Texaco, Inc. v. Short (U.S. Supreme Court): An Analysis of the Proposed Dormant Mineral Legislation for Arkansas

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*Texaco, Inc. v. Short*
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AN ANALYSIS OF THE PROPOSED DORMANT MINERAL LEGISLATION FOR ARKANSAS

The burdensome and often futile efforts to locate mineral owners for leasing purposes is a consequence of recognizing, as the Arkansas Supreme Court did in the landmark case of Bodcaw Lumber Co. v. Goode that oil and gas may be severed from the surface estate, and what results is a perpetual mineral estate that is not lost by abandonment or non-use or acquired by adverse possession of the surface. Since that development mineral ownership separate and apart from the surface ownership has become commonplace. Indeed, conveyancing in areas where mineral exploration and production prevails has been characterized by grants or reservations of "oil, gas and other minerals" or "the surface only." Further, conveyances of fractional mineral interests during boom times to investors and speculators and devolution of title by testate and intestate succession has resulted in highly fractionalized ownership of many mineral titles.

Passage of time and failure of severed mineral owners to probate non-productive mineral properties often results in difficulty in ascertaining mineral ownership and locating the mineral owners. If the mineral owner is "lost", cannot be found or is "unknown", the ownership cannot be ascertained and the
acquisition of leases is impossible. Further, lack of an oper-ative system of ad valorem taxation for severed mineral interests precludes forclosures for non-payment of taxes from solving many "lost" or "unknown" mineral owner problems. 4

Although remedies exist for the "lost" or "unknown" mineral owner, 5 especially 52 Ark. Stat. Ann. 2016 et seq., commonly referred to as the receivership statute, dormant mineral legislation is currently pending in the Arkansas legislature. Since dormant mineral acts have been introduced in the legislature in 1955 7 and 1973, 8 such legislation is not a stranger to the General Assembly. 9 The impetus for the current legislation is the recent United States Supreme Court decision in Texaco, Inc. v. Short, 10 which sustained the constitutionality of the Indiana dormant mineral act.

This is the background of the problem. The remainder of my remarks will focus on the existing remedies now available for the "lost" or "unknown" mineral owner phenomena with emphasis, due to its importance, on the receivership statute. Then, the dormant mineral acts pending in the legislature will be reviewed. Limitations on the existing remedies will be highlighted so that the need, if any, of a dormant mineral act can be better assessed. Professor Webber, my colleague from the UALR School of Law, will discuss Texaco, Inc. v. Short and the constitutional objections to dormant mineral legislation, if any, that remain after that decision.
The Receivership Act

52 Ark. Stat. Ann. 201 et seq., permits a tenant in common, or its lessee, to mineral lands or severed mineral interests to compel appointment of a receiver in the Chancery Court who is empowered to execute a lease to the mineral lands or interests. The lease must be executed for cash and a royalty and be "to the best interests of, or compensation to," the affected mineral owners. If the consideration is "fair and equitable" the court must approve the lease. The statute may not be utilized, however when operations under a valid mining lease are being undertaken on the tract.

The statute is broad in its scope. It is applicable not only to the "lost" or "unknown" mineral owner but also to the known mineral owner who refuses to execute the lease, i.e., the recalcitrant mineral owner. However, as the statute may only be invoked by a tenant in common, or its lessee, to the outstanding mineral interest, it offers no solution to the "lost" or "unknown" mineral owner problem when the interest of a cotenant is neither owned or under lease. For example, a tract to which none of the mineral owners can be found cannot be leased under the statute.

The statute was before the Arkansas Supreme Court in Davis v. Schimmel. Even though the case did not involve a direct constitutional assault on the act, the statute was applied therein and the bar has viewed the case as alleviating all doubts as to the constitutionality of the statute.
Receivership Pursuant to Partition and Sale

A similar statutory scheme, 53 Ark. Stat. Ann. 401, et seq. provides for appointment of a receiver to execute an oil and gas lease on the entire tract, not merely the interest of the defendant mineral owner, pursuant to a partition action. The court must find that the interests of the parties will be fully protected, and the various interests will have greater value after the execution of an oil and gas lease than after a sale or partition in kind of the interests. The lease must provide for a royalty of not less than (1/8) one-eighth and, also, be upon such terms as are "just and proper." The statute may only be applied when no production or oil and gas lease covering the entire leasehold estate is outstanding.

