OHIO'S DORMANT MINERAL ACT: CURRENT AND UNRESOLVED ISSUES

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I. INTRODUCTION

Ohio's oil and natural gas development requires oil and gas producers to make significant investments in capital and resources.[1] However, before drilling or exploration of oil or natural gas can commence, a producer must obtain the right to drill from those who own those rights.[2] Often, oil and gas rights have been severed from the surface estate; some severances are decades old, making it difficult—if not impossible—to identify current owners of the severed interests. To address this issue, the Ohio General Assembly enacted Ohio's Dormant Mineral Act (DMA)[3] to deem dormant mineral interests abandoned after twenty years of non-use.[4] The original Act took effect in 1989 (1989 Statute),[5] and was later amended in 2006 (2006 Amendment),[6] and most recently in 2013.[7] Although the DMA was intended to remove uncertainty regarding the ownership of prior unused and severed mineral interests, the DMA's imprecise statutory construction and

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[1] Keith Schneider & Codi Yeager, *Fossil Fuel Boom Shakes Ohio, Spurring Torrent of Investment and Raising Water Concerns*, CIRCLE OF BLUE (Mar. 12, 2012, 4:54 PM), http://www.circleofblue.org/waternews/2012/world/fossil-fuel-boom-shakes-ohio-spurring-torrent-of-investment-and-worry-over-water.

[2] OHIO REV. CODE ANN. § 1509.06 (West 2014).

[3] OHIO REV. CODE ANN. § 5301.56 (West Supp. 2015).

[4] *Id*.

[5] Sub. S.B. 223, OHIO LAWS FILE 314 (1988) (amending OHIO REV. CODE ANN. § 5301.56).

[6] Sub. H.B. 288, OHIO LAWS FILE 5960 (2006) (amending OHIO REV. CODE ANN. § 5301.56).

[7] Sub. H.B. 72, OHIO LAWS FILE 90 (2013) (amending OHIO REV. CODE ANN. § 5301.56).

multiple amendments have led to varying interpretations of its application.[8] The various interpretations, as well as questions regarding the statute's constitutionality, have led to a multitude of cases before Ohio courts within the past three years.[9] A number of key issues have made their way through the Ohio appellate courts, and the Supreme Court of Ohio has a number of cases presently before it regarding the correct application of certain aspects of the DMA.[10] Additionally, unresolved questions remain.[11] Some are not currently in litigation, and more have yet to be discovered.[12] This Article explains the current state of the DMA under Ohio case law and provides guidance to practitioners.

First, Part II of this Article discusses the history of the DMA. Next, Part III discusses and analyzes key issues currently before the Supreme Court of Ohio regarding the DMA. Then, Part IV expounds upon unresolved issues that have not yet been litigated in Ohio courts. Finally, Part V concludes with a succinct summary of how to apply the DMA given current Ohio court precedent.

II. HISTORY OF THE DMA

In 1961, the General Assembly enacted Ohio's Marketable Title Act (MTA).[13] The MTA was adopted to simplify and facilitate land title transactions by extinguishing ancient claims and interests in land that had become stale.[14] The MTA provides that a person who has an unbroken chain of title or record to any interest in land for forty years or more has a marketable record title to such interest, unless certain exceptions apply.[15]

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[8] CHRIS BARONZZI, *The Dormant Mineral Act: Lots of Questions, Few Answers*, OIL & GAS L. REP. (Jan. 2, 2015), http://www.oilandgaslawreport.com/2015/01/02/the-dormant-mineral-act-lots-of-questions-and-still-no-answers.

[9] *Id. See also, e.g.*, Tribett v. Shepherd, 2014-Ohio-4320, 20 N.E.3d 365 (7th Dist.), *appeal allowed*, 142 Ohio St. 3d 1447, 2015-Ohio-1591, 29 N.E.3d 1003; Taylor v. Crosby, 7th Dist. Belmont No. 13 BE 42, 2014-Ohio-4433, *appeal allowed*, 142 Ohio St. 3d 1421, 2015-Ohio-1353, 28 N.E.3d 121; Wendt v. Dickerson, 5th Dist. Tuscawarus No. 2014 AP 01 0003, 2014-Ohio-4615, *appeal allowed*, 142 Ohio St. 3d 1464, 2015-Ohio-1896, 30 N.E.3d 973; Thompson v. Custer, 2014-Ohio-5711, 26 N.E.3d 278 (11th Dist.), *appeal allowed*, 143 Ohio St. 3d 1416, 2015-Ohio-2911, 34 N.E.3d 929.

[10] BARONZZI, *supra* note 8.

[11] *Id.*

[12] *Id.*

[13] OHIO REV. CODE ANN. §§ 5301.47–.55 (West 1961).

[14] OHIO REV. CODE ANN. § 5301.50 (West 2014).

[15] *Id.* § 5301.51.

On March 22, 1989, the General Assembly enacted the 1989 Statute,[16] amended it in 2006—effective June 30 of that year[17]—and again amended it in 2013—effective January 30, 2014.[18] The DMA is part of the MTA and was enacted to encourage the development of Ohio's natural resources by declaring a severed mineral interest "abandoned" after a twenty-year period of non-use.[19] Under the DMA, an abandoned mineral estate may become reunified with the surface estate if certain conditions are satisfied.[20] The DMA applies to all mineral severances except coal or mineral interests owned by the United States, the State of Ohio, or any political subdivision (e.g., county, township, municipality, or school district).[21]

The 1989 Statute provides a surface owner with the opportunity to gain title to previously-severed mineral interests if those interests or rights had not been subject to a "savings event" during a preceding twenty-year time period.[22] The 1989 Statute provided for a twenty-year look-back period, and a three-year savings period, effectively giving severed mineral interest holders until March 22, 1992, to prevent their severed mineral interests from being "deemed abandoned"[23] by virtue of the DMA. The 1989 Statute did not require notice to be served on the severed mineral interest holders, although a notice requirement was added by the 2006 Amendment.[24] Nevertheless, under the 1989 Statute, if no savings events occurred within the preceding twenty years, the severed mineral interest would be deemed abandoned and vested in the surface owner.[25] The following is a summary of the savings events as enumerated in the 1989 Statute:

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[16] Sub. S.B. 223, OHIO LAWS FILE 314 (1988) (amending OHIO REV. CODE ANN. § 5301.56).

[17] Sub. H.B. 288, OHIO LAWS FILE 5960 (2006) (amending OHIO REV. CODE ANN. § 5301.56).

[18] Sub. H.B. 72, OHIO LAWS FILE 90 (2013) (amending OHIO REV. CODE ANN. § 5301.56).

[19] OHIO REV. CODE ANN. § 5301.56(B) (West Supp. 2015).

[20] *Id.* § 5301.56(E).

[21] *Id.* § 5301.56(B)(1)–(2).

[22] Sub. S.B. 223, OHIO LAWS FILE 314 (1988) (amending OHIO REV. CODE ANN. § 5301.56).

[23] OHIO REV. CODE ANN. § 5301.56(B)(1) (1989).

[24] OHIO REV. CODE ANN. § 5301.56(E)(1) (West 2007).

[25] *See* OHIO REV. CODE ANN. § 5301.56(B)(1) (1989).

(1) "The mineral interest has been the *subject of a title transaction* . . . recorded in the office of the county recorder of the county in which the lands are located."[26]

(2) "Actual production or withdrawal of minerals."[27]

(3) Minerals were used in underground gas storage.[28]

(4) A drilling or mining permit was issued.[29]

(5) A claim to preserve the mineral interest has been filed.[30]

(6) A tax parcel number has been created for the mineral interest.[31]

As a result of the 2006 Amendment,[32] a surface owner was required to give notice of abandonment to the severed mineral interest holders, and those holders had sixty days to respond before the severed mineral interest would be deemed abandoned and vested in the surface owner.[33] Under the 2006 Amendment, the twenty-year look-back period begins when notice is given to the severed mineral interest holders,[34] and if all appropriate steps for notice were followed and abandonment occurred, the county recorder was required to make a notation on the original severance that the severed mineral interest had been abandoned.[35] In January 2014, the General Assembly amended this provision, removing the requirement that the county recorder make a notation on the original severance deed.[36] Because of the 2013 Amendment, the notation must be made in a "Notice of Failure to File a Mineral Interest," which is the final filing by the surface estate holder whereby he or she states that the severed mineral interest is abandoned and vested with the surface.[37]

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[26] *Id*. § 5301.56(B)(1)(c)(i) (emphasis added).

[27] *Id*. § 5301.56(B)(1)(c)(ii).

[28] *Id*. § 5301.56(B)(1)(c)(iii).

[29] *Id*. § 5301.56(B)(1)(c)(iv).

[30] *Id*. § 5301.56(B)(1)(c)(v).

[31] *Id*. § 5301.56(B)(1)(c)(vi).

[32] OHIO REV. CODE ANN. § 5301.56(B)(3) (West 2007).

[33] *Id*. § 5301.56(B)(2).

[34] *Id*. § 5301.56(B)(3).

[35] Sub. H.B. 288, OHIO LAWS FILE 5960 (2006) (amending OHIO REV. CODE ANN. § 5301.56).

[36] Sub. H.B. 72, OHIO LAWS FILE 90 (2013) (amending OHIO REV. CODE ANN. § 5301.56).

[37] *Id*. at 94.

III. ISSUES BEFORE OHIO COURTS INVOLVING THE DMA

A number of issues are currently before the Supreme Court of Ohio relating to Ohio's DMA. The issues discussed in this Article are:[38]

(1) Is the 1989 Statute constitutional?[39]

(2) Does the 1989 Statute require the application of a fixed or rolling-window approach?[40]

(3) Is the 1989 Statute automatic and self-executing?[41]

(4) Is the 2006 Amendment retrospective or prospective?[42]

(5) When is a mineral interest the subject of a title transaction recorded in the office of the county recorder under Ohio Revised Code section 5301.56(B)(3)(c)(i)?[43]

A. Is the 1989 Statute Constitutional?

A number of cases have addressed the constitutionality of the 1989 Statute with respect to the Ohio and federal constitutions; thus far, no Ohio court has found the 1989 Statute unconstitutional under either.[44] The

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[38] Ohio has twelve appellate districts. *See Ohio Court of Appeals*, SUP. CT. OHIO, http://www.supremecourt.ohio.gov/judsystem/districtcourts (last visited Mar. 14, 2016). Most of the oil and gas production from the Utica and Point Pleasant Shale has occurred within counties falling in the jurisdiction of the Seventh District Court of Appeals; thus, a majority of the cases regarding Ohio's DMA have arisen in that appellate district. *See Utica Shale Map*, UTICA SHALE BLOG (Aug. 29, 2015), http://www.uticashaleblog.com/p/maps.html. Cases have also come out of the Fifth District and the Eleventh District, both of which border the Seventh District. *See Ohio Court of Appeals*, *supra*.

