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Dormant Mineral Statutes and Abandoned Severed Mineral Interests

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NOTES

DORMANT MINERAL STATUTES AND ABANDONED SEVERED MINERAL INTERESTS

I. INTRODUCTION

In North Dakota severed mineral estates are estates in real property with characteristics similar to those of the surface estate.[1] Surface owners conveyed the minerals or conveyed the land and reserved the minerals to create these separate estates.[2] In the past these conveyances and reservations and the resulting estates were given little attention due to their unknown value.[3] Throughout the years many severed mineral estates became highly fractionalized.[4] Today, as a result, the owners of these severed mineral interests are often hard to identify and locate, which thus hampers mineral

1. Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 651, 180 N.W. 787, 789 (1920). *See* Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980). It is the majority position that severed mineral estates are freehold estates entitled to the usual incidents of property ownership. *Id.* at 369, 412 N.E.2d at 524.

2. Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 42, 47 N.W.2d 543, 550 (1951).

3. N.D. LEGISLATIVE COUNCIL, BACKGROUND MEMORANDUM FOR JUDICIARY "B" COMMITTEE, June 1979, at 1 (quoting 1969 LEGISLATIVE COUNCIL REPORT) [hereinafter BACKGROUND MEMORANDUM]. The Senate Resolution that authorized this study of severed mineral interests states that "many mineral rights have been sold and are owned by persons not owning the surface rights to the land. . . . [T]hrough further sale and subdividing of interests, and through the inheritance of mineral rights by numerous heirs, severed mineral rights have, in many cases, been divided into minute fractional interests. . . ." 1979 N.D. Sess. Laws 1946.

4. BACKGROUND MEMORANDUM, *supra* note 3, at 1 (quoting 1969 LEGISLATIVE COUNCIL REPORT).

exploration and development.[5] The North Dakota Legislative Council determined that "some method of dealing with . . . severed mineral interests that [are] restricting production should be found to assure that mineral development in North Dakota [will] proceed at a satisfactory pace."[6]

Although North Dakota has not yet developed a legislative solution to the problem of fractionalized dormant severed minerals that impede energy development,[7] other states have devised various solutions to the problem, among them dormant mineral acts.[8] These statutes set certain requirements, such as registration or actual mineral production, which, if not met in a specified number of years, cause the mineral estate to become extinguished and

5. Commentators have written about the obstacles to mineral development when severed mineral estates are fractionalized and when the titles are no longer easily connected to their owners. *See, e.g.,* Hardy, *Ancient Mineral Claims—An Obstacle to Development,* 28 INST. ON OIL & GAS L. & TAX'N 137 (1977); Kuntz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest,* 22 INST. ON OIL & GAS L. & TAX'N 81 (1971); Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests,* 43 TEX. L. REV. 129 (1964); Note, *Severed Mineral Interests, A Problem Without a Solution?,* 46 N.D.L. REV. 451 (1970) [hereinafter cited as Note, *Severed Mineral Interests*]; Note, *Abandonment of Mineral Rights,* 21 STAN. L. REV. 1227, 1231 (1969); Note, *Oklahoma's Absent Mineral Owners,* 15 TULSA L.J. 792, 795-96 (1980). One commentator questions whether the problem is as severe as others assert. *See* Outerbridge, *Missing and Unknown Mineral Owners,* 25 ROCKY MTN. MIN. L. INST. 20-1, 20-57 (1979).

6. BACKGROUND MEMORANDUM, *supra* note 3, at 1 (quoting 1969 LEGISLATIVE COUNCIL REP).

7. During the last 12 years North Dakota legislators have introduced various proposals attempting to deal with dormant severed mineral interests, but none have become law. In 1969 an Abandoned Property Act was introduced in the North Dakota Senate. N.D.S.B. 38, 41st Leg. Sess. (1969). The bill would have declared certain mineral interests abandoned and would have placed them in trust for the owner in the same manner as unclaimed personal property. *See* N.D. CENT. CODE ch. 47-30 (1978 & Supp. 1981). The bill passed the senate but was defeated in the house. *See* Note, *Severed Mineral Interests, supra* note 5, at 459-60 (a critical analysis of this bill). In the next legislative session a bill was introduced to tax all mineral interests and make them subject to foreclosure and eventually subject to sale for delinquent taxes, but the bill was postponed indefinitely in the senate. N.D.S.B. 2468, 42d Leg. Sess. (1971).

In 1973, Senate Bill No. 2227 was introduced. This bill provided a presumption that severed minerals were abandoned if taxes were not paid, the interest was not transferred, there was no actual production, or an affidavit of interest was not recorded. N.D.S.B. 2227, 43d Leg. Sess. (1973). After the state attempted to give notice to possible owners, the interest was to be put up for public auction. *Id.* The surface owner, however, would have an option to purchase the minerals by matching the highest bid. *Id.* This bill was postponed indefinitely in the house. A similar bill was introduced and again postponed in 1975. N.D.H.B. 1117, 44th Leg. Sess. (1975).

Also in 1975 a bill was introduced that would have required recordation of severed mineral interests. The penalty for nonrecordation was forfeiture of the interest to the state. N.D.S.B. 2084, 44th Leg. Sess. (1975). The bill passed the senate, but was postponed indefinitely in the house. In 1977 a bill was introduced that would have deemed unrecorded, unleased, and undeveloped severed mineral interests abandoned, vesting them in the surface estate through a theory of adverse possession. N.D.H.B. 1317, 45th Leg. Sess. (1977). This bill passed the house, but was defeated in the senate. Bills similar to Senate Bill No. 2084 from the 1975 session were also introduced in 1977 and 1979. N.D.S.B. 2292, 45th Leg. Sess. (1977); N.D.S.B. 2403, 46th Leg. Sess. (1979). The 1977 bill passed the senate, but not the house, and the 1979 bill was defeated in the senate.

Also in 1979 a bill identical to the 1977 House Bill No. 1317, which provided for adverse possession of severed mineral interests, was passed in the senate, but defeated by the house. N.D.S.B. 2443, 46th Leg. Sess. (1979). The 1979 legislature also authorized three studies relating to severed mineral interests. 1979 N.D. Sess. Laws 1794, 1828, 1946.

In 1981 two bills were introduced to separately tax severed mineral interests. N.D.S.B. 2421, 2439, 47th Leg. Sess. (1981). Both were defeated in the senate. Two bills were introduced in the house in 1981 to require transfer or reservation of part of the mineral estate to the surface owner upon conveyance of the surface or mineral estate. N.D.H.B. 1335, 1626, 47th Leg. Sess. (1981). House Bill 1335 was defeated in the house, and House Bill 1626 passed in the house, but was defeated in the senate.

8. *See, e.g.,* MICH. COMP. LAWS ANN. §§ 554.291-.294 (1967).

merge with the surface estate.[9] Five of these statutes have been challenged on constitutional grounds since 1977.[10] The highest court in each state, when facing the question of the statute's constitutionality, considered issues such as procedural due process violations[11] and impairment of contract rights.[12] As a result, three statutes were declared unconstitutional, those in Wisconsin,[13] Nebraska,[14] and Illinois.[15] Indiana[16] and Michigan,[17] however, upheld the validity of their dormant mineral acts. In the recent United States Supreme Court case of *Texaco, Inc. v. Short*[18] the validity of Indiana's dormant mineral act was affirmed.

States like North Dakota, which are considering similar dormant mineral acts as a solution to the problem of dormant severed mineral interests, should be aware of possible constitutional challenges to these acts as they attempt to create a just solution to this problem. This Note will examine severed mineral estates in North Dakota and general legal principles that affect severed mineral interests. In addition, this Note will analyze several dormant mineral statutes and the legal challenges brought against them.

II. LEGAL PRINCIPLES THAT AFFECT THE ABANDONMENT OF SEVERED MINERAL INTERESTS

A. COMMON LAW PRINCIPLES OF ABANDONMENT

Whether severed mineral interests can be abandoned has

9. For example, the Illinois dormant mineral legislation requires registration, actual production, or a recorded transfer of the minerals within the last 25 years. Otherwise, the severed minerals will vest in the owner of the surface. ILL. ANN. STAT. ch. 30, ¶¶ 197-198 (Smith-Hurd Supp. 1981) (declared unconstitutional in Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980)).

10. The five statutes and the corresponding cases that considered their constitutionality are as follows: ILL. ANN. STAT. ch. 30, ¶¶ 197-198 (Smith-Hurd Supp. 1981), Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980); IND. ANN. STAT. §§ 32-5-11-1 to -8 (Burns 1980), Short v. Texaco, Inc., ___ Ind. ___, 406 N.E.2d 625 (1980), *aff'd,* 102 S. Ct. 781 (1982); MICH. COMP. LAWS ANN. §§ 554.291-.294 (1967), Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982); NEB. REV. STAT. §§ 57-228 to -231 (1978), Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978); WIS. STAT. ANN. § 700.30 (West 1981), Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 316 (1977). The State of Minnesota also has dormant mineral legislation that was recently challenged, although in Minnesota the interest forfeits to the state instead of merging with the surface. *See* Contos v. Herbst, 278 N.W.2d 732, 740 (Minn.), *appeal dismissed sub nom.* Prest v. Herbst, 444 U.S. 804 (1979); MINN. STAT. §§ 93.52-.58 (1980).

11. *See, e.g.,* Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 571-72, 259 N.W.2d 316, 319 (1977).

12. *See, e.g.,* Van Slooten v. Larsen, 410 Mich. 21, 39-41, 299 N.W.2d 704, 708-09 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

13. *See* Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

14. *See* Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978).

15. *See* Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980).

16. *See* Short v. Texaco, Inc., ___ Ind. ___, 406 N.E.2d 625 (1980), *aff'd,* 102 S. Ct. 781 (1982).

17. *See* Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

18. 102 S. Ct. 781 (1982).

become important recently because of an increased emphasis on energy development. One commentator has noted:

> 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.[19]

In all jurisdictions severed mineral estates are classified as land.[20] At common law legal title to land could not be lost by abandonment.[21] Similarly, legal title to real property could not be relinquished through abandonment.[22] Subsequently, the principles of abandonment that developed usually dealt with abandonment of personalty[23] and interests that are not realty, such as easements[24] and contract rights.[25] Nevertheless, these principles of abandonment are important today in the area of severed minerals because dormant mineral legislation often refers to the legal principles of abandonment.

The law of abandonment has become well established, requiring two elements — the intent to abandon and an act evidencing that intent.[26] Once the elements of abandonment exist

19. 1 H. WILLIAMS & C. MEYERS, OIL & GAS LAW § 210.1, at 112.3 (1981) (footnote omitted) [hereinafter cited as WILLIAMS & MEYERS].

20. *Id.* § 212.

21. *See, e.g.*, Kimberlin v. Hicks, 150 Kan. 449, 454, 94 P.2d 335, 339 (1939); Tate v. Biggs, 89 Neb. 195, 203, 130 N.W. 1053, 1056 (1911).

22. *See, e.g., In re* Kelley, 50 Hawaii 567, 579, 445 P.2d 538, 546 (1968).

23. *See, e.g.*, Botkin v. Kickapoo, Inc., 211 Kan. 107, 505 P.2d 749 (1973) (abandonment of mill equipment); Emmons v. Easter, 62 Mich. App. 226, 233 N.W.2d 239 (1975) (abandonment of personal possessions).

24. *See, e.g.*, Strauch v. Coastal States Crude Gathering Co., 424 S.W.2d 677 (Tex. Civ. App. 1968) (abandonment of a pipeline easement).

25. *See, e.g.*, Melco Inv. Co. v. Gapp, 259 Minn. 82, 105 N.W.2d 907 (1960) (abandonment of contract rights).

26. *See, e.g.*, Lake Merced Golf & Country Club v. Ocean Shore R.R., 206 Cal. App. 2d 421, ____, 23 Cal. Rptr. 881, 889 (1962); Sioux City v. Johnson, 165 N.W.2d 762, 767 (Iowa 1969); Botkin v. Kickapoo, Inc., 211 Kan. 107, 110, 505 P.2d 749, 752 (1973); Emmons v. Easter, 62 Mich. App. 226, ____, 233 N.W.2d 239, 245 (1975); Melco Inv. Co. v. Gapp, 259 Minn. 82, 85, 105 N.W.2d 907, 909 (1960); Rumph v. Dale Edwards Inc., ____ Mont. ____, ____, 600 P.2d 163, 171 (1979); Minot v. Fisher, 212 N.W.2d 837, 839 (N.D. 1973); Cundy v. Weber, 68 S.D. 214, 225-26, 300 N.W. 17, 22 (1941); State v. Murry, 195 Wis. 657, ____, 219 N.W. 271, 272 (1928).

