Eastern Division S.D. Ohio Court Case No. 2:13-cv-00246

PRELIMINARY MEMORANDUM OF RESPONDENTS CHESAPEAKE EXPLORATION, L.L.C., CHK UTICA, L.L.C., DALE PENNSYLVANIA ROYALTY, L.P., LARCHMONT RESOURCES, L.L.C., AND TOTAL E&P USA, INC. ADDRESSING CERTIFIED QUESTIONS OF STATE LAW

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I. Introduction

The United States District Court for the Southern District of Ohio has asked this Court to answer two questions presented by the parties' pending motions for summary judgment, each of which implicate the Ohio Dormant Mineral Act, R.C. § 5301.56 ("ODMA"):

1. Does the 2006 version or the 1989 version of the ODMA apply to claims asserted after 2006 alleging that the rights to oil, gas, and other minerals automatically vested in the surface land holder prior to the 2006 amendments as a result of abandonment?

2. Is the payment of a delay rental during the primary term of an oil and gas lease a title transaction and "savings event" under the ODMA?

(S.D. Ohio Case No. 2:13-cv-00246, Opinion and Order ("Dist. Ct. Op.") May 14, 2014, at p. 20).

The first question has been addressed or implicated in at least seven Ohio Courts of Common Pleas cases,[1] is currently pending in at least ten additional cases in the Districts of the Court of Appeals of Ohio,[2] and has been subject to conflicting treatment by the Seventh District Court of Appeals. *Compare Dodd v. Croskey*, 2013 -Ohio- 4257 (7th Dist. Sept. 23, 2013) *with Walker v. Shondrick-Nau*, 2014 -Ohio- 1499 (7th Dist. Apr. 3, 2014) *and Swartz v. Householder*, 2014 -Ohio- 2359 (7th Dist. June 2, 2014). *Walker* is a jurisdictional appeal which has been filed

[1] *Wiseman v. Potts*, Morgan C.P. No. 08CV0145 (Dec. 10, 2009); *Bender v. Morgan*, Columbiana C.P. No. 2012-cv-378 (Mar. 20, 2013); *Taylor v. Crosby*, Belmont C.P. No. 11cv472 (Sept. 16, 2013); *Hendershot v. Korner*, Belmont C.P. No. 12cv453 (Oct. 28, 2013); *Blackstone v. Moore*, Monroe C.P. No. CVH2012-166 (Jan. 22, 2014); *Harmon v. Capstone*, Noble C.P. No. 213-0048 (Feb. 18, 2014); *Kuzior v. Fisher*, Monroe C.P. No. CVH2012-382 (Feb. 21, 2014).

[2] *Wendt v. Dickerson*, 2014 AP 010003 (5th Dist.); *Marty v. Dennis*, 13 MO 07 (7th Dist.); *Farnsworth v. Burkhardt*, 13 MO 14 (7th Dist.); *Kross v. Ruff*, 13 JE 35 (7th Dist.); *Gentile v. Ackerman*, 14 MO 04 (7th Dist.); *Tribett v. Shepherd*, 13 BE 22 (7th Dist.); *Dahlgren v. Brown Farm*, 2013 CA 0896 (7th Dist.); *M&H Ptnsh'p v. Hines*, HA-2014-0004 (7th Dist.); *Schucht v. Bedway*, HA-2014-0010 (7th Dist.); *Myers v. Bedway Land Minerals Co.*, HA-2012-0011, 0012, 0013 (7th Dist.).

and docketed in this Court at 2014-0803, but this Court has not yet determined whether to accept the appeal.

Despite this glut of litigation, no consensus has been reached on this issue. This case provides the perfect opportunity to resolve a legal issue which will provide certainty and predictability to oil and gas owners, surface owners, and one of this state's fastest growing industries. Specifically, if this case is accepted by the Court the precise legal question at issue throughout Ohio will be directly before the Court in a context in which it can be answered as a pure matter of law. Under Supreme Court Practice Rule 9.01(A), this Court may answer questions of law certified to it by federal courts if those questions "may be determinative of the proceeding" and "there is no controlling precedent in the decisions of this Supreme Court." That test is met for question No. 1. There is no controlling precedent for question No. 1, and that issue will be determinative in this case "because Plaintiff [here Petitioner] does not argue he has met the procedural requirements contained in the 2006 amendments[,]" Dist. Ct. Op. at p. 13, and therefore if this Court finds that the 2006 version of the ODMA applies, summary judgment will be granted to the Respondents.[3] Respondents request that the Court accept question No. 1 and order full briefing and arguments on the merits of that question.

The requirements of Supreme Court Practice Rule 9.01(A) are also met for question No. 2, as no precedent of this Court currently addresses that issue, and it is determinative in this case because the mineral interest may never have been "abandoned" if this Court answers question No. 2 affirmatively. However, question No. 2 is also related to the second certified question currently being considered by this Court in *Chesapeake Exploration, L.L.C. v. Buell*, No. 2014-

[3] If this Court finds that the 1989 version of the ODMA applies, additional issues will remain to be determined. *See, e.g.*, Dist. Ct. Op. at pp. 18-20 (discussing whether the execution or expiration of an oil and gas lease works to toll the dormancy period under the ODMA).

0067, whether or not the expiration of a recorded oil and gas lease is a "savings event" under the ODMA. If the expiration of a lease is not a savings event, that would mean that the 20-year dormancy clock begins to run on the first day of a lease and continues running during the entire term of the lease – a result that turns the word "dormant" on its head. Assuming this Court answers the second *Buell* question in the affirmative, question No. 2 here becomes unnecessary: if the end of an oil and gas lease is a savings event, there is no need to decide issues regarding events that occur during the life of the lease. However, if the second *Buell* question is decided in the negative, question No. 2 will need to be decided as a delay rental – a payment made to defer the commencement of drilling operations or the commencement of production during the primary term of a lease, and which affects ownership of the mineral interest and title to the property – is undoubtedly the subject of a title transaction.

Answering the questions currently posed to this Court is proper under Supreme Court Practice Rule 9.01(A), will assist the District Court, the parties, and others facing the same issues, and will undoubtedly conserve public and private resources by settling a frequently litigated question of Ohio law. This Court should answer question No. 1 and, if necessary, question No. 2.

