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Oklahoma's Absent Mineral Owners

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OKLAHOMA'S ABSENT MINERAL OWNERS

I. INTRODUCTION

When the owner of a mineral estate is absent and cannot be located by reasonable means, the development of his mineral estate would be difficult were it not for statutory provisions which allow the development of the mineral estate to proceed, despite the owner's absence. Oklahoma recently enacted three statutes[1] dealing with tax sale, abandonment, and escheat and their effect on severed mineral interests. These new statutes, together with existing statutes[2] and common law provisions,[3] work together to provide a framework which allows the development of the absent mineral owner's mineral estate. Development can take place in the mineral owner's absence, but the surface owner's interest in the mineral estate associated with his surface estate is not protected by either these new statutes or common law.

This comment examines the way in which the three recently enacted statutes interact with existing laws relating to absent owners of mineral interests in Oklahoma. The analysis of old and new laws demonstrates that a void in the statutory scheme exists and that Oklahoma needs additional statutory provisions to protect the interests of the surface owner and of the state in nonproducing, severed mineral estates.

II. EFFECTS OF THE ABSENT MINERAL OWNER

Absentee ownership, by one who cannot reasonably be located, has an effect upon other interested parties who have, or might want to acquire, a stake in the absentee owner's mineral estate. These interested parties might be cotenants or potential producers who want to develop the minerals. The state has an interest in the encouragement of petroleum production and in the marketability of real estate. A surface owner might want to buy some or all of the mineral interest associated with his surface estate, or he might want to contract with the absentee mineral owner to provide more protection for his surface estate when

1. OKLA. STAT. tit. 60, § 658.1 (Supp. 1979) (abandonment); *id.* tit. 68, § 24323.1 (Supp. 1979) (tax sales); *id.* tit. 84, § 271.1 (Supp. 1979) (escheat).

2. OKLA. STAT. tit. 16, §§ 71-81 (1971) (Marketable Record Title Act); *id.* tit. 52, § 87.1 (Supp. 1979) (forced pooling provisions); *id.* tit. 52, § 521 (1971) (Absent Mineral Owners Statute).

3. For discussion of adverse possession and abandonment of mineral estates under the common law, *see* notes 37-56 *infra* and accompanying text.

minerals are leased to a producer. These interests might be more easily met if the owners of property were available for personal negotiation. As demand for domestic petroleum development escalates, the problems associated with absentee owners of mineral interests tend to arise more frequently.

The worsening world-wide energy crisis[4] has led to increased exploration for oil and gas deposits within the United States.[5] Oklahoma, with its geological promise and history of petroleum production,[6] has been the target of intensified interest in mineral development.[7] Secondary and tertiary recovery methods such as fire flooding, water flooding, chemical recovery, steam injection, fracturing, and extraction from shale have become more economically attractive as the price of oil has risen.[8] The renewed exploration and production of petroleum has been accompanied by a resurgence in activities connected with leasing the rights to explore for oil and gas.[9]

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4. Ray, *Urgency of Our Energy Crisis*, 25 ROCKY MT. MIN. L. INST. lxxvii (1979).

5. Frizzell, *National Energy Forum 1978, Introduction*, 13 TULSA L.J. 661, 661 (1978); Nesbitt, *A Primer on Forced Pooling of Oil and Gas Interests in Oklahoma*, 50 OKLA. B.J. 648, 648 (1980).

6. Nesbitt, *supra* note 5, at 648; OKLAHOMA ENERGY ADVISORY COUNCIL, ENERGY IN OKLAHOMA 11 (1974).

7. OKLAHOMA ENERGY ADVISORY COUNCIL, *supra* note 6, at 9, 11, 12, 20; Outerbridge, *Missing and Unknown Mineral Owners*, 25 ROCKY MT. MIN. L. INST. 20-21 (1979).

8. NATIONAL ENERGY LAW & POLICY INSTITUTE, LEGAL ASPECTS OF ENHANCED OIL RECOVERY 10 (1977). There are some well established methods of enhanced oil recovery which have been used successfully for a long time in the United States: pressure maintenance, repressurization, and water flooding. As technology advances and the price of gas and oil rises the more exotic methods of enhanced oil and gas recovery become more attractive as viable production methods. There are several types of enhanced recovery methods: (1) Gas injection, often called repressuring or pressure maintenance, where dry gas is injected into the formation to maintain or enhance the pressure and cause oil to continue to flow into producing wells. As the price of gas goes up, so does the cost of using the gas injection method. (2) Water flooding has been used successfully for over a quarter of a century. Water is pumped into some wells in a formation, thus forcing the oil to flow toward producing wells in the same formation. The entire reservoir must be treated in order for this method to work. (3) Thermal methods operate by lowering the viscosity of the oil in a formation so it can flow to the producing wells. There are three basic types of thermal methods: cyclic steam which uses steam injected into the formation to heat the oil; steam flooding which injects steam into one well to force oil to flow to producing wells in the formation; and in-situ combustion or fire flooding which injects air or air and water into the formation so that it will react with the crude oil, producing heat which will lower the viscosity of the oil. (4) Carbon dioxide miscible flooding method injects a fluid which dissolves the oil and then water is injected to force the oil to a producing well. (5) Chemical flooding is the newest and least used method of enhanced recovery. It is a new concept in recovery but there are already three recognized methods of chemical flooding. Polymer flooding is essentially water flooding with a water soluble polymer. Surfactant polymer flooding method uses a polymer injection, followed by a slug or micellar fluid. Water injection follows which drives the oil to producing wells. Alkaline flooding uses an alkaline chemical such as sodium silicate added to water and operates just as a water flood method does.

9. Potential lessees are seeking out owners of mineral interests that have not been under lease for many years. The increasing price of petroleum products may make it commercially

The new interest in leasing has concomitantly heightened the necessity for locating the owners of mineral interests. For oil and gas exploration and development to occur, the potential mineral lessee must acquire the right to explore[10] from the owner of the mineral estate who must have quiet title to the property.[11] If the fee simple absolute[12] title to land were not divided and the mineral estate were not severed from the surface estate, the problem of the absent owner of severed, nonproducing mineral interests would not arise.[13] In many areas of the United States, fee ownership of land generally includes both the surface and the minerals.[14] In Oklahoma, however, mineral interests usu-

feasible to recover petroleum products from formations which were in the past too expensive to explore and to develop. OKLAHOMA ENERGY ADVISORY COUNCIL, *supra* note 6, at 16.

10. Kuntz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest*, 22ND ANN. INST. ON OIL & GAS L. & TAX 81, 84-91 (1971).

11. Outerbridge, *supra* note 7, at 10-3. *See also*, Note, *Abandonment of Mineral Rights*, 21 STAN. L. REV. 1227, 1232-33 (1969) (explaining the liability of the lessee for failing to obtain quiet title).

12. The fee simple absolute, in early property law, was the "largest quantum of interest that a land owner [could] have." J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 40 (2d ed. 1975). The twentieth century concept of fee simple includes certain aspects of fee ownership that never complicated the title to land under early property law. It was ancient doctrine that ownership in land extended upward to the ends of the universe, United States v. Causby, 328 U.S. 256, 269 (1946), and downward to the center of the earth. Hinman v. Pacific Air Transport, 84 F.2d 755, 757 (9th Cir. 1936). The doctrine arose at a time when the uses of air and space and the products found beneath the surface were practically and conceptually limited. The aspect of the doctrine which limited ownership to that which could be used and controlled has validity today, but has been complicated by man's increased use of the air above and the earth beneath the surface. *Id.* The surface owner of land in the twentieth century may own the fee simple to his land, or he may own only the surface and find himself forced to share the other parts of the divided fee with other owners.

13. Tax sale procedures provide a method for allowing land owned by a person who is permanently absent, who cannot be located, and whose taxes are delinquent, to be sold for nonpayment of taxes and to re-enter the stream of commerce. When the mineral estate is not severed from the surface estate, the entire estate is subject to the tax sale procedure for default in payment of taxes. OKLA. STAT. tit. 68, § 24323.1 (Supp. 1979). A severed, producing mineral interest is itself subject to taxation separate and apart from the surface of the land. OKLA. STAT. tit. 68, § 1001 (1966 & Supp. 1979). The tax is assessed at the wellhead and is paid whether the owner is absent or not. Consequently, the producing mineral interest is not subject to a tax sale for failure to pay taxes. But in Oklahoma, the nonproducing mineral estate, whether severed or not, is not subject to taxation apart from the surface estate. OKLA. STAT. tit. 68, § 2419 (1971). Therefore, it cannot be subject to a tax sale for nonpayment of taxes as no taxes are ever assessed on the nonproducing mineral estate as a separate entity.

14. Note, *Severed Mineral Interests, A Problem Without a Solution?* 46 N.D. L. REV. 451 (1970) [hereinafter cited as *Severed Mineral Interests*]. When the ownership of land is an undivided fee simple absolute, there is no problem in determining the ownership of the various components of the property; the air, the mineral, and the water rights are all tied together in one unit, the fee simple absolute. *Id.*

"A fee simple absolute is an estate limited absolutely to a man and his heirs and assigns forever without limitation or condition." BLACK'S LAW DICTIONARY 742 (rev. 4th ed. 1968) (citation omitted).

ally have long been severed.[15] In turn, the mineral estate itself might well be divided into many different types of mineral interests.[16]

Heightened oil and gas exploration activity is also resulting in an increase in the speculative value of unproven mineral interests. The current owners of these interests, no matter how small a fraction they hold, are reluctant to sell when they might soon be able to reap a bonanza. As a result, mineral interests are passing from owner to owner through testate and intestate succession. With each succession, the mineral interest tends to become more and more fragmented.[17] The resulting miniscule mineral interests are a stumbling block to title examiners, to cotenants or potential lessees seeking to develop the mineral interests, as well as to potential purchasers.[18] Title problems may make initial exploration uneconomical to the average mineral lessee who might want to lease from owners of these fragmented estates.[19]

15. H. WILLIAMS & C. MEYERS, OIL & GAS LAW § 224.2 (1975); Kuntz, *Adverse Possession of Severed Mineral Interests*, 5 ROCKY MT. MIN. L. INST. 409, 424 (1960).

16. The mineral owner can create by grant, reservation, or exception, WILLIAMS & MEYERS, *supra* note 15, at §§ 202.2, 301, three types of interests in his fee simple mineral estate: leasehold, mineral interest, and royalty. *Id.* at §§ 202.1-202.3. The interest may be a separate interest or an undivided co-interest in the minerals. *Id.* at §§ 501-510. The mineral estate owner can retain a royalty interest in the proceeds of mineral production, *id.* at § 202.3; he can create an overriding royalty interest, *id.* at § 418; he can lease, sell, devise, or assign his mineral interest horizontally, Note, *Mines and Minerals—Oil and Gas—What Constitutes Adverse Possession of Severed Mineral Interests by Surface Possessor?*, 17 ALA. L. REV. 126, 126 (1964) [hereinafter cited as *Adverse Possession by Surface Possessor*], or by vertical level or stratum, WILLIAMS & MEYERS, *supra* note 15, at § 203.4; or he can effect any combination of the above. *Id.* at § 301. This scheme becomes overburdened with complexity because each owner of each mineral interest generally has the right to assign his interest to any number of other persons, even if he retains a degree of ownership for himself. Kuntz, *Old and New Solution, supra* note 10, at 82; *Severed Mineral Interests, supra* note 14, at 451.

