DIGGING BENEATH THE SURFACE OF OHIO'S DORMANT MINERAL ACT

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I. INTRODUCTION

Shale oil and gas exploration and production from fracking has become the harbinger of recovery to eastern Ohio, and as exploration has expanded so too has litigation. To access the potentially vast source of energy, and its equally vast wealth, energy corporations execute exploration and production leases with those who possess rights in the mineral interests buried below Ohio. Property laws in Ohio, combined with the laws of intestate succession, have resulted in a murky environment for these companies to properly identify and negotiate with landowners and have raised questions about who owns the minerals they seek. Those questions have reached the Ohio Supreme Court for a final resolution of the state's approach to seeing energy production continue throughout its borders.

Historically, landowners, through reservations included in deeds transferring the surface of large tracts of land, have severed the mineral interests in their properties from the surface rights. This disassociation of the surface and subsurface interests has created an environment where identifying who to negotiate with to access the minerals hidden beneath is not as simple as knocking at the front door of the property. As these severed interests have passed from generation to generation, sometimes with and sometimes without the assistance of the courts, or where corporate owners have ceased operation, the task of finding all the parties needed to contract related to those interests has the potential of preventing exploration altogether.

Like many other states, Ohio has enacted legislation that reunites these dormant, unused mineral interests with the surface owner's interests. The Ohio Dormant Mineral Act (the "ODMA"), a portion of the Ohio Marketable Title Act ("OMTA")[1], provides the steps to reunite these interests when the mineral interest holder fails to affirmatively preserve the interest.[2] Originally enacted in 1989 and substantially amended in 2006, the ODMA has raised more questions than it has answered regarding who actually owns the interests these exploration companies seek. The recent boom has left many to discover the mineral interests they thought they owned were in fact no longer their property, but belong to the owner of the surface. Litigation surrounding the application of the ODMA has resulted in the Ohio Supreme Court accepting many cases to clarify the impact of the original statute and its amended version.

This Comment will discuss the major questions presented to the Ohio Supreme Court regarding the application of both the 1989 and 2006 versions of the ODMA. Part II provides a brief explanation of the shale formations underlying eastern Ohio and the potential economic impact of oil and gas exploration. Next, the Uniform Dormant Mineral Interests Act ("UDMIA")

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[1] OHIO REV. CODE ANN. §§ 5301.47–56 (LexisNexis 2004 & Supp. 2015).
[2] *Id.* § 5301.56.

and the approaches of several other states will be discussed. Finally, the ODMA, both as originally enacted and later amended, will be discussed.

In Part III, this Comment will present the three major questions awaiting decision from the Ohio Supreme Court: (1) Was the 1989 version of the ODMA self-executing? (2) What twenty-year period established a dormant interest? and (3) What transactions satisfy the "subject of a title transaction" savings event? Through a discussion of the arguments of the parties involved and the existing case law, the competing viewpoints on each of these issues will be discussed before culminating in Part IV where the Comment will attempt to foretell the Court's holdings on these questions.

II. BACKGROUND

A. The Marcellus and Utica Shale Formations and Ohio

The harnessing of the two major shale formations, or "shale plays," under Ohio has created an opportunity for the state to become not only self-sufficient regarding oil and gas production, but possibly even an exporter.[3] This Comment begins with a discussion of the geography and potential production of these formations, followed by a presentation of the incredible potential economic impact both on Ohio and the owners of these interests.

The Marcellus Shale formation is situated approximately 7,000 feet below the surface and ranges in thickness from 50 to 200 feet.[4] According to the Ohio Department of Natural Resources ("ODNR") Division of Geological Survey, the Marcellus, found throughout eastern Ohio, as well as Pennsylvania, New York and West Virginia, is the largest exploration play in the eastern United States.[5] Even more impactful on Ohio is the Utica Shale hidden below most of the state's counties.[6] Underlying the Marcellus Shale at depths of approximately 10,000 feet and with a thicknesses ranging from 87 to 350 feet,[7] the Utica Shale has previously been underexplored due to drilling technology limitations, but it provides an additional development opportunity in oil and gas production in Ohio and throughout the Appalachian basin.[8] Since 2012, the production from the two formations has accounted for approximately 85% of the reported growth in natural gas production according to the United States Energy Information Administration Drilling

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[3] Andrew R. Thomas et al., *An Analysis of the Economic Potential for Shale Formations in Ohio*, URB. PUBLICATIONS 1, 1 (2012).

[4] Eric Romich & Stephen Schumaker, *Summary of Hydraulic Fracturing in Ohio*, OHIOLINE, http://ohioline.osu.edu/factsheet/SOGD-DEV1 (last updated Sept. 26, 2012).

[5] DIV. OF GEOLOGICAL SURVEY, OHIO DEP'T OF NAT. RES., MARCELLUS & UTICA SHALES DATA, http://geosurvey.ohiodnr.gov/energy-resources/marcellus-utica-shales (last visited Aug. 1, 2016).

[6] *Id.*

[7] *Id.*

[8] *Id.*

Productivity Report for July 2015.[9]

At the request of the Ohio Chamber of Commerce and Ohio Shale Coalition, Cleveland State University, Ohio State University and Marietta College examined the dramatic growth potential and economic impact on the state of the two formations.[10] The 2011 report surmised that development from the drilling and capturing of natural resources from the shale plays could have a total economic output in the state of greater than $9.6 billion, increase tax revenue by more than $433 million, and create as many as 65,000 new jobs in Ohio by 2014.[11] Considering this potential impact on the state, it is easy to understand why the Ohio Supreme Court has continued to find the public policy of the state to be "encourag[ing] 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 the State] of Ohio."[12]

The key to harnessing this potential windfall from oil and gas exploration is the oil and gas lease, "[t]he basic document of the oil and gas industry . . . which authorizes an operator, the lessee or his assignee, to enter upon [the] described premises for the purpose of exploring for and developing the mineral resources . . . ."[13] These leases are particularly lucrative for mineral rights holders who are receiving on average $2,500 per acre and royalty fees near 15% with higher rates paid in those areas appearing most likely to produce in large quantities.[14] Greater than three million acres had been secured under mineral exploration leases as of 2011, and the speed of expansion was expected to continue for years to come.[15]

Unfortunately, the state's property laws, which allow for the severance of the mineral and surface interests, and the laws governing the transfer of property upon death have created a roadblock to increased exploration in Ohio.[16] While mining activity has flourished in Ohio for more than a century, severed mineral interests have been abandoned or indeterminably fractionalized where individual owner interests have passed to heirs and corporate owners have ceased operation.[17] In response to the problems created by this partitioning or abandonment of interests, many states, including Ohio, enacted mineral lapse or abandonment statutes to create a mechanism for exploration to continue when ownership is not clear.

