The Severed Mineral Estate Problem: Are there Legislative Solutions?

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"It is becoming increasingly apparent in jurisdictions which have a long established coal or oil and gas industry that something must be done to eliminate title problems stemming from mineral conveyances executed in years gone by. The problem results from the fact that perpetual or very long term mineral interests may be created during a period of activity in a particular industry, and these interests do not terminate when the activity ceases. Ownership of the minerals may thus be lodged in individuals who have long disappeared from the area, leaving no trace, and making it impossible to further develop the mineral estate at this time.

"The problem is inherent in our common law system in which a separate estate, which may be in fee simple absolute, may be created in the minerals. Such a mineral interest has all the sanctity of an estate in land generally in that title to it cannot be lost by abandonment, and yet it is virtually immune to the various title curative devices, such as adverse possession, the tax deed, and the marketable title act, which keep land in the stream of commerce."
negotiate the terms of the lease. However, the 1937 Act proved deficient in a number of Oil and Gas Commission to integrate unleased interests in drilling units. 12 In 1963, the statute was amended to empower the Commission to fix risk factor penalties of even require a transfer (or lease, in practice) by the non-consenting parties on terms fixed by the Commission. While this procedure is effective where drilling units have been established for a producing field and drilling is imminent, it has no practical application in a wildcat area where mineral owners' whereabouts or existence are unknown.

POSSIBLE LEGISLATIVE SOLUTIONS

In 1955 two Senate Bills, Nos. 114 and 443, approached the problem on the basis of reuniting the mineral interests with the surface title in the absence of development or payment of taxes. Senate Resolution No. 27 directed the Research Department of the Arkansas Legislative Council to make a study of the legal problems involved. The result was Research Report No. 54 raising serious constitutional questions. Since 1955, almost every session has seen a bill of some type directed to a solution of this problem, but none has achieved passage.

Most of the bills introduced have used the assessment and payment of taxes approach to reunite the dormant mineral interest with the surface ownership. The underlying practical objection to this suggested solution, regardless of constitutional questions, is the reluctance, and even refusal, of tax assessors to assess non-producing mineral interests. Since only a nominal value can be ascertained, the tax realized is often said to be less than the cost of assessing and attempting to collect the tax.

The other approach has been that used in S.B. 114 of 1955: that after a severance of 20 years or more the owner of the surface might bring an action to quiet title to the land, including the severed mineral interests, on the theory of abandonment. While the general opinion has been that such a law could only act prospectively, because of constitutional requirements, as we shall see, a similar law has recently been adopted in Virginia and successfully overcome such constitutional important aspects. Primarily the problem of obtaining jurisdiction over the mineral owners whose existence or whereabouts are unknown and incapable of being determined. As originally enacted, the 1937 Act also required that all mineral owners be made parties even though some had already leased.

An attempt was made in 1963 to clarify the language of the 1937 law and resolve the problems mentioned and others which existed. The Mineral Section of the Arkansas Bar Association drafted the remedial legislation and it was sponsored by the Arkansas Bar Association in the General Assembly.

The principal objectives of the 1937 legislation were (i) elimination of the requirement that existing lessors, lessee parties, (ii) provision for the payment of the bonus, rents and royalties received by the receiver into the Registry of the Court, and (iii) an effort to provide more finality to the jurisdictional problem. 9 In 1972, this effort received a very thorough review in Davis v. Schimmel10, and the constitutionality of certain provisions was upheld, although the case did not involve a frontal assault on constitutional questions. However, the court went to some lengths to interpret various provisions so as to bring them within constitutional requirements of due process.