II. The Ohio Dormant Mineral Act

The General Assembly enacted the ODMA to be effective on March 22, 1989. *See* R.C. § 5301.56. The purpose of the ODMA was to provide clear chains of title so as to "encourage the development of minerals in Ohio which have been previously ignored due to defects in title[,]" not to divest a known mineral interest owner, and thus its lessees, of their substantial investment in acquiring their rights. S.B. 223, H.B. 521, Proponent Testimony, 1989 ODMA, p. 3 (attached as App. Ex. 1). *See also id.* (noting that the draft legislation that would become the ODMA had "the essential elements" of the Uniform Dormant Mineral Interests Act ("UDMIA"), an act

whose Prefatory Note states that clearing title "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").

Pursuant to the statute as originally enacted, if a severed mineral interest was not subject to a "savings event" over a twenty year time period, the mineral interest would "be deemed abandoned and vested in the owner of the surface of the land subject to the interest ... ." R.C. § 5301.56(B). One such "savings event" takes place when "[t]he mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located." R.C. § 5301.56(B)(3)(a). The method by which this "deem[ing of] abandon[ment] and vest[ing]" was to take place was not explicitly stated in the 1989 ODMA. However, as discussed below, any interpretation of the ODMA omitting a process for notification of the mineral interest owner would not only be simply inequitable – akin to entering a default against a defendant with no notice of a suit – but would also work a forfeiture of the mineral interest owner's property, something which Ohio law unquestionably abhors. Therefore, to clarify this process the ODMA was amended in 2006. *See* Sponsor Testimony of H.B. 288 Before the House Energy and Public Utilities Committee (Representative Mark Wagoner) (attached as App. Ex. 2) (noting that the 1989 ODMA "did not clearly define when a mineral interest became abandoned and exactly how the process to reunite the mineral interest with the surface ownership was to be accomplished[,]" and that the 2006 amendments "remove[d] the ambiguity of the existing statute with a clear definition of when a mineral right is deemed abandoned"); Report of the Ohio Bar Association's Natural Resources Committee, available at www.ohiobar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx (stating that the 2006 Amendments were "a necessary clarification of the existing statute").

The statute now states than an interest is "deemed abandoned and vested" when no savings event takes place over a twenty year period *and* "the requirements established in division (E) of this section are satisfied ... ." *Id.* Division (E) states that prior to vesting a surface owner must serve notice on each mineral interest holder of the surface owner's intent to declare the mineral interest abandoned, R.C. § 5301.56(E)(1), and between thirty and sixty days after that service the surface owner must also file an affidavit of abandonment. R.C. § 5301.56(E)(2). Division (H) allows a mineral interest owner, within sixty days of being served with Division (E) notice, to file either a claim to preserve the mineral interest or an affidavit identifying a savings event which has occurred within the twenty years prior to the notice of service under division (E). If the mineral interest owner does not take either of these steps, or does so untimely, the surface owner must then file a "notice of failure to file," which is the mechanism by which "the mineral interest shall vest in the owner of the surface of the lands ... ." R.C. § 5301.56(H)(2).

III. The Case in the District Court

The facts of this case are undisputed. In 1959, Respondent North American Coal Royalty Company's ("North American") predecessor, North American Coal Corporation ("NA Coal") conveyed 164.5 acres of property in Harrison County (the "Property") to Petitioner Hans Michael Corban's predecessors, with NA Coal reserving for itself the oil, gas, and mineral rights. Dist. Ct. Op. at pp. 1-3. Mr. Corban is now the current surface owner of the Property. *Id.* at p. 3. NA Coal entered into an oil and gas lease, which was recorded in February of 1984 (the "1984 Lease"), and assigned to Carless Resources, Inc. ("Carless") in May of 1985. *Id.* at p. 4. Either Carless or its predecessor paid delay rentals to NA Coal through the five year term of the 1984 Lease, meaning payments were made in 1985, 1986, 1987, and 1988. *Id.* The 1984 Lease then expired, and the rights reverted to Bellaire – formerly NA Coal – in 1989. *Id.* In 2009 North

American – Bellaire's successor– entered into an oil and gas lease with Mountaineer Natural Gas Company (the "2009 Lease"). *Id.* The remainder of the Respondents in this case – Chesapeake Exploration, L.L.C., CHK Utica, L.L.C., TOTAL E&P USA, INC., Dale Pennsylvania Royalty, LP, and Larchmont Resources, L.L.C. – are the current lessees of the 2009 Lease. *Id.* at 5.

Mr. Corban contends that the mineral rights underneath the Property vested in him pursuant to the 1989 version of the ODMA either in 1992 – the 1989 ODMA's effective date – or in 2005, twenty years after the 1984 Lease's assignment was recorded. *See id.* at p. 9. Because both of these dates are prior to the 2006 amendments – even though this case was filed in 2013, seven years after the 2006 amendments – Mr. Corban contends that the 2006 amendments are inapplicable, and that the mineral rights "automatically vested" in him pursuant to the 1989 ODMA.[4] *See id.* This position is incorrect. As explained below, interpreting either version of the ODMA to permit automatic vesting runs directly contrary to the legislative intent of that statute, as evidenced by the 2006 amendments. Ohio's public policy abhors a forfeiture, the language of the 1989 ODMA does not support Mr. Corban's position that the mineral interest here was abandoned, and applying the 2006 amendments to this case filed in 2013 in no way implicates any concerns regarding retroactivity. It is also the case here that the mineral rights did not transfer to Mr. Corban because that transfer was tolled by either the expiration of the 1984 Lease – assuming this Court answers the second *Buell* question in the affirmative – or the payment of delay rentals, which, if the expiration of an oil and gas lease is not a savings event, are unquestionably savings events under either version of the ODMA.

[4] Mr. Corban must take this position, as it is undisputed he effectuated none of the notification procedures required under the 2006 amendments. *See* Dist. Ct. Op. at pp. 9, 13.

IV. Analysis

A. If the Court Finds that the 2006 Version of the ODMA Applies to Claims Asserted After 2006 Alleging that Rights Automatically Vested in the Surface Owner Prior to the 2006 Amendments, That Would Determine the Outcome of the Federal Action, and there is No Controlling Precedent On Point.

There is no dispute that Mr. Corban undertook none of the notification or filing requirements of the 2006 ODMA. Thus, if the 2006 ODMA applies to this case filed in 2013, Mr. Corban can have no claim to the mineral interest. By answering the District Court's first question in the affirmative, the Court will provide a legal basis for the District Court to enter summary judgment, while simultaneously resolving an issue disputed throughout Ohio.