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[9] *Marcellus, Utica Provide 85% of U.S. Shale Gas Production Growth Since 2012*, U.S. ENERGY INFO. ADMIN. (July 28, 2015), http://www.eia.gov/todayinenergy/detail.cfm?id=22252.

[10] Thomas et al., *supra* note 3, at 1.

[11] *Id.* at 2.

[12] Newberry Twp. Bd. of Trs. v. Lomak Petroleum (Ohio), Inc., 583 N.E.2d 302, 304 (Ohio 1992).

[13] PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS OIL & GAS LAW § 601 (4th ed. 2010).

[14] Thomas et al., *supra* note 3, at 1.

[15] *Id.*

[16] *Report of the Natural Resources Committee*, OHIO ST. B. ASS'N, https://www.ohiobar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx (last visited Aug. 1, 2016).

[17] *Id.*

B. The Uniform Dormant Mineral Interests Act

In 1986, the National Conference of Commissioners on Uniform State Laws ("Conference") approved and recommended that all states enact the UDMIA to address the fractionalization of severed mineral rights.[18] In explaining its formulation of the Model Act, the Conference discussed a litany of considerations that every state should consider in establishing its own dormant mineral statute.[19] Distinguishing between actual and presumed abandonment, the Conference endorsed inferring the intent to relinquish the mineral interest through failure to take affirmative action for a prescribed number of years.[20] Specifically, the Conference endorsed abandonment in the situation where an owner fails to record a notice of intent to preserve the interest within a specified time period after the severance.[21] Additionally, the Conference discussed the merits of competing methods of addressing abandonment including reunification of the mineral and surface interests, the establishment of a trust for unknown mineral owners, and allowing the interests to escheat to the state as abandoned property.[22]

In an effort to reach all mineral interests that may be subject to termination and reunification under the Act, the UDMIA defined minerals and mineral interests broadly.[23] The Model Act established a twenty-year time period for establishing nonuse and abandonment of a mineral interest by its holder, and required the surface to seek reunification of the interests through an action in court.[24] Also, the UDMIA permitted the mineral interest owner to save the interest from reunification after lapse by filing a late notice intent to preserve.[25] Importantly, perhaps with an eye towards notice and due process considerations, the UDMIA established a two-year grace period for mineral interest owners who would be subject to the termination provision to preserve the interest.[26]

C. Dormant Mineral Statutes Outside of Ohio

Several of Ohio's neighbors and other states across the nation have attempted to handle fractionalized interests in varying methods from requiring the filing of an action seeking the court's approval to terminate the interests

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[18] *See* Unif. Dormant Mineral Interests Act (1986). The recommendation was approved by the American Bar Association in February 1987, and the Conference changed the designation from "Uniform" to "Model" in January 1999. *Id.*

[19] *Id.* Actual abandonment involves the high burden of proving an intent to forever relinquish the interest whereas the legal fiction of deemed abandonment infers the intent through a failure to act. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*; *see* 58 PA. STAT. AND CONS. STAT. ANN. § 701.2 (West 2015).

[23] Unif. Dormant Mineral Interests Act § 2 (1986).

[24] *Id.* §§ 4–6.

[25] *Id.* § 6. This opportunity to preserve by filing a late notice also required the interest owner to pay the surface owner's costs of litigation. *Id.* § 6(b).

[26] *Id.* § 8(b).

to requiring the establishment of trusts to protect the interests of the owners. The methods these states have employed to address dormant interests provide a framework within which to consider Ohio's system for reunification.

California and Nebraska require a surface owner to petition the court to have dormant mineral interests deemed abandoned and to have them reunited with the interests of the surface owner.[27] California law declares "[a]n action to terminate a mineral right pursuant to this article shall be brought in the superior court of the county in which the real property subject to the mineral right is located."[28] Similarly, Nebraska law allows the "owner or owners of the surface of real estate from which a mineral interest has been severed . . . may sue in equity in the county where such real estate . . . is located, praying for the termination and extinguishment of such severed mineral interest . . . ."[29] These states, as suggested by the UDMIA, require the surface owner to harness the equitable powers of the courts to reunite the severed interests just as the UDMIA recommended.[30]

Pennsylvania has adopted an opposing approach that protects the economic interests of those owners who are "unknown or unlocatable."[31] The state allows any party with an interest in the oil and gas of the property, whether fee holder, leaseholder, or otherwise, to petition the courts for the creation of a beneficial trust for these unknown owners.[32] Instead of reuniting the mineral and surface interests in the surface, the courts create a constructive trust and appoint a trustee to act on their behalf.[33] These trusts remain active repositories for the owner's interests until located or the state's unclaimed funds laws take effect and the funds escheat to the state.[34]

D. Ohio's Dormant Mineral Act

In May 1987, just months after the ABA's endorsement of the UDMIA, the Ohio Senate introduced S.B. 223, which would eventually become the ODMA.[35] This amendment to the OMTA was intended to see that mineral interests "held . . . by any person other than the owner of the surface

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[27] Brief of Appellant at 27, Walker v. Shondrick-Nau, 15 N.E.3d 883 (Ohio 2014) (No. 2014-0803), 2014 Ohio LEXIS 916 (first citing NEB. REV. STAT. § 57–228 (2015); then citing CAL. CIV. CODE § 883.240(a) (West 2015)).

[28] CAL. CIV. CODE § 883.240(a).

[29] NEB. REV. STAT. § 57–228.

[30] Unif. Dormant Mineral Interests Act § 4.

[31] 58 PA. STAT. AND CONS. STAT. ANN. § 701.2 (West 2015).

[32] *Id.* § 701.4(a); *see also* W. VA. CODE ANN. § 55–12A–4(b) (West 2015) (permitting the court to appoint a special commissioner to lease the mineral interests and providing for surface owner to gain both title to the mineral interests and the funds unclaimed after seven years).

[33] *Dormant Mineral Acts and the Marcellus and Utica Shale Plays*, JONES DAY (Apr. 2013), http://www.jonesday.com/dormant_mineral_acts/ (discussing 58 PA. STAT. AND CONS. STAT. ANN. § 701.1).