As with 52 Ark. Stat. Ann. 201 et. seq., the statute appears to be applicable to the recalcitrant mineral owner as well as the "lost" or "unknown" mineral owner. Also, a cotenancy relationship must exist before the statute may be utilized. The constitutionality of the act was upheld over due process objections in Overton v. Porterfield.

Since in most instances oil and gas leases will have been acquired on some of the mineral interests to the tract involved, with the necessity for the receivership extending only to the unleased interests, 52 Ark. Stat. Ann. 201 et seq. is probably the most prevalently used statute as it only requires a sale of the unleased interest while 52 Ark. Stat. Ann. 401 et. seq. requires a lease to the entire mineral estate.
Finally, both receivership statutes have been criticized.\(^1\) As each statute entails judicial proceedings, they offer an expensive remedy.\(^2\) The most salient criticism, however, arises from the conflict of interest that exists when, as usually happens, the receiver executing the lease on behalf of the defendant mineral owners is acting solely to accommodate the plaintiff-lessee.\(^3\)

**Forced Integration**

The forced integration statute, 53 Ark. Stat. Ann. 115,\(^4\) et. seq., also provides a remedy for the "lost" or "unknown" mineral owner. The act is applicable to "separately owned tracts and separately owned interests" in all or part of the spacing unit.\(^5\) Thus, "non-consenting acreage" within the spacing unit as well as "non-consenting" undivided mineral interest to tracts located within the spacing unit are governed by the statute. There is only one potential limitation on forced integration as a remedy for the "lost" mineral owner. The statutory remedy may be applicable only when the tract in issue is encompassed within an established drilling unit, which requires the existence of a common "pool,"\(^6\) and precludes its use for a wildcat prospect. If the statute could be construed as permitting the establishment of drilling units for a potential, as opposed to an actual, common source of supply, forced integration would not be so limited.\(^7\)

If the forced integration statute is applicable, the lost or unknown mineral owner would appear to be relegated to the forced sale option, a cash sum for the development right which is equivalent to a bonus plus a royalty interest.\(^8\) The Oil and Gas
Commission typically requires the unleased mineral owner to
affirmatively elect to take its proportionate share of produc-
tion, either by having its proportionate share of costs recovered
out of production plus a risk factor penalty or by paying its
advance share of costs. The proceeds from the forced sale and
royalty would probably be placed in an escrow account.

Senate Bill No. 30

Senate Bill No. 30 provides that a mineral interest unused
for twenty (20) years is extinguished and reverts to the surface
owner unless a statement of claim is filed of record by the
mineral owner. The definition of a mineral interest appears to
include, by implication, a royalty or leasehold interest as well
as a mineral interest in coal, oil and gas and other minerals.
Use which precludes extinguishment is defined as production,
receipt of delay rentals, minimum or shut-in royalty, or gas or
other liquid storage operations on the land or the land pooled or
unitized therewith. Payment of taxes on the mineral interest is
also a use precluding extinguishment. Further, fulfilling any of
the use criteria preserves all of the interests conveyed or
reserved in the instrument of severance. Thus, production of oil
preserves the gas or any other mineral encompassed within a grant
of "oil, gas and other minerals."

The claim of ownership, equivalent to use under the act,
must contain the name and address of the owner, legal description
of the land, book and page of the recorded instrument of
severance and be recorded in the circuit clerk's office. As the
act operates retroactively, the filing must be made within one
(1) year from the enactment of the act if the twenty (20) year period of nonuse has run.34 If the twenty years of nonuse has not yet passed, the claim must be filed before the period expires.35

An unobservant owner of extensive mineral interests may be spared from having an unused mineral interest extinguished for failure to timely file a statement of claim.36 To qualify for the exception the omission must have been due to inadvertance.37 Also, on the expiration date for the filing of the ownership claim, at least ten (10) other mineral interests must have been owned in the county where the non-preserved mineral interest is situated.38 Further, the mineral owner must have made a diligent effort to preserve all unused mineral interests and some interests must have actually been preserved by proper filing of ownership claims within ten (10) years of the expiration date for the filing of the non-preserved interest.39 Finally, within sixty (60) days of acquiring knowledge of the lapsed interest or the giving of notice by publication by the successor-in-interest to the lapsed interest, the mineral owner must file a statement of claim.40

Dormant mineral legislation, if enacted, should operate so that mineral ownership can be determined with certainty, preferably from record title, without necessity of litigation. Further, the act should readily permit a determination that the standard for a drilling title examination, a defensible title, i.e., a title that can be successfully defended, exists. Basically, the present proposal fails to meet these requirements.

