

# Dormancy Mineral Legislation A Cure for the Malady or Another Affliction?

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### § 12.01.     **Introduction.**

Highly fractionalized ownership of severed mineral titles is endemic to areas where coal, oil and gas production and exploration are prevalent. The geometric increase in ownership of a severed mineral interest that occurs with each passing generation by testate and intestate succession, resulting in greater fractional ownership, *i.e.*, more owners of diminished fractional interests, impedes the development of coal, oil and gas prospects.<sup>2</sup> The small fractional interest owner's bonus and royalty share is so trivial that little incentive is provided to communicate with the landman, much less to execute the lease. Consequently, locating the small fractional interest owner and acquiring an oil and gas lease from such a *de minimis* interest owner is time-consuming, expensive and often an exercise in futility.<sup>3</sup> Likewise, examination of title and the incidental

<sup>2</sup> The literature on the dormant severed mineral interests problem is extensive. See Patrick J. Garver & Patricia J. Winmill, "Medicine for Ailing Mineral Titles: An Assessment of the Impact of Adverse Possession, Statutes of Limitation, and Dormant Mineral Acts," 29 *Rocky Mt. Min. L. Inst.* 267 (1983); George W. Hardy, III, "Ancient Mineral Claims — An Obstacle to Development," 28 *Inst. on Oil & Gas L. & Tax'n* 137 (1977); Dwight F. Kalash, "Severed Mineral Interests, a Problem Without a Solution?" 46 *N.D. L. Rev.* 451 (1970); Eugene Kuntz, "Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest," 22 *Inst. on Oil & Gas L. & Tax'n* 81 (1971); Cheryl Outerbridge, "Missing and Unknown Mineral Owners," 25 *Rocky Mt. Min. L. Inst.* 20-1 (1979); Ronald W. Polston, "Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles," 7 *Land & Water L. Rev.* 73 (1972); James C. Robertson, "Abandonment of Mineral Rights," 21 *Stan. L. Rev.* 1227 (1969); Victor A. Sachse, III & Robert L. Atkinson, "Reuniting Unused Mineral Interests With the Land," 44 *Inst. on Oil & Gas L. & Tax'n* 2-1 (1993).

<sup>3</sup> Locating the "lost and unknown" mineral owner who is not assessed taxes on the severed interest, may have never lived in the area, or has long since departed, is difficult if not impossible. Even if the owner is located, acquiring a lease is another matter. Because the bonus and royalty share as to small fractional interests is relatively insignificant, the

curative work required to ensure marketable or defensible title to such diminutive fractional interests is excessively costly and burdensome.<sup>4</sup>

Dormancy mineral legislation<sup>5</sup> is the modern solution to the problems associated with severed mineral titles of ancient origin.<sup>6</sup> Once an oddity, dormant mineral acts are now a common feature of mineral law. Twenty-three states have some form of Dormant Mineral Act.<sup>7</sup> Most of the

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small interest owner has no incentive to negotiate or grant the lease. Even if a minimum bonus that far exceeds the per-acre bonus allotment for the prospect is utilized to further entice the *de minimis* interest owner to execute the lease, unanswered letters and unreturned phone calls remain the norm. (Does anyone today cash a \$50 check and sign a document that he or she knows nothing about?).

<sup>4</sup> The title examination reflects the last record title owner of a severed mineral interest. If the date of the conveyance vesting title in the owner is ancient, testate or intestate succession inevitably results in different ownership. Probate of wills or judicial determination of heirs are often not done as to severed mineral interests. The ownership must be reconstructed from information furnished by the present owner, if located. The cost of title examination and subsequent title curative work is expensive.

<sup>5</sup> The literature on dormant mineral legislation is also extensive. See Owen L. Anderson, "Dormant Mineral Statute Upheld," *Nat. Resources & Env't*, Summer 1989, at 50; Laurence M. Elkus, "The Dormant Mineral Act for the General & Real Estate Practitioner," 71 *Mich. B.J.* 62 (1992); Cyril A. Fox, jr., "Clearing Mineral Titles by Statute After *Texaco, Inc. v. Short*," 3 *E. Min. L. Inst.* 25-1 (1982); Louis B. Guttman, "Dormant Minerals Statute — Do We Need It in Florida?" 58 *Fla. B.J.* 111 (1984); Jeffrey A. Townsend, "The Model Dormant Mineral Interest Act: Limited Practicability," 8 *E. Min. L. Inst.* 20-1 (1987).