[34] *Id.*

[35] Brief of Appellant at 27, Walker v. Shondrick-Nau, 15 N.E.3d 883 (Ohio 2014) (No. 2014-0803), 2014 Ohio LEXIS 916 (citing Analysis of Subcomm. S.B. 223, 131st Gen. Assemb., Reg. Sess. (Ohio 1988) (as reported by the S. Judiciary, February 16, 1988)).

land, would be deemed abandoned and would vest in the owner of the surface land" if certain savings conditions were not met.[36] In pertinent part, the enacted legislation provided:

> (B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, *shall be deemed abandoned and vested in the owner of the surface*, if none of the following applies:
>
> (a) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53 of the Revised Code;
>
> (b) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code;
>
> (c) *Within the preceding twenty years*, one or more of the following has occurred:
>
> (i) The 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;
>
> (ii) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code . . . ;
>
> (iii) The mineral interest has been used in underground gas storage operations by the holder;
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> (iv) A drilling or mining permit has been issued to the holder . . . ;
>
> (v) A claim to preserve the interest has been filed in accordance with division (C) of this section;
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> (vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

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[36] *Id.*

> (2) A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, until *three years* from the effective date of this section.
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> . . . .
>
> (D)(1) A mineral interest may be preserved *indefinitely* from being deemed abandoned under division (B)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(c) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.[37]

Several items suggested by the UDMIA are missing in the original version of the ODMA, including any requirement to file an action with the court to have the interests reunited, a definite description of the twenty-year period of nonuse allowing for the assumption of abandonment, and any opportunity for the mineral interest holder to preserve the interest by filing a late notice to preserve.[38]

The 1989 version of the ODMA remained in effect until June 30, 2006 when the Ohio legislature made significant changes to address issues with perceived ambiguity in the Statute's text.[39] As sponsor Representative Mark Wagoner noted, "Ohio's Dormant Mineral Statute [was] seldom . . . 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."[40] First, the amendments create a definite point from which the twenty-year examination for savings events must begin, the filing of notice:

> (B) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest *if the requirements established in division (E) of this section are satisfied* and none of the following applies:
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> . . . .
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> (3) Within the *twenty years immediately preceding the date on which notice is served or published under division (E) of*

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[37] OHIO REV. CODE ANN. § 5301.56 (LexisNexis 2004 & Supp. 2015) (emphasis added).

[38] *See generally* Unif. Dormant Mineral Interests Act (1986).

[39] Eisenbarth v. Reusser, 18 N.E.3d 477, 500 (Ohio Ct. App. 2014) (DeGenaro, P.J., concurring) ("House Bill 288 removes the ambiguity of the existing statute with a clear definition of when a mineral right is deemed abandoned." (quoting *Hearing on H.B. 288 Before the Ohio H. Pub. Utils. Comm., 118th Gen. Assemb.* (Ohio 1989) (sponsor testimony of Rep. Mark Wagoner)).

[40] *Id.*

> *this section*, one or more of the following has occurred.[41]

This portion of the amendment made it clear that in order for the interests to reunite through the ODMA a notice requirement must be met and the date of that notice established the twenty-year period preceding notice within which nonuse must be established. The added section (E) of the ODMA describes how the notice must be served and what steps the surface must undertake to record that notice:

> (E) Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface of the lands subject to the interest shall do both of the following:
>
> (1) Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned. If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located. The notice shall contain all of the information specified in division (F) of this section.
>
> (2) At least thirty, but not later than sixty days after the date on which the notice required under division (E)(1) of this section is served or published, as applicable, file in the office of the county recorder of each county in which the surface of the land that is subject to the interest is located an affidavit of abandonment that contains all of the information specified in division (G) of this section.[42]

Further, the amendments allowed the mineral interest holder a final opportunity to preserve an interest by filing a notice to preserve the claim:

> (H)(1) If a holder or a holder's successors or assignees claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned, the holder or the holder's successors or assignees, not later than sixty days after the date on which the notice was served or published, as applicable, shall file in the office of the county recorder of each county where the land that is subject to the mineral interest is located one of the following:

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[41] OHIO REV. CODE. ANN. § 5301.56(B)(3) (emphasis added).
[42] *Id.* § 5301.56(E).

> (a) A claim to preserve the mineral interest in accordance with division (C) of this section;
>
> (b) An affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section.
>
> The holder or the holder's successors or assignees shall notify the person who served or published the notice under division (E) of this section of the filing under this division.[43]

Finally, if the mineral interest holder failed to timely file a notice to preserve the interest or an affidavit identifying another savings event:

> [T]he owner of the surface of the lands subject to the interest who is seeking to have the interest deemed abandoned and vested in the owner shall file in the office of the county recorder of each county where the land that is subject to the mineral interest is located a notice of failure to file.
>
> . . . .
>
> Immediately after the notice of failure to file a mineral interest is recorded, the mineral interest shall vest in the owner of the surface of the lands formerly subject to the interest, and the record of the mineral interest shall cease to be notice to the public of the existence of the mineral interest or of any rights under it.[44]

The Statute affirmatively stated that the mineral interest immediately vested when the surface owner's "notice of failure to file a mineral interest is recorded" and not before such notice was recorded.[45] These changes created a mineral lapse statute that provided far greater rights to the mineral interest owner, but those same changes highlight the significant shortcomings in the original enactment that serve as the primary points of contention in litigation based in the ODMA.

III. ANALYSIS

As the exploration of, and extraction from, the Marcellus and Utica Shale plays has exploded, litigation over the application of the 1989 version of the ODMA has increased. The Ohio Supreme Court has accepted twelve cases for review related to the application of the ODMA to severed mineral interests that may have been eligible for reunification under the 1989 version

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[43] *Id.* § 5301.56(H)(1).
[44] *Id.* § 5301.56(H)(2).
[45] *Id.*

but were not subject to any action by the surface owner until after the 2006 version was enacted.[46] The three primary issues presented, and which will be the subject of the remainder of this Comment, are:

1. Was the 1989 version of the ODMA self-executing or was the surface holder required to take some affirmative action to reunite the severed mineral interest?
2. What did the legislature mean when it stated a savings event had to occur in the preceding twenty years?
3. Is the listing of a previously severed mineral estate on a deed transferring the surface a title transaction and therefore a savings event under O.R.C. § 5301.56(B)(3)(a)?

A. The 1989 version of the ODMA was self-executing.

When considering the proposed ODMA, the Ohio legislature had a number of options available to it when deciding how the surface and mineral interest reunification under the Statute would occur, including bringing an action in equity to unite the interests, establishing a constructive trust, or self-executing automatic vesting upon abandonment.[47] Through the language adopted in the ODMA, the legislature clearly intended for automatic vesting to occur when the statutory requirements had been met.[48]

1. The Statute is unambiguous and the plain meaning is that the ODMA was self-executing.

The language of the 1989 version of the ODMA is unambiguous, and when the words in the Statute are given their plain meanings the Statute can only be interpreted to have been self-executing. Those who support the self-executing reading of the Statute have argued that the ODMA, although part of the OMTA, was intended to do more than simply "facilitate title transactions – it was intended to provide that[] when deemed abandonment

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[46] The Court has accepted certified questions from two federal court cases. Chesapeake Expl., L.L.C. v. Buell, 45 N.E.3d 185 (Ohio 2015); Corban v. Chesapeake Expl., L.L.C., 12 N.E.3d 1228 (Ohio 2014). The Court has granted discretionary review of ten Ohio cases. Lipperman v. Batman, No. 14 BE 2, 2014 Ohio App. LEXIS 5328 (Ohio Ct. App. Dec. 12, 2014); Shannon v. Householder, 19 N.E.3d 923 (Ohio 2014); Albanese v. Batman, 34 N.E.3d 131 (Ohio 2015); Wendt v. Dickerson, 22 N.E.3d 1095 (Ohio 2015); Tribett v. Shepherd, 45 N.E.3d 242 (Ohio 2016); Dahlgren v. Brown Farm Props., L.L.C, 26 N.E.3d 823 (Ohio 2015); Eisenbarth v. Reusser, 26 N.E.3d 823 (Ohio 2015); Walker v. Shondrick-Nau, 15 N.E.3d 883 (Ohio 2014); Swartz v. Householder, 19 N.E.3d 923 (Ohio 2014); Dodd v. Croskey, 37 N.E.3d 147 (Ohio 2015).