17. Kuntz, *Old and New Solutions, supra* note 10, at 82.

> Family settlements are made and wills are drafted with an understandable lack of concern over the effect upon a mineral interest that is not productive. If the mineral interest has been severed for very many years, an incredible degree of further fragmentation can occur as the result of intestate succession.

Id. An example of the situation the title examiner confronts when he seeks to trace title to such land or mineral interests can be seen in Allotment number 135 on the Crow Creek Reservation. At last count this 320 acre plot of land had 444 owners and the 1966 heirs' fraction of the res was 15,925/1,224,440,064. Francisco, *Land is Still the Issue*, 10 TULSA L.J. 340, 356 n.38 (1975). Another example is found in a thirty year old Oklahoma case where four plaintiffs owned the following fractions of an undivided mineral interest in a 160 acre plot: 459/6960, 93/1740, 93/1740, and 9/87. Colonial Royalties Co. v. Hines, 202 Okla. 660, 216 P.2d 958 (1948).

18. Contos v. Herbst, 278 N.W.2d 732, 741 (Minn. 1979). "[A] large number of mineral interests were severed in the late nineteenth century and early twentieth century, [and the fact] that a large number of the severed mineral interests are fractionalized mineral interests is time consuming and often hinders exploration and development of minerals." *Id.*

19. Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 LAND & WATER L. REV. 73, 73 (1972); Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEX. L. REV. 129, 143 (1964); *Severed Mineral Interests, supra* note 14, at 451; *Abandonment of Mineral Rights, supra* note 11, at 1233.

The state's interest in the marketability of real property, more specifically undeveloped mineral estates, could be more readily served were such property held by an active owner. Procedural legislation could solve the problem of the absent mineral owner and his nonproducing, severed mineral interest through administrative means and avoid the clogging of courts with costly and lengthy law suits.

If all owners of the mineral estate were active, leasing for development of the mineral estate would be less burdensome. Without an active party capable of contracting, the other cotenants and potential lessees must resort to the statutory provisions[20] for leasing and pooling the interests of the absent mineral owner in order to develop the minerals. This is an additional burden upon the cotenants, or upon their lessees.

The surface owner would like to reunite the mineral and surface estates to better control the use of the surface and protect his substantial investment in the land. If he is unable to reunite the entire fee, he could gain better control over the use of his land if he owned some of the minerals. He could enter into a lease with the mineral developer to protect both his surface estate and to allow the development of the mineral estate. Absent this small degree of ownership in the minerals, the surface owner could contract with one of the other mineral estate owners and require the mineral owner to protect the surface owner's interest whenever he leased his mineral estate. If the mineral owner is an absentee owner who cannot be located by reasonable means, the surface owner does not have the option to buy the entire mineral estate, a portion of the mineral estate, or even to contract to protect his surface estate. The surface owner who is unable to obtain any of the options above cannot control the oil and gas lessee who enters upon his land to explore. The surface owner in Oklahoma has only those protections afforded by the regulations of the Corporation Commission,[21] common law,[22] or those written into the lease itself. Absent a contract with the surface owner, there is little incentive for either owners of severed mineral interests or oil and gas lessees to write leases which give added protection to the surface owner.

If the surface owner had title to even a small portion of the mineral estate, or a contract with a mineral owner, he could require that an

20. OKLA. STAT. tit. 52, § 87.1 (Supp. 1979); *id.* at § 521 (1971).
21. *Id.* at tit. 17, §§ 51-53 (1971).
22. WILLIAMS & MEYERS, *supra* note 15, at § 217.

oil and gas lease be written to protect his interest in the surface estate.[23] He could specify that pipelines be placed below plow depth and provide that specific damages be paid to him for injury to crops, livestock, trees, and structures. He could control the manner and route of ingress and egress of the mineral lessee. He could bargain for free use of gas for heating his dwelling, or even require the lessee to leave the pipe in any dry hole so that he could convert the well to a water well for his own use. He could restrict the use of cattle ponds, require the lessee to fence the drilling and pumping area and demand that sludge pits be fenced to protect his cattle from injury. Absent a contract with the mineral lessee, the surface owner with no interest in the mineral estate is without power to bargain, contract, or enter into a lease on his own behalf.[24] Frequently, the surface owner has extensive investments in the operations on the surface estate. His main concern is the protection of these interests.

Repeated attempts have been made to resolve the problems inherent in fragmented mineral interests and absentee ownership.[25] Statu-

23. On the other hand, should the co-owner of an undivided mineral interest or the owner of a separate tract within a spacing unit seek to block the development of the mineral estate, the potential lessee may resort to forced pooling statutes. OKLA. STAT. tit. 52, § 87.1 (Supp. 1979). These will allow him to develop the minerals despite the objections of the recalcitrant mineral owner. The pooling provisions allow the non-consenting mineral owner a choice between paying his proportionate share of the cost of the well and receiving the same share of the working interest, or receiving a bonus instead of the right to participate in the working interest in the well. Naturally, the mineral owner must know what costs will be involved if he elects to participate in the well versus the amount of bonus he will receive should he elect not to participate. *See generally* Nesbitt, *supra* note 5.

24. WILLIAMS & MEYERS, *supra* note 15, at § 218.

25. Forced pooling statutes allow development to take place without the absent owner if necessary. The surface and mineral estates continue to remain permanently severed providing no relief to the surface owner. *See, e.g.*, OKLA. STAT. tit. 52, § 87.1 (Supp. 1979).

This is especially vexing in Oklahoma which has historically been the scene of active mineral speculation. Outerbridge, *supra* note 7, at 20-2. Oklahoma does not allow abandonment of non-producing mineral estates, Noble v. Kahn, 206 Okla. 13, 16, 240 P.2d 757, 759 (1952); Deruy v. Noah, 199 Okla. 230, 233, 185 P.2d 189, 191 (1947); *Abandonment of Mineral Rights, supra* note 11. Except in the rarest of instances, the surface owner has little opportunity to reunite the surface and the mineral interest. The surface owner, therefore, is prevented from controlling the exploration and development of the minerals on his land and the use of the surface by the mineral lessee. Unfortunately for many Oklahoma landowners, the eventual ownership of a fee simple absolute estate in surface and subsurface is an impossible dream.

Exploration for oil and gas requires that the mineral lessees gain access to the working interest in the mineral estate. OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1979):

> For the purpose of this section, the owner, or owners, of oil and gas rights in and under an unleased tract of land shall be regarded as a lessee to the extent of a seven-eighths (⅞) interest in and to said rights and a lessor to the extent of the remaining one-eighth (⅛) interest therein.

Id. The seven-eighths interest referred to in § 87.1(e) is the working interest. The unavailable mineral owner poses an obstacle to acquiring the right to explore and develop mineral interests. Outerbridge, *supra* note 7, at 20-2. This places a great financial and administrative burden upon

tory solutions have been attempted with some success.[26] Nevertheless, most statutory provisions have not been able to stem the tide of mushrooming mineral interest holders and solve the problems created by the increasing number of absentee owners of fragmented interests. Moreover, this legislation has focused on the interests of the mineral owner, the developer, and the state, while ignoring the interests of the surface owner.

The Oklahoma legislature has struck a new balance among the interests and rights of these divergent groups. Through new statutes[27] the legislature has recognized the need for better access to the mineral estates, more promotion of marketability of real estate, greater encouragement of exploration for oil and gas, protection of the rights of mineral estate owners who do not wish to abandon their mineral estate and who do not wish to have their rights extinguished by operation of law, and recognition of the interests of the surface owner who wishes to have more control over the activities of mineral lessees who come on his land. The balance has proved a difficult task. To reach a fairer equilibrium there is a need for additional legislation to protect the interests of the surface owner, while continuing to maintain protection for the interests of the absentee mineral owner, the other mineral owners, the state, and the mineral developer.

III. THE COMMON LAW, THE EXISTING STATUTES, AND THE NEW STATUTES

Oklahoma has recently enacted three statutes, two of which deal with abandonment[28] and escheat[29] of producing mineral interests. The third statute[30] exempts severed,[31] nonproducing mineral interests not owned by the surface owner, from the effects of a tax sale of the surface estate. Three existing statutes may also have a direct effect, or actually

the lessee to find the holder of the outstanding mineral interest. *Abandonment of Mineral Rights, supra* note 11, at 1232-33; Kuntz, *Old and New Solutions, supra* note 10, at 81.

26. The Absent Mineral Owners Statute, OKLA. STAT. tit. 52, § 521 (1971), provides a remedy for the potential lessee of mineral interests owned by absentee mineral owners and the force pooling statute, OKLA. STAT. tit. 52, § 87.1 (Supp. 1979), provides a remedy for the potential lessee where a cotenant of a fragmented mineral estate refuses to enter into a lease.

27. OKLA. STAT. tit. 60 § 658.1 (Supp. 1979); *id.* tit. 84, § 271.1 (Supp. 1979).

28. *Id.* tit. 60, § 658.1 (Supp. 1979).

29. *Id.* tit. 84, § 271.1 (Supp. 1979).

30. *Id.* tit. 68, § 24323.1 (Supp. 1979).

31. H. WILLIAMS & C. MEYERS, OIL & GAS TERMS 227 (1954). "An expense-bearing interest in the minerals in, on and under a given tract of land owned by a person other than the surface owner." *Id.*

may fail to have any effect, on the mineral interests owned by absent owners: the absent mineral owners statute,[32] the forced pooling statute,[33] and the Marketable Record Title Act.[34] The common law provisions for adverse possession and abandonment also may affect the estate of the absent mineral owner.

Together, the common law, the existing statutes, and the new statutes provide a framework within which mineral development can take place and within which title to some mineral interests can be quieted. There is no provision, however, for a change in the status of the title to severed, nonproducing mineral interests held by absentee owners. In addition, these provisions afford no protection for the surface owner who seeks to protect his surface investment, but who cannot gain access to the mineral estate through purchase or contractual agreement because the mineral owner is permanently absent.

A. *Common Law Provisions*

Adverse possession and abandonment are two common law theories which may have a direct effect on the estate of the severed mineral interest held by an absentee owner. The operation of these two theories may be modified by the application of nonownership versus ownership in place theories[35] and the realty versus personalty distinctions.[36] Re-

32. OKLA. STAT. tit. 52, § 521 (1971).

33. *Id.* § 87.1 (Supp. 1979).

34. *Id.* tit. 16, §§ 71-81 (1971).

35. There are two prevalent theories of ownership in oil and gas, and these affect the legal treatment mineral interests receive in the various states. Under the non-ownership theory the one who seeks to capture the oil has the right to go onto the land to capture the fugitive oil and gas beneath it. Under the ownership in place theory, the mineral owner has title to the oil and gas in place in the same way that he has title to solid minerals that are not subject to migration. WILLIAMS & MEYERS, *supra* note 15, at § 203.1-203.3. Oklahoma adheres to a "qualified ownership theory" which draws its distinction from earlier days of mineral exploration and production. *See* Emery, *Real Property Mineral Interests in Oklahoma*, 24 OKLA. L. REV. 337, 338 (1971). At that time the qualified ownership theory imposed upon each landowner an obligation not to damage the common formation and not to waste the oil and gas in the formation. WILLIAMS & MEYERS, *supra* note 15, at § 203.2. Along with these duties came the right to unrestricted production from the common reservoir, even if oil and gas were drained from land not owned by the producer. This concept of correlative rights is now accepted in non-ownership states. *Id.* The primary legal significance of the ownership theories is their impact upon the possessory classification of mineral royalty, and leasehold interests as corporeal or incorporeal. The distinction between these two classifications becomes vitally important when there is a question relating to abandonment or adverse possession of mineral interests. Outerbridge, *supra* note 7, at 20-7, 20-8; *Adverse Possession by Surface Possessor*, *supra* note 16, at 127.