<sup>6</sup> Traditional remedies applicable to cotenants or non-consenting mineral owners, such as partition, compulsory pooling, receivership statutes, and tax sales of delinquent interests, may not solve the problem of the "lost" or "unknown" mineral owner. See Cheryl Outerbridge, "Missing and Unknown Mineral Owners," 25 *Rocky Mt. Min. L. Inst.* 20-1, 10-27 (1979). Even if the remedy provides a solution for securing the development right, it does not eliminate the costs associated with title examination or satisfying the due process requirement of notice.

<sup>7</sup> Cal. Civ. Code §§ 883.210-.270 (West Supp. 1995); Conn. Gen. Stat. Ann. §§ 47-33m to -33t (West Supp. 1995); Ga. Code Ann. § 44-5-168 (1991); Ill. Ann. Stat. ch. 765, para. 515/1 to /17 (Smith-Hurd 1993); Ind. Code Ann. §§ 32-5-11-1 to -8 (Burns Repl. 1995); Iowa Code Ann. §§ 557C.1-.6 (West 1992); Kan. Stat. Ann. §§ 55-1601 to -1607 (1994); Ky. Rev. Stat. Ann. §§ 353.460-.476 (Michie/Bobbs-Merrill Repl. 1993); Me. Rev. Stat. Ann. tit. 14, § 6662 (West Supp. 1994); Mich. Comp. Laws Ann. §§ 554.291-.294 (West 1988); Minn. Stat. Ann. §§ 93.52-.58 (West 1995); Neb. Rev. Stat. §§ 57-228 to -231 (Reissue 1993); N.H. Rev. Stat. Ann. § 498:5-e (Repl. 1983); N.C. Gen. Stat. §§ 1-42.1 to -42.9 (1983 & Supp. 1994); N.D. Cent. Code §§ 38-18.1-01 to -08 (Repl. 1987

legislation was enacted during 1980s. A Uniform Dormant Mineral Interests Act (1986) has been drafted under the auspices of the National Conference of Commissioners on Uniform State Law.<sup>8</sup>

Dormant Mineral Acts solve the problem of fractionalized and unproductive mineral estates by terminating severed mineral interests after a specified period of non-use. Typically, the dormant interest owner can avoid termination by filing a recorded document.<sup>9</sup> Almost universally, the terminated interest reverts to the surface owner.<sup>10</sup> The Acts vary as to the individual requirements. Some are “self executing” while others require an adjudication of the termination.<sup>11</sup> Historically, the salient criticism of dormancy mineral legislation was directed at the windfall that accrues to the surface owner who paid only for the surface estate but is likely to own, or will ultimately own, the mineral estate by operation of the Act. Large landowners, such as timber companies, or government entities, as opposed to small farmers, are often the prime beneficiaries of the windfall.

The purpose of this chapter is to examine the operation of dormancy mineral legislation to determine if it reduces the problems of fractionalized and unknown mineral ownership. Likewise, the affect of the legislation

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& Supp. 1993); Ohio Rev. Code Ann. § 5301.56 (Anderson Supp. 1994); Or. Rev. Stat. §§ 517.170-.180 (1988); S.D. Codified Laws Ann. §§ 43-30A-1 to -10 (Supp. 1995); Tenn. Code Ann. § 66-5-108 (Repl. 1993); Va. Code Ann. §§ 55-153 to -155 (Michie Repl. 1986 & Supp. 1994); Wash. Rev. Code Ann. §§ 78.22.010-.090 (West Supp. 1995); W. Va. Code §§ 55-12A-1 to -10 (Repl. 1994 & Supp. 1994); Wis. Stat. Ann. § 706.057 (West Supp. 1994)

<sup>8</sup> Unif. Dormant Mineral Interests Act, 7A U.L.A. 60 (Supp. 1995). For a critical analysis of the Act see Jeffrey A. Townsend, “The Model Dormant Mineral Interest Act: Limited Practicability,” 8 *E. Min. L. Inst.* 20-1 (1987).

<sup>9</sup> *But see* Ga. Code Ann. § 44-5-168(a)(1991)(providing working or attempting to work the mineral interest and payment of taxes as the only means to preserve the interest).

<sup>10</sup> *But see* Minn. Stat. Ann. § 93.55 (West 1995)(providing for forfeiture to the state); Ind. Code Ann. § 32-5-11-1 (Burns Repl. 1995)(providing for reversion to the owner from which the interest was carved).

<sup>11</sup> Some Dormant Mineral Acts expressly require a judicial determination of the lapse of the dormant mineral interest. *See* Cal. Civ. Code § 883.240 (West Supp. 1995); Conn. Gen. Stat. Ann. § 47-33q (West Supp. 1995); Ga. Code Ann. § 44-5-168(b)(1)(1991); Me. Rev. Stat. Ann. tit. 14, § 6662(2)(West Supp. 1994); N.H. Rev. Stat. Ann. § 498:5-e(1)(Repl. 1983).