[47] *See* discussion *supra* Section II.B.

[48] OHIO REV. CODE ANN. § 5301.56(B)(1) ("Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, *shall be deemed abandoned and vested in the owner of the surface*, if none of the following applies . . . ." (emphasis added)).

occurs, the interest will vest in the surface owner."[49]

In analyzing statutes, "[i]t is axiomatic that an unambiguous statute means what it says."[50] The ODMA is clear that mineral interests will be "deemed abandoned" if the interest holder fails to satisfy any of the savings events delineated in the Statute.[51] Black's Law Dictionary tells us "deem" means "treat[ing] something as if (1) it were really something else, or (2) it has qualities that it does not have . . . ."[52] This is an important characteristic of the law because to show property is *actually* "abandoned" means showing the holder "relinquish[ed] or [gave] up with the intention of never again reclaiming [the holder]'s rights or interest in" the property.[53] Surface holders did not have to reach this high burden of proving intent; instead, the Act applies a legal fiction that the holder has abandoned the property based on the holder's nonuse of the property for the statutorily defined period of twenty years.[54]

These unused mineral interests were not only "deemed abandoned," but the drafters further vested these abandoned interests "in the owner of the surface . . . ."[55] "Vested" means "[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute . . . ."[56] By applying the definition, we find that these abandoned mineral interests were not an inchoate right waiting for the surface owner to exercise at his or her fancy, but these interests were unconditional and the absolute right of the owner of the surface.

When the entire phrase "deemed abandoned and vested in the owner of the surface" is substituted with the meanings discussed above, the ODMA provides that because of nonuse, the mineral interest will be treated as property that the holder has relinquished with no intention to ever reclaim the rights, and it has unconditionally become a present right for present or future enjoyment belonging to the owner of the surface. The sentence could not be much clearer that the ODMA is self-executing in its efforts to reunite the surface and the mineral right.

2. Self-executing mineral rights acts do not violate the U. S. Constitution and are not forfeiture Statutes.

When challenging the self-executing aspect of the original ODMA, mineral owners often describe the ODMA as affecting a forfeiture when the

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[49] Brief of Appellant at 5, *Walker*, 15 N.E.3d 883 (No. 2014-0803) (quoting OHIO REV. CODE ANN § 5301.56).
[50] Hakim v. Kosydar, 359 N.E.2d 1371, 1373 (Ohio 1977).
[51] OHIO REV. CODE ANN. § 5301.56(B)(1).
[52] *Deem*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[53] *Abandon*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[54] *See* Unif. Dormant Mineral Interests Act (1986).
[55] OHIO REV. CODE ANN. § 5301.56(B)(1).
[56] *Vested*, BLACK'S LAW DICTIONARY (10th ed. 2014).

vested mineral rights are reunited with the surface interests.[57] However, as the U.S. Supreme Court has already addressed, the conditioning of a vested property right upon action by the holder and termination of that right is not a forfeiture of that right, but instead a failure to act by the holder.[58]

"Forfeitures . . . are not favored in law or equity . . . ."[59] Black's Law Dictionary defines a "forfeiture" as "[t]he divestiture of property without compensation . . ." or "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."[60] While on the surface this definition appears to describe precisely the outcome effectuated by the 1989 ODMA, the U.S. Supreme Court has repeatedly found "that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time."[61] While evaluating the Indiana Dormant Mineral Interests Act (the "IDMIA"), the Court further explained:

> In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect. We have concluded that the State may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property -- and not the action of the State -- that causes the lapse of the property right; there is no "taking" that requires compensation. The 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."[62]

Justice Stevens' statement centers on the premise that the holder relinquishes all rights and interest in the property when it is abandoned, so the holder has no interest left to be compensated.[63] As such, once the property is "deemed abandoned" through the holder's nonuse for the specified period, the holder has no interest to be compensated for when it is "vested in the owner of the

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[57] *See, e.g.*, Brief of Appellant at 15–17, Walker v. Shondrick-Nau, 15 N.E.3d 883 (Ohio 2014) (No. 2014-0803), 2014 Ohio LEXIS 916.

[58] *See* Texaco, Inc. v. Short, 454 U.S. 516, 528–29 (1982).

[59] State *ex rel*. Lukens v. Indus. Comm'n, 56 N.E.2d 216, 217 (Ohio 1944).

[60] *Forfeiture*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[61] *Texaco, Inc.*, 454 U.S. at 526; *see also* Hawkins v. Barney's Lessee, 30 U.S. 457, 466 (1831) ("What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?").

[62] *Texaco*, Inc., 454 U.S. at 530. The Indiana statute, like Ohio's, provided for automatic investiture in the surface owner after twenty years of nonuse. *Id.*

[63] *Id.*

surface."

While evaluating the IDMIA, the Court not only addressed the forfeiture and abandonment argument, but it also addressed whether or not due process was offended by the self-executing nature of the Statute; specifically, whether mineral interest holders "had a constitutional right to be advised . . . that their 20-year period of nonuse was about to expire."[64] The Court noted "it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur."[65] Where the court is invoked to quiet title or affirm that the lapse did in fact occur, "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."[66]

Due process in the application and execution of the law raises a different consideration where the "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . ."[67] The IDMIA's two-year grace period before abandonment could occur "was sufficient to allow property owners in the State to familiarize themselves with the terms of the statute and to take any action deemed appropriate to protect existing interests," and as such, holders could be presumed to be on notice about the IDMIA.[68] Ultimately, after the grace period, any lapse that resulted in abandonment and reunification with the surface was not repugnant of the Due Process Clause.[69] Similarly, the ODMA was enacted with a three-year grace period before its abandonment procedures became effective, so Ohio's statute is also not repugnant of the Due Process Clause.[70]

3. The ODMA does not violate the Ohio Constitution.

Mineral interest holders also argue that the self-executing nature of the ODMA violates the Ohio Constitutional prohibition on retroactive legislation.[71] Section 28, Article II states "[t]he general assembly shall have no power to pass retroactive laws . . ." and the Ohio Supreme Court has held that the strong language of the provision imputes that the state has adopted protections against retrospective legislation.[72] If a law is to be deemed unconstitutionally retroactive, the Court must "determine whether the General

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[64] *Id.* at 533–38.
[65] *Id.* at 533.
[66] *Id.* at 534.
[67] *Id.* at 535 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (alterations in original)).
[68] *Id.* at 532–33.
[69] *Id.* at 535 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).
[70] OHIO REV. CODE. ANN. § 5301.56(B)(2) (LexisNexis 2004 & Supp. 2015).
[71] *See* Brief of Appellant at 17–18, Walker v. Shondrick-Nau, 15 N.E.3d 883 (Ohio 2014) (No. 2014-0803), 2014 Ohio LEXIS 2155.
[72] OHIO CONST. art. II, § 28; Van Fossen v. Babcock & Wilcox Co., 522 N.E.2d 489, 495 (Ohio 1988).