The intent to abandon must be proven through the use of strong and convincing evidence. Wilson v. Wheeler Farms, Inc., 591 S.W.2d 287, 289 (Mo. Ct. App. 1979). Note, however, that in appropriate cases intent can be inferred from long continued nonuse. *Id. See* Botkin v. Kickapoo, Inc., 211 Kan. 107, 110, 505 P.2d 749, 752 (1973). This evidence can consist of the statements or acts of the owner. Conway v. Fabian, 108 Mont. 287, 306-07, 89 P.2d 1022, 1029 (1939). The act (or failure to act) accompanying the property owner's intent to abandon must be unequivocal, decisive, and overt, whereby the owner totally relinquishes the property. *See, e.g.*, Storck v. Pascoe, 247 Iowa 54, 64, 72 N.W.2d 467, 473 (1955); Botkin v. Kickapoo, Inc., 211 Kan. 107, 110, 505 P.2d 749, 752 (1973); Barnes v. Hulet, 34 N.D. 576, 588, 159 N.W. 25, 29 (1916).

simultaneously, abandonment instantly occurs.[27]

Abandonment can be distinguished from mere neglect as abandonment is an intentional act divesting an owner of title to his property,[28] while neglect is unintentional. Similarly, courts often state that mere nonuse is not sufficient to constitute abandonment.[29] Abandonment can also be distinguished from forfeiture. Forfeiture is coercive; abandonment is voluntary.[30] Furthermore, the act of abandonment is not a transfer to another person, such as a sale, barter, or gift; rather, the property is freed by one party who has no intention of repossessing or reclaiming it and is indifferent to what will become of it in the future.[31] With abandonment, the combination of the two elements, act and intent, results in a total loss of the property.[32]

The conclusion that a severed mineral estate cannot be abandoned when it is classified as real property[33] is complicated by the classification of severed minerals as corporeal or incorporeal hereditaments.[34] These classifications and the corresponding

27. Farmer's Irrigation Dist. v. Frank, 72 Neb. 136, 155, 100 N.W. 286, 292 (1904).

28. Vallejo v. Burrill, 64 Cal. App. 399, 408, 221 P. 676, 679-80 (1923).

29. *See, e.g.*, Pearson v. Guttenberg, 245 N.W.2d 519, 529 (Iowa 1976); Wilson v. Wheeler Farms, Inc., 591 S.W.2d 287, 289 (Mo. Ct. App. 1979); Morgan v. Fox, 536 S.W.2d 644, 652 (Tex. Civ. App. 1976). *But see* Cundy v. Weber, 68 S.D. 214, 226, 300 N.W. 17, 22 (1941) (water right not put to beneficial use since 1894 was considered impliedly abandoned).

Failure to assert legal title to land does not constitute abandonment. Hadley v. Platte Valley Cattle Co., 143 Neb. 482, 487, 10 N.W.2d 249, 252 (1943); Engen v. Kincannon, 79 N.W.2d 160, 167 (N.D. 1956). Correspondingly, failure to pay taxes does not automatically constitute abandonment. Knowlton v. Coye, 76 N.D. 478, 485, 37 N.W.2d 343, 349 (1949). Note, though, that in *Knowlton* the failure to pay taxes occurred during the depression years. *Id.*

30. *See* Coleman v. Mountain Mesa Uranium Corp., 257 F.2d 382, 383-84 (10th Cir.), *cert. denied,* 358 U.S. 928 (1958). *See also* Herman Hanson Oil Syndicate v. Bentz, 77 N.D. 20, 24, 40 N.W.2d 304, 306 (1949) (abandonment requires voluntariness).

31. *See, e.g.*, Goltra v. United States, 96 F. Supp. 618, 625 (Ct. Cl. 1951); Del Giorgio v. Powers, 27 Cal. App. 2d 668, ____, 81 P.2d 1006, 1014 (1938); Irion v. Hyde, 107 Mont. 84, 91, 81 P.2d 353, 356 (1938).

32. Ball v. Williams, 250 Iowa 216, 222, 93 N.W.2d 723, 727 (1958).

In essence, courts look to the person who allegedly abandoned the property and consider how he acted and what he intended. Friedman v. United States, 347 F.2d 697, 704 (8th Cir.), *cert. denied,* 382 U.S. 946 (1965). When considering these factors courts must analyze all the facts and circumstances involved in the owner's relationship with the property. *See In re* Berman, 310 Minn. 446, 452, 247 N.W.2d 405, 408 (1976). The issue of abandonment presents a question of fact. Botkin v. Kickapoo, Inc., 211 Kan. 107, 111, 505 P.2d 749, 753 (1973). Since the proof of abandonment must be clear and unequivocal, it will not be readily presumed. Russell v. Allen, 496 S.W.2d 290, 294 (Mo. Ct. App. 1973); Bennett v. Bowers, 238 Iowa 702, 706, 28 N.W.2d 618, 620 (1947). *But see* Milford v. Tennessee River Pulp & Paper Co., 355 So. 2d 687, 689 (Ala. 1978) (personalty generally considered valueless was presumed abandoned).

33. A severed mineral estate in North Dakota is an interest in real property. Carlson v. Tioga Holding Co., 72 N.W.2d 236, 238 (N.D. 1955).

34. The terms "corporeal" and "incorporeal" are explained in the text accompanying *infra* notes 36-44. Simply, a corporeal estate is a fee simple estate similar to a solid mineral estate recognized in jurisdictions that adopt the ownership in place theory. An incorporeal estate can be compared to an easement in that one does not "own" the oil and gas interest. This classification is recognized by states that have adopted nonownership theories based on the migratory nature of oil and gas. *See* H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 150, 354 (5th ed. 1981).

The classification of mineral estates as real property is based upon the duration of the mineral estate, while the classification as corporeal or incorporeal is based on its possessory nature. WILLIAMS & MEYERS, *supra* note 19, § 212. The case of Gerhard v. Stephens, 68 Cal. 2d 864, 883-86, 442 P.2d 692, 708-10, 69 Cal. Rptr. 612, 628-30 (1968), analyzes and distinguishes the two classifications and

consequences concerning abandonment also are factors to be considered when analyzing a state's dormant mineral legislation.

B. THE CORPOREAL-INCORPOREAL DISTINCTION

As oil and gas law developed, several theories evolved that a state could use in the classification of its mineral estates.[35] The two main theories of mineral ownership are the nonownership theory and the ownership in place theory. The ownership in place theory has been adopted by the majority of states that have made a classification.[36] In ownership in place states the oil and gas interest is treated the same as a fee interest in solid minerals.[37] The minerals may be severed from the surface and are considered separate corporeal estates.[38] Under the nonownership theories, oil and gas are not owned until they are "captured" or produced.[39] If this theory is adopted mineral interests are generally viewed as incorporeal and may not be severed from the ownership of the land.[40]

The general rule today is the same as it was at common law: legal title to corporeal property cannot be lost or destroyed by abandonment, but an incorporeal interest may be extinguished under certain circumstances.[41] In a state that has adopted the

concludes that both interests, possessory nature and duration, must be considered when determining whether a mineral interest can be abandoned in a particular jurisdiction. *Id.*

35. WILLIAMS & MEYERS, *supra* note 19, § 203.

36. WILLIAMS & MEYERS, *supra* note 19, § 203.3. Arkansas is one state that has adopted this view. Bodcaw Lumber Co. v. Goode, 160 Ark. 48, ____, 254 S.W. 345, 349 (1923). The Arkansas Supreme Court stated in *Goode* that "separate title to the minerals is retained in perpetuity." *Id.* at ____, 254 S.W. at 349. Courts in Kansas, Michigan, Montana, and Nebraska also have adopted the ownership in place theory or have classified severed mineral estates as corporeal. "Kansas landowners own a present estate in the oil and gas in the ground. . . . This is the 'ownership in place theory.' " Mobil Oil Corp. v. State Corp. Comm'n, 227 Kan. 594, 609, 608 P.2d 1325, 1338 (1980) (Schroeder, J., dissenting) (citation omitted). "In Michigan we adhere to the ownership-in-place theory." Wronski v. Sun Oil Co., 89 Mich. App. 11, ____, 279 N.W.2d 574, 579 (1979) (citation omitted). "Montana is an ownership in place state with regard to oil, gas and other minerals." Stokes v. Tutvet, 134 Mont. 250, 255, 328 P.2d 1096, 1099 (1958). "[W]hen a mineral estate is conveyed [in Nebraska] an estate in fee simple in land or a corporeal hereditament is created." Wheelock v. Heath, 201 Neb. 835, 841, 272 N.W.2d 768, 772 (1978). Texas and Colorado also are considered to have adopted the ownership in place theory. *See* Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, ____, 254 S.W. 296, 299 (1923) (when severance is accomplished the minerals in place are a freehold, or an estate in fee simple); Brian v. Valley View Cattle Ranch, Inc., 35 Colo. App. 428, ____, 535 P.2d 237, 241 (1975) ("the possession and title of [a reserved] mineral interest becomes distinct and separate from the surface estate"). Note, however, that most major oil producing states other than Texas have adopted nonownership theories. *See* WILLIAMS & MEYERS, *supra* note 19, § 203.3.

37. WILLIAMS & MEYERS, *supra* note 19, § 203.3, at 44. *Accord* Callahan v. Martin, 3 Cal. 2d 110, 115-16, 43 P.2d 788, 791 (1935).

38. WILLIAMS & MEYERS, *supra* note 19, §§ 204.2, 209. *See* Sox v. Miracle, 35 N.D. 458, 469-71, 160 N.W. 716, 719-20 (1916) (common law definitions of corporeal and incorporeal hereditaments).

39. WILLIAMS & MEYERS, *supra* note 19, § 203.1.

40. WILLIAMS & MEYERS, *supra* note 19, §§ 204.2, 209. These incorporeal interests are compared to easements and are often described as *profits a prendre*. *Id. Accord* Callahan v. Martin, 3 Cal. 2d 110, 118, 43 P.2d 788, 792 (1935).

41. *See* Tietjen v. Meldrim, 169 Ga. 678, ____, 151 S.E. 349, 359 (1930). *Accord* 5 G. THOMPSON, REAL PROPERTY § 2515, at 491 (1979).

ownership in place theory and classifies severed mineral interests as corporeal, it would follow that the interest could not be lost by abandonment.[42] At common law these severed mineral interests could not be abandoned by their owners no matter what the owners intended.[43] As estates in land, they had to be "owned" continuously by someone because gaps in the chain of title to land were disfavored.[44]

If a state court has adopted a severed mineral classification of corporeal or incorporeal, courts and legislators should consider the classification when analyzing the issue of abandonment of severed mineral interests. If a court has declared that the state is an ownership in place jurisdiction with corporeal mineral interests and further decides to allow abandonment of the mineral estate, an ambiguity will exist that needs clarification. Legislatures in ownership in place states are faced with the same problem when drafting dormant mineral statutes that deem a mineral estate abandoned after a certain period of nonuse. States, such as North Dakota, that are contemplating the adoption of dormant mineral legislation should consider these issues and the constitutional challenges discussed in section V of this Note.

III. SEVERED MINERAL INTERESTS IN NORTH DAKOTA

In North Dakota the fee simple surface owner has the right to everything permanently situated beneath the surface.[45] The mineral estate may be severed from the surface estate, however, "by a conveyance of the mines and minerals, or by a conveyance of the land with a reservation or exception as to the mines and minerals."[46] Minerals, in theory, can be severed from the surface if

42. Some courts have declared that leasehold interests can be terminated by abandonment. *See* WILLIAMS & MEYERS, *supra* note 19, § 210.1.

43. 5 G. THOMPSON, REAL PROPERTY § 2515, at 491-92 (1979).

44. *See* Note, *Abandonment of Mineral Rights,* 21 STAN. L. REV. 1227, 1228 n.13 (1969). *See also* Gerhard v. Stephens, 68 Cal. 2d 864, 886-88, 442 P.2d 692, 710-11, 69 Cal. Rptr. 612, 630-31 (1968). In *Gerhard v. Stephens* the Supreme Court of California held that a severed mineral estate in California is an incorporeal hereditament subject to abandonment upon a showing of the requisite act and intent. *Id.* at 876-77, 442 P.2d at 703-04, 69 Cal. Rptr. at 624-25. The *Gerhard* case is a landmark case in that it was one of the first to consider many of the issues analyzed in this Note.

Some commentators question the validity of the corporeal-incorporeal distinction. *See* WILLIAMS & MEYERS, *supra* note 19, § 211. One author suggested that dormant mineral interests should be subject to abandonment based on policy reasons and that the "abstract categorization of such interests as corporeal or incorporeal should be totally irrelevant to the question [of abandonment]." Note, *supra,* at 1234.

45. N.D. CENT. CODE § 47-01-12 (1978). *See* Smith v. Nyreen, 81 N.W.2d 769 (N.D. 1957). When the mineral estate is not severed from the surface, the title to the surface includes that which lies beneath it. *Id.* at 771.

46. Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 42, 47 N.W.2d 543, 550 (1951) (quoting Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 180 N.W. 787 (1920)). *See generally* Fleck, *Severed Mineral Interests,* 51 N.D.L. REV. 369 (1974).

they are owned by one who does not own the land.[47] The severance of the minerals from the surface creates two estates,[48] each a freehold estate of inheritance that may be conveyed separately thereafter.[49] The severed estates are separate estates, considered as if they are different parcels of land.[50] The severed mineral estate consists of "the right or title to all, or to certain specified, minerals in a given tract."[51] This right or title to the minerals is an interest in real property.[52]

The Supreme Court of North Dakota has not specifically stated which ownership theory applies to severed mineral interests in the state. The case of *Bilby v. Wire*[53] has been interpreted to suggest adoption of the ownership in place theory[54] because it states that "severance of the mineral estate from the surface creates two estates which are as distinct as if they contained two parcels of land."[55] If one assumes that North Dakota is an ownership in place state, the corporeal severed mineral interests would not be subject to abandonment according to common law principles.[56] Furthermore, North Dakota classifies a severed mineral estate as real property,[57] also not subject to abandonment at common law.[58] This fact will be of importance later when considering the possibility of a dormant mineral act to help solve the problem of dormant severed mineral interests in North Dakota, as most dormant mineral statutes consider the minerals "deemed abandoned" after a specified period of time.

Because dormant severed mineral interests may be hindering mineral development in the state[59] and it is the state's policy to

47. Noss v. Hagen, 274 N.W.2d 228, 234 (N.D. 1979) (Pederson, J., concurring).
48. Bilby v. Wire, 77 N.W.2d 882, 889 (N.D. 1956).
49. McDonald v. Antelope Land & Cattle Co., 294 N.W.2d 391, 396 (N.D. 1980).
50. Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 651, 180 N.W. 787, 790 (1920).
51. Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 41, 47 N.W.2d 543, 550 (1951) (quoting 58 C.J.S. *Mines and Minerals* § 3 (1948)).
52. Carlson v. Tioga Holding Co., 72 N.W.2d 236, 238 (N.D. 1955). *See* Texaro Oil Co. v. Mosser, 299 N.W.2d 191 (N.D. 1980). In *Texaro* the North Dakota Supreme Court stated that "[a] 'mineral interest' is a real property interest created in oil and gas in place." *Id.* at 194 (quoting Stratman v. Stratman, 204 Kan. 658, 662, 465 P.2d 938, 942 (1970)).
53. 77 N.W.2d 882 (N.D. 1956).
54. WILLIAMS & MEYERS, *supra* note 19, § 209, at 102.
55. Bilby v. Wire, 77 N.W.2d 882, 889 (N.D. 1956).
56. 5 G. THOMPSON, REAL PROPERTY § 2515, at 491 (1979).
57. Carlson v. Tioga Holding Co., 72 N.W.2d 236, 238 (N.D. 1955).
58. *See In re* Kelley, 50 Hawaii 567, 579, 445 P.2d 538, 546 (1968).
59. *See* S. Con. Res. 4079, 1979 N.D. Sess. Laws 1946. Senate Concurrent Resolution No. 4079 stated:

> [I]n many cases severed mineral interests have, for practical purposes, been abandoned as worthless. . . . [T]itle to abandoned severed mineral interests should be legally acquired by the state or its political subdivisions so that such property may be resold to surface owners or other interested purchasers and thereby returned to valuable use. . . .

Id.

encourage mineral development,[60] the North Dakota Legislature probably will continue to consider methods to eliminate obstacles to such development. Before the analysis of dormant mineral acts in the next section of this Note, more traditional remedies applicable in North Dakota and their limitations will be discussed.[61]

North Dakota currently has a statute whereby undivided mineral interests belonging to unknown owners can be put into trust after court proceedings initiated by another mineral owner in the same property.[62] Although this statute seems to solve a limited number of severed mineral problems, commercial institutions are not eager to become trustees for numerous individual fractionalized mineral interests for an unspecified period of time.

A traditional remedy used by some states to deal with the problems of dormant severed minerals is a marketable record title statute.[63] Although North Dakota has a Marketable Record Title Act,[64] the usual application of this Act has no effect on a severed

60. N.D. CENT. CODE § 38-08-01 (1980). Section 38-08-01 of the North Dakota Century Code states that it is "in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state . . . [so that] the general public [may] realize and enjoy the greatest possible good from these vital natural resources." *Id.*

61. *See* Outerbridge, *supra* note 5, at 20-10 to 20-25 (general analysis of the traditional remedies of taxation, compulsory pooling statutes, permissive development statutes, and marketable title statutes).

62. N.D. CENT. CODE §§ 38-13-01 to -04 (1980). Section 38-13-01 of the North Dakota Century Code allows a district court to set up a trust "[w]here any undivided mineral, leasehold, or royalty interest in land is claimed or owned by a person whose place of residence and whereabouts is unknown" and when satisfactory proof is shown that "a diligent but unsuccessful effort to locate such owner or claimant has been made." *Id.* § 38-13-01. Section 38-13-02 limits this remedy so that trustee proceedings may be instituted only by petition of one who owns a mineral, leasehold, or royalty interest in the same land. *Id.* § 38-13-02. *See generally* Outerbridge, *supra* note 5, at 20-46 to 20-56.

63. Florida has a marketable title statute specifically made applicable to rights of entry "for the purpose of mining, drilling, exploring, or developing for oil, gas, [and] minerals." FLA. STAT. ANN. § 704.05(1) (West Supp. 1982). The Florida Supreme Court considered the Florida statute and decided it did not operate retrospectively, but the court did not reach the question of whether the statute was constitutional if applied prospectively. Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So. 2d 521, 524, 528 (Fla. 1973). The *Tufts* decision was upheld in Williston Highlands Dev. Corp. v. Hogue, 277 So. 2d 260, 261-62 (Fla. 1973). The Florida Legislature responded to these cases by giving both prospective and retrospective effect to the statutory limit on the duration of oil and gas exploratory and mining easements. FLA. STAT. ANN. § 704.05(3) (West Supp. 1982). The current statutory scheme has not yet been considered by the Florida courts.

The State of Virginia has an unusual statute that is similar to a marketable record title act. VA. CODE §§ 55-154 to -155 (1981). The statute creates an evidentiary presumption that no minerals exist in certain lands after 35 years of inactivity. *Id.* § 55-154. Exploring, drilling, transfer or production of the minerals, or payment of mineral taxes are activities that annul this presumption. *Id.* If no activity has occurred during the proscribed period, Virginia surface owners can bring a suit in equity to extinguish the claim. *Id.* § 55-155. After a six month waiting period, wherein the defendant can explore for minerals, the court can extinguish the mineral interest. *Id.* The Virginia Supreme Court upheld the constitutionality of this statute in Love v. Lynchburg Nat'l Bank & Trust Co., 205 Va. 860, ____, 140 S.E.2d 650, 653 (1965).

One author has expressed approval of the Virginia statute, finding it consistent with the constitutional principle justifying marketable title statutes. Spies, *The Annual Survey of Virginia Law: Property,* 51 VA. L. REV. 1621, 1661 (1965). Another commentator, however, questions the theory of mineral ownership used by the Virginia court in *Love,* because most theories of ownership of severed mineral interests do not depend on knowledge of the existence of minerals before the existence of a mineral estate. *Discussion Notes,* 22 OIL & GAS REP. (MB) 241 (1965).

64. N.D. CENT. CODE §§ 47-19.1-01 to -11 (1978). Section 47-19.1-01 of the Marketable Record Title Act provides:

mineral estate belonging to one who is not the possessor of the surface. The North Dakota Supreme Court has held that one must be in *actual* possession of the interest he claims, to come within the protection of the Act.[65] In a like manner, the traditional remedy of adverse possession will not solve the problems of abandoned severed mineral interests. Because the surface estate and the severed mineral estate are distinct, "it follows that the title to one cannot be acquired by adverse possession of the other."[66] *Actual* possession is also essential to the adverse possession of the mineral estate.[67]

Separate assessment and taxation of severed mineral estates is another traditional method used to deal with abandoned severed mineral interests.[68] When these taxes are not paid, the interests

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> Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by himself . . . which has been recorded for a period of twenty years or longer, and is in possession of such real estate, shall be deemed to have a marketable record title. . . .

Id. § 47-19.1-01. The stated purpose of this Act is "simplifying and facilitating real estate title transactions by allowing persons to deal with the record title owner . . . and to rely upon the record title. . . ." *Id.* § 47-19.1-10.

65. Northern Pac. Ry. v. Advance Realty Co., 78 N.W.2d 705, 719 (N.D. 1956). *See generally* Note, *Severed Mineral Interests, supra* note 5, at 454-55.

66. Bilby v. Wire, 77 N.W.2d 882, 889 (N.D. 1956).

67. *Id. See generally* Note, *Severed Mineral Interests, supra* note 5, at 452-54. *See also* Stoebuck, *Adverse Possession of Severable Minerals,* 68 W. VA. L. REV. 274 (1966).

A Georgia statute uses the theory of adverse possession to provide a way for a surface owner to terminate a severed mineral interest when the mineral owner has failed to work or attempt to work the mineral estate and has paid no taxes on that estate for a period of seven years. GA. CODE ANN. § 85-407.1 (1978). An action was brought to quiet title to minerals based on this statute, but the Georgia Supreme Court interpreted the Act as being prospective and held that no actions could be based upon the law until 1982. Nelson v. Bloodworth, 238 Ga. 264, ____, 232 S.E.2d 547, 548 (1977). The Georgia Supreme Court later affirmed its decision to limit the statute to prospective application. Johnson v. Bodkin, 241 Ga. 336, 247 S.E.2d 764 (1978). For a further discussion of the *Nelson* case, see Futrell, *Environment, Natural Resources, and Land Use,* 29 MERCER L. REV. 131, 140 (1977).

68. The Minnesota Legislature has codified its legislative findings related to severed mineral taxation. MINN. STAT. § 272.039 (1980). The reasons given for taxing mineral interests are applicable to other states as well:

> [A] class of real property has been created which, although not exempt from taxation, is not assessed for tax purposes and does not, therefore, contribute anything toward the cost of supporting the governments which protect and preserve the continued existence of property. . . .[F]or the purpose of requiring mineral interests owned separately from surface interests to contribute to the costs of government at a time when other interests in real property are heavily burdened with real property taxes, . . . the taxation of severed mineral interests . . . is necessary and in the public interest. . . .

Id. Many state courts have expressed the propriety of taxing severed mineral interests. *See, e.g.,* Nelson v. Teal, 293 Ala. 173, ____, 301 So. 2d 51, 52 (1974); Red Bluff Developers v. Tehama, 258 Cal. App. 2d 668, ____, 66 Cal. Rptr. 229, 231 (1968); Valls v. Arnold Indus., 328 So. 2d 471, 473 (Fla. Dist. Ct. App. 1976); Brown v. Lober, 63 Ill. App. 3d 727, 739, 379 N.E.2d 1354, 1363 (1978) (Jones, J., dissenting), *rev'd on other grounds,* 75 Ill. 2d 547, 389 N.E.2d 1188 (1979); State *ex rel.* Svoboda v. Weiler, 205 Neb. 799, 801, 290 N.W.2d 456, 458 (1980); Bannard v. New York Natural Gas Corp., 488 Pa. 239, ____, 293 A.2d 41, 50 (1972); Duval County Ranch Co. v. State, 587 S.W.2d 436, 443 (Tex. Civ. App. 1979), *cert. denied,* 449 U.S. 1077 (1981). For a listing of state statutes that provide for the assessment and taxation of severed mineral interests, see Outerbridge, *supra* note 5 at 20-11, 20-12. *See also* Note, *Tax Sales, Due Process and Severed Mineral Interests in Oklahoma,* 11 TULSA L.J. 615 (1976).

forfeit to the state or county and can be sold at a tax sale.[69] Currently, North Dakota has a statute that requires county assessors to list all severed minerals for taxation.[70] Flat rate taxation of severed minerals is the most practical taxation method; however, this is not constitutionally possible in North Dakota. "To be uniform [and thereby constitutional in North Dakota] property taxes must be laid with regard to the value . . . ."[71]

Two early attempts at severed mineral taxation were held unconstitutional by the North Dakota Supreme Court. One violated the uniformity clause of the North Dakota Constitution,[72] and the other violated the fourteenth amendment to the United States Constitution.[73] Although severed mineral estates in North Dakota are required by statute to be separately assessed and taxed, it is recognized that this is not done.[74] A 1979 North Dakota Senate Resolution declared that "severed mineral interests are not now assessed and taxed under laws relating to the ad valorem system of taxing property because of the cost of determining ownership and the cost of assessment, collection, and foreclosure."[75]

In North Dakota, as in other states, traditional remedies do not completely solve the problem of dormant severed mineral interests. Special legislation dealing with the problem appeared to be the answer, and as a result, several states enacted dormant mineral statutes during the last decade. As these statutes became effective, many were legally challenged because they took a severed mineral interest belonging to one and vested that interest with a surface estate belonging to another. The following sections of this Note will examine these statutes and the corresponding legal challenges to determine if dormant mineral acts are a feasible

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69. N.D. CENT. CODE § 57-28-08 (1972). Section 57-28-08 provides that lands can become the property of the county in which they are located upon the failure of the owner to redeem them. *Id.*

70. *Id.* §§ 57-02-24, -25. Section 57-02-24 of the North Dakota Century Code provides that "[t]he assessor shall list for taxation all coal and other minerals underlying any lands the ownership of which has been severed from the ownership of the overlying strata, and shall assess such coal and other minerals to the owner in the county in which the same actually lie." *Id.* § 57-02-24.