First, needless litigation will be required due to the failure of the statute to sufficiently define the terms and scope
of its operation. The most glaring deficiency is the failure of the act to specifically define "production," which precludes extinguishment under the act, in terms of "paying quantities" or whatever standard is intended to apply. Further, if intended to encompass dormant royalty interests, the statute should explicitly so indicate.

More importantly, the existence of "defensible title" may not be readily ascertained as to mineral interests that have apparently reverted to the surface owner under the act for, inter alia, failure to file an ownership claim. In effect, the possibility of a subsequent proper filing under the exception provision must be eliminated before a defensible title in the surface owner can be established. Thus, the relevant records must be checked to ascertain if ten (10) other mineral interests, some of which were preserved by a proper filing, were owned by the severed mineral owner in the county on the expiration date. Ascertaining such information may well be burdensome and time consuming.

Additionally, other information, outside of the record title and difficult to acquire, may often be required by the act to resolve mineral ownership. For example, historical production records for the land and for any lands with which the tract was pooled may be required to determine if non-production existed during the requisite period for extinguishment. Also, if an oil and gas lease providing for delay rental payments was executed during the twenty (20) year period of non-production, evidence that delay rentals were actually paid must be produced before it
can be determined whether the mineral interest has been extinguished. The act could have avoided a possible difficult issue of fact, which will likely make location of the burden of proof determinative of the issue, by providing a statutory presumption that such payments have been made.

Summary

Turning from the shortcomings of the proposed act, the need for dormant mineral legislation in Arkansas is difficult to assess. Admittedly, the receivership and forced integration statutes, the traditional remedies, may not offer a comprehensive solution to the problem. If a producing formation is a prerequisite for establishing drilling units, development rights to wildcat lands may not be acquired by forced integration. Also, the receivership acts may only be used when the applicant is a cotenant with the absent mineral owner. Thus, the traditional remedies offer no solution for lands that are not embraced within established field wide units and have not been leased, or a mineral interest acquired therein, due to lost mineral ownership.

However, despite the deficiencies inherent in the traditional statutory remedies, no empirical evidence exists, to my knowledge, which indicates that exploration or production on Arkansas lands has been prevented by the lost mineral owner phenomenon. The lack of empirical evidence may be attributed either to the fact that any such revelation would disclose proprietary information or that the lack of a universal remedy has only had academic significance.
However, dormant mineral legislation need not be justified solely on the basis of necessity for development. Addresses, initially current, of owners of non-productive severed mineral interests will be yielded by the registration requirement, a common feature of such legislation. Mineral interests not preserved by compliance with the act will be extinguished. Thus, leasing of mineral interests will be expedited and the costly, protracted and often fruitless search for missing mineral owners should occur only rarely.

Ideally, the decision to adopt dormant mineral legislation should involve a balancing of the public's interest in facilitating the leasing of mineral interests against the interests of non-productive severed mineral owners who may lose their mineral rights for failure to comply with a statute of which they may have no knowledge. Non-resident mineral owners, who are unlikely to receive information on the adoption of an Arkansas statute, are particularly vulnerable under such legislation. *Texaco, Inc. v. Short* only resolved that the dormant mineral acts under scrutiny therein satisfied the due process requirements of the fourteenth amendment. Even if the proposed legislation is constitutional, a question remains concerning its propriety.