36. Courts have made yet another two part distinction between mineral interests—realty and personalty. In Oklahoma, the mineral estate is characterized as an interest in real property, Cornelius v. Jackson, 201 Okla. 667, 209 P.2d 166, (1948), *appeal dismissed per curiam* 335 U.S. 906 (1949); Emery, *supra* note 35, at 338. The oil and gas produced is characterized as personalty.

cent case law has suggested that the prevailing common law theories on abandonment of mineral interests should be modified.[37]

1. Adverse Possession

If the mineral estate and the surface estate are still united when the adverse possessor takes hostile and actual possession of the land, claiming both surface and minerals, the mineral title will be quieted along with the surface title when it is perfected by the adverse possessor.[38] When the mineral estate is severed prior to the entry of the adverse possessor upon the surface, however, adverse possession of the surface does not extend to the minerals[39] unless the adverse possessor actually produces the minerals and thus acquires title to them by prescription.[40] After entry by an adverse possessor with claim of title to the surface and unsevered minerals, an attempt by the true owner to convey the mineral interests will have no effect upon the running of the statute of limitations as to the adverse possessor or his successor in interest.[41] Furthermore, if the adverse possessor grants or leases mineral rights after he has entered land claiming a unified surface and mineral estate, the grantee of either minerals or surface will be allowed to tack[42] his holding time to that of the adverse possessor.[43] Prior to October 1,

Cornelius v. Jackson, 201 Okla. 667, 209 P.2d 166, (1948), *appeal dismissed per curiam*, 335 U.S. 906 (1949); Emery, *supra* note 35, at 339; WILLIAMS & MEYERS, *supra* note 15, at § 212.

37. Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 710, 69 Cal. Rptr. 612 (1968).

38. Hunsley v. Valter, 12 Ill. 2d 608, 147 N.E.2d 356 (1958); Kuntz, *Adverse Possession, supra* note 15, at 411; Mosburg, Jr., *Statutes of Limitation and Title Examination*, 13 OKLA. L. REV. 125, 154 (1960); *Adverse Possession by Surface Possessor, supra* note 16, at 127.

39. Mosburg, *supra* note 38, at 155; Outerbridge, *supra* note 7, at 20-9.

40. Walker v. Hoffman, 405 P.2d 57, 57 (Okla. 1965); Churchill v. Muegge, 323 P.2d 339 (Okla. 1958); BLACK'S, *supra* note 14, at 1346: "Prescription: the name given to a mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment." *Id.*; WILLIAMS & MEYERS, *supra* note 15, at §§ 224, 224.1; Kuntz, *Adverse Possession, supra* note 15, at 420; Mosburg, *supra* note 38, at 155; Polston, *supra* note 19, at 74; Smith, *supra* note 19, at 161; *Severed Mineral Interests, supra* note 14, at 454.

41. Kuntz, *Adverse Possession, supra* note 15, at 412.

42. BLACK'S, *supra* note 14, at 1623: "Tack: To annex some junior lien to a first lien, thereby acquiring priority over an intermediate one." *Id.*

43. Stern v. Franklin, 288 P.2d 412 (Okla. 1958); Tucker v. McCrory, 266 P.2d 433 (Okla. 1954); Kuntz, *Adverse Possession, supra* note 15, at 413; Mosburg, *supra* note 38, at 155. Such time is not tacked where the surface owner has protected himself against losing his minerals through adverse possession by transferring his minerals to a corporation. This method has been used by owners of numerous tracts of land to successfully protect themselves against inadvertently allowing adverse possession of their minerals. The owners simply sever the minerals from the surface estate and convey them to a corporation or *alter ego*. Sautbine v. Keller, 423 P.2d 447 (Okla. 1966). This prevents a surface possessor from creating a valid title to the mineral estate, though he might be successful in adversely possessing the surface estate.

The Oklahoma Supreme Court has held that title to mineral interests could not be acquired by adverse possession when the adverse possessor made no claim that he had ever tried to explore

1979, when a purchaser in Oklahoma bought a tract of land in a tax sale and the deed was subsequently determined to be void,[44] the purchaser could perfect his title to both the surface and the minerals by adverse possession.[45] The current law still provides this remedy, but the purchaser of the void tax deed may adversely possess only those minerals which were owned by the surface owner and which purportedly passed with the void tax deed. The remaining minerals are unaffected by the tax deed whether valid or void.[46]

Adverse possession is one method available at common law to eliminate a dormant mineral interest. The requirements, however, that the minerals be adversely possessed for the requisite time period that they be actually reduced to possession by the adverse possessor are stringent requirements indeed. Consequently, adverse possession as a method for eliminating dormant mineral interests is highly impractical, especially in areas where the mineral interests are historically found severed from the surface estate.

2. Abandonment

A second common law vehicle for quieting title to property is the theory of abandonment. It is a firmly established principle of common law that title to property can be abandoned,[47] except that a perfect legal

for or take minerals or even authorized anyone else to do so. Deruy v. Noah, 199 Okla. 230, 232, 185 P.2d 189, 191 (1947). The Oklahoma courts have routinely held that when the ownership of the mineral estate has been severed from that of the surface estate, in order to perfect title by adverse possession it is necessary to develop and produce the minerals for the requisite period of time. Hassell v. Texaco, 372 P.2d 233 (Okla. 1962); Churchill v. Muegge, 323 P.2d 339 (Okla. 1958); May v. Archer, 302 P.2d 768 (Okla. 1956); Barker v. Campbell-Ratcliff Land Co., 64 Okla. 249, 167 P. 468 (1917); Mosburg, *supra* note 38, at 155-59; Polston, *supra* note 19, at 74.

Actual domestic use of natural gas from abandoned wells on the land for seventeen years was held by the Oklahoma court not to be a perfection of title by adverse possession or prescription. Hassell v. Texaco, Inc., 372 P.2d 233, 235 (Okla. 1962). The court said the use of the gas for domestic purposes was not clear and positive proof of a claim of ownership but rather was an inference. *Id.*

One reason to protect the mineral interest owner from adverse possession is because he has no cause of action against one who adversely enters the surface. Mosburg, *supra* note 38, at 159. Mineral estate owners are presumed to be in possession of the minerals in the absence of actual possession by another. Kuntz, *Adverse Possession, supra* note 15, at 421. Mineral estate owners are not expected to be alert to the activities on the surface of the land. WILLIAMS & MEYERS, *supra* note 15, at § 224.1. On the other hand, the public has a vested interest in the ready marketability of land.

44. *See* Kenyan, *Status of Oklahoma Tax Titles*, 8 OKLA. L. REV. 414, 445 (1955).

45. Walker v. Hoffman, 405 P.2d 57, 61 (Okla. 1965); Crane v. Taylor, 261 P.2d 587 (Okla. 1953); Kuntz, *Adverse Possession, supra* note 15, at 433.

46. OKLA. STAT. tit. 68, § 24323.1 (Supp. 1979).

47. Note, *Abandonment of Mineral Rights*, 21 STAN. L. REV. 1227 (1969).

title to a corporeal hereditament cannot be abandoned.[48] Real property must always have an owner seized of title. Abandonment of the title would cause a void in the chain of title, and this is impermissible.[49] Consequently, the doctrine of abandonment has no application to a fee simple estate.[50] The 1968 California Supreme Court decision in *Gerhard v. Stephens* held that since the mineral estate would revert back to the surface estate were the mineral estate to be abandoned, there would be no void in the chain of title if the mineral estate were to be abandoned.[51] Case law before *Gerhard* seemed to support the common law position that an estate in real property, having perpetual duration, could not be abandoned.[52] Consequently, because fee simple mineral estates are considered real property, they have not been subject to abandonment, until the *Gerhard* decision. The court in *Gerhard* determined that the real versus personal property distinction, predicated upon the duration of the estate, was too broad. They felt the distinction should be based upon the genus, rather than upon the duration of a property interest.[53] *Gerhard* was the first case to hold that a mineral estate with perpetual duration could be abandoned.

Once it was determined that the mineral estate could be abandoned, the *Gerhard* court required that the abandonment be established by evidence of intent and nonuse.[54] The two-part test in *Gerhard* provides a method to establish abandonment and allow titles to be

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> Interests in land, or hereditaments, have long been categorized by the common law for certain purposes as either "corporeal" or "incorporeal." For example, fee simple ownership of a plot of land is considered ownership of a corporeal hereditament; the owner is deemed to "own" a corporeal substance—the land. On the other hand, an easement is an example of an incorporeal hereditament. The holder of an easement does not "own" any tangible substance; rather, he "owns" the right to use portions of another's land for passage. . . .
>
> While incorporeal hereditaments, such as easements, licenses, mining claims, and franchises, have uniformly been held subject to abandonment, a firmly established common law rule provides that a corporeal interest in land cannot be abandoned. Underlying this rule is the seldom-articulated but ancient policy disfavoring voids or gaps in the chain of title to land.

Id. at 1227-28.

48. Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 710, 69 Cal. Rptr. 612 (1968); Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978); *Abandonment of Mineral Rights, supra* note 11, at 1227; 1 C.J.S. *Abandonment* §§ 3, 7 (1936 & Supp. 1980).

49. *Abandonment of Mineral Rights, supra* note 11, at 1228; 1 C.J.S. *Abandonment* §§ 3, 7 (1936 & Supp. 1980).

50. Sandy River Coal Co. v. Champion Bridge Co., 243 Ky. 424, 48 S.W.2d 1062 (Ct. App. 1932).

51. Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 711, 69 Cal. Rptr. 612 (1968).

52. Sandy River Coal Co. v. Champion Bridge Co., 243 Ky. 424 48 S.W.2d 1062 (Ct. App. 1931).

53. Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 710, 69 Cal. Rptr. 612 (1968).

54. *Id.*

cleared, thus making an unencumbered ownership available to the next title holder.[55] The *Gerhard* holding reflects the state's interest in the marketability of real property. As the court in *Gerhard* pointed out:

> The abandonment concept, when applied, frequently serves the very useful purpose of clearing title to land of mineral interests of long standing, the existence of which may impede exploration or development of the premises by reason of difficulty of ascertainment of present owners or of difficulty of obtaining the joinder of such owners.[56]

The holding in *Gerhard* would narrow the common law provision that real estate, having a fee simple duration, could not be abandoned. It would allow abandonment of real property, classified as incorporeal, and having a fee simple duration. This departure from the traditional common law would allow severed mineral interests, whether producing or nonproducing, to revert back to the surface estate. This theory of abandonment, as applied by the *Gerhard* court, could both promote the interests of the state in marketability of real estate and enhance the interest of the surface owner in reuniting the severed fee simple title to his land.