71. Northwestern Improvement Co. v. State, 57 N.D. 1, 11, 220 N.W. 436, 440 (1928). The North Dakota Constitution provides that "[t]axes shall be uniform." N.D. CONST. art. X, § 5 (formerly N.D. CONST. art XI, § 176).

72. A flat rate per acre per year tax on minerals was declared unconstitutional by the North Dakota Supreme Court in Northwestern Improvement Co. v. State, 57 N.D. 1, 11, 220 N.W. 436, 440 (1928), because the tax violated the uniformity clause of the North Dakota Constitution. *Id.*

73. A second attempt at taxing severed minerals was also struck down by the North Dakota Supreme Court in Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 42, 47 N.W.2d 543, 551 (1951), because the tax was discriminatory, unreasonable, and arbitrary in violation of the fourteenth amendment. *Id. See generally* Note, Severed Mineral Interests, *supra* note 5, at 455-58.

74. Justice Pederson, in a concurring opinion, expressed his doubt that assessors assess the minerals separately. Noss v. Hagen, 274 N.W.2d 228, 234 (N.D. 1979) (Pederson, J., concurring). The 1969 Legislative Council also reported on the impossibility of taxing severed minerals separately. *See* BACKGROUND MEMORANDUM, *supra* note 3, at 2. *See generally* Outerbridge, *supra* note 5 at 20-14 (1979).

75. 1979 N.D. Sess. Laws 1946.

alternative for states like North Dakota, in which dormant severed mineral interests may be adversely affecting mineral exploration and development.

IV. DORMANT MINERAL STATUTES

One popular method used by legislatures to solve the problems connected with missing or unknown owners of severed mineral interests is the enactment of dormant mineral statutes. These statutes can be divided into two general categories: (1) Recordation statutes, which impose registration requirements on severed mineral interest owners, with the failure to record resulting in merger with the surface estate or forfeiture to the state; and (2) conventional dormant mineral statutes, which impose specific requirements, such as registration, taxation, or actual production, that, if not satisfied in a set time period, will cause the mineral estate to be considered abandoned and will vest the mineral estate in the owners of the surface estate out of which it was carved.

State legislatures in Minnesota,[76] Wisconsin,[77] and South Dakota[78] enacted the first type, recordation statutes, in an attempt to deal with their problems relating to dormant severed mineral interests. The statutes generally describe the recordation requirements in detail.[79] The Wisconsin statute also requires

76. MINN. STAT. §§ 93.52-.58 (1980). Minnesota's severed mineral registration statute begins by stating its purpose as follows:

> The purpose of sections 93.52 to 93.58 is to identify and clarify the obscure and divided ownership condition of severed mineral interests in this state. Because the ownership condition of many severed mineral interests is becoming more obscure and further fractionalized with the passage of time, the development of mineral interests in this state is often impaired. Therefore, it is in the public interest and serves a public purpose to identify and clarify these interests.

Id. § 93.52(1).

77. WIS. STAT. ANN. § 700.30 (West 1981). The Wisconsin statute requires that all owners of severed mineral rights who do not also own the surface record their claim with the county register of deeds and pay an annual registration fee. *Id.* § 700.30(1).

78. S.D. COMP. LAWS ANN. § 43-30-8.1 (Supp. 1981). The South Dakota recordation statute is a recent amendment to its marketable title statute. *Id.* §§ 43-30-1 to -15 (1967 & Supp. 1981). For a discussion of various marketable record title statutes (enacted in Florida, Georgia, North Dakota, and Virginia) and their application to severed mineral interests, see *supra* notes 63-67 and accompanying text.

79. For example, the Minnesota statute requires the following:

> [E]very owner of a fee simple interest in minerals . . . owned separately from the fee title to the surface . . . shall file for record in the county recorder office . . . a verified statement . . . setting forth his address, his interest in the minerals, and both (1) the legal description of the property upon or beneath which the interest exists, and (2) the book and page number or the document number . . . of the instrument by which the mineral interest is created or acquired.

MINN. STAT. § 93.52(2) (1980). The United States, Minnesota, and American Indian tribes are exempt from this registration requirement. *Id.* § 93.52(3).

payment of recording and registration fees,[80] while the Minnesota statute is connected with Minnesota's tax on severed mineral interests.[81] Failure to record a claim pursuant to these statutes results in merger with or reversion to the surface estate in South Dakota[82] and Wisconsin,[83] and forfeiture to the state in Minnesota.[84]

Conventional dormant mineral acts have been enacted in Illinois,[85] Indiana,[86] Michigan,[87] and Nebraska.[88] These acts declare interests that have been unused for specific periods of time to be extinguished and vest the mineral estate with the surface owner unless the mineral owner records a claim of interest. The legislative purpose behind the enactment of most dormant mineral acts[89] is similar to Nebraska's — to provide a means for the

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80. Wis. Stat. Ann. § 700.30(1) (West 1981). The statute provides that "[i]n addition [to the recording fee], the claimant shall thereafter pay an annual registration fee of 15 cents per acre or fraction thereof with a minimum fee of $2 for each single description registered on the lands wherein such mineral rights are claimed." *Id.*

81. In Minnesota, forfeiture of the severed mineral estate does not occur if there is "substantial compliance with laws requiring the registration and taxation of severed mineral interests." Minn. Stat. § 93.55(2) (1980). Severed minerals in Minnesota are separately taxed. *Id.* § 272.04. The tax on severed minerals currently consists of $.25 per acre per year or $2.00 per interest per year, whichever is greater. *Id.* § 273.13 (2a).

In the case of *Contos v. Herbst,* the Minnesota Supreme Court considered constitutional challenges to the taxation of severed minerals based on the lack of uniformity within the *ad valorem* system and the lack of an actual property valuation foundation for the tax. Contos v. Herbst, 278 N.W.2d 732, 740 (Minn.), *appeal dismissed sub nom.* Prest v. Herbst, 444 U.S. 804 (1979). The Minnesota Supreme Court analyzed these objections, but found that they did not render the tax unconstitutional. *Id.*

82. Unless one claiming a severed mineral interest in South Dakota records an instrument describing that interest with the register of deeds at least once every 10 years, it will merge with the surface estate. S.D. Comp. Laws Ann. § 43-30-8.1 (Supp. 1981). This statute has not yet been construed by the South Dakota courts.

83. Wis. Stat. Ann. § 700.30(1) (West 1981). The Wisconsin statute states the following: "Failure to register any claim of mineral rights shall result in reversion of such rights to the surface fee owner. Failure to pay the registration fee within 3 years of the annual due date shall cause all rights to revert to the surface fee owner." *Id.* In 1977 this statute was found unconstitutional by the Wisconsin Supreme Court. Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 571, 259 N.W.2d 316, 318 (1977). The effect of *Pedersen* is that owners of severed mineral interests in Wisconsin today do not have to record their claims or pay the accompanying registration fee.

84. Under the Minnesota system, failure to file a verified statement of ownership pursuant to the statute results in the forfeiture of the mineral interest to the state after notice and opportunity for a hearing. Minn. Stat. § 93.55(1) (1980). Prior to a 1979 amendment the Minnesota statute did not provide for notice and a hearing. The notice and hearing requirements were added after the Minnesota Supreme Court determined that the statute violated the due process clause. *See* Contos v. Herbst, 278 N.W.2d 732, 742 (Minn.), *appeal dismissed sub nom.* Prest v. Herbst, 444 U.S. 804 (1979).

85. Ill. Ann. Stat. ch. 30, ¶¶ 197-198 (Smith-Hurd Supp. 1981) (enacted in 1969), *held unconstitutional in* Wilson v. Bishop, 82 Ill. 2d 364, 373, 412 N.E.2d 522, 526 (1980).

86. Ind. Code Ann. §§ 32-5-11-1 to -8 (Burns 1980) (enacted in 1971), *held constitutional in* Short v. Texaco, Inc., ___ Ind. ___, ___, 406 N.E.2d 625, 632 (1980), *aff'd,* 102 S. Ct. 781 (1982).

87. Mich. Comp. Laws Ann. §§ 554.291-.294 (1967) (enacted in 1963), *held constitutional in* Van Slooten v. Larsen, 410 Mich. 21, 56, 299 N.W.2d 704, 716 (1980) (4-3 decision), *appeal dismissed,* 102 S. Ct. 1242 (1982).

88. Neb. Rev. Stat. §§ 57-228 to -231 (1978) (enacted in 1967), *held unconstitutional as retroactively applied in* Wheelock v. Heath, 201 Neb. 835, 845, 272 N.W.2d 768, 774 (1978).

89. The Illinois statute stated its purpose as follows:

> [T]o provide for the termination of dormant mineral interests in land owned by persons other than the owners of the surface and for the vesting of title to same in the

termination of "dormant and abandoned severed mineral . . . interests in real estate."[90]

The four conventional statutes apply to different mineral interests. For example, the Michigan statute embraces "[a]ny interest in oil or gas,"[91] and the Illinois statute refers to "[a]ny interest in oil, gas or associated hydrocarbons, liquid or gaseous."[92] The Indiana and Nebraska statutes are somewhat broader as they cover all severed mineral interests.[93]

Conventional dormant mineral acts are specific as to what "nonuse" must be found before a mineral interest is terminated. A severed mineral interest in Nebraska will not be abandoned pursuant to the statute if the record owner has publicly exercised his right of ownership during the last twenty-three years.[94] There are many ways to exercise this right in Nebraska:

> [B]y (1) acquiring, selling, leasing, pooling, utilizing, mortgaging, encumbering, or transferring such interest or any part thereof by an instrument which is properly recorded in the county where the land from which such interest was severed is located; or (2) drilling or mining for, removing, producing, or withdrawing minerals . . . or (3) recording a verified claim of interest . . . .[95]

Conventional dormant mineral statutes also designate the number of years of nonuse that must transpire before an interest is deemed abandoned. The Indiana[96] and Michigan[97] statutes require a period of twenty years; Nebraska[98] requires twenty-three years;

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surface owners in the absence of the filing of a notice of claim of interest within a specified period of time.

ILL. ANN. STAT. ch. 30, ¶ 197 (note) (Smith-Hurd Supp. 1981). The Michigan statute's stated purpose is almost identical to the one above, the difference being that it refers to "the termination of dormant oil and gas interests" instead of dormant mineral interests. MICH. COMP. LAWS ANN. § 554.291 (1967) (caption). This is just one of the many similarities between the Illinois and Michigan dormant mineral acts. *Compare* ILL. ANN. STAT. ch. 30, ¶¶ 197-198 (Smith-Hurd Supp. 1981) *with* MICH. COMP. LAWS ANN. §§ 554.291-.294 (1967).

90. 13 CREIGHTON L. REV. 687, 689 (1979) (quoting *Statement of Purpose on L.B. 158: Public Works Comm.*, 77th Leg., 1st Sess. (1967)).

91. MICH. COMP. LAWS ANN. § 554.291(1) (1967).

92. ILL. ANN. STAT. ch. 30, ¶ 197 (Smith-Hurd Supp. 1981).

93. IND. CODE ANN. §§ 32-5-11-1 to -2 (Burns 1980) ("[a]ny interest in coal, oil and gas, and other minerals"); NEB. REV. STAT. § 57-228 (1978) ("mineral interest").

94. NEB. REV. STAT. § 57-229 (1978).

95. *Id.* In Michigan the issuance of a drilling permit for a mineral interest also prevents the interest from becoming abandoned under the statute. MICH. COMP. LAWS ANN. § 554.291(1) (1967). A mineral interest in Indiana is held by production and is held "when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas, or other fluid substances, or when rentals or royalties are being paid . . . or when taxes are paid on such mineral interest by the owner thereof." IND. CODE ANN. § 32-5-11-3 (Burns 1980).

96. IND. CODE ANN. § 32-5-11-1 (Burns 1980).

97. MICH. COMP. LAWS ANN. § 554.291 (1967).

98. NEB. REV. STAT. § 57-229 (1978).

and Illinois[99] requires twenty-five years.