[39] *See infra* Section III.A.

[40] *See infra* Section III.B.

[41] *See infra* Section III.C.

[42] *See infra* Section III.D.

[43] *See infra* Section III.E.

[44] *See, e.g.*, Tribett v. Shepherd, 2014-Ohio-4320, 20 N.E.3d 365 (7th Dist.), *appeal allowed*, 142 Ohio St. 3d 1447, 2015-Ohio-1591, 29 N.E.3d 1003; Taylor v. Crosby, 7th Dist. Belmont No. 13 BE 42, 2014-Ohio-4433, *appeal allowed*, 142 Ohio St. 3d 1421, 2015-Ohio-1353, 28 N.E.3d 121; Wendt v. Dickerson, 5th Dist. Tuscawarus No. 2014 AP 01 0003, 2014-Ohio-4615, *appeal allowed*, 142 Ohio St. 3d 1464, 2015-Ohio-1896, 30 N.E.3d 973; Thompson v. Custer, 2014-Ohio-5711, 26 N.E.3d 278 (11th Dist.), *appeal allowed*, 143 Ohio St. 3d 1416, 2015-Ohio-2911, 34 N.E.3d 929.

Seventh District Court of Appeals examined this issue in *Tribett v. Shepherd*.[45]

In *Tribett*, the trial court relied on *Texaco, Inc. v. Short*[46] in finding the 1989 Statute constitutional.[47] The Shepherds appealed the trial court decision, arguing that the trial court's reliance on the Supreme Court's decision in *Texaco* was misguided because it was a 5–4 decision; it was based solely on federal constitutional issues of due process, equal protection, and taking claims of the Fourteenth Amendment; and it was not based on Ohio constitutional jurisprudence.[48] The *Tribett* court first looked to whether the trial court's application of *Texaco* was valid.[49] The *Tribett* court found that the Indiana statute in *Texaco* was very similar to the 1989 Statute, and, as a result, the 1989 Statute was constitutional under the Federal Constitution.[50] The *Tribett* court subsequently evaluated the constitutionality issue under the Ohio Constitution.[51]

The Shepherds argued that what is commonly referred to as the Retroactivity Clause [52] of Article II, Section 28 of the Constitution of the State of Ohio[53] bars retroactive legislation, and thus the 1989 Statute's twenty-year look-back period divested the Shepherds' interest in mineral

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[45] *Tribett*, 2014-Ohio-4320, at ¶¶ 54–57. In this case, the Tribetts owned the surface to two tracts of land acquired by deeds in 1996 and 2006. *Id.* ¶ 87. The Shepherds claimed an interest in the mineral estate via reservation in a 1962 deed. *Id.* ¶ 4. The trial court found that the oil and gas estate was automatically deemed abandoned and vested in the surface estate holder, the Tribetts, under the 1989 Statute. *See* Tribett v. Shepherd, Belmont C.P. No. 12-CV-180 (July 22, 2013).

[46] 454 U.S. 516 (1982). The Supreme Court of the United States held that the Indiana Dormant Mineral Statute was constitutional under the Federal Constitution because a state may treat as abandoned a mineral interest that has not been used for twenty years for which no statement of claim has been filed. *Id.* at 530–31. The court emphasized that the state "surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State." *Id.* at 529–30. Further, it held that no separate notice was required because the Indiana statute's two-year grace period was sufficient to allow property owners to become familiar with the new law, and to take appropriate action to protect their interests. *Id.* at 532.

[47] *Id.* at 518.

[48] *Tribett*, 2014-Ohio-4320, at ¶ 54.

[49] *Id.* ¶¶ 54–56.

[50] *Id.*

[51] *Id.* ¶ 54.

[52] *Id.* The Retroactivity Clause states that the "general assembly shall have no power to pass retroactive laws." *Id.*

[53] OHIO CONST. art. II, § 28.

rights in violation of the Ohio Constitution.[54] The Supreme Court of Ohio has established a two-part test to determine whether a statute is impermissibly retroactive under the Retroactivity Clause.[55] First, a clear indication that a statute applies retroactively must be evident.[56] Under Ohio Revised Code section 1.48, a statute is presumed to be prospective in its operation unless expressly made retrospective.[57] If legislative intent clearly expresses that a statute apply retroactively, the second step is to determine whether the statute can survive the constitutional limitations of Ohio's Retroactivity Clause.[58] Ohio courts have distinguished between statutes that merely apply retroactively from those that offend the Ohio Constitution.[59] A law that offends the Ohio Constitution must be considered substantive and not remedial.[60] A retroactive statute is substantive if it "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction."[61]

To analyze this issue, the *Tribett* court first determined whether there was a clear indication that the 1989 Statute applied retroactively.[62] The *Tribett* court related its prior analysis on the retroactivity of the 2006 Amendment to the similar 1989 Statute.[63] It had previously held in *Swartz v. Householder*[64] that there was no indication that the 2006 Amendment was to be applied retroactively.[65] The *Tribett* court also cited its previous footnote in *Swartz* that a twenty-year look-back period does not implicitly make a statute retroactive.[66] If the 2006 Amendment's twenty-year look-back period did not make that statute retroactive, it reasoned, then the 1989

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[54] *Tribett*, 2014-Ohio-4320, at ¶ 54.

[55] Bielat v. Bielat, 721 N.E.2d 28, 32–33 (Ohio 2000).

[56] *Id*. at 33.

[57] OHIO REV. CODE ANN. § 1.48 (West 2004).

[58] *Bielat*, 721 N.E.2d at 33.

[59] *Id*. at 33–34.

[60] *Id*.

[61] *Id*.

[62] *Tribett*, 2014-Ohio-4320, at ¶ 57.

[63] *Id*.

[64] 2014-Ohio-2359, 12 N.E.3d 1243 (7th Dist.), *appeal allowed*, 2014-Ohio-5098, 140 Ohio St. 3d 1506, 19 N.E.3d 923, *and appeal allowed sub nom.* Shannon v. Householder, 2014-Ohio-5098, 140 Ohio St. 3d 1506, 19 N.E.3d 923.

[65] *Id*. ¶ 34 n.2.

[66] *Tribett*, 2014-Ohio-4320, at ¶ 57 (citing *Swartz*, 2014-Ohio-2359, at ¶ 34 n.2).

Statute's twenty-year look-back period did not make it retroactive.[67] Finally, the *Tribett* court stated that the 1989 Statute's three-year grace period provided an opportunity for severed mineral interest holders to take action to preserve their mineral interests.[68] The *Tribett* court did not explain the importance of that fact, but that fact supports the argument that the opportunity to preserve an interest, when coupled with a twenty-year look-back period, means that the statute operated prospectively and not retroactively.[69] For the above reasons, the *Tribett* court held, in a 2-1 decision with little analysis, that the 1989 Statute was constitutional under the Ohio Constitution as well as the U.S. Constitution.[70]

The lone dissenter, Judge DeGenaro, argued that the 1989 Statute is unconstitutional under the Ohio Constitution based on the additional protection the constitution provides to property owners relative to the federal and Indiana constitutions.[71] She argued that the majority incorrectly applied *Texaco* because that case was based on Indiana and federal constitutional property standards, which are not as stringent as Ohio's.[72] She alleged that

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[67] *Id.* The court did not discuss whether the twenty-year look-back period indicated a clear intent to make the statute retroactive, or, if that were so, whether the twenty-year look-back period was substantive or remedial.

[68] *Id.*

[69] Under that analysis, a rolling-window approach, discussed below, would have a higher hurdle to overcome in regard to the Retroactivity Clause because there is no prospective grace period connected with the rolling-window approach. *See infra* Part III.B.

[70] *Tribett*, 2014-Ohio-4320, at ¶ 57.

[71] *Id*. ¶ 103 (DeGenaro, J., dissenting).

[72] *Id*. ¶¶ 105–10. Judge DeGenaro writes:

> Ohio's vigorous statutory protection, when contrasted with the Indiana Act, is rooted in Ohio's heightened constitutional protection of private property rights. "All men are by nature, free and independent, and have certain inalienable rights, among which are * * * acquiring [sic] possessing, and protecting property." Ohio Constitution, Article I, Section 1. "Private property shall ever be held inviolate." Ohio Constitution, Article I, Section 19. The Supreme Court of Ohio has described the extent of this right as follows:
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> "The right of private property is an original and fundamental right, existing anterior to the formation of the government itself[.] * * * The right of private property being, therefore, an original right, which it was one of the primary and most sacred objects of government to secure and protect[.] * * * In light of these Lockean notions of property rights, it is not surprising that the founders of our state expressly incorporated

the enactment of the 2006 Amendment was an indication by the General Assembly that the 1989 Statute was not in line with the Ohio Constitution's heightened constitutional protection of private property rights.[73] Furthermore, she stated that four other state supreme courts—Illinois,[74] Minnesota,[75] Nebraska,[76] Wisconsin[77]—have found their dormant mineral statutes unconstitutional under their state constitutions "because reversion with the surface fee occurred automatically without prior notice of hearing" (even when the statutes had grace periods).[78] In conclusion, she argued that "by measuring the 1989 [Statute] against federal, rather than Ohio constitutional property rights standards, and declaring it a constitutional self-executing statute, the majority has created a forfeiture of inviolate private property rights in contravention of Ohio constitutional jurisprudence."[79]

The Supreme Court of Ohio has not yet examined the issue of whether the DMA is unconstitutional, but it has accepted the Shepherds' discretionary appeal.[80] The court will review the decision and not only consider the Shepherds' arguments that the 1989 Statute is unconstitutional, but it will also likely consider the points raised by Judge DeGenaro in her dissent.[81] The decision of whether the DMA is constitutional will come down to the interpretation of *Texaco* under the Federal Constitution and the

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> individual property rights into the Ohio Constitution[.] * * * 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."