B. *The Existing Law*

There are three Oklahoma statutes which directly affect, or expressly fail to affect, absentee owned severed mineral interests. The Marketable Record Title Act[57] could be a vehicle to quiet outstanding mineral interests and enhance marketability of property where the owner of severed mineral interests cannot be found, but in Oklahoma mineral interests are specifically exempted from the effects of the Marketable Record Title Act.[58] The Absent Mineral Owners Statute[59] allows mineral developers to gain access to the working interest in the minerals and encourages development of oil and gas even though the owner of the mineral interest cannot be located. Through the use of force pooling statutes,[60] absent or recalcitrant mineral owners can be forced to join with others so that well spacing and drilling units can be

55. *Id.*
56. *Id.* at 711 (quoting WILLIAMS & MEYERS, *supra* note 15, at § 210.1). *See Abandonment of Mineral Rights*, *supra* note 11, at 1228.
57. OKLA. STAT. tit. 16, §§ 71-80 (1971).
58. *Id.* § 76.
59. *Id.* tit. 52, § 521 (1971).
60. *Id.* § 87.1 (Supp. 1979).

developed. This allows the mineral developer to explore and produce oil and gas even when the owner of the mineral estate cannot be found.

These statutes protect the interests of the developer, the mineral owner, and the state. But the interest of the surface owner in controlling the surface use of his land is still unprotected. These statutes provide no way for the surface owner to gain access to the mineral estate. The surface owner gains no protection from the existing Oklahoma statutes.

1. Marketable Record Title Act

The purposes of the Marketable Record Title Act[61] in Oklahoma are to simplify land title transactions, to give a usable definition to the concept of marketability, and to make the record title marketable as against the stale claims and defects that arose prior to the root of title.[62] Root of title in the state is an instrument that has been of record for at least thirty years.[63] The Oklahoma legislature specifically exempted mineral and royalty interests from the effects of the Marketable Record Title Act.[64] This precludes the use of the Act for quieting title to stale mineral claims even though the owners are absent and their interests appear to have been abandoned for at least thirty years.

2. Absent Mineral Owners Statute

The Absent Mineral Owners Statute,[65] enacted in 1968, forms an integral part of the current legislative scheme for dealing with absent mineral owners. The producer of oil and gas is authorized to lease mineral interests from minority owners who cannot be located and is

61. *Id.* tit. 16, §§ 71-80 (1971).

62. Hicks, *The Oklahoma Marketable Record Title Act*, 9 TULSA L.J. 68, 72-73 (1968); *But see* Polston, *supra* note 19, at 75. If land has been conveyed during the statutory period, and the conveyance was made subject to the outstanding mineral interests shown on the record, marketable record title legislation will not affect them. Therefore, the marketable title statutes do not solve the real difficulty encountered in mineral interest marketability. Such statutes reach only stale claims while mineral claims usually stay fresh because conveyances of the surface will often except outstanding mineral interests whether or not there is an active mineral owner present. The surface owner generally will seek to convey only that which he owns and therefore, the minerals in many transactions would be excepted from the conveyance. When such interests are excepted from the conveyance, they remain part of the record of title and thus the statute does not affect them. Some way must be provided to eliminate dormant mineral interests regardless of the state of the record title.

63. OKLA. STAT. tit. 16, § 74 (1971).

64. *Id.* § 76; Barnett, *Marketable Title Act—Panacea or Pandemonium?* CORNELL L. REV. 45, 78 (1967); Hicks, *supra* note 62, at 97.

65. OKLA. STAT. tit. 52, § 521 (1971).

protected against liability for bad faith trespass to the mineral estate. Exploration for oil and gas is thereby encouraged when the owner of the mineral estate cannot be located.[66] The interest of the missing mineral estate owner is protected by the court.[67]

> In an action filed by any person, firm or corporation owning an interest in the minerals in any tract or tracts of land in the State of Oklahoma or owning an oil and gas lease on such an interest wherein it is made to appear that the defendant or defendants in such action own or appear to own in the aggregate a minority interest in said minerals thereunder but that the residence, business address or whereabouts of one (1) or more of the defendants cannot be ascertained, the District Court of the county wherein such tract or tracts of land are situated shall have the power to appoint a receiver over the mineral interest of such defendants whose residence, business, or whereabouts are unknown, upon compliance with the procedure set forth in Section 2 hereof.[68]

The Absent Mineral Owners Statute[69] provides protection for the developer who wishes to explore and develop a mineral tract whose owner cannot be located. It protects the interest of the mineral owner who does not want to lose his mineral property rights simply because he cannot be located at the time the lessee wishes to begin development of the tract. The statute also protects the state's interest in enhancing oil and gas development within the state. The surface owner, however, gains no protection from this statute. He cannot even appeal to a live mineral owner to protect him by entering into a restrictive lease which could provide extra protection for the surface estate. Because the mineral owner is absent and cannot be located his mineral estate can be developed with minimum restrictions through the use of the Absent Mineral Owners Statute.[70]

3. Force Pooling Statute

The force pooling provisions of the Oklahoma statutes[71] provide yet another way to reach the mineral interest of the absent owner while

66. Outerbridge, *supra* note 7, at 20-3; *Abandonment of Mineral Rights*, *supra* note 11, at 1232.
67. OKLA. STAT. tit. 52, § 521 (1971).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* § 87.1 (Supp. 1979).

protecting the interests of other parties such as the state and the mineral lessee. By using a force pooling statute[72] Oklahoma oil and gas producers can force pool absent and nonconsenting mineral owners and acquire authority to develop a tract.[73] This provision provides the missing or recalcitrant mineral owner's "permission" to establish a well spacing or drilling unit.[74]

Generally, the owners of undivided interests in the mineral estate are cotenants and each may exercise his right to lease, explore or drill for gas and oil without the consent of the other cotenants.[75] The cotenant who does exercise his right to develop the mineral estate is liable to the other cotenants for waste and for their portion of the proceeds, less operating costs.[76] The nonconsenting cotenants are not, however, liable for costs in drilling a dry hole.[77] One of the major purposes of forced pooling is to equalize the risk of loss by requiring nonconsenting cotenants to decide in advance "whether they will share in both the benefits and the risks of the oil and gas exploration."[78]

The state can operate as a custodian for any bonus or royalty that might accrue to the force pooled and missing mineral owner.[79] This solves the immediate problem of leasing for oil and gas exploration when the owner of an outstanding mineral interest is unavailable. It does not solve the problem of the absent mineral owner on a permanent basis. If the mineral tract which is force pooled under this statutory provision becomes a producing mineral interest, the newly enacted statutes which provide for abandonment[80] and escheat[81] can act upon the mineral interest and quiet the title so that ultimately an active owner will be recognized. But if the force pooled mineral interest turns out to be nonproducing, the lease will expire and the working interest will revert back to the original mineral owner who is absent and unavailable to negotiate lease arrangements. The situation then becomes the same as it was before the force pooling statute was used. The force

72. *Id.*
73. Nesbitt, *supra* note 5, at 648.
74. *Id.* at 656; OKLA. STAT. tit. 52, § 521 (1971).
75. Nesbitt, *supra* note 5, at 648; WILLIAMS & MEYERS, *supra* note 15, at § 502. *See also* Wallace, *Partition of Mineral Interests*, NINTH ANNUAL INSTITUTE ON OIL & GAS TAXATION 211 (1958).
76. Earp v. Mid-Continent Petrol. Corp., 167 Okla. 86, 90, 27 P.2d 855, 859 (1933).
77. Nesbitt, *supra* note 5, at 648; WILLIAMS & MEYERS, *supra* note 15, at 259.
78. Nesbitt, *supra* note 5, at 648.
79. OKLA. STAT. tit. 52, § 521 (1971).
80. *Id.* tit. 60, § 658.1 (Supp. 1979).
81. *Id.* tit. 84, § 271.1 (Supp. 1979).

pooling statute provides no help in solving the problem of dormant mineral interests when the leased mineral estate turns out to be a nonproducing one.

C. *The New Statutes*

1. Tax Sales

Prior to October 1, 1979, there were three types of tax sales[82] in Oklahoma which could affect severed mineral interests:[83] (1) original sale and resulting certificate deed,[84] (2) resale and resulting resale deed,[85] and (3) commissioners' sale and resulting commissioners' deed.[86] These statutes are still in effect, but the new tax sale statute[87] exempts severed mineral interests from the effects of a surface interest tax sale. Now the severed mineral interest is not generally affected by the tax sale of the surface estate. Previously when a tract of land was sold and a valid tax deed issued in any of the three types of tax sales,[88] the title to all nonproducing mineral interests in the land, whether severed or not, passed to the purchaser of the tax deed in fee simple.[89] This method successfully protected the state's interests in collecting taxes and promoted the policy of making land readily marketable.

Although it was required that notice be given to both mineral and surface owners before a certificate deed was issued, if personal notice could not be obtained, notice by publication would suffice.[90] The pur-

82. (1) Original sale and resulting certificate deed: The original sale is a lien to the county which may be assigned to any individual offering to pay the amount due. This purchaser receives a certificate of purchase. If there is no redemption within two years, the certificate holder becomes entitled to a certificate deed to the property. (2) Resale and resale deed: If the county still holds the lien on the property two years after the original sale, the county must conduct a resale which is open to all bidders. The successful bidder at the resale receives a resale deed to the property. (3) Commissioners' sale and resulting commissioners' deed: If no one bids the required sum due at the resale, the resale deed is issued to the Board of County Commissioners. Thereafter any sale is initiated by an interested bidder. When a person wants to bid on land, title to which is held by the Board of County Commissioners, the amount of his bid is published and if he is the successful bidder at the ensuing commissioners' sale, a commissioners' deed will be issued to him. Legg, *Tax Sales and the Constitution*, 20 OKLA. L. REV. 365, 366-67 (1967).

83. *Id.* at 366. Consideration of the reliability of the tax deed is outside the scope of this article. *See generally*, Kenyan, *supra* note 44.

84. OKLA. STAT. tit. 68, § 24312 (Supp. 1979); *id.* §§ 24311, 24313-24328 (1971).

85. *Id.* § 24331 (Supp. 1979); *id.* §§ 24329, 24332-24337 (1971).

86. *Id.* § 24338-24340 (1971).

87. *Id.* § 24323.1 (Supp. 1979).

88. Legg, *supra* note 82, at 366-67.

89. Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), *vacated and remanded on other grounds*, 414 U.S. 100 (1973); Walker v. Hoffman, 405 P.2d 57 (Okla. 1965); Crane v. Taylor, 261 P.2d 587 (Okla. 1953); Coates v. Hewgley, 581 P.2d 929 (Okla. Ct. App. 1978).

90. 1965 Okla. Sess. Laws, ch. 501, § 24323. *See* Kenyon, *supra* note 44, at 418 n.25.

chaser of the resale tax deed received title[91] to any nonproducing, severed mineral interest without requiring either personal notice of the pending tax sale, or compensation to the owner of the outstanding mineral interest.[92] There were serious questions,[93] however, about the lack of due process given the owners of severed, nonproducing mineral interests.[94] Before 1975, the owner received personal notice only when a certificate holder demanded a Certificate Deed.[95] After 1975, notification by certified mail to the record owner on the tax rolls was required for original sales[96] and for resales.[97] Because the severed, nonproducing mineral estate is not taxed separately,[98] the owners of the severed mineral interest which is not producing are not on the tax rolls. Consequently, only the surface owner received personal notice. Inadequate notice for the owners of severed, nonproducing mineral interests was the practical consequence of these statutes. The United States Supreme Court's[99] standard of notice reasonably calculated to reach those who could be easily identified and informed was not being fully met for mineral interest owners.[100]

From the beginning to the end of the procedure, the owner of the severed, nonproducing mineral interest never received personal notice of an impending sale unless he happened to receive the written notice

91. Kenyon, *supra* note 44, at 417-18 & n.25.

92. Legg, *supra* note 82, at 366-67 (if the owner cannot be served with personal notice, notice by publication will suffice); Comment, *Tax Sales, Due Process and Severed Mineral Interests in Oklahoma*, 11 TULSA L. J. 615, 625 (1976) [hereinafter cited as *Tax Sales*].