Assembly expressly intended the statute to apply retroactively."[73]

The plain language of the Statute clearly does not state that it acts retroactively to affect any rights, but instead it expressly declares that its provisions shall not be effective until three years after the bill's enactment.[74] Further, there is no statement that the Statute had any impact on any activity of the mineral interest owner prior to the end of the grace period; mineral interests remained fully vested in the holder until March 22, 1992, the first date when dormant interests could be deemed abandoned and vested in the surface owner's estate.[75]

As shown, the ODMA, as enacted in 1989, was a self-executing statute that deemed abandoned unused mineral interests and vested those interests in the estate of the surface owner. The Statute did not affect a forfeiture, as the mineral holder had no interest to be compensated once the interest was abandoned through nonuse. And finally, the provisions of the ODMA violate neither the U.S. Constitution's Due Process Clause, nor the Ohio Constitution's prohibition on retroactive legislation.

B. The ODMA's twenty-year look-back period was a rolling period allowing for abandonment if a savings event did not occur in any twenty-year period.

Litigation over the application of the ODMA has almost uniformly addressed the issue that the Statute's establishment of a look-back period of "the preceding twenty years" created a difficult question to answer—preceding what?[76] Surface owners have argued that the preceding twenty-year period describes any twenty years in which the Statute's description of nonuse is satisfied.[77] Mineral owners and the Seventh District have offered two potential alternatives to that description: (1) the twenty years of import are those years preceding the surface owner's commencement of an action;[78] or (2) the twenty years preceding the enactment of the ODMA (after the grace period terminated).[79] While none of these approaches can be definitively gleaned from the text of the Statute, only the "rolling look-back" approach can be found to be consistent both with other provisions of the ODMA and with the self-executing nature of the Statute.

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[73] Brief of Appellant at 19, *Walker*, 15 N.E.3d 883 (No. 2014-0803) (quoting Bielat v. Bielat, 721 N.E.2d 28, 33 (Ohio 2000)). The Court must determine if the law is expressly retroactive because OHIO REV. CODE ANN. § 1.48 assumes that laws passed by the General Assembly are prospective in nature unless otherwise declared. *Id.*

[74] OHIO REV. CODE ANN. § 5301.56(B)(2).

[75] *Id.*

[76] *Id.* § 5301.56(B)(1)(c).

[77] *See* Brief of Appellant at 7, Walker v. Shondrick-Nau, 15 N.E.3d 883 (Ohio 2014) (No. 2014-0803).

[78] Brief of Appellant at 8, *Walker*, 15 N.E.3d 883 (No. 2014-0803).

[79] Eisenbarth v. Reusser, 18 N.E.3d 477, 487 (Ohio Ct. App. 2014); *see also* Riddel v. Layman, No. 94 CA 114, 1995 Ohio App. LEXIS 6121, at *6 (Ohio Ct. App. July 10, 1995).

1. The look-back period was not fixed.

An approach to the twenty-year look-back period where the period is fixed and considers only the twenty years immediately preceding the enactment of the ODMA, after the three-year grace period, has been endorsed by the Seventh District Court of Appeals.[80] After determining that the language in the Statute was ambiguous because it failed to answer the question "preceding what?," the Court narrowly construed the twenty years to be a fixed period from March 22, 1969 to March 22, 1989, (and the grace period provided in the Statute) which must be reviewed to determine if a savings event occurred to prevent abandonment of the interest.[81]

As discussed above, the ODMA does not affect a forfeiture of mineral interest rights by deeming them abandoned after nonuse, so the Court's protective view of forfeiture is inapplicable to the consideration of the twenty-year period.[82] The fear of forfeiture aside, there may be a basis in the belief that the look-back period was intended to be fixed in the fact that the ODMA is a portion of the OMTA.

The OMTA's stated intention is to "simplify and facilitate land title transactions by allowing persons to rely on a record chain of title . . . ."[83] Under the Statute, an unbroken chain of title can be relied on where the "root of title" purports to create an interest in either the person or some other person whereby through the chain of conveyances it can be traced to the person claiming the interest in the property.[84] It could be argued that the OMTA creates a "floor" in the title search history, whereby a party claiming an interest in the property can rely on the "root of title" in asserting its claim of ownership of the property, and that the ODMA, if using a fixed look-back period, creates a similar floor for title search purposes of March 22, 1969, twenty years prior to the Statute's enactment.

However, there are two significant obstacles to this approach to the ODMA look-back period. First, no court in the State has ever held that the OMTA's forty-year look-back period runs only from the Statute's enactment on September 29, 1961.[85] In fact, the original mineral lapse section of the Statute replaced by the ODMA provided that "[r]egardless of when the forty-

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[80] *Eisenbarth*, 18 N.E.3d at 487.

[81] *Id.* (citing State *ex rel.* Falke v. Montgomery Cty. Residential Dev., Inc., 531 N.E.2d 688, 690–91 (Ohio 1988)) (noting "the law abhors a forfeiture," so statutes possibly resulting in a forfeiture should be narrowly construed).

[82] *See* discussion *supra* Section III.A.2.

[83] Semachko v. Hopko, 301 N.E.2d 560, 563 (Ohio Ct. App. 1973).

[84] OHIO REV. CODE ANN. § 5301.48 (LexisNexis 1989). The "root of title" is defined as:

> [T]hat conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined.

Id. § 5301.47(E).

[85] Brief of Appellants at 19, *Eisenbarth*, 18 N.E.3d 477 (No. 2014-1767).

year period specified in section 5301.47 to 5301.56 of the Revised Code expires, for the purpose of filing a notice . . . [regarding an] interest in and to minerals . . . shall not be considered to expire until after December 31, 1976."[86] If the Statute intended a fixed forty-year period from its enactment, then there would be no need to establish such a date as that date could never fall within a fixed forty-year look-back.