Id. ¶ 110 (quoting City of Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 36–38).

[73] *See id.* ¶¶ 110–12.

[74] Wilson v. Bishop, 412 N.E.2d 522, 526 (Ill. 1980).

[75] Contos v. Herbst, 278 N.W.2d 732, 736 (Minn. 1979).

[76] Wheelock v. Heath, 272 N.W.2d 768, 774 (Neb. 1978).

[77] Chicago & N.W. Transp. Co. v. Pedersen, 259 N.W.2d 316, 317 (Wis. 1977).

[78] *Tribett*, 2014-Ohio-4320, at ¶ 115 (DeGenaro, J., dissenting). Although Judge DeGenaro does not point to this in her dissent, all four state supreme court decisions occurred prior to the decision in *Texaco*. Furthermore, the Ohio General Assembly enacted the DMA with the knowledge that a similar statute, the Indiana Dormant Mineral Act at issue in *Texaco*, had been found constitutional by the Supreme Court of the United States. *See id.* ¶¶ 105–07; Texaco, Inc. v. Short, 454 U.S. 516, 539–40 (1982).

[79] *Tribett*, 2014-Ohio-4320, at ¶ 116 (DeGenaro, J., dissenting).

[80] Tribett v. Shepherd, 142 Ohio St. 3d 1447, 2015-Ohio-1591, 29 N.E.3d 1003.

[81] *See Tribett*, 2014-Ohio-4320, at ¶¶ 54, 77, 130–31.

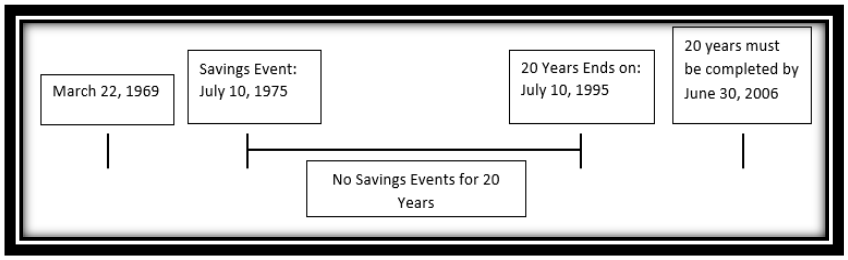
application of the two-part framework for retroactivity under the Ohio Constitution.[82] Although the Supreme Court of Ohio may find the 1989 Statute unconstitutional under either the federal or Ohio constitutions, as of yet, no Ohio courts have found the DMA unconstitutional.[83] The most effective approach for a practitioner is to follow the current finding of Ohio courts (i.e., that the 1989 Statute is constitutional under both the federal and Ohio constitutions[84]) and watch for any contrary rulings.

B. Does the 1989 Statute Require Application of a Rolling or Fixed-Window Approach?

There are two possible interpretations of when the twenty-year look-back period begins under the 1989 Statute: (1) a rolling-window approach; or (2) a fixed-window approach.[85]

Under a rolling-window approach, if there is a mineral severance prior to March 22, 1969, and there is a qualifying savings event under the 1989 Statute to prevent abandonment, or a mineral severance post March 22, 1969, *but* there remains a subsequent twenty-year period without a savings event prior to the effective date of the 2006 Amendment on June 30, 2006, then the severed mineral interest should still be deemed abandoned.[86] Table 1 indicates a savings event that occurred on July 10, 1975, but with a subsequent twenty years that elapsed without a savings event.

Table 1



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[82] *See id*. ¶ 57.

[83] *See id*. ¶ 2.

[84] *Id*. ¶ 56.

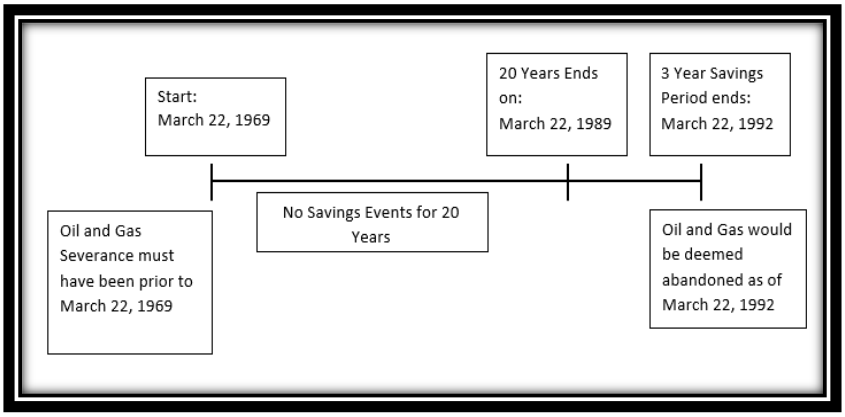
[85] Sub. S.B. 223, OHIO LAWS FILE 314 (1988) (amending OHIO REV. CODE ANN. § 5301.56).

[86] Eisenbarth v. Reusser, 2014-Ohio-3792, 18 N.E.3d 477, ¶ 37 (7th Dist.), *appeal allowed*, 2015-Ohio-842, 141 Ohio St. 3d 1488, 26 N.E.3d 823.

In this situation, under application of a rolling-window approach, the oil and gas estate would be deemed abandoned as of July 10, 1995.[87] It must be noted that the rolling-window period is valid only until enactment of the 2006 Amendment on June 30, 2006.[88]

Under a fixed-window approach, if a mineral interest was held by any person other than the surface owner prior to March 22, 1969, and a savings event did not occur between March 22, 1969, and March 22, 1989—in addition to the three-year savings period ending March 22, 1992—the mineral interest is deemed abandoned.[89] Table 2 portrays a scenario under the fixed-window approach whereby a severance occurred prior to March 22, 1969, and no savings events occurred between March 22, 1969, and March 22, 1992.

Table 2



In this scenario, the severed mineral interest, if any, is deemed abandoned and vested in the surface estate as of March 22, 1992.[90]

The Seventh District Court of Appeals in *Eisenbarth v. Reusser* discussed in detail the fixed-window approach.[91] The Eisenbarths appealed

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[87] *See id.*

[88] *Id.*

[89] Riddel v. Layman, No. 94 CA 114, 1995 WL 498812 (Ohio Ct. App. July 10, 1995).

[90] *See id.*

[91] Eisenbarth v. Reusser, 2014-Ohio-3792, ¶ 37. In 1954, William Eisenbarth transferred the subject parcel to Paul Eisenbarth and Ida Eisenbarth, his son and daughter-in-law, granting them the right to lease but reserving a one-half oil and gas interest in the parcel. *Id*. ¶ 5. Thereafter, William transferred his one-half severed mineral interest to his daughter

the trial court's application of a fixed-window, arguing that the 1989 Statute was in effect from March 22, 1989, until the enactment of the 2006 Amendment on June 30, 2006.[92] They urged the court to find a rolling twenty-year look-back period, such that the surface owner could look back twenty years from any selected date between March 22, 1989, and June 30, 2006.[93] Further, they argued that the January 1974 recordation of the oil and gas lease expired as a savings event in January 1994, resulting in automatic abandonment at that time.[94] The Eisenbarths pointed to division (D)(1) of the statute, which provides that a mineral interest may be preserved indefinitely by "successive filings of claims to preserve mineral interests" and urged that the statute's allowance of successive claims to preserve showed that it covered more than a fixed twenty-year period.[95]

The Seventh District Court of Appeals did not agree with the Eisenbarths, holding that a fixed-window should be applied. Discussing *Riddel v. Layman*,[96] the *Eisenbarth* court asked the following question: "[W]ould a mineral owner be unreasonable in reading the statute of March 22, 1989, the day of enactment and saying, 'I have a savings event in the past twenty years as I just bought these minerals rights in 1974; so I'm safe,' without realizing that they ha[ve] to reassert their interest by 1994 (5 years after enactment and 2 years after the grace period)?"[97] The *Eisenbarth* court found that such thoughts would be reasonable and that the 1989 Statute's

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Mildred Reusser. *Id.* Leland Eisenbarth and other co-plaintiffs were successors-in-interest to Paul and Ida Eisenbarth's one-half interest, while defendants Dean F. Reusser and others were the successors-in-interest to Mildred Reusser's one-half interest. *Id.* The Plaintiffs attempted to have the oil and gas estate deemed abandoned under the 2006 Amendment, but after the Reussers filed a claim to save their interest within the allotted time period of the 2006 Amendment, the plaintiffs filed suit seeking a declaration that the defendants' rights to the oil and gas were abandoned under both the former and current version of the DMA. *Id.* ¶¶ 6–7. To determine the outcome, the trial court applied a fixed-window approach and found that an oil and gas lease in 1974, executed by Paul and Ida Eisenbarth, qualified as a savings event during the fixed-window period. *Id.* ¶¶ 8–9. As a result, the trial court held that the Reussers' one-half interest in the oil and gas estate was not abandoned under the 1989 Statute. *Id.* ¶ 10.

[92] *Id.* ¶ 37.

[93] *Id.*

[94] *Id.*

[95] *Id.* ¶ 40.

[96] No. 94 CA 114, 1995 WL 498812 (Ohio Ct. App. July 10, 1995). In *Riddel*, the Fifth District Court of Appeals applied a fixed window and found that the oil and gas estate had not been abandoned, because it was the subject of a title transaction in 1973. *Id.* at *3.