1. Utilizing the 2006 Amendments to the ODMA is the Only Way to Effectuate the Legislative Intent of Both the Ohio Marketable Title Act and the ODMA.

The ODMA is a part of Ohio's Marketable Title Act ("OMTA"). *See, e.g.*, Dist. Ct. Op. at pp. 10-11 (citing *Dahlgren*). "[T]he legislative purpose of" the OMTA is "simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title ... ." R.C. § 5301.55. Operating as part of the OMTA, the more specific purpose of the ODMA is the facilitation of clear title to "encourage the development of minerals in Ohio which have been previously ignored due to defects in title." S.B. 223, H.B. 521, Proponent Testimony, 1989 ODMA, p. 3. *See also Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio). Inc.*, 62 Ohio St.3d 387, 389 (1992) ("It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio"). Nowhere is it stated that the purpose of the ODMA is to favor surface owners over mineral owners. Instead, as part of the OMTA, the ODMA works to provide a clear title for mineral interests – regardless of who owns those interests – so that the mineral interests can be utilized. This intent was clearly expressed in

the UDMIA, which, again, was considered by the drafters of the ODMA, *see* §II above, in the statement that the clearing of title "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 interests," as that interest often represents a significant investment of the owner. UDMIA, Prefatory Note, at p. 4. Rather, the "objective is to clear title of worthless mineral interests about which no one cares." *Id.*

The interpretation of the ODMA put forth by Mr. Corban in the District Court – that the 1989 ODMA "automatically vests ownership of the mineral interest in the surface owner[,] " Plaintiff's Motion for Partial Summary Judgment, p. 4 – directly undercuts the purpose of both the OMTA and the ODMA. This "automatic vesting" creates a situation where a transfer of ownership in the mineral rights occurs *outside* the record chain of title, therefore rendering the title record unreliable, an act in direct contravention of the express legislative purpose of the OMTA to "simplify[] and facilitat[e] land title transactions by allowing persons to rely on a record chain of title." R.C. § 5301.55. When a record chain of title cannot be relied upon, the "defects in title" which the ODMA expressly sought to avoid once again come into play, S.B. 223, H.B. 521, Proponent Testimony, 1989 ODMA, p. 3, chilling the development of oil and gas in this state because potential oil and gas lessees have no definitive means to determine from whom they should be leasing. Mr. Corban's interpretation of the ODMA, therefore, also violates the express purpose of the ODMA. *See, e.g.*, *Dahlgren*, at 14-15 (finding that "the surface owners' interpretation of the 1989 version conflicts with 'the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title'" because a "title examiner might well find the recorded Dahlgren deed with its reservation of mineral rights, without any record that shows whether the Dahlgrens or their descendants preserved or abandoned those rights"). Given that this interpretation leads to such undesirable

results, it is not surprising that the 2006 amendments to the ODMA clarified that the statute requires a series of procedures antithetical to a concept of "automatic vesting."

2. Finding that the 1989 ODMA Calls for "Automatic Vesting" Effects a Forfeiture of Mineral Owners' Private Property, Which Ohio Law Abhors.

Interpreting the 1989 ODMA as calling for an "automatic vesting" of mineral rights would cause the forfeiture of a property right, a result which Ohio law abhors. *See, e.g.* Ohio Const., Art. I § 19 ("Private property shall ever be held inviolate[.]"); *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534 (1992) ("Forfeitures are not favored by the law. The law requires that we favor individual property rights when interpreting forfeiture statutes"); *Norwood v. Horney*, 110 Ohio St.3d 353, 362 (2006) ("The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself") (quoting *Bank of Toledo v. Toledo*, 1 Ohio St. 622, 632 (1853)); *id.* at 363 ("Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces"); *Dahlgren*, at 15 ("Forfeitures are not favored by the law. The law requires that we favor individual property rights when interpreting forfeiture statutes") (quoting *Sogg* v. *Zurz*, 121 Ohio St. 3d 449 (2009)). Effectuating a forfeiture is especially undesirable here, where neither version of the statute favors surface interest owners over mineral interest owners, and the forfeiture would bring about a result directly at odds with the purposes of both the ODMA and the OMTA. *See* § IV.A.1, above.

3. The 1989 ODMA Language Does Not Support "Automatic Vesting."

Nowhere in the text of either version of the ODMA is any derivation of the word "automatic" used. Instead, section (B)(1) of the 1989 ODMA stated that under certain conditions a mineral interest "shall be deemed abandoned and vested in the owner of the surface ... ." Ohio

courts have already noted that this language is "less conclusive" than language used in other portions of the OMTA, which states that rights are "null and void" or "extinguished," and found that this looser language of the ODMA suggests that statute "provides standards but does not resolve the issue." *Dahlgren*, at 15. Further, the relevant language of the 1989 ODMA must be read using proper canons of statutory interpretation. Specifically, when the conjunction "and" is used, the phrases it joins must be read together, not independently. *See, e.g., Colonial Mortg. Service Co. v. Southard*, 56 Ohio St.2d 347, 349 (1978). As such, under the 1989 ODMA's command that a mineral interest is "deemed abandoned and vested," the mineral interest is not "deemed abandoned" and also "vested," but both *deemed* abandoned and *deemed* vested. The word "deem" is a term of art, meaning "[t]o treat (something) as if (1) it were really something else, or (2) it has qualities that it doesn't have." *Black's Law Dictionary* 425 (7th Ed. 1999). *See also* G.C. Thornton, *Legislative Drafting* 83-84 (2d ed. 1979) ("'Deem' is a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be something it is not or negatively by 'deeming' something not to be something which it is"). Therefore, under the 1989 ODMA a mineral interest can be "treat[ed] ... as if" it were both abandoned and vested under certain circumstances. This does not mean, however, that the mineral interest in fact *is* abandoned and vested despite the absence of *any* kind of procedure to effectuate that abandonment. The General Assembly made clear that this was their intent in 2006 when they clarified the procedure under which a mineral interest could go from being *deemed* abandoned and vested to in fact *being* abandoned and vested; had the legislature wanted to affirm an "automatic vesting" concept it would have done so, but it took the antithetical course of action. Neither version of the ODMA calls for an "automatic vesting" of the mineral interest.