Secondly, the language of the ODMA provides that the "mineral interest may be preserved indefinitely . . . by the occurrence of any of the circumstances described in division (B)(1)(c) of this section, including, but not limited to, successive filings of claims to preserve mineral interests . . . ."[87] If the look-back period is fixed and a single claim to preserve the mineral interests was filed during that period, or the grace period before abandonment, there would never be a need to file a successive claim to preserve; either the interest would be preserved by the single filing or it would be abandoned and revert to the surface owner. There can be no purpose to this language, and the Ohio Supreme Court has held that "[n]o part of a statute 'should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which *renders a provision meaningless or inoperative*.'"[88] This point was emphasized by Judge DeGenaro in her concurrence in *Eisenbarth*:

> Because R.C. 5301.56(D)(1) refers to successive filings, the 1989 ODMA contemplated that the holder of severed mineral rights was required to renew that interest of record every 20 years. . . .
>
> . . . .
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> . . . [The] statute must be construed so that it is not meaningless or inoperative; instead each phrase must be accorded meaning in order to avoid absurd results.[89]

As the appellant in *Eisenbarth* points out, "[p]rior to the Seventh District Court of Appeals' holding in [the] case, numerous courts throughout Ohio applied the 1989 [O]DMA on a 'rolling' or continuous basis."[90]

For each of these reasons, the 1989 ODMA did not establish a fixed look-back period of March 22, 1969 to March 22, 1989.

2. The surface owner cannot tie the 1989 ODMA twenty-year look-back

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[86] OHIO REV. CODE ANN. § 5301.56.
[87] *Id.* § 5301.56(D)(1).
[88] Brief of Appellants at 17, *Eisenbarth*, 18 N.E.3d 477 (No. 2014-1767) (quoting Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448, 452 (Ohio 2010) (alterations in original)).
[89] *Eisenbarth*, 18 N.E.3d at 489 (DeGenaro, P.J., concurring).
[90] Brief of Appellants at 9, *Eisenbarth*, 18 N.E.3d 477 (No. 2014-1767).

period to the initiation of legal action.[91]

The second potential meaning for the preceding twenty years, and in fact the period defined in the 2006 ODMA, is the twenty years preceding the filing of a legal process to reunite the interests.[92] Those who support this approach utilize the testimony of Mark Wagoner, sponsor of the 2006 amendments to the ODMA, before the Ohio House Public Utilities Committee, where he stated:

> The bill is designed, first, to address technical problems with Ohio's current Dormant Mineral Statute . . . .
>
> . . . .
>
> House Bill 288 removes the ambiguity of the existing statute with a clear definition of when a mineral right is deemed abandoned. . . . [B]oth (1) no active use of the mineral rights and (2) failure by the mineral rights owner to file to preserve the inactive mineral rights for future use for at least 20 years from the time a surface owner petitions to reunite the surface with [an] inactive mineral interest.[93]

There are several reasons why tying the twenty-year look-back period to the date of the filing of an action to reunite is incompatible with the plain language of the 1989 ODMA. First, while the statement of Mr. Wagoner and the eventual amendments found in the 2006 ODMA clearly express the intent of the Ohio legislature in 2006, those same statements cannot be utilized to determine the intent of the legislature in 1987–1989.

Second, and most important, the 1989 ODMA was a self-executing statute that "deemed abandoned and vested" a mineral interest that had gone dormant through nonuse for twenty years.[94] The Ohio legislature could have written into the 1989 ODMA a requirement that a surface owner take some form of legal action to reunite the mineral interests with the surface, as the UDMIA suggested,[95] but the Statute instead declared that those interests would instead be "deemed abandoned and vested" in the surface.[96] In fact, the proximity of the release of the UDMIA by the Conference in August 1986, and its approval by the American Bar Association in February 1987, to the

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[91] Though the author rejects this formulation for the reasons discussed below, this formulation of the twenty-year look-back period is the best construction if the Ohio Supreme Court should find that the 1989 ODMA was not a self-executing statute.

[92] *See* OHIO REV. CODE ANN. § 5301.56(B)(3) (LexisNexis 2004 & Supp. 2015) (fixing the look-back period as the twenty years preceding the service of notice of abandonment); *see also* Brief of Appellees at 18, *Eisenbarth*, 18 N.E.3d 477 (No. 2014-1767).

[93] *Eisenbarth*, 18 N.E.3d at 500 (DeGenaro, P.J., concurring) (quoting *Hearing on H.B. 288 Before the Ohio H. Pub. Utils. Comm., 118th Gen. Assemb.* (Ohio 1989) (sponsor testimony of Rep. Mark Wagoner)).

[94] OHIO REV. CODE ANN. § 5301.56(B)(1); *see* discussion *supra* Section III.A.

[95] Unif. Dormant Mineral Interests Act § 4 (1986).

[96] OHIO REV. CODE ANN. § 5301.56(B)(1).

introduction of Ohio's ODMA in May 1987, combined with the similarity between the ODMA and the UDMIA should lead an observer to conclude that the Ohio legislature was not only aware of the recommendation to require legal action to reunite the interests, but that the legislature rejected that construction as evidenced by the self-executing nature of the ODMA.[97] As there was no need for the surface owner to take any affirmative action for the interests to be reunited, the preceding twenty years cannot possibly refer to a period immediately preceding the initiation of legal action by the surface owner.

3. The 1989 ODMA operated to reunite severed mineral interests if the mineral interests were dormant during any twenty-year period while it was in effect.

The final potential interpretation of the phrase "preceding twenty years" is that the mineral interests were "deemed abandoned and vested" as soon as the mineral interests went dormant through a twenty-year period of nonuse. This approach is referred to as the "rolling look-back period," and is mischaracterized by the Seventh District Court of Appeals as an arbitrary construction that allows the surface owner to choose any random date "between March 22, 1989 and June 30, 2006 and then look back 20 years from that date . . . ."[98] Instead, this construction is the only possible construction that gives meaning to the ODMA's reference to the potential for "successive filings of claims to preserve mineral interests" to avoid abandonment while also permitting the self-executing nature of the Statute.[99]

That the rolling look-back period allows the Statute to embody both of these characteristics that plagued the other two approaches to the look-back period is likely best illustrated through hypothetical. Imagine that in 1960, *A* sold Blackacre to *B* but severed and reserved the mineral rights to the property underlying Blackacre to himself. Then, perhaps finely attuned to developments in other states or motivated by some other reasons, *A* files a claim to preserve his mineral interest in Blackacre on March 25, 1972. When the grace period ended on March 22, 1992, *A* was fortuitously protected by his filing nearly twenty years earlier. The question is four days later what will be *A*'s interest in Blackacre?