These dormant mineral statutes use the concept of abandonment to clear titles of ancient, unused mineral interests.[100] The Illinois, Michigan, and Nebraska statutes provide that when the severed mineral interest is unused for the specified number of years, it will be considered abandoned[101] and thereafter vested in the owner or owners of the surface.[102] All four conventional dormant mineral acts provide for preservation of the severed mineral interest through recordation of a written claim of interest in the county register of deeds office.[103] The effect of recording a claim of interest is preservation of the interest for the number of years specified in the statute. For example, recording a notice of interest in Michigan protects the interest from the operation of the act for a period of twenty years, and the interest may be preserved indefinitely by filing notices each succeeding twenty year period.[104] Some statutes exempt government bodies from the recordation procedure.[105]

Minnesota and Wisconsin's recordation statutes and the conventional dormant mineral acts enacted in Illinois, Indiana, Michigan, and Nebraska have each been constitutionally challenged in the state's highest court. The supreme courts in Illinois,[106] Minnesota,[107] Nebraska,[108] and Wisconsin[109] declared

99. ILL. ANN. STAT. ch. 30, ¶ 197 (Smith-Hurd Supp. 1981).

100. *See* Outerbridge, *supra* note 5, at 20-27.

101. ILL. ANN. STAT. ch. 30, ¶ 197 (Smith-Hurd Supp. 1981); MICH. COMP. LAWS ANN. § 554.291 (1967); NEB. REV. STAT. § 57-229 (1978). The Indiana statute uses the term "extinguished" instead of abandoned. IND. CODE ANN. § 32-5-11-1 (Burns 1980).

The Nebraska statute is unique in that the surface owner must bring an action in equity to terminate the severed mineral interest. The Nebraska court considers whether the interest has been abandoned and, if so, terminates the mineral interest and vests the title in the surface owners. NEB. REV. STAT. §§ 57-228 to -230 (1978).

102. ILL. ANN. STAT. ch. 30, ¶ 197 (Smith-Hurd Supp. 1981); MICH. COMP. LAWS ANN. § 554.291 (1967); NEB. REV. STAT. § 57-230 (1978). The Indiana statute states that the mineral interest "shall revert to the then owner of the interest out of which it was carved." IND. CODE ANN. § 32-5-11-1 (Burns 1980). The Indiana statute has another unique section that allows a person who succeeds to the ownership of a mineral interest to give notice of the lapse of the mineral interest to the mineral interest owner or the public. *Id.* § 32-5-11-6.

103. ILL. ANN. STAT. ch. 30, ¶ 198 (Smith-Hurd Supp. 1981); IND. CODE ANN. § 32-5-11-4 (Burns 1980); MICH. COMP.LAWS ANN. § 554.292 (1967); NEB. REV. STAT. § 57-229 (1978). The Indiana statute provides for a separate "Dormant Mineral Interest Record" book to be kept in the county recorder's office for the recordation of these claims. IND. CODE ANN. § 32-5-11-7 (Burns 1980).

104. MICH. COMP. LAWS ANN. § 554.292 (1967).

105. The Michigan statute exempts "any interest in oil or gas owned by any governmental body or agency thereof." MICH. COMP. LAWS ANN. § 554.292 (1967). Nebraska exempts "mineral interests of which the State of Nebraska or any of its political subdivisions is the record owner." NEB. REV. STAT. § 57-229 (1978).

The Indiana statute has a special section stating that failure to file will not extinguish the mineral interest if four criteria are met, including owning ten or more mineral interests. IND. CODE ANN. § 32-5-11-5 (Burns 1980).

106. Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980).

107. Contos v. Herbst, 278 N.W.2d 732, 742 (Minn.), *appeal dismissed sub nom.* Prest v. Herbst, 444 U.S. 804 (1979).

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

109. Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

the statutes unconstitutional in some way, but the supreme courts in Indiana[110] and Michigan[111] upheld the statutes. In a five-four decision rendered in January 1982, the United States Supreme Court upheld the Indiana Supreme Court's determination that the Indiana Dormant Mineral Interests Act is constitutional.[112] The Court also dismissed an appeal of the Michigan Supreme Court's decision upholding the constitutionality of Michigan's dormant mineral act.[113] The six state supreme courts and the United States Supreme Court considered many challenges to the dormant mineral acts, including several constitutional challenges.[114]

V. CHALLENGES TO THE ACTS

The conventional dormant mineral acts adopted in Illinois, Indiana, Michigan, and Nebraska have many similarities. The Nebraska and Illinois statutes, however, were found to be in violation of constitutional provisions, while the Indiana and Michigan statutes were upheld.[115] The dilemma courts have faced when considering the constitutionality of dormant mineral acts has been stated as follows:

> [I]n our energy short and energy conscious generation, the legislative act has a real public purpose — to encourage exploration and drilling of new gas and oil wells. . . .
>
> On the other hand, the gas and oil interest holders have a property right given them by private publicly recorded contracts. . . . Whose rights are paramount, the state's or the individual's?[116]

Because of the nature of this problem, a court's balancing process and resolution of these issues seems to depend a great deal upon its philosophy regarding mineral development.

The Indiana and Illinois courts illustrate this proposition. The

110. Short v. Texaco, Inc., ___ Ind. ___, 406 N.E.2d 625 (1980), *aff'd,* 102 S. Ct. 781 (1982).

111. Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

112. Texaco, Inc. v. Short, 102 S. Ct. 781 (1982).

113. Larsen v. Van Slooten, 102 S. Ct. 1242 (1982).

114. Constitutional issues discussed in several cases include due process violations, impairment of contracts, taking without just compensation, and equal protection violations. *See, e.g.,* Texaco, Inc. v. Short, 102 S. Ct. 781 (1982); Short v. Texaco, Inc., ___ Ind. ___, 406 N.E.2d 625 (1980), *aff'd,* 102 S. Ct. 781 (1982).

115. *See supra* notes 106-13 and accompanying text.

116. Bickel v. Fairchild, 83 Mich. App. 467, ___, 268 N.W.2d 881, 882 (1978), *rev'd sub nom.* Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

thesis that controlled the Indiana Supreme Court's determination in upholding the constitutionality of Indiana's statute was that the legislature validly exercised its police power[117] in enacting a statute that should be justified as a matter of policy.[118] The court emphasized "[t]he dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources."[119] The Indiana court upheld the statutory forfeiture method within the Mineral Lapse Act as a valid and practical method whereby the public interests of marketable title, energy exploration, and effective utilization of land could be achieved.[120]

Although the Illinois court also recognized the beneficial purpose of the Illinois statute in facilitating oil and gas production, it found that the lack of procedural safeguards available for vested property owners rendered the act unconstitutional.[121] The Illinois trial court stated that "the constitutional provisions of due process and impairment of contracts must win out. Property, i.e., freehold, cannot be taken without due process nor can contracts be impaired because the nation's economic interests would be improved."[122]

The majority and dissenting opinions in the Michigan Supreme Court case also illustrate this contrast in policy. The majority opinion upheld Michigan's dormant mineral statute and stated that it benefited the public because it improved the marketability of severed mineral interests, increased the development of fossil fuels, increased property tax revenue, and increased employment.[123] The dissenting opinion recognized the public purpose behind the act, but emphasized the forfeiture of the mineral interest, which it considered to be a severe impairment of contract rights.[124]

Courts have not easily decided whether dormant mineral statutes are valid,[125] since they have had to consider many issues in

117. Short v. Texaco, Inc., ___ Ind. ___, ___, 406 N.E.2d 625, 629, 631-32 (1980), *aff'd*, 102 S. Ct. 781 (1982).

118. The *Short* opinion begins by giving four policy justifications for the act: (1) A dormant mineral interest is "mischievous and contrary to the economic interests and welfare of the public," (2) the dormant interests create uncertainties in title, (3) the dormant interests constitute an impediment to mineral development, and (4) the dormant interests constitute an impediment to surface development. ___ Ind. at ___, 406 N.E.2d at 627.

119. *Id.* at ___, 406 N.E.2d at 630.

120. *Id.* at ___, 406 N.E.2d 630-32. *See generally* Note, *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 IND. L. REV. 455, 482 (1979).

121. Wilson v. Bishop, 82 Ill. 2d 364, 370, 412 N.E.2d 522, 525 (1980).

122. Wilson v. Bishop, No. 76-CH-7 (Cir. Ct., White County, Ill. Jan. 19, 1979) (quoted in Outerbridge, *supra* note 5, at 20-43).

123. Van Slooten v. Larsen, 410 Mich. 21, 44, 56, 299 N.W.2d 704, 710, 716 (1980), *appeal dismissed*, 102 S. Ct. 1242 (1982).

124. 410 Mich. at 60-62, 299 N.W.2d at 718-19 (Levin, J., dissenting) (4-3 decision).

125. The recent United States Supreme Court decision upholding the constitutionality of Indiana's dormant minerals act was a 5-4 decision. Short v. Texaco, Inc., 102 S. Ct. 781 (1982). The

their determinations. The following subsections of this Note will examine the traditional legal challenges and the constitutional challenges raised against dormant mineral acts.

A. CONFLICTS WITH TRADITIONAL LEGAL PRINCIPLES

Traditional dormant mineral statutes consider severed mineral estates "abandoned" after a certain period of nonuse.[126] These statutes stretch the definition of abandonment by basing it on the mineral owner's failure to do something. According to the traditional definition, neglect of one's property is not sufficient to prove abandonment[127] because abandonment generally requires an act and intent on the part of the owner to relinquish his property.[128]

When considering the constitutionality of Nebraska's dormant mineral act, the Nebraska Supreme Court quoted a commentator's thoughts about abandonment in the context of dormant mineral statutes as follows:

> "The concept (of abandonment in the statutes of Illinois, Michigan, and Nebraska) is necessarily predicated upon an assumption by the legislature that the nature of the title is such that it is capable of being abandoned. Whether or not this assumption is a valid one must be determined by the judicial process. Such determination, in turn, will require an appraisal or reappraisal of the basic theory of ownership adopted in the state and an appraisal or reappraisal of the basic legal principles regarding abandonment of title to real property."[129]

Courts in Michigan and Nebraska made this reappraisal of the principles of abandonment when considering the constitutionality of dormant mineral statutes. In the case of *Van Slooten v. Larsen*[130]

Michigan Supreme Court divided 4-3 when upholding the constitutionality of Michigan's dormant minerals act. Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982). It is interesting to note that no dissenting opinions were filed in the three state supreme court opinions that invalidated dormant minerals legislation. *See* Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980); Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978); Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

126. *See, e.g.,* MICH. COMP. LAWS ANN. § 554.291 (1967).

127. *See supra* notes 28-29 and accompanying text.

128. *See supra* note 26 and accompanying text.

129. Wheelock v. Heath, 201 Neb. 835, 839, 272 N.W.2d 768, 771 (1978) (quoting Kuntz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest,* 22 INST. ON OIL & GAS L. & TAX'N 81, 97 (1971)).

130. 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

The Michigan dormant minerals statute had been considered four times by appellate courts before the decision of the Michigan Supreme Court. In the first case, the question of the statute's constitutionality was not reached. Mask v. Shell Oil Co., 77 Mich. App. 25, 257 N.W.2d 256

the Michigan Supreme Court upheld the Michigan act, overcoming the theory that severed minerals cannot be abandoned. In contrast, the Nebraska Supreme Court in *Wheelock v. Heath*[131] held Nebraska's statute unconstitutional, following the traditional rule disallowing abandonment.

The Nebraska Supreme Court reviewed the principles of abandonment and noted that Nebraska's dormant mineral statute is contrary to the common law rule, which states that legal title to land can not be abandoned.[132] In Nebraska a severed mineral interest is a vested property right, an estate in fee simple in land.[133] It is classified as corporeal[134] and, therefore, generally not subject to abandonment.[135] The faulty use of abandonment principles in the dormant mineral statute was one of the reasons the Nebraska court used to reach its conclusion that the Nebraska dormant mineral act should not be upheld.[136]

The Michigan Supreme Court faced a similar situation, since severed mineral interests in Michigan are also classified as

(1977). The initial case that considered the statute's constitutionality held the statute unconstitutional in its retroactive application. Bickel v. Fairchild, 83 Mich. App. 467, ____, 268 N.W.2d 881, 884 (1978), *rev'd sub nom.* Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982). The *Bickel* case involved a contest between surface owners and owners of mineral interests who had not fulfilled the statutory requirements of the dormant mineral act so as to preserve their claim. 83 Mich. App. at ____, 268 N.W.2d at 882.