4. The 2006 ODMA Can Be Applied Without Raising Any Concerns About Improper Retroactivity.

"[A] court should apply the law in effect at the time it renders its decision … even though that law was enacted after the events that gave rise to the suit." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (quotations omitted). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment … ." *Id.* at 269 (citations omitted). "Changes in procedural rules may often be applied [even] in suits arising before their enactment without raising concerns about retroactivity." *State v. Ayala*, 1998 Ohio App. LEXIS 5416, at *6-7 (10th Dist. Nov. 10, 1998) (quoting *Landgraf*, 511 U.S. at 275). "[T]he fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." *Landgraf*, 511 U.S. at 275. The question is "whether there is a change in substantive obligation as opposed to a change in the way in which the same obligation is adjudicated." *Combs v. Comm'r of Social Security*, 459 F.3d 640, 647 (6th Cir. 2006). A change in the way rights are adjudicated is not "retroactive," even if it "may be outcome-determinative for some … ." *Id. See also Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St.3d 103, 109-110 (2013) ("Although the Retroactivity Clause bars statutes that extinguish preexisting rights … it does not prohibit legislation that merely affects the methods and procedures by which rights are recognized … ") (citations and quotations omitted).

The 2006 ODMA does not "extinguish preexisting rights." ." *Longbottom*, 137 Ohio St.3d at 109-110. Instead, it merely clarifies the "methods and procedures by which rights are recognized, protected and enforced … ." *Id. See also* Sponsor Testimony of H.B. 288 Before the House Energy and Public Utilities Committee (Representative Mark Wagoner) (noting that the 2006 amendments would "remove[] the ambiguity of the existing statute with a clear definition of when a mineral right is deemed abandoned"); Report of the Ohio Bar Association's

Natural Resources Committee (stating that the 2006 Amendments were "a necessary clarification of the existing statute"). Although this clarification "may be outcome-determinative for some" surface owners, *see Combs*, 459 F.3d at 647, it certainly is not for all. Indeed, for any surface owner who follows the procedures put forth in the 2006 ODMA, and receives no response from any mineral interest owner, the mineral interest will vest in the surface owner. Thus, because the 2006 ODMA merely clarifies a procedure to perfect a right, as opposed to extinguishing that right, the 2006 ODMA can be applied without any concern for violating concepts of retroactivity.

5. This Court Should Decide Which Version of the ODMA Applies to Cases Filed After 2006, Regarding Interests Allegedly Abandoned Before 2006, in This Case.

On May 16, 2014, two days after the District Court certified the questions now before this Court and the same day in which the District Court's opinion was filed in this Court, the Notice of Appeal was also filed in *Walker v. Shondrick-Nau*, 2014-0803. The issue in *Walker* was described by the Seventh District Court of Appeals as "when to apply the 1989 version of [the ODMA] and when to apply the 2006 version." *Walker*, 2014 -Ohio-1499, at *6. This issue is identical to the District Court's first question. Because this case allows the Court to resolve a pure question of law, whereas *Walker* provides a more fact-intensive jurisdictional appeal, this Court can more definitively resolve the issue here. Further, *Walker* is one of a few ODMA cases in which no oil and gas industry member is represented; hearing *Walker* and not this case would mean this Court decided one of the most crucial questions of law to arise in Ohio's oil and gas industry's history without hearing input from any oil and gas industry member as a party to the

case at issue.[5] This case should be at least one of the vehicles in which this question is answered.

When this Court rules on a certified question, as it would be here, it "issue[s] a written opinion *stating the law* governing the question or questions certified." S.Ct.Prac.R. 9.08 (emphasis added). When this Court rules on a jurisdictional appeal, as it would in *Walker*, one party is appealing an *order* from a lower court, not only a single question of law. S.Ct.Prac.R. 5.02 ("[A] 'jurisdictional appeal' is an appeal from a *decision* of a court of appeals ... ") (emphasis added). That means this Court could decide *Walker* without addressing the question at issue in this case. *See, e.g., Newcomb v. Dredge*, 152 N.E.2d 801, 807 (7th Dist. 1957) (stating that an appellate court can affirm a judgment on a different theory than the trial court). If this Court decides this question in the *Walker* jurisdictional appeal, the Court will be answering this question in the context of the specific and particular facts of *Walker*. Because of the import of this issue, regardless of what this Court decides, numerous parties would attempt to distinguish *Walker* based on those specific and particular facts, and argue that its holding does not apply to *their* specific and particular set of facts. Deciding the District Court's first certified question in this matter serves judicial efficiency by putting the question to rest.

This Court should also answer the question before it in this matter because this matter involves parties who represent each of the larger groups of interested parties. The plaintiff in *Walker* is an individual surface owner and the defendant is an individual mineral rights owner. *See Walker*, 2014 -Ohio- 1499, at *1. Although these are individuals representative of *some* of the larger groups impacted by this decision, there is one major party not present in *Walker*: the

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[5] Chesapeake Exploration, L.L.C. filed an *Amicus Curiae* brief in *Walker*, urging this Court to accept that appeal. Should this Court accept *Walker* for review, it should consolidate the cases, such as to allow all relevant parties to present argument to the Court. *See, e.g., Sorrell v. Thevenir*, 69 Ohio St.3d 415 (1994) (consolidating a case from a District Court of Appeals with questions of law certified from a federal court).

oil and gas industry. It is that industry's investment of over $18 billion dollars in the state of Ohio[6] which has made the question now before this Court one of interest; to decide this issue without the input of even one industry member as a party is inequitable. The Court can avoid that inequity by deciding the question before it here, in which all interested parties – surface owner, mineral owner, and mineral lessee – are represented.

B. If the Court Finds That the Termination of an Oil and Gas Lease Makes a Mineral Interest the Subject of a Title Transaction, Question No. 2 Becomes Irrelevant.

Whether viewed as a new savings event, or the end of a continuing savings event, the expiration of an oil and gas lease starts the ODMA "clock." The termination of a lease is an event that affects the ownership of the mineral interest and title to the property and thus should start the twenty-year clock for determining if an interest is dormant; indeed, every day of a lease, including the last, must toll the ODMA in order to comport with the statute's stated purpose of clearing title to allow for the production of minerals. Any other finding would be a declaration that a lessor had begun to "abandon" its interest at the same time it was actively providing that interest for development, a statement that flies in the face of the ODMA's purpose of encouraging production. Because the first and last day of a lease, and every day in between, tolls the ODMA, it need not be decided whether the payment of a delay rental does so as well.