Section 5301.56(D)(1) provided that *A* could preserve his interest through successive filings of claims to preserve, and if a claim were filed during this interim the mineral interest would be protected for another twenty years. However, should *A* opt not to file such a claim, on March 26, 1992, *A*'s mineral interest will have been in a period of nonuse for the twenty years

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[97] *Compare* Unif. Dormant Mineral Interests Act, *with* OHIO REV. CODE ANN. § 5301.56.
[98] *Eisenbarth*, 18 N.E.3d at 485.
[99] OHIO REV. CODE ANN. § 5301.56(D)(1); *see* discussion *supra* Section III.A.

preceding that date; the ODMA's self-executing nature would thereby deem the mineral interests both abandoned by *A* and vested in *B* as the surface owner of Blackacre. Both the self-executing nature of the Statute as provided in (B)(1) and the concept of successive filings in (D)(1) are given effect by a rolling look-back period.

Judge DeGenaro finds the look-back period and the potential for "arbitrary selection of some random date to put a savings event outside the 20 year look-back period is so violative of due process that it does not warrant further discussion."[100] Such an assertion could not be further from the truth in light of the decision in *Texaco, Inc. v. Short* regarding due process.[101] Due process with regard to a self-executing dormant minerals statute requires no more than a "person of ordinary intelligence [be given] a reasonable opportunity to know what is [required], so that he may act accordingly . . . ."[102] Since Indiana's two-year grace period was sufficient time to put its citizens on notice of the potential for abandonment,[103] it seems illogical to believe the ODMA's three-year grace period would not equally comport with due process requirements.[104]

Finally, there is little difference between the way the self-executing ODMA reunites dormant severed mineral interests with the surface owner's interest and the manner in which adverse possession transfers a deemed abandoned right to possession and ownership of property from the lawful owner to the adverse possessor immediately upon the satisfaction of twenty-one years of qualifying possession of the property.[105] The interests are vested into a different party immediately upon satisfaction of the requirements established at common law.

The answer to the question "What twenty years are referred to in the Statute?" is clear from the language of the Statute. The only interpretation of the preceding twenty years consistent with the language of the ODMA is one that permits a rolling look-back period that deems property abandoned and vested immediately upon the expiration of twenty years of nonuse.

C. What constitutes a title transaction under O.R.C. § 5301.56(B)(3)(a)?

The last question being posed to the Ohio Supreme Court is applicable to both the 1989 and 2006 versions of the ODMA, and it centers on the legislature's meaning when it declared that a mineral interest that is "the subject of a title transaction" is saved from being "deemed abandoned

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[100] *Eisenbarth*, 18 N.E.3d at 504 (DeGenaro, P.J., concurring).
[101] *See* discussion *supra* Section III.A.2.
[102] Texaco, Inc. v. Short, 454 U.S. 516, 535 (1982) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1977)).
[103] *Id.* at 532.
[104] OHIO REV. CODE ANN. § 5301.56(B)(2).
[105] *See* Grace v. Koch, 692 N.E.2d 1009, 1012 (Ohio 1998).

and vested."[106] Specifically, both versions of the ODMA provide that same language to describe an exception from abandonment where "[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 . . . ."[107] Frequently, the courts have been asked to determine if either a lease of the mineral interests[108] or a specific reference to a prior severance of the mineral estate in a deed transferring the surface estate[109] is sufficient to qualify as a "title transaction."

The legislature did not define "title transaction" within the ODMA; instead they relied on the definition as found in the OMTA, which is "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or [by] decree of any court, as well as warranty deed, quitclaim deed, or mortgage."[110] The Ohio Supreme Court recently held that this definition "is not limited to the transactions enumerated in the statute or to transactions that transfer an ownership interest."[111] Under that analysis, a lease of mineral interests, though not specifically listed, may be a title transaction under the ODMA.[112]

Further confusing the situation is the ODMA's requirement that the mineral interest be the "*subject of* the title transaction" in question. Ohio courts have only considered the impact of the qualifier in a very limited number of cases.[113] The phrase is not defined in either the ODMA or the OMTA, so the Seventh District construed the meaning "according to the rules of grammar and common usage."[114] That court, relying on the Webster's Dictionary definition of "subject," held that the mineral interest is the "subject of a title transaction" when the mineral interest is the "topic of interest, primary theme or basis for action" of a title transaction.[115]

1. The mineral rights are not the subject of a title transaction where a deed

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[106] OHIO REV. CODE ANN. § 5301.56(B)(1), (3)(a).

[107] *Id.* § 5301.56(B)(1)(c)(i).

[108] *See* Chesapeake Expl., L.L.C. v. Buell, 5 N.E.3d 665 (Ohio 2014); *see also* Eisenbarth v. Reusser, 26 N.E.3d 823 (Ohio 2015).

[109] *See* Walker v. Shondrick-Nau, 32 N.E.3d 505 (Ohio 2015); *see also* Tribett v. Shepherd, 29 N.E.3d 1003 (Ohio 2015); Tribett v. Shepherd, 20 N.E.3d 365 (Ohio Ct. App. 2014); *Eisenbarth*, 26 N.E.3d 823.

[110] OHIO REV. CODE ANN. § 5301.47(F) (LexisNexis 1989).

[111] *See* Chesapeake Expl., L.L.C. v. Buell, 45 N.E.3d 185, 192 (Ohio 2014); *see also Eisenbarth*, 26 N.E.3d 823 (finding the listing, though extensive, is not exhaustive of all possible title transactions).

[112] The Ohio Supreme Court appears to have affirmed this point. Relying on the particular nature of an oil and gas lease that transfers to the lessee a fee simple determinable in the minerals that serves as an encumbrance on the surface estate for the life of the lease. *Chesapeake Expl., L.L.C.*, 45 N.E.3d at 188.

[113] The phrase was first addressed under the 1989 version of the ODMA in Riddel v. Layman, No. 94 CA 114, 1995 Ohio App. LEXIS 6121, at *5 (Ohio Ct. App. July 10, 1995), a case where the mineral interest was actually the interest transferred by deed, and in a few recent decisions.

[114] Dodd v. Croskey, No. 12 HA 6, 2013 Ohio App. LEXIS 4475, at *23 (Ohio Ct. App. 2013) (quoting Smith v. Landfair, 984 N.E.2d 1016, 1022 (Ohio 2012)), *aff'd*, 37 N.E.3d 147 (Ohio 2015).

[115] *Id.* (citing *Subject*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1984)).

transferring the surface interest contains a specific reference to a prior reservation of those interests.

The inclusion of a specific reference to a previously severed mineral interest in a deed transferring the surface interest clearly involves a title transaction. Whether or not those interests should be considered the "subject of" that title transaction is not so clear.