In the subsequent case of *Van Slooten v. Larsen* a result contrary to *Bickel* was reached. Van Slooten v. Larsen, 86 Mich. App. 437, ____, 272 N.W.2d 675, 680 (1978), *aff'd,* 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982). In *Van Slooten* the constitutionality of Michigan's dormant mineral act was considered on stipulated facts. 86 Mich. App. at ____, 272 N.W.2d at 676. The case arose following a dispute over the ownership of a severed mineral interest. The dispute was between a surface owner and a mineral owner who had not fulfilled the requirements of the statute. *Id.* The *Van Slooten* decision did not mention the earlier *Bickel* decision, which had declared the act unconstitutional. In 1979 the fourth appellate court decision interpreting the dormant mineral act was handed down. Wagner v. Dooley, 90 Mich. App. 759, 282 N.W.2d 469 (1979). *Wagner v. Dooley* was decided on the premise that the act was constitutional. *Id.* at ____, 282 N.W.2d at 471. Because the mineral interest owners did not perform any of the necessary actions required under the act, the court deemed their interest abandoned and vested it in the surface owners of the property. *Id.* at ____, 282 N.W.2d at 472.

In 1979 the conflicting *Van Slooten* and *Bickel* decisions were consolidated and argued before the Michigan Supreme Court. In a 4-3 decision the Michigan Supreme Court affirmed *Van Slooten* and reversed *Bickel* by upholding the constitutionality of the Michigan dormant mineral act as applied in these cases. Van Slooten v. Larsen, 410 Mich. 21, 56, 299 N.W.2d 704, 716 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982). On January 18, 1982, the United States Supreme Court dismissed appeals from the Michigan Supreme Court's decision. Larsen v. Van Slooten, 102 S. Ct. 1242 (1982); Craig v. Bickel, 102 S. Ct. 1242 (1982).

131. 201 Neb. 835, 272 N.W.2d 768 (1978). The Nebraska dormant mineral statute was held unconstitutional in *Wheelock* and its companion case, *Monahan Cattle Co. v. Goodwin,* insofar as the statute is interpreted to be retroactive in its operation. Wheelock v. Heath, 201 Neb. 835, 845, 272 N.W.2d 768, 774 (1978); Monahan Cattle Co. v. Goodwin, 201 Neb. 845, 846, 272 N.W.2d 774, 774 (1978).

In *Wheelock* the facts were not in dispute. The plaintiffs were surface owners and the defendants were corresponding mineral owners who had acquired their interest more than 23 years prior to the commencement of the action. 201 Neb. at 838, 272 N.W.2d at 771. The mineral owners had not fulfilled the requirements of the Nebraska dormant minerals statute. *Id.* For a comprehensive analysis of the *Wheelock* case, see 13 CREIGHTON L. REV. 687 (1979).

132. Wheelock v. Heath, 201 Neb. 835, 839-40, 272 N.W.2d 768, 771 (1978).

133. *Id.* at 840, 272 N.W.2d at 771.

134. *Id.*

135. *Id.* at 842, 272 N.W.2d at 772.

136. *Id.* at 839-42, 272 N.W.2d at 771-72.

corporeal hereditaments, which cannot be abandoned under common law.[137] The Michigan dormant mineral act converts a corporeal nonabandonable interest into an interest subject to abandonment.[138] The Michigan court considered whether the act was a valid exercise of the state's police power.[139] In upholding the statute, the court found both a valid public purpose[140] and a reasonable relationship between the act and the purpose.[141] The Michigan court noted that "[t]he same result could have been achieved without any reference to the concept of abandonment. . . ."[142]

The Indiana Dormant Mineral Interest Act uses the term "extinguished" instead of "abandoned."[143] In *Texaco Inc. v. Short*[144] the majority did not discuss the abandonment issue when considering the constitutionality of Indiana's act, but the dissent mentioned it in a footnote.[145] Justice Brennan noted that failure to comply with the dormant mineral act does not imply that there has been an abandonment.[146] The requirements of a dormant mineral act may be met, resulting in the loss of a severed mineral estate, without the traditional elements of intent to abandon and acts evidencing that intent.[147]

As noted above, the *Texaco* Court did not have to discuss the abandonment issue because the Indiana statute is unique in not using the word "abandoned."[148] The Nebraska Supreme Court considered the Nebraska act's faulty use of traditional abandonment principles when invalidating it.[149] Because of the possible complications in the use of "abandonment," legislatures would be prudent to draft dormant mineral statutes using other terms to avoid confusion with traditional legal principles of abandonment. Then these principles concerning abandonment and a corporeal classification of severed minerals would not be "stumbling blocks" in declaring a statute legally and constitutionally valid.

137. Van Slooten v. Larsen, 410 Mich. 21, 37, 299 N.W.2d 704, 707 (1980), *appeal dismissed*, 102 S. Ct. 1242 (1982).

138. *See* MICH. COMP. LAWS ANN. § 554.291 (1967).

139. 410 Mich. at 42, 299 N.W.2d at 709.

140. *Id.* at 43-44, 299 N.W.2d at 710. The act benefits the public by improving the marketability of severed mineral interests, which increases mineral development, property tax income, and employment. *Id.*

141. *Id.* at 44-50, 299 N.W.2d at 710-13.

142. *Id.* at 51 n.24, 299 N.W.2d at 714 n.24.

143. IND. CODE ANN. § 32-5-11-1 (Burns 1980).

144. 102 S. Ct. 781 (1982).

145. Texaco, Inc. v. Short, 102 S. Ct. 781, 799 n.3 (1982) (Brennan, J., dissenting).

146. *Id.*

147. *See, e.g.*, Texaco, Inc. v. Short, 102 S. Ct. 781 (1982).

148. *See id.*; IND. CODE ANN. § 32-5-11-1 (Burns 1980).

149. Wheelock v. Heath, 201 Neb. 835, 838-42, 272 N.W.2d 768, 771-72 (1978).

Proponents of dormant mineral acts often analogize them to other devices whose constitutionality has already been upheld. One example of this occurred in the Minnesota case of *Contos v. Herbst.*[150] The defendants argued that the dormant mineral statute was analogous to Minnesota's marketable title act, which had previously been declared constitutional.[151] The court did not find this argument persuasive because the marketable title act extinguishes stale claims, while Minnesota's dormant mineral act extinguishes both valid and invalid claims upon the failure to file a claim pursuant to the statute.[152] The court also emphasized the differing consequences in failing to file under the recording act and the dormant mineral statute.[153]

When considering the constitutionality of Indiana's dormant mineral act, the United States Supreme Court stated that the Indiana statute "is similar in operation to a typical recording statute."[154] The dissent strongly disagreed with the majority's analogy to a recording statute, stating:

> In an attempt to support its refusal seriously to inquire into the adequacy of the protections afforded mineral interest owners by which they might preserve their property, the Court analogizes the Indiana statute to a recording act and draws on the pre-Fourteenth Amendment case of *Jackson v. Lamphire.* . . . The Court's reliance is misplaced.[155]

In addition to a comparison to a marketable record title act, several courts have compared dormant mineral acts to statutes of limitation. In *Contos v. Herbst*[156] the defendants argued that

150. 278 N.W.2d 732 (Minn.), *appeal dismissed sub nom.* Prest v. Herbst, 444 U.S. 804 (1979). A plaintiff in the *Contos* case, United States Steel, owned 721,640 acres of severed mineral interests in Minnesota. Contos v. Herbst, 278 N.W.2d 732, 736 (Minn.), *appeal dismissed sub nom.* Prest v. Herbst, 444 U.S. 804 (1979). The plaintiff brought an action seeking to have the registration, forfeiture, and tax provisions of the dormant minerals act held unconstitutional. 278 N.W.2d at 735. The Minnesota Supreme Court affirmed the district court's decision that the statutes were constitutional except for the forfeiture procedure. *Id.* at 736, 747. The statute has since been amended to correct this problem. *See* MINN. STAT. §§ 93.52-.58 (1980).

151. 278 N.W.2d at 744. The constitutionality of Minnesota's marketable title act was upheld in Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957). *See supra* notes 63-65 and accompanying text for a discussion of marketable record title acts and their application to severed mineral interests.

152. 278 N.W.2d at 744-45. *Compare* MINN. STAT. § 541.023 (1980) (entitled "Actions Affecting Title to Real Estate") *with* MINN. STAT. §§ 93.52-.58 (1980) (dormant severed minerals legislation).

153. 278 N.W.2d at 746. The court in *Contos* stated that "[t]he failure to file under a recording act does not automatically result in divestiture." *Id.* In comparison, failure to comply with a dormant minerals act does automatically result in divesture. *See, e.g.,* IND. CODE ANN. § 32-5-11-1 (Burns 1980).

154. Texaco, Inc. v. Short, 102 S. Ct. 781, 791 (1982).

155. *Id.* at 799 n.2 (Brennan, J., dissenting).

156. 278 N.W.2d 732 (Minn), *appeal dismissed sub nom.* Prest v. Herbst, 444 U.S. 804 (1979).

Minnesota's dormant mineral statute could be profitably compared to a statute of limitations as failure to file under either statute divests one of a property interest.[157] The Minnesota court did not accept this analogy, noting that statutes of limitations generally affect remedies and not rights.[158] The Indiana Supreme Court, however, did analogize Indiana's dormant mineral act to statutes of limitation in the case of *Short v. Texaco, Inc.*[159] The court noted the distinctions between the two types of statutes, but did not find this controlling.[160] The court emphasized that statutes of limitation must meet a test of reasonableness to be constitutionally upheld.[161] The court found that the test was met in the *Short* case because of a two year grace period provided in the act.[162]

In the later case of *Wilson v. Bishop*[163] the Illinois Supreme Court voiced disapproval of the *Short* decision, specifically the analogy of the dormant mineral statutes to ordinary statutes of limitation.[164] The court stated that "statutes of limitations are procedural in nature . . . and are not designed to alter substantive rights or convey property interests. The time limitations of the [dormant mineral statute], however, operate to transfer vested freehold interests."[165] In affirming the *Short* decision the United States Supreme Court did not find the distinction the *Wilson* court had noted. The Supreme Court determined that a comparison between a dormant mineral act and a statute of limitation could be made because "the practical consequences of extinguishing a right [through the dormant mineral legislation] are identical to the consequences of eliminating a remedy [through a statute of limitation]."[166]

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157. 278 N.W.2d at 745.

158. *Id.*

159. ___ Ind. ___, ___, 406 N.E.2d 625, 629 (1980), *aff'd,* 102 S. Ct. 781 (1982). *See generally* Note, *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act,* 12 IND. L. REV. 455 (1979).

160. Short v. Texaco, Inc., ___ Ind. at ___, 406 N.E.2d at 629.

161. *Id.* at ___, 406 N.E.2d at 630.

162. *Id.* The grace period in Indiana's dormant mineral act gave mineral owners two years after the act's effective date in which to file their claim. IND. CODE ANN. § 32-5-11-4 (Burns 1980). Therefore, after 1973 a mineral interest owner must meet the statutory requirements or the reversion will occur.

163. 82 Ill. 2d 364, 412 N.E.2d 522 (1980). In *Wilson* a surface owner claimed ownership of an undivided one-third interest in the oil and gas discovered under his 72 acre tract of land because the defendant mineral owners' failed to file written notices of claim pursuant to Illinois' dormant mineral act. Wilson v. Bishop, 82 Ill. 2d at 366, 412 N.E.2d at 523.

164. *Id.* at 371-72, 412 N.E.2d at 525-26. The same analogy was approved by the Michigan Supreme Court. Van Slooten v. Larsen, 410 Mich. 21, 40-41, 299 N.W.2d 704, 708-09 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

165. 82 Ill. 2d at 373, 412 N.E.2d at 526.

166. Texaco, Inc. v. Short, 102 S. Ct. 781, 791 (1982).

The Nebraska dormant mineral statute was analogized to a possibility of reverter. Wheelock v. Heath, 201 Neb. 835, 843, 272 N.W.2d 768, 773 (1978). The Nebraska court, however, found a vast difference between the slight value of a possibility of reverter and the conceivably great value of severed mineral interests. *Id.*

Although analogies have been made between dormant mineral acts and marketable title acts or statutes of limitation, these analogies have not always been effective in convincing courts that dormant mineral statutes should be upheld. Courts, however, have not had to rely on the breakdown in these analogies or the problems inherent in the use of abandonment principles to invalidate dormant mineral legislation. All the statutes also faced several serious state and federal constitutional challenges.

B. CONSTITUTIONAL CHALLENGES

1. In General

The one constitutional challenge that all the dormant mineral statutes have encountered is violation of procedural due process.[167] This important constitutional challenge will be discussed in part two of this section.[168] In addition to procedural due process problems, dormant mineral statutes have also been attacked as impairing the obligation of contracts,[169] violating equal protection guarantees,[170] violating substantive due process guarantees,[171] taking without just compensation,[172] containing unconstitutional presumptions,[173] and being unconstitutionally vague.[174] Each of these constitutional issues will be considered briefly to determine how different courts analyzed them.

Impairment of contracts was one of the most prevalent constitutional challenges to dormant mineral statutes.[175] The Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts."[176] A Michigan appellate court specifically based its decision that the Michigan dormant mineral statute was unconstitutional upon the impairment of the contract rights of the mineral owners.[177] Another Michigan appellate court considered the same issues, impairment of contracts

167. *See, e.g.*, Wilson v. Bishop, 82 Ill. 2d 364, 370, 412 N.E.2d 522, 525 (1980) (procedural due process violation alone sufficient to invalidate statute).