[97] *Eisenbarth*, 2014-Ohio-3792, at ¶ 47.

use of the words "preceding twenty years" does not create a rolling-window look-back period.[98] Further, the *Eisenbarth* court stated that to do so, the 1989 Statute should have stated that the mineral interest is deemed abandoned and vested if no savings events occurred "within twenty years after the last savings event."[99] The *Eisenbarth* court dismissed the Eisenbarths' argument that successive claims to preserve indicated a rolling look-back period, and instead noted that the statement could be merely a reference to any preservations that were filed under the MTA as existed prior to the 1989 Statute.[100] It further noted that the three-year grace period is connected to the date of enactment, implying that a rolling-window approach does not have a statutory grace period and would result in an immediate forfeiture.[101] Finally, the *Eisenbarth* court stated, "As forfeitures are abhorred in the law, we refuse to extend the look-back period from fixed to rolling."[102] The Supreme Court of Ohio has accepted review of *Eisenbarth*, and as a result, this issue is pending before the Court.[103]

In addition to *Eisenbarth*, the issue of whether a rolling-window approach should be applied is before the Supreme Court of Ohio in other cases, including *Walker v. Shondrick-Nau*,[104] *Taylor v. Crosby*,[105] *Farnsworth v. Burkhart*,[106] and *Albanese v. Batman*.[107] As of this Article's publication in March of 2016, no Ohio appellate court has applied a rolling-window approach. Conversely, a number of Common Pleas Courts within the Seventh District have applied such an approach, but the Seventh District Court of Appeals overturned the application of a rolling-window approach and held in each case that only a fixed window can be applied.[108] It should be noted that three cases have come before U.S. district courts with issues involving whether to apply a fixed window or rolling window to Ohio's

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[98] *Id.* ¶ 48.

[99] *Id.*

[100] *Id.* ¶ 49.

[101] *Id.*

[102] *Id.*

[103] *See* Eisenbarth v. Reusser, 2015-Ohio-842, 141 Ohio St. 3d 1488, 26 N.E.3d 823.

[104] 140 Ohio St. 3d 1414, 2014-Ohio-3785, 15 N.E.3d 883.

[105] 142 Ohio St. 3d 1421, 2015-Ohio-1353, 28 N.E.3d 121.

[106] 142 Ohio St. 3d 1447, 2015-Ohio-1591, 29 N.E.3d 1002.

[107] 143 Ohio St. 3d 1403, 2015-Ohio-2747, 34 N.E.3d 131.

[108] *See Walker*, 2014-Ohio-1499; *Swartz*, 2014-Ohio-2359; *Eisenbarth*, 2014-Ohio-3792.

DMA.[109] Two of the cases, *Chesapeake Exploration, L.L.C. v. Buell*[110] and *Corban v. Chesapeake Exploration, L.L.C.*,[111] have yet to be decided in federal court but have been sent to the Supreme Court of Ohio for certification on issues that do not address the appropriate look-back period.[112]

The Eastern Division of the Southern District of Ohio supports a rolling-window approach.[113] The Northern District also applied a rolling-window approach in *McLaughlin v. CNX Gas Co.*[114] In that case, the U.S. District Court for the Northern District of Ohio reviewed whether a January 3, 1985, oil and gas severance could be deemed abandoned under the 1989 Statute.[115] Under a fixed-window approach, the severed mineral interest would not have been deemed abandoned because it was first severed from the surface estate in 1985 during the twenty-year look-back period.[116] The *McLaughlin* court applied a rolling-window approach from the date of the oil and gas severance on January 3, 1985, to January 3, 2005, but determined that the oil and gas estate had not been abandoned because a savings event had occurred on July 6, 1992.[117] Ultimately, U.S. District Courts must follow the substantive law of the forum state;[118] therefore, it is up to the Supreme Court of Ohio to determine whether a fixed-window or rolling-window approach should be applied under the 1989 Statute. As an aside, if the Supreme Court of Ohio determines that a fixed-window approach should be applied under the 1989 Statute, the holding in *McLaughlin* would be

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[109] *See, e.g.*, Corban v. Chesapeake Expl., L.L.C., No. 2:13-cv-246, 2014 U.S. Dist. LEXIS 182735 (S.D. Ohio May 14, 2014); Chesapeake Expl., L.L.C. v. Buell, No. 2:12-cv-916 (S.D. Ohio Jan. 2, 2014).

[110] No. 2:12-cv-916 (stayed proceedings pending certification of two questions of Ohio law by the Supreme Court of Ohio, filed on May 16, 2014).

[111] No. 2:13-cv-246, 2014 U.S. Dist. LEXIS 182735 (stayed proceedings pending certification of two questions of Ohio law by the Supreme Court of Ohio, filed on May 16, 2014).

[112] Chesapeake Expl., L.L.C. v. Buell, 138 Ohio St. 3d 1446, 2014-Ohio-1182, 5 N.E.3d 665, *certified question answered*, 2015-Ohio-4551; Corban v. Chesapeake Expl., L.L.C., 139 Ohio St. 3d 1482, 2014-Ohio-3195, 12 N.E.3d 1228.

[113] *Buell*, No. 2:12-cv-916, at 8 n.2. *See also Corban*, 2014 U.S. Dist. LEXIS 182735, at *8.

[114] No. 5:13CV1502, 2013 WL 6579057 (N.D. Ohio Dec. 13, 2013), *aff'd sub nom.* McLaughlin v. CNX Gas Co., LLC, No. 14-3102, 2016 WL 278985 (6th Cir. Jan. 22, 2016).

[115] *Id.* at *2.

[116] *Id.*

[117] *Id.* at *4–5.

[118] Erie R. R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

unaffected because the outcome would have been the same under a fixed-window approach.[119] The Supreme Court of Ohio has heard oral arguments on this issue in *Walker v. Shondrick-Nau*,[120] and its final decision is pending.[121]

Current Ohio court precedent supports application of a fixed window. A practitioner's best approach is to apply the fixed-window approach, but take note of the result under a rolling-window approach and keep watch for two upcoming Supreme Court of Ohio decisions—*Walker v. Shondrick-Nau*[122] and *Eisenbarth v. Reusser*[123]—which may alter or overturn current Ohio precedent supporting the fixed-window approach.

C. Is the 1989 Statute Automatic and Self-Executing?

Ohio Courts have had to determine whether the 1989 Statute is automatic and self-executing in situations where twenty years passed without a savings event during the applicable look-back period.[124] The 1989 Statute states that if no exceptions applied during the applicable look-back period, then the severed mineral interest "shall be *deemed abandoned and vested* in the owner of the surface."[125] The Seventh District Court of Appeals addressed this issue in *Walker v. Shondrick-Nau*[126] and *Swartz v.*

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[119] *McLaughlin*, 2013 WL 6579057, at *4.

[120] Walker v. Shondrick-Nau, 7th Dist. Noble No. 14 NO 402, 2014-Ohio-1499.

[121] Walker v. Shondrick-Nau, 140 Ohio St. 3d 1414, 2014-Ohio-3785, 15 N.E.3d 883.

[122] *Id.*

[123] Eisenbarth v. Reusser, 2014-Ohio-3792, 18 N.E.3d 477 (7th Dist.), *appeal allowed*, 141 Ohio St. 3d 1488, 2015-Ohio-842, 26 N.E.3d 823.

[124] *Walker*, 2014-Ohio-1499, at ¶¶ 41–42.

[125] OHIO REV. CODE ANN. § 5301.56(B)(1) (1989) (emphasis added).

[126] *Walker*, 2014-Ohio-1499, *appeal allowed*, 140 Ohio St. 3d 1414, 2014-Ohio-3785, 15 N.E.3d 883. In *Walker*, the severance of John Walker's estate occurred prior to March 22, 1969, and his first attempt to have the mineral estate deemed abandoned failed. *Id.* ¶¶ 4–7. On December 2, 2011, Walker sent a notice of abandonment of mineral interest to John R. Noon, and Noon responded within 60 days of the notice by filing an affidavit and claim to preserve his mineral interest. *Id.* After failing to have the minerals deemed abandoned under the 2006 Amendment, Walker filed a complaint for declaratory judgment and to quiet title arguing that the mineral estate had been automatically abandoned and merged with the surface as of March 22, 1992 under the 1989 Statute. *Id.* The trial court, with little analysis, held that application of the 2006 Amendment was moot because Noon's severed mineral interest had been automatically abandoned and vested with the surface on March 22, 1992 under the 1989 Statute. *Id.* ¶ 10.

Householder.[127] The *Walker* court looked at whether a severed mineral interest created prior to March 22, 1969, without intervening savings events, was automatically "'deemed abandoned and vested' in the surface owner" as of March 22, 1992.[128] The *Walker* court examined what it means to have a "vested" interest and found it to be a "property right" that "so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent."[129] As a result, the court found that "once the mineral interest vested in the surface owner, it 'completely and definitely' belonged to the surface owner."[130]

In *Swartz*—on appeal at the same time as *Walker*[131]—defendant-appellants argued that to use the 1989 Statute, the surface owners must have applied the act prior to the 2006 Amendment's effective date of June 30, 2006.[132] Defendant-appellants, citing *Dahlgren v. Brown Farm Properties, LLC*,[133] argued that the 1989 Statute's use of the words "deemed abandoned and vested" created an "inchoate right" requiring judicial confirmation or a recorded abandonment claim for the surface estate holders for the severed mineral interest to vest in the surface owner.[134] The *Swartz* court disagreed

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[127] Swartz v. Householder, 2014-Ohio-2359, 12 N.E.3d 1243 (7th Dist.), *appeal allowed*, 140 Ohio St. 3d 1506, 2014-Ohio-5098, 19 N.E.3d 923, *and appeal allowed sub nom.* Shannon v. Householder, 140 Ohio St. 3d 1506, 2014-Ohio-5098, 19 N.E.3d 923, at ¶ 2. In *Swartz*, the plaintiffs held the surface estate to a combined 190 acres, and the defendants claimed title to the oil and gas estate underlying that property as a result of severances that occurred in the 1940s. *Id.* ¶¶ 2–6. The trial court found no savings events between March 22, 1969 and March 22, 1992; thus, it held that the 1989 Statute was automatic and self-executing, and the defendant's severed mineral interest was vested in the surface estate as of March 22, 1992. *Id.* ¶ 8.

[128] *Walker*, 2014-Ohio-1499, at ¶ 39.

[129] *Id.* ¶ 40 (citing State *ex rel.* Jordan v. Indus. Comm'n, 120 Ohio St. 3d 412, 2008-Ohio-6137, 900 N.E.2d 150, at ¶ 9).

[130] *Id.* ¶ 41.

[131] The trial court decisions in *Walker* and *Swartz* were handed down on March 20, 2014, and July 17, 2013, respectively. *See Swartz*, 2014-Ohio-2359, at ¶ 8. The Seventh District Court of Appeals decided *Walker* on April 3, 2014, *see Walker*, 2014-Ohio-1499, and *Swartz* on June 2, 2014, *see Swartz*, 2014-Ohio-2359.