93. *See generally Tax Sales*, *supra* note 92.

94. *Id.* at 625.

95. OKLA. STAT. tit. 68, § 24323 (1971); Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), *vacated and remanded on other grounds*, 414 U.S. 100 (1973); Cornelius v. Jackson, 201 Okla. 667, 209 P.2d 166 (1948), *appeal dismissed per curiam* 335 U.S. 906 (1949).

96. OKLA. STAT. tit. 68, § 24312 (Supp. 1979).

97. *Id.* § 24331 (Supp. 1979).

98. *Id.* § 2419:

> Real property, for the purpose of ad valorem taxation, shall be construed to mean the land itself, and all rights and privileges thereto belonging or in any wise appertaining, such as permanent irrigation, or any other right or privilege that adds value to real property, and all mines, minerals, quarries and trees on or under the same, and all buildings, structures and improvements or other fixtures of whatsoever kind thereon, exclusive of such machinery and fixtures on the same as are, for the purpose of ad valorem taxation, defined as personal property.

Id. OKLA. STAT. tit. 60, § 4 (1971): "Property is either: 1. Real or immovable; or 2. Personal or movable." *Id.* § 5: "Real or immovable property consists of: 1. Land. 2. That which is affixed to land. 3. That which is incidental or appurtenant to land. 4. That which is immovable by law." *Id.* § 6: "Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance." *Id.* § 9: "Every kind of property that is not real is personal."

99. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

100. Legg, *supra* note 82, at 371.

sent to him at the time application was made for a certificate deed. He could lose his property interest at any time, never having received a hint of personal notice that his interest was in jeopardy. The question was whether this scheme provided the procedural due process to which these mineral owners were entitled. The Court said that notice should be "reasonably calculated to reach"[101] the party being sought. While that standard was decided upon in 1950, it was not until 1975 that the Oklahoma legislature changed its tax sale statutes for resale deeds to require that written notice be given to the surface owner when there was a threat that his property would be sold for nonpayment of taxes.[102]

The Oklahoma courts[103] upheld the notice requirements in the tax sale statutes, noting that there were differences in the three types of tax sales. In *Walker v. Hoffman*[104] the Oklahoma Supreme Court held that

101. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

102. 1965 Okla. Sess. Laws, ch. 501, § 24312; OKLA. STAT. tit. 68, § 24312 (Supp. 1979). The earlier statute stated:

> The county treasurer shall give notice of the sale of real property for delinquent taxes and special assessments, by publication thereof once a week for the three (3) consecutive weeks immediately prior to the third Friday in September preceding the sale, in some newspaper in the county, to be designated by the county treasurer. Such notice shall contain a notification that all lands on which the taxes are delinquent and remain due and unpaid will be sold, and of the time and place of the sale, and shall contain a list of the lands to be sold and the amount of taxes due and delinquent. . . .

1965 Okla. Sess. Laws, ch. 501, § 2. After the 1975 amendments § 24312 stated:

> The county treasurer shall give notice of the sale of real property for delinquent taxes and special assessments, by publication thereof once a week for the three (3) consecutive weeks immediately prior to the third Friday in September preceding the sale, in some newspaper in the county, to be designated by the county treasurer. Such notice shall contain a notification that all lands on which the taxes are delinquent and remain due and unpaid will be sold, and of the time and place of the sale, and shall contain a list of the lands to be sold, *the name or names of the last owner or owners as reflected by the records in the office of the county treasurer* and the amount of taxes due and delinquent. . . . *In addition to said published notice, the county treasurer shall give notice by certified mail by mailing to the owner of said real property as shown by the last tax rolls in his office, a notice of said sale stating the time and place thereof, and showing the legal description of the owner's property being sold, provided that failure to receive said notice shall not invalidate said sale.*

OKLA. STAT. tit. 68, § 24312 (Supp. 1979) (emphasis added).

103. Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), *vacated and remanded on other grounds*, 414 U.S. 100 (1973) (resale tax deed procedures requiring notice by publication of ad valorem tax foreclosures afforded adequate notice); Walker v. Hoffman, 405 P.2d 57 (Okla. 1965) (certificate tax deed procedures requiring applicant to give notice to owners of severed minerals were upheld); Cornelius v. Jackson, 201 Okla. 667, 209 P.2d 166 (1948) *appeal dismissed per curiam* 335 U.S. 906 (1949) (resale deed procedures requiring notice by publication were adequate because the action was *in rem* and the mineral owner had the right to redeem the land, to acquire a lien against the surface owner, and to protect his mineral estate at any time prior to the issuance of the resale tax deed). Coates v. Hewgley 581 P.2d 929 (Okla. Ct. App. 1978) (publication notice of resale is supplemental to other action which had conveyed a warning to the owners of interest in the land).

104. 405 P.2d 57 (Okla. 1965).

notice to the mineral interest holder was required for the issuance of a valid certificate deed.[105] The statute[106] at issue in the *Walker* decision, had the same notice requirement as the 1965 amended statute:[107] an attempt had to be made by mail to notify the "owner" of the land of the impending issuance of the certificate deed. The *Walker* decision, that the "owner" meant the holder of severed mineral interests as well as the surface interest owner, is still valid law.

The leading case regarding the notice requirements for a resale tax deed is *Cornelius v. Jackson*[108] which was decided in 1948. The notice requirements of the 1939 statute[109] were four weeks published notice in a newspaper of general circulation in the county where the land was located or, if no such newspaper were available, the notice could be posted on the courthouse door. The 1965 amendments[110] added the provision that notice was to be mailed to the owner of record on the tax rolls. This owner of record does not, however, include the mineral interest owner as he is not listed on the tax rolls.[111] Although issuance of a certificate deed, as in the *Walker* case, required that personal notice be given the mineral owner, the resale tax deed, as in the *Cornelius* case, required no such personal notice.[112]

The 1948 statute,[113] as well as the statute of 1965,[114] provided that the successful purchaser of any type of tax deed would receive a fee simple absolute in the land, surface and minerals. The holding in *Cornelius v. Jackson*[115] that the notice requirements of the 1939 statute were sufficient as to the mineral interest holder, applies to the 1965 amendments also because there was no change in the type of notice required for the mineral interest holder. The *Mullane v. Central Hanover Bank & Trust Co.*[116] decision might have influenced the 1965 change in the statute, but the changes did nothing to enhance the level

105. *Id.* at 62.
106. 1939 Okla. Sess. Laws, ch. 66, art. 31, § 3.
107. 1965 Okla. Sess. Laws, ch. 501, § 24331.
108. 201 Okla. 667, 209 P.2d 166 (1948), *appeal dismissed per curiam* 335 U.S. 906 (1949).
109. 1939 Okla. Sess. Laws, ch. 66, art. 31, § 33.
110. 1965 Okla. Sess. Laws, ch. 501, § 24331.
111. Herndon v. Pigg, 190 Okla. 403, 124 P.2d 425 (1942). The treasurer was not compelled to search the records of the county clerk when seeking the owner of property to be affected by the impending issuance of a resale tax deed.
112. *See* notes 124-25 *infra* and accompanying text.
113. 1939 Okla. Sess. Laws, ch. 66, art. 31, § 7.
114. 1965 Okla. Sess. Laws, ch. 501, § 24335.
115. 201 Okla. 667, 209 P.2d 166 (1948), *appeal dismissed per curiam* 335 U.S. 906 (1949).
116. 339 U.S. 306 (1950).

of notice previously afforded the mineral interest owner. The Supreme Court of Oklahoma addressed the issue of notice in *Cornelius*:

> Where a statute authorizes a lien for ad valorem taxes to be foreclosed by advertisement and sale by the county treasurer, the proceedings thereunder relate to the land itself, rather than the owner thereof, and where the statute provides for notice and gives the right to any person owning the land, or any interest therein, to redeem the land from such taxes at any time before a tax deed is issued by the county treasurer, the statute affords due process of law, and the owners of the nonproducing oil, gas, and other mineral rights, whose interest in the land, in the name of the owner of the surface, is assessed, advertised, and sold for delinquent ad valorem taxes, is given equal protection of the law and is not deprived of property without due process of law.[117]

In 1972, the Oklahoma Supreme Court decided *Christie-Stewart, Inc. v. Paschall*.[118] The trial court had held that the notice requirements of the statutes,[119] in effect at the time the resale tax deed was granted, were adequate as to the mineral interest owner.[120] The court of appeals reversed the trial court, holding that publication as provided in the statute,[121] did not meet the due process requirements imposed by *Mullane*.[122] The Oklahoma Supreme Court reversed the court of appeals and concluded, "Oklahoma's Resale tax sale procedures afford adequate notice and due process where, as here, the land was correctly described in the notices and the statutory procedures were specifically followed."[123] The Oklahoma Supreme Court distinguished the requirements in *Walker*, dealing with certificate deeds, from those in *Christie-Stewart* which dealt with resale deeds. The *Walker* court justified its requirement, that notice be given to the mineral interest owner, by saying that the timing of a certificate deed is left to the purchaser of the tax lien and the burden placed upon the owner to keep constant surveillance as to when the purchaser would request the issuance of a certificate deed was too onerous. The court thought the burden of adequate notice and due process should fall on the applicant for the certifi-

117. 209 P.2d at 167.
118. 502 P.2d 1265 (Okla. 1972), *vacated and remanded on other grounds*, 414 U.S. 100 (1973).
119. 1910 Okla. Rev. Laws § 7389-7395, 7397, 7401, 7403, 7406, 9772; 1939 Okla. Sess. Laws, ch. 66, art. 31, § 3.
120. 502 P.2d at 1266.
121. 1939 Okla. Sess. Laws, ch. 66, art. 31, § 3.
122. 339 U.S. 306 (1950).
123. 502 P.2d at 1268.

cate deed.[124] The court said the resale deed, on the other hand, was issued after notice by publication to an owner who already had statutory notice as to the time and place of sale in the event that the taxes remain unpaid. Thus, the publication notice to the owner was considered supplemental to the statutory notice that should have already warned the owner of impending loss of property through tax sale procedures.[125] Again, the due process requirements of *Mullane*[126] seemed to give no added protection to the mineral owner. He had not received personal notice for the resale tax deed procedure, but again, he had lost his property. The Oklahoma Supreme Court has upheld this procedure,[127] even after the *Mullane* holding requiring that notice reasonably calculated, under the circumstances, to reach the interested party must be given.[128]

The latest Oklahoma decision on the matter of notice to severed mineral interest owners in the resale tax deed was in *Coates v. Hewgley*.[129] The court said:

> [T]he resale tax deed [acquired by the county at tax resale] is not void as to the prior mineral owner by reason of the admitted lack of service of notice upon the owner of the severed minerals other than by publication. The valid resale tax deed . . . passes fee simple title to the land, including the mineral rights therein, whether severed or not, to the purchaser and extinguishes the rights of the owners of the land and mineral rights of all their estate therein.[130]

The court referred to the holding in *Walker* that a certificate deed required notice to the mineral interest holders. The court also referred to the *Christie-Stewart* and *Mullane* decisions for support. The court said that with regard to the resale tax deed, the notice requirement was met sufficiently by publication to owners who already have statutory notice. Thus, the holding in *Christie-Stewart* was reaffirmed.