Preliminarily, a specific reference within a deed to a prior recorded severance would be sufficient to preserve that interest within the root of title under the OMTA. The OMTA provides that "a general reference in such muniments, or any of them, to easements, use restrictions, *or other interests* created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such . . . other interest . . . ."[116] Applying that language, one appellate court found the language "'subject to easements and restrictions of record' [to be] inadequate to preserve those interests, even though a general reference appear[ed] in the deeds of title which [made] up the entire forty year chain [of title]."[117] However, a reservation included in a 1959 deed that was "[s]ubject to [the] restrictions as contained in the deed from [Grantors] to [Grantee] recorded in [the] Lake County Deed Records Volume 183, Page 241" was sufficient to preserve those restrictions even though they were originally laid down in a title outside of the forty-year look-back period, 1941, for the root of title.[118] So, it appears that a deed which specifically references a prior severance by reference to the volume and page number would be sufficient to preserve the interest within the strictures of the OMTA.

The ODMA's requirement that the mineral rights be the "subject of a title transaction" creates a stricter framework within which the mineral interest holder must operate to preserve the interest. As discussed above, the phrase "subject of" has been held to mean more than simply a passing reference to the severed mineral interest with regard to language in a reservation.[119] It requires that the mineral interests themselves be the "topic of interest, primary theme or basis for action" of the deed.[120]

The logic for such an outcome should seem apparent. Allowing a passing reference to act as a savings event under the ODMA would save the inactive mineral interest owner, fortunate to have a surface that has been frequently transferred, from losing his rights while a similar holder subject to a passive surface owner would be at risk under the Statute. Such an outcome

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[116] OHIO REV. CODE ANN. § 5301.49(A) (LexisNexis 2004 & Supp. 2015) (emphasis added).

[117] Semachko v. Hopko, 301 N.E.2d 560, 563 (Ohio Ct. App. 1973) (quoting OHIO REV. CODE ANN. § 5301.51(A)).

[118] Blakely v. Capitan, 516 N.E.2d 248, 250 (Ohio Ct. App. 1986).

[119] *See Dodd*, 2013 Ohio App. LEXIS 4475, at *23.

[120] *Id.*; Tribett v. Shepherd, 20 N.E.3d 365, 371 (Ohio Ct. App. 2014); Walker v. Shondrick-Nau, No. 13 NO 402, 2014 Ohio App. LEXIS 1443, at *12–14 (Ohio Ct. App. Apr. 3, 2014).

cannot be how the legislature intended the exception to function. As the Belmont County Court of Common Pleas stated, and the Seventh District affirmed, "the mere reference to [an] oil and gas exception [is] simply to clarify what [is] being transferred. . . . [T]he restatement of the reservation [is] not the primary purpose of these deeds."[121]

The Court's recent decision in *Chesapeake Exploration, L.L.C. v. Buell*, holding that a lease of the oil and gas interests is a title transaction and savings event under the ODMA, raises a question that must be addressed regarding specific reservations.[122] In evaluating the impact of a mineral lease on the title to property, the Court noted that the lease "resembles more of an encumbrance than an easement or a mortgage."[123] This encumbrance "is binding on . . . successors and . . . remains with the realty."[124]

A reservation of mineral interests included in a deed certainly places an encumbrance on the surface estate, so why would a specific reference in a later deed not also be an encumbrance on the title? The answer to this question is not a matter of substance, but instead is a matter of timing. The analysis in *Buell* centers on the creation and recording of a lease, and the rights and privileges that are associated with leasing the mineral interests.[125] The lease *creates* rights in the lessee that have been described by some courts as granting a fee simple determinable in the minerals to the lessee.[126] Similarly, when a reservation is originally recorded in a deed transferring away other interests, an encumbrance is *created* on the transferred interests. However, when the surface is transferred and specific reference is made to a prior reservation, nothing new is created. Instead, the reference is a little more than a clarification about an existing encumbrance on the transfer.[127]

IV. CONCLUSION

The ODMA has certainly become a major focus of the courts in Eastern Ohio with the incredible boom tied to the Marcellus and Utica Shale formations underlying so much of the eastern part of the state. As the exploration for oil and natural gas has become particularly lucrative, decades old severances of mineral rights made it particularly complicated to determine the proper parties with whom to negotiate and execute exploration leases. The 1989 version of the ODMA solved the problem by reuniting mineral and surface estates if a twenty-year period of nonuse lapsed. Unfortunately, the original ODMA was not perfectly clear in its language about how to effect this unification, and now the Ohio Supreme Court has to decide how the

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[121] *Tribett*, 20 N.E.3d at 371.
[122] No. 2014-0067, 2015 Ohio LEXIS 2971, at *58 (Ohio 2015).
[123] *Id.* at *30.
[124] *Id.* at *29 (citing Eisenbarth v. Reusser, 18 N.E.3d 477, 484 (Ohio Ct. App. 2014)).
[125] *Id.* at *28–29.
[126] *See id.* at *29; Harris v. Ohio Oil Co., 48 N.E. 502, 506 (Ohio 1897).
[127] Tribett v. Shepherd, 20 N.E.3d 365, 371 (Ohio Ct. App. 2014).

ODMA applied before its amending in 2006. The Court's answer to the problems created by these perceived ambiguities can and should be resolved by relying on the plain language of the Statute as originally enacted in 1989.

The Statute was self-executing and did not require any action on the part of the surface owner to merge the severed interests. Upon the satisfaction of a twenty-year period of nonuse, the severed mineral interests were "deemed abandoned and vested" in the surface owner's estate. Any other interpretation of the plain language interjects the courts into an area in which the legislature saw no need for the courts to act. The Supreme Court addressed the question about whether or not this scheme of abandonment and vesting in *Texaco, Inc. v. Short* and found that the state is free to require a severed mineral owner to take some affirmative action to secure that interest in the future. Rather than effectuating a forfeiture, the ODMA determines when the mineral interest's owner's failure to act results in abandonment of the interest and then reunites that abandoned interest with the surface owner.

The Court must also find that the 1989 ODMA worked on a "rolling" twenty-year period. Among the different arguments presented to define how the ODMA's timeframe should apply, only a rolling period is consistent with other statutory interpretations of similar timeframes and prevents the Statute from becoming dead law. The rolling period is similar in action to the twenty-one-year period applicable within Ohio's adverse possession jurisprudence. Immediately upon satisfaction of the timeframe, title transfers.

Finally, questions surrounding a title transaction savings event must again be resolved by reliance on the language of the Statute. It is not sufficient for the mineral interest to be a tangential part of or a passing reference in a title transaction, but the mineral interest must be the "subject of" that title transaction. Simply repeating a prior reservation in a deed transferring the surface, even when made to the specific page number the original reservation is recorded, is not a sufficient act to save the interests. The mineral interest is plainly not the "topic of interest, primary theme or basis for action" in these deeds, and the interest of the mineral owner should not be protected by such activity of the surface owner.

The law surrounding mineral interests in Ohio under the 1989 version of the ODMA will finally be clarified in the near future by the Court. This is not to say that other concerns will not be raised under the application of the 2006 version, but the Court will put the 1989 ODMA to rest with its rulings.