[132] *Swartz*, 2014-Ohio-2359, at ¶ 23.

[133] 2014-Ohio-4001, 19 N.E.3d 926 (7th Dist.), *appeal allowed*, 141 Ohio St. 3d 1487, 2015-Ohio-842, 26 N.E.3d 823. In *Dahlgren*, the Court of Common Pleas held that the 1989 Statute required implementation, i.e., being a recorded abandonment claim or appropriate court proceeding, in order to confirm abandonment. *Id.* ¶ 7. Citing *Swartz*, the Seventh District Court of Appeals ultimately overturned *Dahlgren*. *Id.* ¶¶ 31–33.

[134] *Swartz*, 2014-Ohio-2359, at ¶ 23.

with Defendant-Appellants and stated that the Supreme Court of the United States in *Texaco, Inc. v. Short*[135] found the Indiana Dormant Mineral Act to be "self-executing" because the extinguished mineral interest re-vested to the surface,[136] and the *Swartz* court held that the 1989 Statute was the same type of "self-executing statute."[137] Notice to avoid automatic abandonment, other than the statutory three-year grace period, was not required.[138] The *Swartz* court also referenced its decision in *Walker* noting that the 1989 Statute creates a vested right in the surface owner; therefore, the 2006 Amendment and the 1989 Statute could both be used in harmony because the 1989 Statute was automatic and self-executing.[139] The Supreme Court of Ohio has accepted *Walker* and *Swartz* on this issue; *Swartz* is being held pending *Walker*.[140] A practitioner should treat the 1989 Statute as automatic and self-executing but should be prepared if the Supreme Court of Ohio holds otherwise in *Walker*.

D. Is the 2006 Amendment Retrospective or Prospective?

The issue of whether to apply the 2006 Amendment or the 1989 Statute in cases where the severance occurred prior to March 22, 1969, is another issue before the Supreme Court of Ohio in *Walker*.[141] The Seventh District had to determine in *Walker* whether to apply the 2006 Amendment retrospectively (thus ignoring the 1989 Statute) or whether the 1989 Statute could still be applied even after the later enactment of the 2006 Amendment.[142] Shondrick-Nau, who became the appellant after Noon's passing, argued that the trial court erred in applying the 1989 Statute.[143] Shondrick-Nau argued that the Supreme Court of the United States, in *Landgraf v. USI Film Products*, established that, in many situations, a court should "apply the law in effect at the time it renders its decision."[144]

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[135] 454 U.S. 516 (1981).

[136] *Id.* at 518.

[137] *Swartz*, 2014-Ohio-2359, at ¶ 27.

[138] *Id.*

[139] *Id.* ¶¶ 28–29.

[140] *See* Shannon v. Householder, 140 Ohio St. 3d 1506, 2014-Ohio-5098, 19 N.E.3d 923 (indicating that both the *Swartz* and *Shannon* discretionary appeals were accepted but "held for the decision in" *Walker*).

[141] *See* Walker v. Shondrick-Nau, 7th Dist. Noble No. 14 NO 402, 2014-Ohio-1499, *appeal allowed*, 140 Ohio St. 3d 1414, 2014-Ohio-3785, 15 N.E.3d 883.

[142] *Id.*

[143] *Id.* ¶¶ 11, 31–33.

[144] *Id.* ¶ 31 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994)).

Therefore, the trial court should have applied the 2006 Amendment because it was the law in effect at the time Walker purchased the property in 2009.[145] Furthermore, Shondrick-Nau argued that she must prevail because Noon filed a timely preservation of mineral interest under the 2006 Amendment.[146]

The *Walker* court did not look to *Landgraf*[147] for guidance, but instead looked to the Ohio Revised Code, which states: "A statute is presumed to be prospective in its operation unless expressly made retrospective."[148] Also, the court stated that "[t]he amendment or repeal of a statute does not affect the prior operation of the statute or affect 'any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder.'"[149] The *Walker* court found no language in the 2006 Amendment to suggest it should be applied retrospectively, finding that it should be applied only prospectively.[150] The *Walker* court also found that the 2006 Amendment would not have affected any "validation, cure, right, privilege, obligation, or liability previously acquired" accrued, accorded, or incurred thereunder.[151] As a result, the *Walker* court agreed with the trial court that the 1989 Statute still applied and that the severed mineral interest had been automatically abandoned and vested with Walker on March 22, 1992.[152] *Walker* is currently before the Supreme Court of Ohio.[153] Thus, practitioners should treat the 2006 Amendment as only prospective while waiting for a decision in *Walker* on this issue.

E. When Is a Mineral Interest the Subject of a Title Transaction Recorded in the Office of the County Recorder Under Ohio Revised Code Section 5301.56(B)(3)(c)(i)?

One enumerated savings event in both the 1989 Statute and 2006 Amendment is when "[t]he mineral interest has been the *subject of a title transaction* . . . recorded in the office of the county recorder of the county in

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[145] *Id.*

[146] *Id.* ¶ 33.

[147] 511 U.S. 244 (1994).

[148] *Id.* ¶ 36 (citing OHIO REV. CODE ANN. § 1.48).

[149] *Id.* (citing OHIO REV. CODE ANN. § 1.58(A)(1)(2)). *See also* Swartz v. Householder, 2014-Ohio-2359, 12 N.E.3d 1243, ¶ 30 (7th Dist.), *appeal allowed*, 140 Ohio St. 3d 1506, 2014-Ohio-5098, 19 N.E.3d 923, *and appeal allowed sub nom.* Shannon v. Householder, 140 Ohio St. 3d 1506, 2014-Ohio-5098, 19 N.E.3d 923.

[150] *Walker*, 2014-Ohio-1499, at ¶ 37.

[151] *Id.* ¶ 38.

[152] *Id.* ¶¶ 38–39.

[153] Walker v. Shondrick-Nau, 140 Ohio St. 3d 1414, 2014-Ohio-3785, 15 N.E.3d 883.

which the lands are located."[154] The term "title transaction" is defined in the MTA as "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 decree of any court, as well as warranty deed, quit claim deed, or mortgage."[155] If "subject of a title transaction" is combined with the MTA's definition of a "title transaction," the result is that the mineral interest must be the "subject of *any transaction affecting title to any interest in land* . . . recorded in the office of the county recorder of the county in which the lands are located" to qualify as a savings event.[156] Based on current Ohio court precedent, a three-part test can be applied to determine whether a transaction qualifies as a savings event under Ohio Revised Code section 5301.56(B)(3)(c)(i).[157] This three-part test is referred to here as the *Chesapeake* test:[158]

(1) Is the transaction a "title transaction," being any transaction affecting title to any interest in land?

(2) Is the mineral interest the "subject of" the "title transaction"?

(3) Was the transaction recorded in the office of the county recorder of the county in which the lands are located?

For a transaction to qualify as a savings event under Ohio Revised Code section 5301.56(B)(3)(c)(i), the answers to all three questions must be yes.

1. Part One of the Chesapeake Test

In *Chesapeake Exploration, L.L.C. v. Buell*, the Supreme Court of Ohio determined whether a recorded oil and gas lease, and subsequent unrecorded

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[154] OHIO REV. CODE ANN. § 5301.56(B)(3)(c)(i) (West Supp. 2015) (emphasis added).

[155] OHIO REV. CODE ANN. § 5301.47(F) (West 2014).

[156] *See* Eisenbarth v. Reusser, 2014-Ohio-3792, 18 N.E.3d 477, ¶¶ 17–18 (7th Dist.), *appeal allowed*, 141 Ohio St. 3d 1488, 2015-Ohio-842, 26 N.E.3d 823.

[157] *See* Chesapeake Expl., L.L.C. v. Buell, 2015-Ohio-4551 (Ohio Nov. 5, 2015). *See also Eisenbarth*, 2014-Ohio-3792, ¶¶ 17–18; Dodd v. Croskey, 7th Dist. Harrison No.12 HA 6, 2013-Ohio-4257, ¶¶ 42–44, *appeal allowed*, 138 Ohio St. 3d 1432, 2014-Ohio-889, 4 N.E.3d 1050, *cross appeal allowed*, 140 Ohio St. 3d 1406, 2014-Ohio-3708, 14 N.E.3d 1052, *aff'd*, 143 Ohio St. 3d 293, 2015-Ohio-2362, 37 N.E.3d 147; Tribett v. Shepherd, 2014-Ohio-4320, 20 N.E.3d 365, ¶¶ 23–24 (7th Dist.), *appeal allowed*, 142 Ohio St. 3d 1447, 2015-Ohio-1591, 29 N.E.3d 1003.

[158] *Chesapeake*, slip op. at n.6.

expiration of the lease, qualified as savings events.[159] The court examined whether an oil and gas lease qualified as a "title transaction," focusing initially on whether an oil and gas lease involved an "interest in land."[160] The court stated that "oil and gas leases are unique, as they 'seemingly straddle the line between property and contract: they are neither residential leases nor commercial contracts for the sale of goods.'"[161] It looked to prior Supreme Court of Ohio precedent, specifically *Harris v. Ohio Oil Co.*[162] and *Back v. Ohio Fuel Gas Co.*,[163] to determine whether an oil and gas lease created an "interest in land."[164] In *Harris*, the Supreme Court of Ohio stated that an oil and gas lease was "more than a mere license" because it created a "vested, though limited, estate in the lands for the purposes named in the lease."[165] Fifty-six years later the Supreme Court of Ohio determined in *Back* that a deed conveying the right and privilege of operating for oil and gas was a license, rather than a deed of conveyance granting real property.[166] The court found, based on the granting clauses in each case, that because *Harris* dealt with an oil and gas lease, and *Back* did not, the two cases did

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[159] *Chesapeake*, slip op. ¶ 27 n.2. The U.S. District Court for the Southern District of Ohio is in the process of determining whether the mineral rights under 90.2063 acres of land were abandoned under the 1989 Statute. *See* Corban v. Chesapeake Expl., L.L.C., No. 2:13-cv-246, 2014 U.S. Dist. LEXIS 182735, at *4 (S.D. Ohio May 14, 2014). The District Court stayed proceedings pending certification of two questions of Ohio law by the Supreme Court of Ohio, filed on May 16, 2014. Chesapeake Expl., L.L.C. v. Buell, 138 Ohio St. 3d 1446, 2014-Ohio-1182, 5 N.E.3d 665, *certified question answered*, 2015-Ohio-4551. The two questions of Ohio law are:

> (1) Is the recorded lease of a severed subsurface mineral estate a title transaction under the [Ohio Dormant Mineral Act], Ohio Revised Code section 5301.56(B)(3)(a)?
>
> (2) Is the expiration of a recorded lease and the reversion of the rights granted under that lease a title transaction that restarts the twenty-year forfeiture clock under the ODMA at the time of the reversion?