168. *See infra* notes 224-64 and accompanying text.

169. *See infra* notes 175-85 and accompanying text.

170. *See infra* notes 186-201 and accompanying text.

171. *See infra* notes 202-12 and accompanying text.

172. *See infra* notes 213-16 and accompanying text.

173. *See infra* notes 217-19 and accompanying text.

174. *See infra* notes 220-23 and accompanying text.

175. *See generally* Note, *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 IND. L. REV. 455, 486-92 (1972) (contract clause should not influence analysis of dormant mineral statute; issue should be whether procedural due process has been satisfied).

176. U.S. CONST. art. I, § 10.

177. Bickel v. Fairchild, 83 Mich. App. 467, ____, 268 N.W.2d 881, 884 (1978), *rev'd sub nom.* Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed sub nom.* Craig v. Bickel, 102 S. Ct. 1242 (1982).

and constitutionality of the statute, and reached the opposite result.[178]

The Michigan Supreme Court determined that a recording requirement was not a substantial impairment of the contract relationship in *Van Slooten v. Larsen*[179] and concluded that the defendants were not induced into entering contractual relationships by the lack of a recording requirement.[180] The three justice dissent to the *Van Slooten* decision found fault in the majority's analysis of the contract clause issue and stressed the severe impairment of contracts, both the obligation to record and the consequences upon failure to do so.[181]

The United States Supreme Court quickly rejected the argument that Indiana's Mineral Lapse Act constituted an impermissible impairment of contracts.[182] The Court mentioned that the mineral owners in *Texaco, Inc. v. Short*[183] leased after the statutory lapse of their rights and that a statute cannot impair a contract which was not in existence at the time of the statute's enactment.[184] The Court went beyond the facts in issue and stated: "In any event, a mineral owner may safeguard any contractual obligations or rights by filing a statement of claim in the county recorder's office. Such a minimal 'burden' on contractual obligations is not beyond the scope of permissible state action."[185]

Another constitutional challenge that was brought before several state courts in an attempt to invalidate dormant mineral acts is an alleged equal protection violation.[186] In Michigan courts the argument was made that the Michigan dormant mineral act[187] denied equal protection because it applied only to oil and gas and

178. Van Slooten v. Larsen, 86 Mich. App. 437, ___, 272 N.W.2d 675, 681 (1978), *aff'd*, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed*, 102 S. Ct. 1242 (1982). *See generally* Polito, *Real Property, Natural Resource and Environmental Law*, 26 WAYNE L. REV. 769, 793 (1980).

179. 410 Mich. 21, 41, 56, 299 N.W.2d 704, 709, 716 (1980), *appeal dismissed*, 102 S. Ct. 1242 (1982).

180. Van Slooten v. Larsen, 410 Mich. 21, 40, 299 N.W.2d 704, 708 (1980), *appeal dismissed*, 102 S. Ct. 1242 (1982). In *Van Slooten* the Michigan Supreme Court noted its approval of the Indiana Supreme Court's treatment of the contract clause issue. 410 Mich. at 40-41, 299 N.W.2d at 708-09. The Indiana court upheld its dormant mineral statute as being within the state's police power and, therefore, not an unconstitutional impairment of the obligation of contracts. Short v. Texaco, Inc., ___ Ind. ___, ___, 406 N.E.2d 625, 631 (1980), *aff'd*, 102 S. Ct. 781 (1982).

181. Van Slooten v. Larsen, 410 Mich. at 60, 299 N.W.2d at 718 (Levin, J., dissenting).

182. Texaco, Inc. v. Short, 102 S. Ct. 781, 792-93 (1982).

183. 102 S. Ct. 781 (1982).

184. *Id.* at 792.

185. *Id.* at 792-93 (footnote omitted).

186. *See* U.S. CONST. amend. XIV. The fourteenth amendment to the Constitution provides that "[n]o state shall . . . deny to any person . . . the equal protection of the laws." *Id.*

A Wisconsin trial court held the Wisconsin dormant mineral act unconstitutional because it violated the equal protection and due process clauses of the Constitution. Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 570-71, 259 N.W.2d 316, 318 (1977). The Wisconsin Supreme Court did not reach the equal protection issue as it found the entire statute invalid based on due process violations. *Id.* at 571 n.2, 259 N.W.2d at 318 n.2.

187. MICH. COMP. LAWS ANN. § 554.291(1)(1967).

not to other minerals.[188] A Michigan appellate court determined that "[s]ince the Act does not involve any suspect classification, the proper standard of evaluation is the 'rational basis' test."[189] The court concluded that there was a rational basis between the legislative policy of encouraging oil and gas development and the application of the dormant mineral act to oil and gas only and, therefore, upheld the constitutionality of the act against the equal protection challenge.[190] In affirming the lower court's decision the Supreme Court of Michigan also rejected the equal protection challenge.[191] The court agreed that treating oil and gas differently from "hard" minerals had a reasonable relation to the dormant mineral act's purpose.[192]

Because of a unique provision in the Indiana dormant mineral statute, the Indiana Supreme Court faced a different equal protection challenge. The Indiana statute treats owners of ten or more mineral interests in the same county different from others.[193] The Indiana court used "the traditional fair and substantial relation test" in its consideration of whether there was an equal protection violation.[194] To analyze whether the criteria set forth in the statute advanced the purpose the legislature was trying to achieve in enacting the dormant mineral legislation, the court needed to define the statute's purpose.[195] The court determined that "the Legislature sought to create an environment in which mineral interests [would] be promptly exploited or abandoned."[196] As it is usual and profitable for developers to join several mineral interests, the legislature gave some leeway to the owners of ten or more interests in the same county to encourage these mineral developers.[197] The Indiana court concluded that the special

188. *See* Van Slooten v. Larsen, 86 Mich. App. 437, ____, 272 N.W.2d 675, 681 (1978), *aff'd,* 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982); Van Slooten v. Larsen, 410 Mich. 21, 55-56, 299 N.W.2d 704, 716 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

189. Van Slooten v. Larsen, 86 Mich. App. at ____, 272 N.W.2d at 681.

190. *Id.* The appellate court also noted that the act "treats all those similarly situated equally; all owners of severed oil and gas rights run the risk of abandoning their rights if they do not comply with the statutory requirements." *Id.*

191. Van Slooten v. Larsen, 410 Mich. at 55, 299 N.W.2d at 716.

192. *Id.* at 55-56, 299 N.W.2d at 716.

193. IND. ANN. STAT. § 32-5-11-5 (Burns 1980). Section 32-5-11-5 of the Indiana Code provides that failure to file a claim of interest within the specified time period will not automatically cause the extinguishment of a mineral interest if four qualifications are met: (1) The mineral owner owned 10 or more mineral interests in the county; (2) the owner made diligent efforts to preserve his mineral interests, including filing statements of claim on some interests; (3) the owner failed to preserve the interest inadvertently; and (4) the owner filed a claim within 60 days after there was published or actual notice that the interest had lapsed. *Id.*

194. Short v. Texaco, Inc., ____ Ind. ____, ____, 406 N.E.2d 625, 632 (1980), *aff'd,* 102 S. Ct. 781 (1982). The basis for using "the substantial relation test" was the determination that the dormant mineral act's different treatment of some mineral owners did not involve a suspect classification or the impingement upon a fundamental right. ____ Ind. at ____, 406 N.E.2d at 632.

195. ____ Ind. at ____, 406 N.E.2d at 631.

196. *Id.*

197. *Id.* at ____, 406 N.E.2d at 632.

treatment provided by the Indiana dormant mineral act to large developers was rationally related to the legislative objective of increased development and not contrary to equal protection guarantees.[198]

The United States Supreme Court also considered the possibility of an equal protection violation.[199] It agreed with the Indiana Supreme Court's determination that there was a legitimate purpose to the special treatment of large developers and that this purpose was related to the central purpose of the statute.[200] The Court concluded by stating: "Since the exception furthers a legitimate statutory purpose, and has no adverse impact on persons . . . who own fewer mineral interests, the exception does not violate the Equal Protection Clause of the Fourteenth Amendment."[201]

The constitutional issue of a substantive due process violation[202] was considered when the Wisconsin dormant mineral statute's constitutionality was at issue in *Chicago & North Western Transportation Co. v. Pedersen*.[203] The plaintiffs alleged that the statute's forfeiture provision denied them substantive due process and was an unreasonable use of the state's police power.[204] The test used to determine whether there is a proper use of the police power in Wisconsin consists of two parts: (1) Whether there is a proper purpose, and (2) whether the means chosen have a reasonable relation to that purpose.[205] The court determined that this test was not met because the statute provides for forfeiture of a property interest and because this property interest forfeits to another person.[206] Because the means used to solve dormant mineral problems did not satisfy the Wisconsin court's test, the court concluded that the statute denied substantive due process and was unconstitutional.[207]

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198. *Id.* at ____, 406 N.E.2d at 631-32.

199. Texaco, Inc. v. Short, 102 S. Ct. 781, 797 (1982).

200. *Id.*

201. *Id.*

202. U.S. CONST. amend. XIV. The fourteenth amendment to the Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." *Id.*

203. 80 Wis. 2d 566, 259 N.W.2d 316 (1977). In *Chicago* an action was brought against the Wisconsin registers of deeds by the Chicago and Northwestern Railroad, owners of more than 250,000 acres of severed mineral interests in Wisconsin, to have the statute declared unconstitutional and to have its enforcement enjoined. Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 570, 259 N.W.2d 316, 318 (1977). The Wisconsin Supreme Court affirmed the trial court's decision holding the entire statute unconstitutional. *Id.* at 568-71, 259 N.W.2d at 317-18.

204. *Id.* at 574, 259 N.W.2d at 320.

205. *Id.*

206. *Id.* The attorney general argued that the reversion to the surface owner was a quasi-public use connected with the public necessity of clearing questionable mineral ownership. *Id.* The *Chicago* court considered this argument unpersuasive because the mineral owners were not being compensated and the importance of clearing mineral titles was not such that the reversion of the minerals to the surface became a quasi-public use. *Id.* at 575, 259 N.W.2d at 320.

207. *Id.* at 570, 574, 259 N.W.2d at 318, 320.

Although other courts have not specifically discussed substantive due process, they have analyzed a state's police power to enact dormant mineral legislation. For example, the Michigan Supreme Court stated that the purpose of Michigan's act was "to facilitate the development of oil and gas resources," a valid public purpose.[208] It determined that a reasonable relationship existed between this purpose and the means used to achieve it.[209] The first issue the United States Supreme Court considered in the *Texaco* case was whether the State of Indiana had the power to provide that property rights could be lost if the owners did not take the action required by statute.[210] The Court noted that the dormant mineral act changed a vested property interest entitled to the same protection as a fee simple to an interest "of less than absolute duration."[211] The Supreme Court concluded that Indiana's police power was sufficient to enact dormant mineral legislation and stated, "[w]e have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[212]

Three other constitutional challenges have been raised against dormant mineral acts. In Indiana the appellee argued that the statute involved a taking of property without just compensation in violation of the Indiana Constitution.[213] The court determined, however, that the state was not exercising its power of eminent domain, as it was "not actually taking the mineral interest for its own use and benefit."[214] Instead, the statute declares that a mineral interest lapses upon occurrence of specified conditions.[215] The United States Supreme Court agreed that no impermissible taking is involved in the Indiana dormant mineral statute because it

208. Van Slooten v. Larsen, 410 Mich. 21, 43, 299 N.W.2d 704, 710 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982). The court stated: "The act as a whole works to the benefit of the public by improving the marketability of severed mineral interests and thereby increasing the development of fossil fuels, the revenues from property taxes, and employment with its related benefits." 410 Mich. at 44, 299 N.W.2d at 710.

209. 410 Mich. at 49, 299 N.W.2d at 712-13.

210. Texaco, Inc. v. Short, 102 S. Ct. 781, 789 (1982).

211. *Id.* at 790.

212. *Id.* The dissent in *Texaco* also agreed that Indiana had a legitimate interest in establishing a registration system to identify severed mineral owners and that extinguishment of the mineral right may be an appropriate sanction for failure to register. *Id.* at 797-98 (Brennan, J., dissenting).

213. Short v. Texaco, Inc., ___ Ind. ___, ___, 406 N.E.2d 625, 631 (1980), *aff'd* 102 S. Ct. 781 (1982).

The fifth amendment to the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. CONST. amend V. This provision has been incorporated by the fourteenth amendment and thus is applicable to the states. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

214. ___ Ind. at ___, 406 N.E.2d at 631.