C. Even if the Termination of an Oil and Gas Lease is Not a "Savings Event," a Delay Rental Payment is Nonetheless a "Savings Event."

Even if this Court decides that the termination of an oil and gas lease does not toll the ODMA, a delay rental payment in an oil and gas lease is undoubtedly the subject of a title transaction within the meaning of the ODMA because the payment evidences the active

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[6] *See, e.g.*, Ohio Oil and Gas Association, *Shale Exploration and Development Continue to Drive Economic Investment in Ohio*, April 15, 2014, available at http://ooga.org/blog.

ownership and enjoyment of the mineral interest, and affects title to the property by continuing the lessee's interest in the property. Had the payments not been made in this case – and nothing obligated the lessee to make them – the primary term of the 1984 Lease would have terminated early, and fee simple determinable title to the oil and gas would have transferred back to the mineral interest owner. Finding that a delay rental payment was not a savings event would lead to the anomalous result that an action taken to perpetuate an oil and gas lease – the principal mechanism by which oil and gas production occurs – would not be sufficient conduct to meet the ODMA's goal of fostering production. Because an oil and gas lease evidences title to the mineral interest, and allows for production of that mineral interest, any act that perpetuates an oil and gas lease is the subject of a title transaction, and thus a savings event under the ODMA.[7]

V. Conclusion

Question No. 1 is a dispositive issue in the federal action that has not been addressed in any previous decision of this Court and is of great consequence to numerous parties throughout the State; this Court should accept that question for full briefing and argument on the merits. If the Court answers the relevant *Buell* inquiry in the negative – which it should not – question No. 2 will also then become a dispositive issue in the federal action, not addressed by any previous decision of this Court, and in that instance it should also be answered.

[7] If the payment of a delay rental is the subject of a title transaction and a savings event under the ODMA, then in this case the final payment of a delay rental in 1988 restarted the ODMA's 20-year clock, and by 2008 the ODMA had been amended to require that a claimant follow specific notice and affidavit procedures before mineral rights can be deemed abandoned. Here, Mr. Corban does not claim to have followed those procedures; as such, if the delay rental payment was a savings event, Respondents are entitled to summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 5th day of June, 2014, a copy of the foregoing was served via Regular U.S. Mail upon the following:

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APPENDIX EXHIBIT 1

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.

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 the States

At its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIFTH YEAR
IN BOSTON, MASSACHUSETTS
AUGUST 1-8, 1986

With Prefatory Note and Comments

UNIFORM DORMANT MINERAL INTERESTS ACT

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

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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:

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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.

UNIFORM DORMANT MINERAL INTERESTS ACT

SECTION 1. STATEMENT OF POLICY.

(a) The public policy of this State is to enable and encourage marketability of real property and to mitigate the adverse effect of dormant mineral interests on the full use and development of both surface estate and mineral interests in real property.

(b) This [Act] shall be construed to effectuate its purpose to provide a means for termination of dormant mineral interests that impair marketability of real property.

COMMENT

This section is a legislative finding and declaration of the substantial interest of the state in dormant mineral legislation.

SECTION 2. DEFINITIONS.

As used in this [Act]:

(1) "Mineral interest" means an interest in a mineral estate, however created and regardless of form, whether absolute or fractional, divided or undivided, corporeal or incorporeal, including a fee simple or any lesser interest or any kind of royalty, production payment, executive right, nonexecutive right, leasehold, or lien, in minerals, regardless of character.

(2) "Minerals" includes gas, oil, coal, other gaseous, liquid, and solid hydrocarbons, oil shale, cement material, sand and gravel, road material, building stone, chemical substance, gemstone, metallic, fissionable, and nonfissionable ores, colloidal

and other clay, steam and other geothermal resource, and any other substance defined as a mineral by the law of this State.

COMMENT

The definitions in this section are broadly drafted to include all the various forms of minerals and mineral interests. This includes both fugacious and nonfugacious, as well as organic and inorganic, minerals. The Act does not distinguish among minerals based on their character, but treats all minerals the same.

The reference to liens in paragraph (1) includes both contractual and noncontractual, voluntary and involuntary, liens on minerals and mineral interests. It should be noted that the duration of a lien may be subject to general laws governing liens. For example, a lien that by state law has a duration of 10 years may not be given a life of 20 years simply by recording a notice of intent to preserve the lien pursuant to Section 5 (preservation of mineral interest by notice), just as a mineral lease which by its own terms has a duration of five years is not extended by recordation of a notice of intent to preserve the lease. Likewise, if state law requires specific filings, recordings, or other acts for enforceability of a lien, those acts must be complied with even though the lien is not dormant within the meaning of this Act. Conversely, an instrument that creates a security interest which, by its terms, endures more than 20 years, cannot avoid the effect of the 20-year statute. See Section 4(c) (termination of dormant mineral interest).

The definition of "minerals" in paragraph (2) is inclusive and not exclusive. "Coal" and other solid hydrocarbons within the meaning of paragraph (2) includes lignite, leonardite, and other grades of coal. This Act is not intended to affect water law but is intended to affect minerals dissolved or suspended in water. See Section 3 (exclusions).

While Section 2 defines the term "minerals" and "mineral interest" broadly, the definitions serve the limited function of determining mineral interests that are terminated pursuant to this Act. They are not intended to redefine minerals and mineral interests for purposes of state law other than this Act.

SECTION 3. EXCLUSIONS.

(a) This [Act] does not apply to:

(1) a mineral interest of the United States or an Indian tribe, except to the extent permitted by federal law; or

(2) a mineral interest of this State or an agency or political subdivision of this State, except to the extent permitted by state law other than this [Act].

(b) This [Act] does not affect water rights.

COMMENT

Public entities are excepted by this section because they have perpetual existence and can be located if it becomes necessary to terminate by negotiation a mineral interest held by the public entity. A jurisdiction enacting this statute should also exclude from its operation interests protected by statute, such as environmental or natural resource conservation or preservation statutes.

This Act does not affect mineral interests of Indian tribes, groups, or individuals (including corporations formed under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1600 et seq.) to the extent that the interests are protected against divestiture by superseding federal treaties or statutes.