Chesapeake, slip op. ¶ 14.

[160] *Chesapeake*, slip op. ¶¶ 41–40.

[161] *Id.* ¶ 41 (citing Byron C. Keeling & Karolyn King Gillespie, *The First Marketable Product Doctrine: Just What Is the "Product"?*, 37 ST. MARY'S L. J. 1, 6 (2005)).

[162] 57 Ohio St. 118, 48 N.E. 502, 506 (Ohio 1897).

[163] 113 N.E.2d 865, 869 (Ohio 1953).

[164] *Chesapeake*, slip op. ¶ 43.

[165] *Harris*, 48 N.E. at 506.

[166] *Back*, 113 N.E.2d at 869.

not contradict each other.[167] The court then stated that "this is a distinction without difference" because the General Assembly had recently amended Ohio Revised Code section 5301.09—which addresses the recording of natural gas and petroleum leases—making it clear that both leases and licenses create an interest in real estate.[168] Therefore, the Supreme Court of Ohio concluded that an oil and gas lease was an "interest in land" and turned its focus on whether an oil and gas lease "affect[ed] title to" the "interest in land."[169]

It had been argued via the holding in *Back* that Ohio follows the incorporeal ownership theory of oil and gas, and thus a grant of oil and gas rights gives the grantee only the "exclusive right to take all of the oil, gas and other minerals" and not an actual interest in the oil, gas, and mineral estate.[170] The Supreme Court of Ohio answered this question, although in dicta, that despite *Back*, Ohio does not recognize the incorporeal ownership theory.[171] It stated that *Back* was limited to determining whether the instrument in question was required by law to be recorded and that the *Back* court, although acknowledging differing views of ownership among the states, did not declare one or the other to be the law of Ohio.[172] Furthermore, the Supreme Court of Ohio pronounced that *Back* did not expressly overrule the numerous cases before it, which held that oil and gas in place is realty subject to ownership.[173]

The Supreme Court of Ohio's analysis of *Back* is dicta, but it provides guidance suggesting that a grant of oil and gas rights should not be analyzed under the incorporeal ownership theory but instead should be considered to convey an interest in oil and gas in place, which is realty subject to ownership. The court found the "rights and privileges under an oil and gas lease, although limited[,] . . . are sufficiently vast to affect the possession and custody of the mineral estate" and thus "affect title."[174] As a result, the Supreme Court of Ohio determined that an oil and gas lease "affect[ed] title"

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[167] *Id.*; *Chesapeake*, slip op. ¶ 48. *See also Back*, 113 N.E.2d at 867.

[168] OHIO REV. CODE. ANN. § 5309.09 (West 2014) ("In recognition that such leases and licenses create an interest in real estate . . . .").

[169] *Chesapeake*, slip op. ¶ 49.

[170] *Id.* ¶ 42.

[171] *Id.* ¶ 48 n.3.

[172] *Id.*

[173] *Id.*

[174] *Id.* ¶ 60.

to "any interest in land" and thus qualified as a "title transaction" under Ohio Revised Code section 5301.56(B)(3)(a).[175]

The Supreme Court of Ohio also had to verify whether the recording and "subject of" requirements of Ohio Revised Code section 5301.56(B)(3)(a) were satisfied. Oil and gas rights were the "subject of" the "title transaction" because "the mineral rights are the very subject of an oil and gas lease."[176] Furthermore, the certified question presumed a recorded lease; therefore, that element was also not at issue.[177] As a result, the Supreme Court of Ohio found that an oil and gas lease meets all of the elements of Ohio Revised Code section 5301.56(B)(3)(a) and thus qualifies as a savings event.[178]

2. Part Two of the Chesapeake Test

Part Two of the *Chesapeake* test (i.e., whether a mineral interest is the "subject of" the "title transaction") was not a key issue in *Chesapeake*[179] but was in *Walker v. Shondrick-Nau*.[180] In *Walker*, the Seventh District Court of Appeals addressed whether reference to a prior mineral severance in a deed conveying the surface estate was enough to make that interest the "subject of" a title transaction.[181] John R. Noon had reserved the oil and gas by deed, recorded on July 26, 1965. Subsequent conveyances of the land in 1970 and 1977 qualified as "title transactions" recorded in the office of the county recorder of the county in which the lands were located,[182] but the *Walker* court had to determine whether a citation to the volume and page number of Noon's prior reservation made his reservation the "subject of" the "title transactions."[183] The *Walker* court held that a reference to a prior mineral severance was not enough to make it the "subject of" a title transaction; therefore, Noon's severed mineral interest was abandoned under the 1989 Statute on March 22, 1992.[184] The court stated that "in order for the mineral interest to be the 'subject of' the title transaction, the grantor must be conveying or retaining that interest . . . the mere mention of the

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[175] *Id.* ¶¶ 39–40, 66.

[176] *Id.* ¶ 66 n.6.

[177] *Id. See also id.* ¶¶ 14–15.

[178] *Id.* ¶ 66 n.6.

[179] *Id.* ¶ 2.

[180] Walker v. Shondrick-Nau, 7th Dist. Noble No. 13 NO 402, 2014-Ohio-1499, ¶¶ 21, 25, 27, *appeal allowed*, 140 Ohio St. 3d 1414, 2014-Ohio-3785, 15 N.E.3d 883.

[181] *Id.* ¶¶ 20–21.

[182] *Id.* ¶ 3.

[183] *Id.* ¶¶ 3, 21.

[184] *Id.* ¶¶ 27, 38–39.

[severed] mineral interest in the 1970 and 1979 [surface] deeds did not make the mineral interest 'the subject' of the title transactions" and thus, were not savings events under the 1989 Statute or the 2006 Amendment.[185] *Walker* was appealed to the Supreme Court of Ohio on this issue.[186]

3. Part Three of the Chesapeake Test

Part Three of the *Chesapeake* test was relied upon by the *Chesapeake* court to determine whether the expiration of a recorded lease, and reversion of rights granted under that lease, satisfy the elements of Ohio Revised Code section 5301.56(B)(3)(a).[187] The expiration of the lease was unrecorded, and the court found that "even if the automatic expiration of an oil and gas lease were a 'title transaction,' it would not rise to the level of a saving event under R.C. 5301(B)(3)(a) when it is not filed or recorded as required by the statute."[188] Further, the court addressed whether the recorded oil and gas lease was sufficient to serve as the recorded title transaction for the lease expiration because the recorded lease included the lease term and expiration date.[189] The court found that it could not.[190] The court found that the terms of a lease describe events that could occur, but the lease itself does not provide notice of the actual occurrence of an event causing lease expiration and reversion of rights in the lessor.[191] As a result, the Supreme Court of Ohio held that the unrecorded expiration of an oil and gas lease does not constitute a savings event under Ohio Revised Code section 5301.56(B)(3)(a).[192] The Supreme Court of Ohio focused on the fact that the lease expiration and reversion of rights were unrecorded, therefore leaving open the possibility that a recorded release of an oil and gas lease

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[185] *Id* ¶ 27.

[186] Walker v. Shondrick-Nau, 140 Ohio St. 3d 1414, 2014-Ohio-3785, 15 N.E.3d 883.

[187] Chesapeake Expl., L.L.C. v. Buell, 2015-Ohio-4551, slip op. ¶¶ 26, 68 (Ohio Nov. 5, 2015).

[188] *Id.* ¶¶ 68, 75.

[189] *Id.* ¶ 76. The court explained that an oil and gas lease typically contains a primary fixed term, and secondary term that extends the lessee's rights, and if the conditions of the secondary term are not met the lease terminates and re-vests in the lessor, but a lease may describe any number of events that could extend the lease or cause the lease to expire such as by "permanent abandonment, lack of production, or the exhaustion of oil and gas resources on the property." *Id.* ¶¶ 77–78.

[190] *Id.* ¶ 81.

[191] *Id.* ¶ 80.

[192] *Id.* ¶ 81.

could qualify as a savings event under Ohio Revised Code section 5301.56(B)(3)(a).[193]

Practitioners should note that under both DMA versions, the Supreme Court of Ohio has determined that an oil and gas lease qualifies as a savings event, but the unrecorded expiration of the oil and gas lease does not. Furthermore, under current Ohio precedent, reference to a prior mineral severance in a deed conveying the surface estate is not enough to make that interest the "subject of" a title transaction.[194] The Supreme Court of Ohio will determine whether to uphold or overrule that issue when it decides *Walker*. For other transactions that do not have the benefit of court precedent, such as recorded oil and gas releases or probate files involving a severed mineral interest, practitioners should use the *Chesapeake* test as a guide to evaluate whether a court would likely determine that the given transaction qualifies as a savings event under Ohio Revised Code section 5301.56(B)(3)(c)(i).

IV. UNRESOLVED ISSUES NOT CURRENTLY BEFORE OHIO COURTS

The Supreme Court of Ohio's eventual resolution of all the above issues will be helpful, but it will only lay the groundwork for additional discoveries and challenges to the law. The following issues have not been litigated in Ohio courts but very well may be in the future:

(1) Is an unaccrued oil and gas royalty interest subject to abandonment under the DMA?

(2) Can an oil and gas lease serve as a savings event for severed royalty interest holders who are not parties to the lease?

(3) Under the DMA, what happens if there was a defect in the process?

A. Is an Unaccrued Oil and Gas Royalty Interest Subject to Abandonment under the DMA?

The issue of whether a royalty interest—specifically a royalty interest in the oil and gas estate before the oil and gas has been extracted from the

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[193] *Id.* ¶ 82 (Under the Supreme Court of Ohio's reasoning in *Chesapeake*, it is likely that other conditions contained within an oil and gas lease that extend or terminate a lease—e.g., payment of delay rentals—will not qualify as savings events under Ohio Revised Code section 5301.56(B)(3)(a) if they are not separately recorded.).