On the whole, the consensus of the bar now seems to be that the receiver procedure obtained a judicial blessing in the Davis case so as to remove critical doubts of constitutionality. However, serious problems still exist in the practicalities of the present law and may be summarized as follows:

1. The expense of judicial proceedings.
2. The problem of jurisdiction over defendants whose existence or whereabouts are unknown and cannot be determined.
3. The effectiveness of the receiver, who, usually serving as an accommodation to the plaintiff-lessee, is placed in the position of an adversarial party to the lessee and the absent defendant. 11

One other existing procedure should be mentioned that touches the problem to a limited extent, namely, the power of the Arkansas objections in the State Supreme Court. 12

Enacted legislation in other states has taken one of two general approaches. First, and most numerous, are the so-called "registration" statutes, which provide that in the absence of production or conveyance for a period of years (usually 20 to 25 years) such interests shall be deemed to have been abandoned, unless the owner registers in some manner in the county where the land is located within a short period (often 3 to 5 years) his name, whereabouts, and other pertinent information. Such statutes have been adopted in Illinois, Michigan, and Nebraska. 14

In 1973 a bill of that type (H.B. 552) probably caused the adoption of HCR 34 creating the "Mineral Resources Commission." An interesting feature of H.B. 552, however, differing from the Michigan-type statutes that would unite the dormant mineral with surface ownership.

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In order to establish abandonment, the California court held that it was necessary to find, in addition to mere non-user, "either that the owner's future use of the right could result only from a palpably unsound business judgment, or that the owner had given a further indication of his intent to abandon."

**CONCLUSION**

The variety of approaches taken by different states indicates the difficulty of a satisfactory solution, legislative or otherwise. It is too early to properly appraise the various alternatives; only experience in their use will provide answers.

In the meantime, Arkansas is fortunate to have judicial and administrative procedures that have stood the tests of time and legal attack. Improvements are needed, to be sure, but a good base is already available.

It is to be hoped that the Mineral Resources Commission and the Mineral Section of the Arkansas Bar Association will continue to monitor the experience in other jurisdictions and weave into existing or future legislation those improvements which meet the requirements of fairness and practicality.

**FOOTNOTES**

1. 160 Ark. 48, 254 S.W. 345 (1923); Summers Oil and Gas Section 131; 38 Am. Jur. (2) 477.


3. i) A member of the Arkansas Oil and Gas Commission; ii) A member of the Mineral Section of the Arkansas Bar Association; iii) A member of the Arkansas Geological Commission; iv) An oil and gas lease broker; v) A member of the Legislative Council; vi) An owner of substantial severed mineral interests; vii) A member of the Arkansas Forestry Commission; viii) An employee of a major oil company; ix) An employee or owner of an independent oil company; x) An abstractor licensed to do business in this State; xi) A county tax assessor; xii) An owner of a substantial surface interest of lands in this State.


8. Act 84.


10. 252 Ark. 1201, 482 S.W. 2d 785 (1972).

11. A similar statute in Mississippi makes the Chancellor Court Clerk the receiver in all cases, Miss. Code, 1972, Section 11-17-34. The Mississippi law applies only to (1) non-residents, and (2) persons whose whereabouts are unknown "after diligent search and inquiry." The law has never before been the Mississippi Supreme Court.


14. Ill Rev. Stat., Ch. 30 Sections 197-198 (1969); Mich. Comp. Laws Anno. 554.191; Nev. Rev. Stat. Sections 57-228 to 57-231. Professor Kuntz, Note 2 supra, criticizes this type of statute: "It is also submitted that the developing statutory pattern that requires a periodic filing of a claim by the owner in order to avoid a loss of title does not strike a good balance in that it impairs security of ownership without necessarily protecting the right of the property enjoyment. It impairs the security of ownership by exposing the owner to loss of title in the absence of the filing of a claim. It does not necessarily protect the right of property enjoyment in that the entering co-tenant may be frustrated by the simple filing of a claim by an uncooperative or absentee co-tenant."

15. Indiana Code Sections 46-1907 et seq.

16. Polston, Note 2 supra.


18. Without the slightest suggestion that the case is authority in Arkansas, the language of Hanson v. Ware, 224 Ark. 430, 274 S.W. 2d 395 (1955), dealing with the nature of a non-participating royalty, is interesting: "It is hard for us to conceive of an estate in real property which vests barrel by barrel or stratum by stratum. In the analogous case of a profit a prendre, such as the perpetual right to take game or fish from another's land, the estate in real property is a present vested interest which is unaffected by the rule against perpetuities."