In 1975 additional changes were made in the notice requirements.[131] The amendment to the certificate deed provisions required that the owner's name, as shown on the tax rolls, be included in the published notice of the impending tax sale and that notice by certified

124. 405 P.2d at 57.
125. *Id.*
126. 339 U.S. 306 (1950).
127. 502 P.2d 1265 (1972).
128. 339 U.S. at 314.
129. 581 P.2d 929 (Okla. Ct. App. 1978).
130. *Id.* at 931.
131. OKLA. STAT. tit. 68, §§ 24323, 24331 (Supp. 1979).

mail was to be sent to this owner.[132] The resale tax deed procedure was amended to provide for notice by certified mail to be sent to the owner of record on the tax rolls.[133] These amendments provided more protection to the surface owner who now must be notified by certified mail before he loses his land through the certificate or resale tax deed procedure. The statutes specifically state, however, that failure to receive notice will not invalidate either type of tax sale.[134]

The amendments to the tax sale statutes since *Mullane* have failed to give the mineral interest owner any more protection than he had under the statutes before the *Mullane* decision.[135] The 1975 amendments tied the concept of "owner" to the name on the tax rolls. Notice by certified mail was to be given to those owners whose names were on the tax rolls. This did not cover the mineral owner whose interest in the land is a severed, nonproducing (and therefore untaxed), mineral interest. The mineral interest holder was not being protected by the statutory tax sale process.

In response to this situation,[136] the Oklahoma legislature passed a new tax sale statute[137] providing that when surface land is sold at a tax sale, only the mineral interest owned by the surface owner would pass with the tax deed. Prior to this, when a surface tract was sold for delinquent taxes, the mineral estate, whether previously severed or not, and the surface estate passed to the tax deed purchaser thus giving him a fee simple absolute in the land. The new law protects the owner of severed mineral estates from loss of his property through tax sale:

> A certificate tax deed or resale tax deed shall convey *only the surface and surface rights and mineral interests owned by the owners of the surface rights* as distinguished from mineral and mineral rights of such real property. The certificate tax deed or resale tax deed shall not convey any other interest

132. *Id.* § 24312 (Supp. 1979).
133. *Id.* § 24331 (Supp. 1979).
134. *Id.* §§ 24312, 24331 (Supp. 1979).
135. *Id.*
136. Interview with James McDaniel, Oklahoma State Senator, Dist. 13, at State Capitol Bldg., Oklahoma City, Oklahoma (Jan. 31, 1980). According to Senator McDaniel, the legislative intent of the Tax Sale Statute was to protect owners of mineral interests from the loss of their property without notice to them that their interests were threatened. Senator McDaniel realized that mineral owners hold interests in varying quantities in many counties in the state and that it is unreasonable to require that the mineral owners check the tax rolls to verify that the surface owner has paid taxes on the surface. Since the notice requirements were minimal, Senator McDaniel recognized that owners might lose their mineral interests unless they maintained unreasonable vigilance on the tax status of the overlying surface estate.
137. OKLA. STAT. tit. 68, § 24323.1 (Supp. 1979).

owned by any other individual or legal entity.[138]

Although the provisions for notice[139] to mineral owners in Oklahoma tax sale legislation had been repeatedly upheld as within due process requirements,[140] there remained a constitutional question.[141] Could Oklahoma's tax sale laws[142] continue to withstand due process attacks? The new tax sale statute[143] eliminates the question of inadequate notice to the mineral interest owner by exempting any mineral interests not held by the surface owner from the effects of a tax sale of the surface.[144] It was the legislative intent that the tax sale statute provide protection for the mineral interest owner who was unable to protect himself by reasonable means.[145]

A producing mineral interest is taxed separately and apart from the surface of the land,[146] but a nonproducing mineral estate is not taxed separately from the surface estate in Oklahoma.[147] Before October 1, 1979, when land was sold at a tax sale, all nonproducing mineral interests, whether severed from the surface or not, passed with the tax deed to the purchaser.[148] As a result of this provision of the law, the mineral interest owner had to be diligent in ascertaining whether ad valorem taxes were timely paid by the surface owner of land or the mineral estate owner could lose his property through tax sale of the surface. Frequently, in Oklahoma, a mineral interest owner owns title to minerals in many counties. Prior to the newly enacted tax sale statutes,[149] to insure his mineral interests against tax sale, the owner had to

138. *Id.* (emphasis added).

139. Legg, *supra* note 82, at 375.

140. Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), *vacated and remanded on other grounds*, 414 U.S. 100 (1973); Walker v. Hoffman, 405 P.2d 57, 62 (Okla. 1965); Cornelius v. Jackson, 201 Okla. 667, 209 P.2d 166, 171 (Okla. 1948), *appeal dismissed per curiam* 335 U.S. 906 (1949). *See also Tax Sales, supra* note 92, at 619.

141. Legg, *supra* note 82, at 370-79; *Tax Sales, supra* note 92, at 625; Kenyan, *supra* note 44, at 439.

142. Legg, *supra* note 82, at 365; *Tax Sales, supra* note 92, at 625. *But see* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). *Mullane* was a landmark decision which held that notice given by publication was inadequate because if the person who should be notified by the publication lived outside the local newspaper's normal circulation area, the odds were great that he would not receive actual notice of actions in which he was an interested party. The Court required notice which was reasonably calculated to give the other party actual notice.

143. OKLA. STAT. tit. 68, § 24323.1 (Supp. 1979).

144. *Id.*

145. Interview with James McDaniel, *supra* note 136.

146. OKLA. STAT. tit. 68, § 1001 (Supp. 1979).

147. *Id.* § 2419 (1971).

148. Coates v. Hewgley, 581 P.2d 929, 931 (Okla. App. 1978). OKLA. STAT. tit. 68, § 24323 (1971). *See also* Legg, *supra* note 82.

149. OKLA. STAT. tit. 68, § 24323.1 (Supp. 1979).

check annually with the tax collector in each county to make certain the surface owner had not defaulted in his ad valorem tax payment.[150] If there were a default, the mineral owner had to pay the taxes himself, or continually recheck to ascertain the tax status of each such property. This could be a considerable nuisance.[151] Absent such diligence, however, the mineral owner stood in jeopardy of losing the title to his mineral interest through a tax sale.

The effects of the new tax sale legislation[152] have been to protect the mineral owner from such nuisance and from the loss of his mineral estate while at the same time preserving the state's interest in marketability of real estate. This appears to be an equitable result for those parties. But the enigma of how to vest title to absentee owned, nonproducing mineral interests in an active owner seems no closer to resolution as a result of this new tax sale legislation.[153]

2. Abandonment and Escheat

The remaining pertinent, newly enacted statutes deal with severed, producing mineral interests. There are important differences between the taxing schemes for producing[154] and nonproducing mineral interests.[155] The nonproducing interest, in Oklahoma, is not taxed separately from the surface estate, but once the oil and gas have been produced, they will be taxed separately at the well-head[156] as personalty. The producing mineral interest enters the tax rolls of the state at this point. Oklahoma's new statutory provisions allow the proceeds from a producing mineral interest, and the underlying mineral estate which generates them, to be declared abandoned and then escheat to the state if the mineral owner is absent or missing.

Title 60, section 658.1 of the Oklahoma Statutes provides that if the income from the mineral estate is presumed abandoned, the newly passed law would allow the underlying mineral estate to escheat and be sold by the state at public auction.

150. Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), *vacated and remanded on other grounds*, 414 U.S. 100 (1973).

151. Interview with James McDaniel, *supra* note 136.

152. OKLA. STAT. tit. 68, § 24323.1 (Supp. 1979).

153. *Id.*

154. *Id.* § 1001 (1979).

155. *Id.* § 2419 (1971).

156. *Id.* § 1001 (1966 & Supp. 1979). The time and place of production for taxing purposes is considered the well-head, the point where the petroleum leaves the ground and enters the collecting system.

> Any mineral interest in land in Oklahoma shall be subject to escheat under the provisions of Sections 271 through 277 of Title 84 of the Oklahoma Statutes if it generates an intangible property interest which is presumed abandoned under the Uniform Disposition of Property Act as provided in Sections 651 through 687 of Title 60 of the Oklahoma Statutes; or under similar laws of another state as described in Section 660 of Title 60 of the Oklahoma Statutes.[157]

In 1979 the legislature provided the second part of the two-part procedure whereby a producing mineral interest, whose owner could not be located and who had not claimed the income from the mineral interest for the statutory number of years, could escheat to the state.

> If the proceeds or other intangible property interest from any mineral interests are abandoned, as provided in Sections 651 through 687 of Title 60 of the Oklahoma Statutes, or under similar laws of another state as described in Section 660 of Title 60 of the Oklahoma Statutes, then the mineral interest which generates the intangible property interest shall be subject to escheat as provided in Sections 271 through 277 of Title 84 of the Oklahoma Statutes.[158]

These two provisions protect the interest of the state in promoting the policy of marketability of real estate. In the past, the proceeds of the producing mineral estate owned by absentee owners were held in trust for three years. The proceeds would then escheat to the state,[159] leaving the title to the real property mineral interest residing in the absentee owner. This provision for producing mineral estates is still in effect but now the new statutes[160] allow the title to the mineral realty, which generates the mineral personalty, to escheat and be sold by the state.[161]

These common law and statutory provisions for dealing with the absent and missing mineral owner have allowed mineral development to occur despite the owner's absence. When the owner of the mineral estate is missing, the burden on the lessee, co-owners, and the state is greater, but not prohibitive. The interests of the state, lessee, and mineral owners have been balanced and a workable plan has been effected. But curative legislation is necessary if the surface owner's interest is to

157. *Id.* tit. 60, § 658.1 (Supp. 1979).
158. *Id.* tit. 84, § 271.1 (Supp. 1979).
159. *Id.* tit. 60, § 657 (1971).
160. *Id.* § 658.1 (Supp. 1979).
161. *Id.* tit. 84, § 276 (1971).

be protected when the missing owner holds title to nonproducing mineral interests. The right of the surface owner to control directly the use of his land and the interest of the state in marketability of real property have not been safeguarded. There is need for curative legislation.

IV. POSSIBLE REMEDIAL MEASURES

What type of curative legislation could be enacted which would protect the interests of all parties concerned? Taxation and provision for tax sale upon default of the mineral estates is one way to eliminate dormant mineral interests. Marketable title legislation could be used for this purpose, or statutes designed specifically for eliminating dormant mineral interests could be enacted.

A. *Separate Taxation*

Separate taxation of the severed, nonproducing mineral estate has been adopted by many states[162] as a means to quiet title in the mineral estate. Failure to pay the tax results in a penalty. The most effective penalty is escheat of the mineral interest to the state. The due process notice issue may be troublesome if the state is unable to identify the missing mineral estate owner, but publication for an extended time period should be sufficient.