[194] Walker v. Shondrick-Nau, 7th Dist. Noble No. 14 NO 402, 2014-Ohio-1499, at ¶ 27, *appeal allowed*, 140 Ohio St. 3d 1414, 2014-Ohio-3785, 15 N.E.3d 883.

ground (defined here as an "unaccrued royalty interest")—[195] is subject to abandonment under the DMA has not been brought before any Ohio Appellate Courts or the Supreme Court of Ohio. The DMA states that "[a]ny 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 none of the exceptions apply.[196] A "mineral interest" is defined in the DMA as "a fee interest in at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided or undivided." [197] There is a debate in Ohio regarding whether an unaccrued oil and gas royalty interest is an interest in real or personal property.[198] Those who argue that an unaccrued oil and gas royalty interest is not subject to abandonment under the DMA base that argument on the premise that an unaccrued oil and gas royalty interest is not an interest in realty. The Supreme Court of Ohio stated in *Pure Oil Co. v. Kindall*,[199] that a royalty interest is personal property and not realty.[200] Regardless of whether an unaccrued oil and gas royalty interest is considered an interest in realty or personal property, the following two cases may be dispositive as to whether an unaccrued oil and gas royalty interest may be subject to abandonment under the DMA.

The only court to directly address application of the DMA to royalty interests was the Monroe County Court of Common Pleas in *Marty v. Dennis*.[201] Citing *Ohio Jurisprudence*, the court in *Marty* found that a

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[195] There is no debate that once oil and gas is extracted from the ground, royalty interests become personal property in the form of cash payment, or payment in-kind. If production is occurring then those interests are not subject to abandonment under the DMA; therefore, royalty interests in already-produced oil or natural gas are not discussed here. *See* HOWARD R. WILLIAM & CHARLES J. MEYERS, OIL AND GAS LAW § 212 (2014) (explaining that an interest in land can be classified as real or personal property, and when oil and gas has been produced, it is personal property).

[196] OHIO REV. CODE ANN. § 5301.56(B) (West Supp. 2015).

[197] *Id.* § 5301.56(A).

[198] *See* Pollock v. Mooney, 7th Dist. Monroe No. 13 MO 9, 2014-Ohio-4435 (holding that the Supreme Court of Ohio's decision in Pure Oil Co. v. Kindall, 156 N.E. 119 (Ohio 1927), was controlling in determining that the nature of a severed royalty interest was personal property rather than real property); Buegel v. Amos, 7th Dist. Monroe No. 577, 1984 WL 7725 (June 5, 1984) (holding that unaccrued oil and gas royalties are personal property).

[199] 156 N.E. 119 (Ohio 1927).

[200] *Id.* at 123 ("Royalty is personal property, and is not realty.").

[201] Monroe C.P. No. 2012-203, at 3 (Apr. 11, 2013).

royalty interest is a fractional interest of the oil and gas estate that is "an interest in realty until the minerals are removed from the ground."[202] As a result, the Monroe County Court of Common Pleas found that the definition of a mineral interest includes an unaccrued oil and gas royalty interest because it is an interest in realty and is, therefore, subject to abandonment under the DMA.[203]

Although no appellate court has addressed the susceptibility to abandonment of unaccrued royalty interests under the DMA, the case of *Pollock v. Mooney* in the Seventh District Court of Appeals determined that a royalty interest was subject to extinguishment under the MTA[204] even though it was considered to be personal property.[205] Though the *Pollock* court followed *Pure Oil Co.* in finding that unaccrued oil and gas royalties are personal property, it nevertheless found that the unaccrued oil and gas royalty interest is subject to the MTA because the MTA applies to all types of interests.[206] In its analysis, the *Pollock* court included the following part of the MTA:

> [R]ecord marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of *all interests, claims, or charges whatsoever*, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title. *All such interests*, claims, or charges, *however denominated*, whether legal or equitable, present or future, whether such interests, claims, or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.[207]

The *Pollock* court specifically emphasized that the terms "all interests, claims, or charges whatsoever" and "[a]ll such interests . . . however denominated" indicate that the MTA does not differentiate between different types of interests but rather applies to all interests.[208]

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[202] *Id.* at 9–10 (citing 68 OHIO JUR. 3D *Mines and Minerals* § 8).

[203] *Id.* at 9–10, 11.

[204] Pollock v. Mooney, 7th Dist. Monroe No. 13 MO 9, 2014-Ohio-4435, at ¶ 17.

[205] *Id*. ¶ 15.

[206] *Id.* ¶¶ 16–17, 21.

[207] *Id*. ¶ 21 (quoting OHIO REV. CODE ANN. § 5301.50).

[208] *Id*.

The DMA is part of the MTA,[209] but the holding in *Pollock* does not directly apply to the DMA because the DMA is a more specific part of the MTA.[210] The DMA only applies to mineral interests as defined within it.[211] However, parallels can be drawn because the DMA definition of a "mineral interest" includes the phrase "regardless of how the interest is created and of the form of the interest," [212] which is analogous to the MTA's use of the phrase, "[a]ll such interests . . . however denominated."[213] The analogous phrase used in the DMA, which was drafted after the MTA, indicates the intent by the legislature not to differentiate between different types of mineral interests under the DMA, therefore including all forms of mineral interests. [214] It follows then that mineral interests, as defined in the DMA, would include an unaccrued oil and gas royalty interest held in the form of personal property, making that interest subject to abandonment.[215]

Taking the approach that an unaccrued royalty interest is an interest in real or personal property, an appellate court would likely determine that such an interest is subject to abandonment under the DMA.[216] If an appellate court followed the holding in *Marty* and held that an unaccrued oil and gas royalty interest is an interest in realty, then the outcome is clear: it would be subject to abandonment under the DMA.[217] If an appellate court considered it to be personal property, then it could still determine from *Pollock* that an unaccrued oil and gas royalty interest, as personal property, is subject to

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[209] Ohio Revised Code section 5301.55 expressly states that "Sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in section 5301.48 of the Revised Code, subject only to such limitations as appear in section 5301.49 of the Revised Code." OHIO REV. CODE ANN. § 5301.55.

[210] Swartz v. Householder, 2014-Ohio-2359, 12 N.E.3d 1243, ¶ 19 (7th Dist.), *appeal allowed*, 140 Ohio St. 3d 1506, 2014-Ohio-5098, 19 N.E.3d 923, *and appeal allowed sub nom.* Shannon v. Householder, 140 Ohio St. 3d 1506, 2014-Ohio-5098, 19 N.E.3d 923.

[211] *Id*. ¶ 20.

[212] OHIO REV. CODE. ANN. § 5301.56(A)(3) (West Supp. 2015).

[213] OHIO REV. CODE. ANN § 5301.50 (West 2014).

[214] *See* OHIO REV. CODE ANN. § 5301.56(A) (West Supp. 2015). *See also* OHIO REV. CODE. ANN § 5301.50 (West 2014); Swartz, 2014-Ohio-2359, at ¶ 12.

[215] Pollock v. Mooney, 7th Dist. Monroe No. 13 MO 9, 2014-Ohio-4435, at ¶¶ 16, 21.

[216] Marty v. Dennis, Monroe C.P. No. 2012-203, at 9 (Apr. 11, 2013).

[217] *Id*.

abandonment under the DMA.[218] Presently, no appellate courts have ruled on this issue.[219]

B. Can an Oil and Gas Lease Serve as a Savings Event for Severed Royalty Interest Holders Who Are Not Parties to the Lease?

An oil and gas estate can be broken into separate, distinct interests or rights, including (but not limited to) the executive right.[220] The executive right is the right to execute oil and gas leases and usually includes the additional rights to receive bonus payments and delay rentals, though the executive right can become separated from one or more of the other interests.[221] In *Chesapeake Exploration, L.L.C. v. Buell*,[222] the Supreme Court of Ohio determined that an oil and gas lease is a savings event under the DMA.[223] What remains unclear is whether an oil and gas lease serves as a savings event for only the executive right holder or whether it serves as a savings event for all interest holders not having an interest in the executive right (e.g., non-participating oil and gas royalty interests).[224]

There is no case law directly on point with this issue, but there is an analogue in *Eisenbarth v. Reusser*.[225] As discussed above, in 1954, William Eisenbarth transferred the subject parcel reserving a one-half oil and gas interest and granting the executive right.[226] The holder of the executive right exercised an oil and gas lease recorded on January 23, 1974.[227] The Seventh District Court of Appeals held that an oil and gas lease by the one-half oil and gas estate holder, who held the entire executive right (the executive holder), qualified as a savings event as to the other one-half mineral interest

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[218] *Pollock*, 2014-Ohio-4435, at ¶¶ 16, 21.

[219] See BARONZZI, supra note 8.

[220] Eisenbarth v. Reusser, 2014-Ohio-3792, 18 N.E.3d 477, ¶ 60 (7th Dist.), *appeal allowed*, 141 Ohio St. 3d 1488, 2015-Ohio-842, 26 N.E.3d 823 ("[T]he five attributes of a severed mineral estate [are]: (1) right to develop (with ingress and egress); (2) right to receive bonus payments; (3) right to receive delay rentals; (4) right to receive royalty payments; and (5) right to lease (known as the executive right).").

[221] Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil and Gas Interests*, 42 TEX. TECH. L. REV. 33, 34 (2009).

[222] 2015-Ohio-4551 (Ohio Nov. 5, 2015).

[223] *Id.* ¶ 66.

[224] *Eisenbarth*, 2014-Ohio-3792, at ¶¶ 2, 4.

[225] *Id.* ¶ 65.

[226] *Id.* ¶ 5.