Although this Act affects minerals dissolved or suspended in water, it is not intended to affect water law. See Comment to Section 2 (definitions).

While Section 2 (definitions) defines the terms "minerals" and "mineral interest" broadly, the definitions serve the limited function of determining mineral interests that are terminated pursuant to this Act. They are not intended to redefine minerals and mineral interests for purposes of state law other than this Act.

SECTION 4. TERMINATION OF DORMANT MINERAL INTEREST.

(a) The surface owner of real property subject to a mineral interest may maintain an action to terminate a dormant mineral interest. A mineral interest is dormant for the purpose of this [Act] if the interest is unused within the meaning of subsection (b) for a period of 20 or more years next preceding commencement of the action and has not been preserved pursuant to Section 5. The action must be in the nature of and requires

the same notice as is required in an action to quiet title. The action may be maintained whether or not the owner of the mineral interest or the owner's whereabouts is known or unknown. Disability or lack of knowledge of any kind on the part of any person does not suspend the running of the 20-year period.

(b) For the purpose of this section, any of the following actions taken by or under authority of the owner of a mineral interest in relation to any mineral that is part of the mineral interest constitutes use of the entire mineral interest:

(1) Active mineral operations on or below the surface of the real property or other property unitized or pooled with the real property, including production, geophysical exploration, exploratory or developmental drilling, mining, exploitation, and development, but not including injection of substances for purposes of disposal or storage. Active mineral operations constitute use of any mineral interest owned by any person in any mineral that is the object of the operations.

(2) Payment of taxes on a separate assessment of the mineral interest or of a transfer or severance tax relating to the mineral interest.

(3) Recordation of an instrument that creates, reserves, or otherwise evidences a claim to or the continued existence of the mineral interest, including an instrument that transfers, leases, or divides the interest. Recordation of an instrument constitutes use of (i) any recorded interest owned by any person in any mineral that is the subject of the instrument,

and (ii) any recorded mineral interest in the property owned by any party to the instrument.

(4) Recordation of a judgment or decree that makes specific reference to the mineral interest.

(c) This section applies notwithstanding any provision to the contrary in the instrument that creates, reserves, transfers, leases, divides, or otherwise evidences the claim to or the continued existence of the mineral interest or in another recorded document unless the instrument or other recorded document provides an earlier termination date.

COMMENT

This section defines dormancy for the purpose of termination of a mineral interest pursuant to this Act. The dormancy period selected is 20 years -- a not uncommon period among the various jurisdictions.

Subsection (a) provides for a court proceeding in the nature of a quiet title action to terminate a dormant mineral interest. The device of a court proceeding ensures notice to the mineral owner personally or by publication as may be appropriate to the circumstances and a reliable determination of dormancy.

Subsection (b) ties the determination of dormancy to nonuse. Each paragraph of subsection (b) describes an activity that constitutes use of a mineral interest for purposes of the dormancy determination. In addition, a mineral interest is not dormant if a notice of intent to preserve the interest is recorded pursuant to Section 5 (preservation of mineral interest).

Paragraph (b)(1) provides for preservation of a mineral interest by active mineral operations. Repressuring may be considered an active mineral operation if made for the purpose of secondary recovery operations. A shut-in well is not an active mineral operation and therefore would not suffice to save the mineral interest from dormancy.

Paragraph (b)(1) is intended to preserve in its entirety a mineral interest where there are active operations directed toward any mineral that is included within the interest. Thus, if there are fractional owners of a mineral interest, activity by one owner is considered activity by all owners. Other interests owned by other persons in the minerals that are the object of

the operations are also preserved by the operations. For example, oil and gas operations by a fractional oil, gas, and coal owner would save not only the interests of other fractional oil and gas owners but also the interests of oil and gas lessees and royalty owners holding under either the oil and gas owner or any fractional owner, as well as the interests of holders of any other mineral interest in the oil and gas that is the object of the operations. The oil and gas operations suffice to save the coal interest of the oil, gas, and coal owner, as well as other minerals included in any of the affected mineral interests, not just the interest in oil and gas that is the subject of the particular operations. This is the case regardless whether the mineral interest was acquired in one instrument or by several instruments. However, oil and gas operations by a fractional oil, gas, and coal owner would not save the mineral interest of a fractional coal owner if the interest does not include oil and gas.

Under paragraph (b)(2), taxes must be actually paid within the preceding 20 years to suffice as a qualifying use of the mineral interest.

Paragraph (b)(3) is intended to cover any recorded instrument evidencing an intention to own or affect an interest in the minerals, including a recorded oil, gas, or mineral lease, regardless whether such a lease is recognized as an interest in land in the particular jurisdiction.

Under paragraph (b)(3), recordation has the effect of preserving not only the interests of the parties to the instrument in the minerals that are the subject of the instrument, but also the recorded interests of nonparties in the subject minerals, as well as other recorded interests of the parties in other minerals in the same property. Thus, recordation of an oil and gas lease between a fractional owner and lessee preserves the interest in oil and gas not only of the fractional owner but also of the co-owners; moreover, the recordation preserves the interest of the fractional owner in other minerals that are not the subject of the lease, whether the other minerals were acquired by the same instrument by which the oil and gas interest was acquired or by a separate instrument.

Recordation of a judgment or decree under paragraph (b)(4) includes entry or recordation in a judgment book in a jurisdiction where such an entry or recordation becomes part of the property records. The judgment or decree must make specific reference to the mineral interest in order to preserve it. Thus, a general judgment lien or other recordation of civil process such as an attachment or sheriff's deed of a nonspecific nature would not constitute use of the mineral interest within the meaning of paragraph (b)(4).

Subsection (c) is intended to preclude a mineral owner from evading the purpose of this Act by contracting for a very long or indefinite duration of the mineral interest. A lien on minerals having a 30-year duration, for example, would be subject to termination after 20 years under this Act if there were no further activities involving the minerals or mineral interest. A person seeking to keep the lien for its full 30-year duration could do so by recording a notice of intent to preserve the lien pursuant to Section 5 (preservation of mineral interest by notice). It should be noted that recordation of a notice of intent to preserve the lien would not extend the lien beyond the date upon which it terminates by its own terms.

SECTION 5. PRESERVATION OF MINERAL INTEREST BY NOTICE.