162. Outerbridge, *supra* note 7, at 20-11 to 20-12 & nn. 44-69. Outerbridge lists some thirty states which provide for assessment and taxation of some or all severed mineral interests: Alabama, ALA. CODE §§ 40-7-16, 40-11-1(1) (1975 & Supp. 1978)(nonproducing oil and gas interests exempt under § 40-20-35); Arizona, ARIZ. REV. STAT. § 42-255 (1957 & Supp. 1978); Arkansas, ARK. STAT. [*sic*] § 84-203 (1960); California, CAL. REV. & TAX. CODE §§ 607.5, 369(b) (West 1970 & Supp. 1979); Colorado, COLO. REV. STAT. §§ 39-1-104, 39-1-106 (1973); Florida, FLA. STAT. ANN. § 193.481 (West Supp. 1979); Georgia, GA. CODE ANN. § 92-104 (1974), *Id.* § 91A-1003 (1978); Idaho, IDAHO CODE § 63-2801 (1976); Illinois, ILL. ANN. STAT. ch. 94, § 7 (Smith-Hurd 1950); Indiana, IND. CODE ANN. § 6-1.1-1-15 (Burns 1978); Iowa, *See* Patterson v. May, 239 Iowa 602, 29 N.W.2d 547 (1947); *In re* Colby, 184 Iowa 1104, 169 N.W. 443 (1918); Kansas, KAN. STAT. § 79-420 (1977); Maryland, MD. ANN. CODE art. 81, § 19(a)(3)(1975) (discretionary with assessing authority); Michigan, MICH. COMP. LAWS ANN. § 211.60 (Supp. 1979-1980); Minnesota, MINN. STAT. §§ 272.04(1), 272.05, 273.13(2a)(1978), as amended by 1979 Minn. Laws; Mississippi, MISS. CODE ch. 303, art. X, 5; MISS. CODE Ann. § 27-35-51 (1972) (nonproducing oil and gas interests exempt under § 27-31-73); Missouri, MO. ANN. STAT. § 259.220 (Vernon Supp. 1979); Montana, MONT. REV. CODES Ann. § 15-6-102 (1978) (rights of entry); New Hampshire, N.H. REV. STAT. ANN. § 75.2 (1970); North Carolina, N.C. GEN. STAT. §§ 105-302, 1-42.1(d), 1-42.2 (d), 1-42.3(d), 1-42.4(d) (1972 & Supp. 1977); North Dakota, N.D. CENT. CODE § 57-02-24 (1972); Ohio, OHIO REV. CODE ANN. § 5713.04 (Page 1973); Oregon, OR. REV. STAT. § 308.115 (1977); Pennsylvania, *See* Appeal of Baird, 334 Pa. 410, 6 A2d 306 (1939); Pennsylvania Bank & Trust Co. v. Dickey, 232 Pa. Super. Ct. 224, 335 A.2d 483 (1975); Tennessee, TENN. CODE ANN. § 67-602(6) (1976); Texas, TEX. REV. CIV. STAT. ANN. art. 7172, § 2 (Vernon 1960), *Id.* art. 7174 (d) (Vernon Supp. 1979); Utah, UTAH CODE ANN. § 59-5-57 (1974); Vermont, VT. STAT. ANN. tit. 32, § 3604 (1970); Virginia, VA. CODE § 58-774 (Supp. 1979); Washington, *See* Gilbreath v. Pacific Coast Coal & Oil Co., 75 Wash. 2d 255, 450 P.2d 173 (1969); West Virginia, W. VA. CODE § 11-4-9 (1974).

The tax sale procedure for the sale of the mineral estate could also provide the surface owner with a right of first refusal to purchase the severed mineral interest from the state as the statutes of Colorado provide.[163] This would enhance marketability of the property and provide the surface owner a way to protect his interests by acquiring a voice in the lease arrangements and mineral development affecting his land.

Oklahoma, however, has opted not to tax the severed mineral estate separately from the surface[164] and unless the legislature should decide to do so, foreclosure on severed mineral interests through a tax sale is unavailable at the present.

B. *Marketable Record Title Act*

Unlike Oklahoma, some states[165] have attempted to subject mineral interests to extinction under their marketable record title acts. It would be possible to amend the Marketable Record Title Act in Oklahoma to specifically include mineral estates, instead of excluding them as it does.[166] The Act serves as a method of terminating stale claims to title, reducing the number of extrinsic facts a title examiner must consider, and enhancing marketability of real estate. Reference to the severed minerals in the recorded chain may serve to keep the title to the mineral estate viable,[167] as marketable record title acts purport only to cleanse a title of defects which are pre-root-of-title.[168]

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163. COLO. REV. STAT. § 39-11-150 (1973).

> Sales for delinquent taxes due on severed mineral interests shall take place at the same place and time and under the same circumstances as in this article, but where the surface estate ownership is coterminous with the severed mineral interest, the owner of the surface estate shall have the right of first refusal to purchase the severed mineral interest.

Id.

164. OKLA. STAT. tit. 68, § 2419 (1971). The Oklahoma legislature has specifically acted to exempt the severed mineral estate from the effect of tax sales to protect mineral owners from losing their property without due process. OKLA. STAT. tit. 68, § 24323.1 (Supp. 1979).

165. The Florida statute, for example, provides that the right of easement for the purpose of mineral exploration and production is subject to being extinguished by marketable record title legislation. FLA. STAT. ANN. § 704.05 (West Supp. 1978).

In contrast, the South Dakota statute provides:

> An affidavit filed pursuant to § 43-30-7 shall bar a severed mineral interest in the same property and shall merge such severed mineral interest with the surface estate interest described in affidavit, unless any person claiming an interest in such severed mineral interest has previously recorded an instrument describing such severed mineral interest with the appropriate register of deeds. Such recording shall be valid for ten years and may be recorded.

S.D. COMP. LAWS § 43-30-8.1 (Supp. 1979).

166. OKLA. STAT. tit. 16, § 76 (1971).

167. Outerbridge, *supra* note 7, at 20-13.

168. Hicks, *supra* note 62, at 74.

The use of Oklahoma's Marketable Record Title Act[169] as a vehicle for quieting title to abandoned, severed, nonproducing mineral interests would seem to be fraught with the same constitutional problems of due process as the old tax sale statutes the legislature has just acted to cure.[170] Additionally, if land has been conveyed, subject to outstanding mineral interests, within the prescribed period of the marketable record title statute, the legislation does not affect them. "Marketable title statutes, therefore, simply do not reach the real problem involved in marketability of mineral interests. . . . Some method of terminating mineral interests after a period of inactivity seems the best means of insuring marketability of mineral interests."[171] This points toward the dormant mineral statute as a more viable means to eliminate stale claims.

C. *Dormant Mineral Statutes*

A third remedial possibility is the dormant mineral statute. Dormant mineral statutes are "aimed at clearing the records of ancient, unused mineral interests and . . . use the concept of abandonment to accomplish this purpose."[172] At common law, abandonment of real property was not allowable because the title had to be seized in someone at all times.[173] The recent landmark decision in the *Gerhard v. Stephens*[174] case seeks to modify this common law maxim. The *Gerhard* holding maintains that, even though the duration of the estate in real property is theoretically perpetual, abandonment of an incorporeal interest in the real property is permissible. Once the mineral estate is considered abandoned, it simply reverts back to the estate from which it was carved, thus leaving no void in the chain of title.[175] The recently passed Federal Land Policy and Management Act of 1976[176] operates on this modified theory of abandonment and could serve as a guide to

169. OKLA. STAT. tit. 16, §§ 71-80 (1971).

170. *Id.* tit. 68, § 24323.1 (Supp. 1979); Hicks, *supra* note 62, at 75. One of the constitutional problems inherent in marketable record title legislation is that it is retroactive in character and has an effect upon vested as well as future property interests. Deprivation of property without due process of law is constitutionally impermissible. The question is whether the taking is a valid exercise of police power. There is a two-part test which must be met; does the legislation have a valid objective and are the measures taken under the legislation reasonable and appropriate? *Id. See also* notes 101-35 *supra* and accompanying text.

171. Polston, *supra* note 19, at 75.

172. Outerbridge, *supra* note 7, at 27.

173. Wheelock v. Heath, 201 Neb. 835, 272 N.W. 2d 768, 772 (1978).

174. 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

175. 442 P.2d at 711.

176. 43 U.S.C. § 1744 (1976).

legislative enactment of dormant mineral statutes incorporating the *Gerhard* view.

Again, however, when legislation is intended to deprive one of his property, questions of adequate due process arise. Dormant mineral statutes which have been enacted in some states have been attacked on such constitutional grounds. The Virginia Supreme Court has upheld that state's dormant mineral statute[177] against an attack which alleged a taking of property without due process and consideration.[178] The statute created a presumption that there were no minerals in the land if the mineral claim were not exercised for thirty-five years. The court held that the statute did not divest any property rights but only created a rule of evidence which could be used to extinguish title to nonexistent minerals and further, that the statute made provision for a showing that minerals did exist. The court observed, "Obviously, if there are no minerals, there can be no mineral rights."[179] The court perceived that the statute did not operate to divest any owner of property rights.

The states of Illinois,[180] Indiana,[181] and Michigan[182] provided that when severed mineral interests have been unused for a specified amount of time, they are deemed abandoned or extinguished unless the owners made a recordation of their claims to the mineral interest within specified times.[183] It became obvious that "use" had to be defined by statute to avoid confusion and ambiguity. In the three states above, actual production constituted use.[184] Other provisions such as sale, lease, mortgage, transfer of interest in writing,[185] issuance of a drilling permit,[186] or production from a pool or unit of which the mineral estate was a part[187] also constituted use for purposes of satisfying the statute. These three states provided that upon the extinguishment of the title to mineral interests by operation of the dormant mineral statute, the title to the severed mineral interest vested in the owner of

177. VA. CODE §§ 55-154, 155 (Supp. 1979).
178. Love v. Lynchburg Nat'l. Bank, 205 Va. 860, 140 S.E.2d 650 (1965).
179. *Id.* at 653.
180. ILL. ANN. STAT. ch. 30, §§ 197, 198 (Smith-Hurd Supp. 1979).
181. IND. CODE ANN. §§ 32-5-11-1 to 32-5-11-8 (Burns 1973).
182. MICH. COMP. LAWS ANN. § 554.291 (1967).
183. Twenty years after the last use in Indiana, IND. CODE ANN. § 32-5-11-1 (Burns 1973), and Michigan, MICH. COMP. LAWS ANN. § 554.291 (1967), and twenty-five years after the last use in Illinois, ILL. ANN. STAT. ch. 30, § 197 (Smith-Hurd Supp. 1979).
184. ILL. ANN. STAT. ch. 30, § 197 (Smith-Hurd Supp. 1979); IND. CODE ANN. § 32-5-11-3 (Burns 1973); MICH. COMP. LAWS ANN. § 554.291 (1967).
185. ILL. ANN. STAT. ch. 30, § 197 (Smith-Hurd Supp. 1979).
186. MICH. COMP. LAWS ANN. § 554.291 (1967).
187. IND. CODE ANN. § 32-5-11-3 (Burns 1973).

the surface estate.[188]

During the past year, however, all three statutes have been declared unconstitutional by lower courts in the respective states.[189] The decisions are currently on appeal to the respective state supreme courts.

The Michigan statute has been attacked twice on constitutional grounds. In the first case, *Bickel v. Fairchild*,[190] the court of appeals balanced the extent to which the mineral owners' right to contract had been impaired against the state's public purpose to encourage petroleum exploration. The court concluded that the statute was an impermissible infringement on the contractual right of the mineral owners. Because there was no provision made for notice, hearing, or compensation, due process also was not afforded mineral owners by the statute.[191]

In *Van Slooten v. Larson*,[192] appealed after *Bickel* was decided, the Michigan Court of Appeals reversed the trial court's declaration that the statute was unconstitutional and discounted arguments that the statute denied equal protection and impaired the right to contract.[193] The court neither cited nor discussed the *Bickel* holding. The *Bickel* and *Van Slooten* cases were argued on the same day, October 3, 1979, before the Michigan Supreme Court. When the court's decision is handed down, the status of Michigan's dormant mineral statute should be resolved.