[227] *Id.*

holder (the non-executive holder).[228] The court held that the executive holder had a fiduciary duty to the non-executive holder and this duty, upon execution of the oil and gas lease, qualified as a savings event for the non-executive holder.[229] But in order for a court to apply *Eisenbarth* to other interests, such as non-participating oil and gas royalty interests, the court would have to find that the executive holder has a fiduciary duty to other interest holders.[230] No court in Ohio has made this determination yet, and it remains to be seen how Ohio courts will treat this issue.[231]

C. Under the DMA, What Happens If There Was a Defect in the Process?

The DMA contains a notification process whereby the surface estate holder must notify each severed mineral interest holder giving them time to respond before he can make a final filing stating that the severed mineral estate has been abandoned.[232] Below is a summary of the process:

(1) The surface owner serves notice by certified mail to each severed mineral interest holder, or each holder's successors or assigns, at their last known address, of the owner's intent to declare the mineral interest abandoned.[233] If service cannot be completed to any holder, the surface owner can publish notice in a newspaper of general circulation in the county.[234]

(2) The surface owner must then wait thirty days.

(3) Between days thirty and sixty, the surface owner must file an affidavit of abandonment.[235] This includes a statement that no savings events have occurred within the twenty years immediately preceding the date on which notice was served.[236]

(4) A severed mineral interest holder may preserve her interest by filing one of the following within sixty days of notice:

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[228] *Id.* ¶¶ 32, 65.

[229] *Id.* ¶¶ 20, 32 (emphasis added).

[230] *Id.* ¶ 59.

[231] The Texas Supreme Court has held that an executive right holder has a duty that is "fiduciary in nature," which requires the "utmost fair dealing" by the executive right holder to other interest holders. Lesley v. Veterans Land Bd., 352 S.W.3d 479, 488 (Tex. 2011).

[232] *See* OHIO REV. CODE ANN. § 5301.56(H)(1) (West Supp. 2015).

[233] *Id.* § 5301.56(E)(1).

[234] *Id.*

[235] *Id.* § 5301.56(E)(2).

[236] *Id.* § 5301.56(F)(4).

(a) A claim to preserve the mineral interest,[237] or

(b) An affidavit that describes a savings event within the twenty years immediately preceding the date on which notice was served.[238]

(5) If the mineral interest holder fails to file a claim to preserve the mineral interest or an affidavit identifying a savings event within sixty days of notice, the surface estate holder must then file a notice of failure to file a mineral interest.[239]

(6) Immediately after the notice of failure to file a mineral interest, the mineral interest will vest in the owner of the surface. [240]

The purpose of this process is to not only give the severed mineral interest holder an opportunity to respond but also provide a record that a third party can review to determine the legal holder of a previously-severed mineral interest.[241] This process, however, is performed by the surface estate holder with only limited oversight provided by the county recorder who records the documents.[242] If this process, according to the record, was followed exactly as prescribed by statute, then a third party can rely on it; but if there were errors or omissions, a third party must determine whether or not the record can be relied upon.

For example, consider the situation in which the abandonment affidavit states that service was made by newspaper publication but does not state that an attempt was first made to notify the severed mineral interest holder by certified mail. The DMA states that the surface owner should serve notice of the owner's intent to declare the mineral interest abandoned by certified mail to each severed mineral interest holder. [243] If service of notice cannot be completed to any holder, the owner shall publish notice in a local newspaper.[244] Ohio appellate courts have found that failure to attempt notice by certified mail is harmless error *if* at least one severed mineral estate holder

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[237] *Id.* § 5301.56(H)(1)(a).

[238] *Id.* § 5301.56(H)(1)(b).

[239] *Id.* § 5301.56(H)(2).

[240] *Id.*

[241] *See id.* § 5301.56(E)–(H).

[242] *See id.*

[243] *Id.* § 5301.56 (E)(1).

[244] *Id.*

responded within the sixty-day time period.[245] In *Dodd*, the surface owner failed to attempt service by certified mail, but one of the severed mineral estate holders responded with a claim to preserve.[246] The Seventh District Court of Appeals found that "failure to strictly comply with the notice requirement . . . amounts to harmless error" if the notice still reached the necessary parties."[247] Where the courts have not provided clarity is if the surface owner fails to attempt service by certified mail and none of the severed mineral interest holders respond within sixty days.[248] This situation gives each severed mineral interest holder a valid claim that could be used to invalidate the abandonment. A severed mineral interest holder may claim she did not receive notice and therefore could not respond within the sixty-day period because the surface estate holder did not attempt service by certified mail, as required by the DMA.[249] The statute of limitations on such a claim has not been established by the DMA or elsewhere.[250] Not only could such a claim lead to invalidation of the abandonment, but a third party or potential lessee examining the record in such a situation cannot rely on

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[245] *See* Dodd v. Croskey, 7th Dist. Harrison No.12 HA 6, 2013-Ohio-4257, ¶ 59, *appeal allowed*, 138 Ohio St. 3d 1432, 2014-Ohio-889, 4 N.E.3d 1050, *cross appeal allowed*, 140 Ohio St. 3d 1406, 2014-Ohio-3708, 14 N.E.3d 1052, *aff'd*, 143 Ohio St. 3d 293, 2015-Ohio-2362, 37 N.E.3d 147. *See also* Tribett v. Shepherd, 2014-Ohio-4320, 20 N.E.3d 365, ¶¶ 71–74 (7th Dist.), *appeal allowed*, 142 Ohio St. 3d 1447, 2015-Ohio-1591, 29 N.E.3d 1003.

[246] *Croskey*, 2013-Ohio-4257, ¶¶ 6, 22.

[247] *Id*. ¶ 59. *See Tribett*, 2014-Ohio-4320, at ¶¶ 71–74. The Supreme Court of Ohio accepted *Dodd*. *See also* Dodd v. Croskey, 143 Ohio St. 3d 293, 2015-Ohio-2362, 37 N.E.3d 147. The surface owner failed to attempt service by certified mail but the severed mineral estate holder responded with a claim to preserve. *See Croskey*, 2013-Ohio-4257, at ¶¶ 6, 22. The Supreme Court of Ohio accepted *Dodd* to determine whether the filing of a claim to preserve for a severed mineral interest, filed within sixty days after notice was published under the 2006 Amendment, was enough to preserve that interest. *See Croskey*, 2015-Ohio-2362, at ¶ 30. The Seventh District Court of Appeals found that "failure to strictly comply with the notice requirement . . . amounts to harmless error" if the notice still reached the necessary parties. *Croskey*, 2013-Ohio-4257, at ¶ 59. *See Tribett*, 2014-Ohio-4320, at ¶¶ 70–74.

[248] *But see Tribett*, 2014-Ohio-4320, at ¶¶ 72–73 (Ohio courts have decided that harmless error occurred when the claim was *only* filed timely under the statute or *only* attempted by certified mail but not when neither had occurred.).

[249] *But see id.* ¶ 73 (The severed mineral interest holder may not have been able to respond because she did not receive notice of the claim as required by the DMA.).

[250] David J. Wigham, *Applying the Statute of Limitations to Dormant Mineral Act Cases*, GAS & OIL MAG. (May 4, 2015, 8:53 AM), http://www.gasandoilmag.com /opinion/2015/05/04/applying-the-statute-of-limitations-to-dormant-mineral-act-cases.

the record to establish ownership of the severed mineral interest because of the risk of such a claim.[251]

Failure of the surface estate holder to follow the DMA's requirements exactly as proscribed leaves open the possibility that abandonment under the DMA would be declared invalid by a court.[252] A process performed by the surface estate holder with no judicial oversight, leaving open the possibility of invalidation at a later date, defeats the purpose of having a process that third parties can rely upon to establish ownership of severed mineral interests.[253] The Ohio General Assembly has the option to amend the law to provide additional clarity; otherwise, specific issues will continue to work their way through Ohio's courts.[254]

V. CONCLUSION

The Supreme Court of Ohio currently has multiple cases before it covering various issues regarding the DMA.[255] The overarching theme of these cases is whether the 1989 Statute can be applied and for what time periods, and how the statute is reconciled with the 2006 Amendment.[256] Based on Supreme Court of Ohio and appellate court precedent, a framework has been established with respect to applying the DMA.[257] Under the framework, the 1989 Statute is constitutional,[258] is automatic and self-executing,[259] and has a fixed look back period from March 22, 1969, to March 22, 1989, with a three-year grace period ending March 22, 1992.[260] The 2006 Amendment is not retroactive, does not alter any rights acquired

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[251] Porter Wright, *The Ohio Dormant Minerals Act: Part 4*, OIL & GAS L. REP. (Jan. 21, 2014), http://www.oilandgaslawreport.com/2014/01/21/the-ohio-dormant-minerals-act-part-4.

[252] *Id.*

[253] *See* Victor Ferreres Commella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEXAS L. REV. 1705, 1730 (2004) (discussing the ramifications of a process without judicial review).

[254] The Ohio General Assembly may amend *any* statute, including the DMA. *See* OHIO CONST. art. II, § 1.

[255] *Dormant Mineral Act (DMA) Cases Pending Before the Ohio Supreme Court*, BRICKER & ECKLER, http://bricker.com/documents/misc/PendingDMACases.pdf (last visited Feb. 21, 2016).

[256] *Id.*

[257] *See supra* Part III.

[258] *See supra* Part III.A.

[259] *See supra* Part III.C.

[260] *See supra* Part III.B.

under the 1989 Statute, and applies after June 30, 2006.[261] Under each, a specific reference to a prior severance is not sufficient to qualify as a savings event because that interest is not the subject of the title transaction, and the unrecorded expiration of an oil and gas lease does not qualify, but a recorded oil and gas lease *does* qualify as a savings event.[262] Under the 2006 Amendment, the filing of the claim to preserve within sixty days after notice was published does qualify as a savings event. [263]

Future precedent of the Supreme Court of Ohio could maintain the status quo, or it could significantly alter it. Until then, there will be room for nuanced decisions, such as whether a delay rental paid during the primary term of an oil and gas lease qualifies as a savings event. Solidifying the primary framework is the Supreme Court of Ohio's most important task. Opinions differ across the state—as evidenced by the number of cases before the Supreme Court of Ohio—about the application of various aspects of the DMA.[264] Regardless of what the Supreme Court of Ohio decides on any given issue, the overarching framework is more important than particular case resolutions. An established DMA framework will be invaluable to those who are involved in, and will benefit from, the development of Ohio's oil and natural gas resources.

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[261] See *supra* Part III.D.

[262] *See supra* Part III.E.

[263] *See supra* Part IV.C.

[264] *See supra* note 255 and accompanying text.