(a) An owner of a mineral interest may record at any time a notice of intent to preserve the mineral interest or a part thereof. The mineral interest is preserved in each county in which the notice is recorded. A mineral interest is not dormant if the notice is recorded within 20 years next preceding commencement of the action to terminate the mineral interest or pursuant to Section 6 after commencement of the action.

(b) The notice may be executed by an owner of the mineral interest or by another person acting on behalf of the owner, including an owner who is under a disability or unable to assert a claim on the owner's own behalf or whose identity cannot be established or is uncertain at the time of execution of the notice. The notice may be executed by or on behalf of a co-owner for the benefit of any or all co-owners or by or on behalf of an owner for the benefit of any or all persons claiming under the owner or persons under whom the owner claims.

(c) The notice must contain the name of the owner of the mineral interest or the co-owners or other persons for whom the

mineral interest is to be preserved or, if the identity of the owner cannot be established or is uncertain, the name of the class of which the owner is a member, and must identify the mineral interest or part thereof to be preserved by one of the following means:

(1) A reference to the location in the records of the instrument that creates, reserves, or otherwise evidences the interest or of the judgment or decree that confirms the interest.

(2) A legal description of the mineral interest. [If the owner of a mineral interest claims the mineral interest under an instrument that is not of record or claims under a recorded instrument that does not specifically identify that owner, a legal description is not effective to preserve a mineral interest unless accompanied by a reference to the name of the record owner under whom the owner of the mineral interest claims. In such a case, the record of the notice of intent to preserve the mineral interest must be indexed under the name of the record owner as well as under the name of the owner of the mineral interest.]

(3) A reference generally and without specificity to any or all mineral interests of the owner in any real property situated in the county. The reference is not effective to preserve a particular mineral interest unless there is, in the county, in the name of the person claiming to be the owner of the interest, (i) a previously recorded instrument that creates, reserves, or otherwise evidences that interest or (ii) a judgment or decree that confirms that interest.

COMMENT

This section is broadly drawn to permit a mineral owner to preserve not only his or her own interest but also any or all related interests. For example, the mineral owner may share ownership with one or more other persons. This section permits but does not require the mineral owner to preserve the interests of any or all of the co-owners by specifying the interests to be preserved. Likewise, the mineral interest being preserved may be subject to an overriding royalty or sublease or executive interest. In this situation, the mineral owner may elect also to preserve any or all of the interests subject to it, by specifying the interests in the notice of intent to preserve. The mineral owner may also elect to preserve the interest as to some or all of the minerals included in the interest.

Where the mineral interest being preserved is of limited duration, recordation of a notice under this section does not extend the interest beyond the time the interest expires by its own terms. Where the mineral interest being preserved is a lien, recordation of the notice does not excuse compliance with any other applicable conditions or requirements for preservation of the lien.

The bracketed language in paragraph (c)(2) is for use in a jurisdiction that does not have a tract index system. It is intended to assist in indexing a notice of intent to preserve an interest despite a gap in the recorded mineral chain of title.

Paragraph (c)(3) permits a blanket recording as to all interests in the county, provided that there is a prior recorded instrument, or a judgment whether or not recorded, that establishes the name of the mineral owner in the county records. The blanket recording provision is a practical necessity for large mineral owners. Where a county does not have a general index of grantors and grantees, it will be necessary to establish a separate index of notices of intent to preserve mineral interests for purposes of the blanket recording.

SECTION 6. LATE RECORDING BY MINERAL OWNER.

(a) In this section, "litigation expenses" means costs and expenses that the court determines are reasonably and necessarily incurred in preparing for and prosecuting an action, including reasonable attorney's fees.

(b) In an action to terminate a mineral interest pursuant to this [Act], the court shall permit the owner of the mineral interest to record a late notice of intent to preserve the mineral interest as a condition of dismissal of the action, upon payment into court for the benefit of the surface owner of the real property the litigation expenses attributable to the mineral interest or portion thereof as to which the notice is recorded.

(c) This section does not apply in an action in which a mineral interest has been unused within the meaning of Section 4(b) for a period of 40 or more years next preceding commencement of the action.

COMMENT

This section applies only where the mineral owner seeks to make a late recording in order to obtain dismissal of the action. The section is not intended to require payment of litigation expenses as a condition of dismissal where the mineral owner secures dismissal upon proof that the mineral interest is not dormant by virtue of recordation or use of the property within the previous 20 years, as prescribed in Section 4 (termination of dormant mineral interest). Moreover, the remedy provided by this section is available only if there has been some recordation or use of the property within the previous 40 years.

SECTION 7. EFFECT OF TERMINATION.

A court order terminating a mineral interest [, when recorded,] merges the terminated mineral interest, including express and implied appurtenant surface rights and obligations, with the surface estate in shares proportionate to the ownership of the surface estate, subject to existing liens for taxes or assessments.

COMMENT

In some states it is standard practice for judgments such as this to be recorded. In other states entry of judgment alone may suffice to make the judgment part of the land records.

Merger of a terminated mineral interest with the surface is subject not only to existing tax liens and assessments, but also to other outstanding liens on the mineral interest. However, an outstanding lien on a mineral interest is itself a mineral interest that may be subject to termination under this Act. It should be noted that termination of a mineral interest under this Act that has been tax-deeded to the state or other public entity is subject to compliance with relevant requirements for release of tax-deeded property.

The appurtenant surface rights and obligations referred to in Section 7 include the right of entry on the surface and the obligation of support of the surface. However, termination of the support obligation of the surface under this Act does not terminate any support obligations owed to adjacent surface owners.

It is possible under this section for a surface owner to acquire greater mineral interests than the surface owner started with. Assume, for example, there are equal co-owners of the surface, one of whom conveys his or her undivided 50% share of minerals. Upon termination of the conveyed mineral interest under this Act, the interest would merge with the surface estate in proportion to the ownership of the surface estate, so that each owner would acquire one-half of the mineral interest. The end result is that the conveying surface owner would hold an undivided one-fourth of the minerals and the nonconveying surface owner surface owner would hold an undivided three-fourths of the minerals. This result is proper since the reversion represents a windfall to the surface estate in general and to the conveying owner in particular, who has previously received the value of the mineral interest.