A challenge to the Indiana dormant mineral statute[194] resulted in a trial court determination that, although exploitation of the state's energy sources was a valid purpose, the method chosen to implement the purpose was unconstitutional.[195] The court reasoned that severed mineral rights were vested property that at common law could not be terminated. The absence of notice, hearing, and compensation were found to be constitutionally impermissible.[196]

Nebraska's dormant mineral statute[197] considers a severed mineral

188. *Id.*; MICH. COMP. LAWS ANN. § 554.291 (1967).
189. Outerbridge, *supra* note 7, at n. 208.
190. 83 Mich. App. 467, 268 N.W. 2d 881 (1978), *appeal docketed*, # 61917 (Mich. Oct. 3, 1979).
191. 268 N.W.2d at 883.
192. 86 Mich. App. 437, 272 N.W. 2d 675 (1978), *appeal docketed*, # 62256 (Mich. Oct., 1979).
193. 272 N.W.2d at 680.
194. IND. CODE ANN. § 32-5-11-1 to 32-4-11-8 (Burns 1973).
195. Pond v. Walden, No. C-78-17 (Cir. Ct., Gibson County, Ind. July 25, 1978) found at Outerbridge, *supra* note 7, at n. 208.
196. Outerbridge, *supra* note 7, at 20-26.
197. NEB. REV. STAT. §§ 57-228 to 231 (1974).

interest abandoned if it has not been publicly exercised by conveyance, working the interest, or recording a claim of interest during the twenty-three years prior to the filing of an action against the title.[198] The statute allows the surface owner to file an action for extinguishment of severed mineral interests[199] where the interest had been so abandoned and if the action is successful, the title to the mineral estate vests in the surface owner.[200]

The Nebraska statute, however, was declared unconstitutional as retroactively applied in *Wheelock v. Heath*.[201] The court relied on the common law rule that a corporeal interest[202] in land could not be abandoned[203] and that, as applied retroactively, the statute violated the due process and contract clauses of the Constitution[204] by depriving owners of their mineral interest without notice, hearing, or compensation.[205]

The Wisconsin dormant mineral statute[206] required registration and recordation of both active and dormant mineral interests and provided that failure of the mineral owner to register and pay the statutory fees would cause the title to the mineral interest to vest in the surface owner. The Wisconsin Supreme Court declared the statute unconstitutional in its entirety because:

> [T]he forfeiture provisions of the statute deny [the plaintiffs] substantive due process by an unreasonable use of the police power. . . . This procedure violates the rule that the legislature cannot take private property from one person for the private use of another. . . . This reversion would occur without a hearing or notice of that hearing having been given to the severed rights owner and without compensation having been paid to them. These enforcement procedures are entirely lacking in substantive and procedural due process.[207]

The Minnesota dormant mineral statute[208] applied to all severed

198. *Id.* § 57-229.
199. *Id.* § 57-228.
200. *Id.* § 57-230.
201. 201 Neb. 835, 272 N.W. 2d 768 (1978).
202. Gerhard v. Stephens, 68 Cal. 2d 864, 442 P. 2d 692, 69 Cal. Rptr. 612 (1968), dealt with an interest in real property, characterized as incorporeal because the non-ownership theory has been adopted by California. Nebraska, however, adopts the ownership in place theory, which characterizes the interest in minerals in place as possessery and consequently corporeal. *See* notes 35 & 47 *supra*.
203. Wheelock v. Heath, 201 Neb. 835, 272 N.W. 2d 768, 772 (1978).
204. 272 N.W.2d at 774.
205. *Id.* at 773.
206. WIS. STAT. ANN. § 700.30 (West Supp. 1978).
207. Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W. 2d 316, 320 (1967).
208. MINN. STAT. § 93.52-93.58 (1978).

mineral interests and required a filing of statements of interest. Failure to do so resulted in escheat of the mineral interest.[209] The mineral owner would be allowed to recover the fair market value of the property (within six years of its loss), but he would still lose his title for failure to timely file. The statute expressly exempted any mineral interest which had a tax imposed upon it.[210] In *Contos v. Herbst*[211] the Minnesota Supreme Court struck down as unconstitutional the procedural provisions in its statute relating to forfeiture of the mineral interest. The court found that the registration and forfeiture provisions were constitutional, but that lack of an opportunity for a hearing before loss of the property occurred was a denial of due process. In response to the *Contos* holding, the Minnesota legislature enacted an amendment allowing forfeiture only after notice and hearing were provided.[212]

A newly enacted Georgia statute[213] provides that a surface owner may file an action and gain title to the severed mineral interests if the mineral owner has not worked or attempted to work, leased, or paid taxes on the mineral rights for seven years since the creation of his interest and for seven years prior to the commencement of the surface owner's action.[214] The Georgia dormant mineral statute[215] avoids the constitutional problems relating to due process by making its application only prospective. There is a seven year grace period before the statute can operate so no cases can be brought challenging the statute until July 1, 1982.[216]

A Tennessee dormant mineral statute,[217] in effect since 1939, provides that any conveyance of oil and gas rights which separates such rights from the surface estate shall expire at the end of ten years if there is no commercial production of minerals. Further, the statute provides that cessation of commercial production for a period of six months after the ten-year period has lapsed will cause the oil and gas rights to expire. All such expired rights revert to the surface estate from which they were carved. The statute was initially designed and has been ap-

209. *Id.* § 93.55.
210. *Id.*
211. Contos v. Herbst, 278 N.W. 2d 732 (Minn. 1979).
212. 1979 MINN. LAWS, ch. 303, Art. X, § 1.
213. GA. CODE ANN. § 85-407.1 (1978).
214. *Id.*
215. *Id.*
216. Johnson v. Bodkin, 241 Ga. 336, 247 S.E. 764 (1978); Nelson v. Bloodworth, 238 Ga. 264, 232 S.E. 2d 547 (1977).
217. TENN. CODE ANN. § 64-704 (Supp. 1978).

plied to have prospective application only.[218]

There are limitations inherent in all the remedies applicable to the problem of the missing owner of severed nonproducing mineral interests. A legislative scheme requiring the owner of any severed, nonproducing mineral interests to record evidence of his continued ownership interest in his mineral estate would benefit all parties concerned. This type of dormant mineral statute could require: (1) periodic affidavit of ownership in severed, nonproducing minerals; (2) a fee, payable to the state, for such recordation; (3) a grace period before any penalty for failure to record becomes effective;[219] (4) escheat of any mineral interests whose owners had failed to timely record evidence of ownership; (5) sale of the severed, nonproducing mineral interest at sheriff's sale; (6) provision for notice, hearing, and compensation; (7) that the surface owner have the first opportunity to buy the mineral interest at the bid price; (8) that the state hold the purchase price of the mineral interest in escrow for the mineral interest owner until he files his claim for the loss of his property; (9) that upon failure of the mineral owner to file for the compensation paid into the state in escrow for the loss, the money itself would escheat after a reasonable time[220] had passed.

The recording fee would offset the expenses incurred by the state for additional administrative costs. Provision could be made for a grace period of considerable duration so that the mineral owner would be more likely to actually receive adequate notice, even if it were provided only by publication. A reasonable grace period during which no penalty for nonrecordation would accrue would seem to be an equitable provision. The benefits under such a scheme appear to outweigh the inconveniences inherent in such a recordation system. Mineral lessees could gain quick access to the identity and address of mineral owners. Furthermore, the requirement for court supervision under Oklahoma's Absent Mineral Owner Statute[221] would be alleviated. Clearing the encumbrances on titles would enhance the state's interest in the marketability of both the mineral and surface estates. The sale

218. *Id.* § 64-704(a).

219. The grace period would have to be "reasonable" and should be specifically defined in the statute. A reasonable period could be three years, as the Oklahoma law requires for abandonment of producing mineral interests, OKLA. STAT. tit. 60, § 658.1 (Supp. 1979), or perhaps a reasonable period could be seven years, as required by the Oklahoma law relating to presumption of death, OKLA. STAT. tit. 84, § 271 (1971), or perhaps a reasonable time would be the fifteen year period required by Oklahoma for the statute of limitations to run on adverse possession of land, OKLA. STAT. tit. 12, § 94(4) (1971).

220. OKLA. STAT. tit. 12, § 94(4) (1971).

221. OKLA. STAT. tit. 52, § 521 (1971). *See* notes 65-70 *supra* and accompanying text.

of abandoned mineral interests which escheat to the state would strengthen the state treasury should the mineral owner fail to file a claim for such funds. The argument in favor of escheat, rather than reversion to the surface estate, is bolstered by the constitutional prohibitions against taking private property without compensation. This becomes especially onerous when property is taken from one person without compensation and given to another private person. If the mineral estate were to escheat and be sold, the proceeds could be held in trust for the original owner for a reasonable, statutorily specified period of time. This would provide for the original owner's constitutional right to protection against taking of property without compensation. A major goal of the dormant mineral statute would be reached since the surface owner would have an opportunity to control the use of his surface estate and reunite the mineral and surface fees.

VI. CONCLUSION

Intensified oil and gas exploration in Oklahoma has created a renewed need for easier access to mineral owners so that producers can economically develop the oil and gas reserves of the state. The passage of time, sociological changes, and speculative transfers in the past have tended to fragment the ownership of mineral interests and scatter the owners over the globe. Owners of mineral estates are frequently absent and unavailable.

Procedures are needed to gain access to the mineral estates of these absentee mineral owners while protecting the property rights of those mineral owners who are present and active. In Oklahoma, there is provision for leasing and developing the mineral estate of absent owners. Should this mineral estate prove to be a producing one, there is newly enacted legislation that will allow the abandoned, producing mineral estate to escheat to the state and be sold. This procedure adequately provides for access to the producing mineral estate and promotes the policy of marketability of property.

The real problem lies with the nonproducing, severed mineral estate whose owner cannot be located by any reasonable means. There is no provision whereby the title to such mineral estates can be affected. Abandonment and adverse possession are not practical avenues to quiet title to these nonproducing interests in Oklahoma. The tax sales statutes were modified in 1979 to exempt severed, nonproducing mineral estates from inclusion in the tax sale deed. These interests are also

exempt from application of the Marketable Record Title Act. Oklahoma does not tax the nonproducing mineral interest separately from the surface so a tax sale of the mineral interest alone is not currently available to quiet title.

A dormant mineral statute could be a viable solution to the problem of the nonproducing mineral estate held by absentee owners. It could require: periodic affidavit of ownership; a recordation fee; a reasonable grace period before property is subject to loss; escheat and sale of the mineral estate; provision for notice, hearing, and compensation for the absentee owner; that the surface owner have first opportunity to purchase the minerals from the state; that purchase price of the estate be held in escrow for the absentee owner for a reasonable period of time; and that upon failure of the absentee owner to apply for the proceeds of the sale, the money itself could escheat. Such a dormant mineral statute would appear to solve, by the least restrictive means, the problem caused by the absent owner of nonproducing severed mineral interests.

Oklahoma could attain the goal of access to abandoned, severed mineral interests through legislation designed to enhance and protect the interests of all: the mineral developer, the mineral estate owner, the surface estate owner, and the state. Alone among these, the surface owner has not been protected by the present legislative program. A dormant mineral statute, of the type suggested herein, would serve to give a measure of protection that is not now afforded to the surface owner.

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