The result from the balancing of the interests, i.e., whether or not dormant mineral legislation should be adopted, does not appear self-evident. However, surface owners, who have traditionally borne the burden of oil and gas operations without
sharing in the benefits of production, will have no such hesitancy in supporting the legislation. Dormant mineral acts, such as Senate Bill No. 30, provide a windfall for the surface owner, i.e., title to the extinguished mineral interest. Given the militancy of modern surface owners, as manifested by liberal "surface damage"41 and "surface owner royalty"42 statutes adopted or proposed in other states, dormant mineral legislation will, if not adopted at this session, remain a perennial subject for the legislature. If a dormant mineral legislation is ever to become a reality in Arkansas, the act must be well-drafted, clear and concise and provide certainty as to mineral ownership without imposing new and additional title problems.
FOOTNOTES

1. 160 Ark. 48, 254 S.W.2d 345 (1923). This case is frequently cited as holding that the in place theory of oil and gas ownership, in which the mineral owner is recognized as having a corporeal or possessory interest in the oil and gas underlying the land, prevails in Arkansas. However, Mr. Justice George Rose Smith in his excellent article, Creation of Various Classes of Mineral Estates, 2nd Annual Arkansas Oil and Gas Inst. 4, (1963) observes that that view "may be an oversimplification of the actual holding in the case."

2. On the acquisition of title to minerals by adverse possession, see, 1 E. Kuntz, The Law of Oil and Gas §§ 10.1-10.7 (1962); and 1 Williams and Meyers, Oil and Gas Law §§ 223-224 (1964). For an analysis of the Pre-1964 Arkansas cases, see, McRae, Adverse Possession and Quieting Title, 3rd Annual Arkansas Oil and Gas Inst. § 5 (1964).


4. Despite legislation compelling assessment for ad valorem taxation purposes, many counties in Arkansas have historically failed to assess and tax severed mineral interests. Further, counties which comply with the statutes generally improperly assess such interests and tax issued deeds pursuant thereto are void. See, Core, Tax Titles as they Relate to Mineral Interests, 1 Ann. Ark. Oil & Gas Inst. 9 (1962).

5. According to the majority view, a tenant-in-common may mine the minerals without committing waste, but he must account to the non-joining cotenants on a net profit basis and has no right to contribution should the operations prove unprofitable. See, e.g., Ashland Oil & Refining Co. v. Bond, 222 Ark. 696, 263 S.W.2d 74 (1953). The right of a cotenant to develop or to seek partition remains as common law remedies
for the "lost" or "unknown" mineral owner. However, in Arkansas, such remedies have largely been displace by the receivership statutes, discussed infra. See, E. Kuntz, supra n. 2 at § 5.3 et. seq.; as to rights of concurrent owners in oil and gas. As to partition, see, Wallace, Partition of Mineral Interests, 9th Ann. Inst. on Oil and Gas Law and Taxation 211 (1958).


7. Senate Bill 114 and 443, 60th Arkansas General Assembly, Regular Session 1955.


9. The 1973 act, supra N. 8, apparently was the impetus for the creation of a "mineral resources commission", an ad hoc state agency, to study and make appropriate recommendations on the "lost" mineral owner problem in Arkansas. Basically, the Commission failed to recommend adoption of dormant mineral legislation at that time. Mr. Oliver Clegg, Esquire, the chairman of the commission, authored an illuminating article on the constitutional dilemma confronting dormant mineral legislation prior to Texaco, Inc. v. Short, see, Clegg, supra. N. 3. The author has relied heavily on the Report of Mineral Resources Commission in this presentation.


12. Id. at §§ 52-207.

13. Id. at §§ 52-201.

14. 252 Ark. 1201, 482 S.W.2d 785 (1972).


16. For a discussion which compares this statute with similar statutes and other common law remedies, see, Smith, supra N. 3 at 149.

17. 206 Ark. 784, 177 S.W.2d 735 (1944).


19. Id.

20. Id.

22. Id. at §§ 53-115 (a).

23. Id. at §§ 53-114 (b).


25. Id. at §§ 53-115 (c).

26. Id.

27. Senate Bill 30, 74th General Assembly, Regular Session 1983. (A copy of the bill is appended to this article). Also, another dormant mineral act, House Bill No. 254, is also pending before the legislature. As the acts are similar in scope and operation, the discussion will be restricted to Senate Bill No. 30.

28. Id. at §§ 1.

29. Id. at §§ 2.

30. Id. at §§ 3.

31. Id.

32. Id.

33. Id. at §§ 4.

34. Id.

35. Id.

36. Id. at §§ 5.

37. Id.

38. Id.

39. Id.

40. Id.

41. For a citation and a discussion of surface use compensation statutes adopted in other states, see, Anderson, David. Goliath: Negotiating the "Lessor's 88" and representing lessors and surface owners in oil and gas lease plays, 27 Rocky Mt. Min. L. Inst. 1029, 1193 (1982).