In the example above, assume that the conveyed mineral interest is not terminated, but instead the owner of the mineral interest executes a 30-year mineral lease. If the lease is terminated under this Act after 20 years have run, the interest in the remaining 10 years of the lease would merge with the surface estate in proportionate shares, at the end of which time it would expire, leaving the interest of the mineral owner unencumbered.

SECTION 8. SAVINGS AND TRANSITIONAL PROVISIONS.

(a) Except as otherwise provided in this section, this [Act] applies to all mineral interests, whether created before, on, or after its effective date.

(b) An action may not be maintained to terminate a mineral interest pursuant to this [Act] until [two] years after the effective date of the [Act].

(c) This [Act] does not limit or affect any other procedure provided by law for clearing an abandoned mineral interest from title to real property.

(d) This [Act] does not affect the validity of the termination of any mineral interest made pursuant to any predecessor statute on dormant mineral interests. The repeal by this [Act] of any statute on dormant mineral interests takes effect [two] years after the effective date of this [Act].

COMMENT

The [two]-year grace period provided by this section is to enable a mineral owner to take steps to record a notice of intent to preserve an interest that would otherwise be subject to termination immediately upon the effective date because of the application of the Act to existing mineral interests. Thus, a mineral owner may record a notice of intent to preserve an interest during the [two]-year period even though no action may be brought during the [two]-year period. Subsection (d) is intended for those states that repeal an existing dormant mineral statute upon enactment of this Act.

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 10. SHORT TITLE.

This [Act] may be cited as the Uniform Dormant Mineral Interests Act.

SECTION 11. SEVERABILITY CLAUSE.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect any other provision or application of this [Act] that can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 12. EFFECTIVE DATE.

This [Act] takes effect _____.

SECTION 13. REPEALS.

The following acts and parts of acts are repealed:

(1) _____.

(2) _____.

(3) _____.

APPENDIX EXHIBIT 2

Mark D. Wagoner, Jr.
State Representative, 46th House District

HOUSE BILL 288
REPRESENTATIVE MARK WAGONER
SPONSOR TESTIMONY
BEFORE THE OHIO HOUSE PUBLIC UTILITIES COMMITTEE

Chairman Hagan and members of the House Public Utilities Committee, I thank you for the opportunity to present sponsor testimony on House Bill 288.

House Bill 288 seeks to update Ohio's mineral rights law. House Bill 288 contains two proposed amendments to Ohio's existing statutory scheme affecting energy production. The bill is designed, first, to address technical problems with Ohio's current Dormant Mineral Statute and, second, to resolve procedural problems with The Ohio Oil and Gas Commission. The General Assembly can take these two steps to help increase the availability of domestic energy supplies without adversely affecting the environment or state tax collections.

Turning first to the Dormant Mineral Statute, Ohio has had an active energy production industry since the mid 1800's. During this period, landowners in mineral producing areas have frequently severed the mineral rights in their land from the surface rights. Through the decades, ownership of the severed minerals has been transferred and factionalized through estates and business transfers. Today, those old severed mineral rights may be the key to new production sites, as advances in current technology and the high cost of energy make reworking old oil and gas fields possible.

The problem is that it may be difficult - if not impossible - to find the owners or in some cases the multiple partial interest owners of such old severed mineral rights. Twenty years ago, Ohio joined the majority of oil and gas producing states by passing a Dormant Mineral Statute that permitted the surface owner to reunite severed mineral rights with the surface estate if the mineral rights had been abandoned. Unfortunately, Ohio's Dormant Mineral Statute has seldom been used, in large measure because the statute did not clearly define when a mineral interest became abandoned and exactly how the process to reunite the mineral ownership with the surface ownership was to be accomplished.

House Bill 288 removes the ambiguity of the existing statute with a clear definition of when a mineral right is deemed abandoned. The mineral right will be deemed abandoned if there

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is both (1) no active use of the mineral rights and (2) a failure by the mineral right owner to file to preserve the inactive mineral right for future use for at least 20 years from the time a surface owner petitions to reunite the surface with the inactive mineral interest.

The first part of House Bill 288 is designed to fix perceived problems with the existing statutory provisions. The Bill will neither alter the balance between surface owner and mineral right owners, nor will the Bill change the environmental or conservation requirements to drill or produce in Ohio. Finally, the bill will not adversely affect tax revenues. In fact, if the bill has its intended results of bringing back old or marginal oil and gas fields to production, the bill should increase Ohio's collection of severance and ad valorem tax.

The second issue addressed in House Bill 288 deals with the administrative practices involved with the permitting and regulation of oil and gas wells in Ohio. Currently, an administrative appeal from a decision by the Chief of the Division of Mineral Resources Management in the Department of Natural Resources is to a body called the Ohio Oil and Gas Commission. The Commission has five (5) members and the current statute provides that no decision may be made without the concurrence of three members. The problem is that, in practice, it may be impossible to get three of the five Commissioners to even hear, much less decide, an appeal. Lack of a quorum can occur because of vacancies on the Commission, illness of a Commissioner or because a Commissioner has to recuse him or herself due to a conflict of interest. If a quorum of Commissioners cannot be assembled, or three votes secured, the appeal is stalled indefinitely.

A similar problem exists within our Courts and is addressed by appointing visiting judges. H.B. 288 applies the same technique by permitting the Chair of the Oil and Gas Commission to appoint visiting Commissioners from the pool of members who make up the oil and gas Technical Advisory Council. The Technical Advisory Council member go through the same screening and appointment process as the Oil and Gas Commissioners and have oil and gas experience and technical skills. Thus, drawing temporary members for the Oil and Gas Commission from the Technical Advisory Council will vest the Commission with the same skill set as the Commission's regular members and will allow the Commission to proceed to decide appeals which are now stalled.

In closing, I hear concerns about the availability and cost price of energy. Given the Ohio's national preeminence in manufacturing and its four month heating season, it is not surprising that Ohio ranks within the top ten states for energy consumption. What is less well

known is that Ohio is also among the top ten states for natural gas and oil production. In fact, almost 15% of the natural gas burned in Ohio's homes and factories is produced locally. House Bill 288 is a small step towards improving local production by streamline existing program and regulations to make them more efficient. It is step worth taking.

The Ohio State Bar Association has played an integral role in drafting and reviewing this legislation and supports it. I ask for your support to pass this bill too. Chairman Hagan and members of the committee, I thank you for your time and I would be happy to answer your questions at this time.