215. *Id.*

is the owner's failure that causes loss of the property, not action by the state.[216]

Two Michigan courts faced arguments that Michigan's dormant mineral statute created an unconstitutional presumption of abandonment. The Michigan appellate court determined that the statute did create a conclusive presumption of abandonment, but that the presumption could be upheld because it was not "arbitrary or capricious."[217] Although the appellate court's determination that the Michigan dormant mineral act was constitutional was upheld by the Michigan Supreme Court, the lower court's conclusion as to presumptions was not.[218] The Michigan Supreme Court decided that the statute did not create an evidentiary presumption, but rather a rule of substantive law, which required mineral owners every twenty years to take steps showing their ownership.[219]

The Minnesota Supreme Court encountered the argument that some of the language used in Minnesota's dormant mineral statute was unconstitutionally vague.[220] The court followed the rule that "[a] statute will not be declared void for vagueness unless it is so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent."[221] The legislative intent is expressly stated in the Minnesota dormant mineral statute as one of identification and clarification of fractionalized severed mineral interests.[222] The court determined that the alleged ambiguities could be reasonably construed consistent with this legislative intent, and therefore, the statute was not unconstitutionally vague.[223]

Each of these possible constitutional challenges should be considered by states that are planning to enact dormant mineral legislation. Although these constitutional principles can be used in

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216. Texaco, Inc. v. Short, 102 S. Ct. 781, 792 (1982).

217. Van Slooten v. Larsen, 86 Mich. App. 437, ____, 272 N.W.2d 675, 680 (1978), *aff'd,* 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

218. Van Slooten v. Larsen, 410 Mich. 21, 49-50, 299 N.W.2d 704, 713 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

219. 410 Mich. at 51, 299 N.W.2d at 713. The court added that even if the statute created a presumption of abandonment, it would not be an unconstitutional one because a rational connection existed between the fact established (no public ownership) and the fact to be presumed (abandonment). *Id.* at 51-52, 299 N.W.2d at 714.

220. Contos v. Herbst, 278 N.W.2d 732, 746 (Minn.), *appeal dismissed sub nom.* Prest v. Herbst, 444 U.S. 804 (1979). The specific language that was challenged includes "minerals," "interest in the minerals," and "created or acquired." *Id. See* MINN. STAT. § 93.52(2) (1980).

221. 278 N.W.2d at 746 (citation omitted). The Minnesota court relied on the case of *Wichelman v. Messner* in their analysis of vagueness. *Id.* (citing Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957)). According to the court in *Wichelman,* words commonly understood are not void for vagueness unless the entire statute is so imperfect that it can not be reasonably construed. 250 Minn. 88, ____, 83 N.W.2d 800, 819 (1957).

222. *See supra* note 76 for the text of the purpose of the Minnesota dormant mineral statute.

223. 278 N.W.2d at 746-47.

an attempt to defeat a dormant mineral act, the most effective weapon seems to be that of alleged procedural due process inadequacies. State supreme courts in Illinois, Minnesota, Nebraska, and Wisconsin all found disabling due process violations in dormant mineral statutes.

2. Procedural Due Process Violations

When the state deprives a person of his property there must be compliance with the due process clause.[224] Two of the basic elements of due process are notice and an opportunity to be heard.[225] When courts examined dormant mineral statutes to determine whether they complied with due process requirements, they reached different conclusions. These results can be rationalized on the basis that the statutes are not identical.[226] Courts, however, have come to opposite conclusions after analysis of the same United States Supreme Court cases and similar dormant mineral statutes.[227] Therefore, it again appears that a court's philosophy towards mineral exploitation affects its ultimate determination regarding the constitutionality of the state's dormant mineral act.[228]

Each of the six state courts and the United States Supreme Court considered the issue of whether procedural due process requirements had been met before the loss of severed mineral interests pursuant to a dormant mineral act. The case relied on by most courts in their due process analysis was *Mullane v. Central Hanover Bank & Trust Co.*[229] In *Mullane* Justice Jackson stated that "at a minimum [the words of the due process clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of

224. U.S. CONST. amend. XIV. ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

225. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 499 (1978).

226. *See* Van Slooten v. Larsen, 410 Mich. at 36 n.1, 299 N.W.2d at 707 n.1.

227. For example, the dormant mineral acts adopted by Illinois and Michigan are very similar. *Compare* ILL. ANN. STAT. ch. 30, ¶¶ 197-198 (Smith-Hurd Supp. 1981) *with* MICH. COMP. LAWS ANN. §§ 554.291-.294 (1967). The state courts that considered these statutes, however, reached opposite conclusions on the issues of procedural due process violations and the statute's constitutionality. *Compare* Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980) *with* Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

228. *See supra* notes 116-124 and accompanying text.

229. 339 U.S. 306 (1950). In *Mullane* the Court considered a New York statute that permitted notice by publication of judicial settlement of the accounts of a trust estate. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 309-10 (1950). The majority opinion explained the requirements necessary to comply with procedural due process guarantees. *Id.* at 313-14. Notice by publication pursuant to the New York statute was deemed constitutional when applied to beneficiaries whose addresses or interests were unknown. *Id.* at 317. The court determined, however, that at least notice by mail would be necessary for the known beneficiaries. *Id.* at 318.

the case."[230] The Minnesota Supreme Court considered *Mullane* and concluded that the Minnesota dormant mineral act's failure to provide a hearing before forfeiture was a clear violation of due process.[231] In contrast, the United States Supreme Court determined that *Mullane* was inapplicable to Indiana's dormant mineral act because the Indiana act is self-executing and there is no judicial proceeding involved.[232] Before analyzing the Supreme Court's due process discussion, this Note will consider the analysis used by state courts to find due process violations and thus hold the dormant mineral acts unconstitutional.

When determining whether the due process standard was met, these courts followed the same general analysis. The initial question was whether there was a property interest that fell under the protection of the due process clause. These courts generally agreed that the mineral interests covered by the dormant mineral legislation were property deserving of this protection.[233] Next, the courts asked whether there was a deprivation of this protected property without notice and an opportunity for a hearing. When they found this deprivation,[234] the courts concluded that the dormant mineral acts were in violation of the due process clause.[235] The supreme courts in Illinois,[236] Minnesota,[237] Nebraska,[238] and Wisconsin[239] found that the dormant mineral legislation of those

230. *Id.* at 313.

231. Contos v. Herbst, 278 N.W.2d 732, 743 (Minn.), *appeal dismissed sub nom.* Prest v. Herbst, 444 U.S. 804 (1979).

232. Texaco, Inc. v. Short, 102 S. Ct. 781, 795 (1982).

Note that Nebraska's dormant mineral act is not self-executing. It requires that the surface owner sue in equity for the termination of an abandoned severed mineral interest. *See* NEB. REV. STAT. § 57-228 (1978). Nevertheless, the Nebraska Supreme Court determined that the retroactive application of this statute violated the due process clause. Wheelock v. Heath, 201 Neb. 835, 845, 272 N.W.2d 768, 774 (1978).

233. The Illinois Supreme Court stated that "[i]t is accordingly clear that the severed mineral interests here under consideration constitute protected property interests entitled to the procedural safeguards which due process requires." Wilson v. Bishop, 82 Ill. 2d at 369, 412 N.E.2d at 524. The Supreme Court of Nebraska stated that "mineral interests are vested property rights. [They] are subject to the protection of the due process clause." Wheelock v. Heath, 201 Neb. at 840, 272 N.W.2d at 771.

234. Contos v. Herbst, 278 N.W.2d at 743 ("We cannot imagine a more clear violation of due process than the failure to provide a hearing before forfeiture."); Wheelock v. Heath, 201 Neb. at 845, 272 N.W.2d at 773 ("No notice of any nature was given to the record owner of a mineral interest.").

235. *See, e.g.*, Wilson v. Bishop, 82 Ill. 2d at 370, 412 N.E.2d at 525 ("Failure to provide those owners with adequate notice and an opportunity to be heard renders the statutory scheme unconstitutional.").

236. *See id.*

237. *See* Contos v. Herbst, 278 N.W.2d at 740. The Minnesota statute attempted to provide some notice of the mineral forfeiture through publication in legal and mining publications. The Minnesota Supreme Court did not find that notice constitutionally adequate. 278 N.W.2d at 742-43. The court also considered the argument that the hearing was only postponed and the notice was adequate according to the decision of *Fuentes v. Shevin.* 278 N.W.2d at 744 (citing Fuentes v. Shevin, 407 U.S. 67 (1972)). The Minnesota court found the *Fuentes* exception inapplicable for two reasons. There was no later opportunity to contest the loss of one's property such as was available in *Fuentes,* and there was no reason for a prompt forfeiture such as existed in *Fuentes.* 278 N.W.2d at 744.

238. *See* Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978).

239. *See* Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

states did not meet due process requirements and, as a result, were unconstitutional.

The state supreme courts in Indiana[240] and Michigan[241] upheld the constitutionality of the Indiana and Michigan dormant mineral acts even though the statutes provide for no more notice or hearing than the statutes that were declared unconstitutional in other states. The Indiana court recognized that severed mineral interests are vested property interests protected by due process of law.[242] The court distinguished *Mullane*[243] on the basis that *Mullane* referred to the due process required in an adjudicatory proceeding.[244] The Indiana dormant mineral act is self-executing and does not require an adjudication before the mineral interest is extinguished.[245] The court concluded that *Mullane* does not require notice and a hearing prior to an extinguishment pursuant to the Indiana dormant mineral statute.[246]

The Michigan Supreme Court took a different approach towards the procedural due process requirements of notice and hearing. That court stated that the act itself provided sufficient notice of the recordation requirement.[247] The Michigan court explained that a hearing is not required because "the constitutional necessity for such a hearing is determined by balancing the competing interests at stake."[248] The court determined that the risk of harm from the deprivation of dormant mineral interests was slight and emphasized that although a predeprivation hearing is not provided, there is a later opportunity for a hearing to determine whether the statute was correctly applied.[249]

The Michigan and Indiana courts upheld the validity of the Michigan and Indiana dormant mineral statutes even though the statutes do not provide actual notice or the opportunity for a hearing before the severed mineral interest is extinguished through

240. *See* Short v. Texaco, Inc., ___ Ind. ___, 406 N.E.2d 625 (1980), *aff'd* 102 S. Ct. 781 (1982).

241. *See* Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 102 S. Ct. 1242 (1982).

242. Short v. Texaco, Inc., ___ Ind. ___, ___, 406 N.E.2d 625, 627 (1980), *aff'd,* 102 S. Ct. 781 (1982).

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

244. ___ Ind. at ___, 406 N.E.2d at 628.

245. *See* IND. ANN. STAT. § 32-5-11-1 (Burns 1980).

246. ___ Ind. at ___, 406 N.E.2d at 628. The Indiana Supreme Court noted that if there were a question as to whether the facts existed to extinguish an interest pursuant to the dormant mineral act, the mineral owner would have notice before a hearing in court. *Id.* at ___, 406 N.E.2d at 629.

247. 410 Mich. at 52 n.28, 299 N.W.2d at 714 n.28. The Indiana court also stated that the enactment itself was sufficient notice. Short v. Texaco, Inc., ___ Ind. at ___, 406 N.E.2d at 629. The Wisconsin Supreme Court, however, clearly rejected this thesis, stating that "[t]here is no authority for that argument [that the act itself is notice]." Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d at 573 n.4, 259 N.W.2d at 319 n.4.

248. Van Slooten v. Larsen, 410 Mich. at 53, 299 N.W.2d at 715 (citations omitted).

249. *Id.* at 54-55, 299 N.W.2d at 715-16.

vesting with the surface estate. The Indiana court relied on its interpretation of the wording in the *Mullane* opinion, and the Michigan court used a balancing approach to escape the traditional due process hearing requirement. The United States Supreme Court also faced the due process issue when considering the constitutionality of Indiana's Dormant Mineral Interests Act in *Texaco, Inc. v. Short.*[250] The five justice majority noted that lack of notice was the appellants' primary attack on the act.[251] The Court divided the appellants' notice issue into two arguments and then rejected both of them.[252]

The first argument was that the State of Indiana did not adequately notify the mineral owners of the statute's legal requirements.[253] The Court answered this argument with two legal principles:

> It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.[254]
>
> It is also settled that the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which the Court shows the greatest deference to the judgment of state legislatures.[255]

The second argument was that the surface owner must give the mineral owner advance notice that the interest was about to expire before the interest could be extinguished.[256] In answering this argument the Court emphasized the difference between a self-executing statute and a judicial determination.[257] The notice and hearing requirements of *Mullane*[258] were not deemed necessary

250. 102 S. Ct. 781, 793 (1982).
251. Texaco, Inc. v. Short, 102 S. Ct. at 793.
252. *Id.*
253. *Id.*
254. *Id.* (citing North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925)).
255. 102 S. Ct. at 793 (citing Wilson v. Iseminger, 185 U.S. 55, 62-63 (1902); Jackson v. Lamphire, 28 U.S. (3 Pet.) 280, 289 (1830)).
The majority of the *Texaco* Court did not expressly state a philosophy in favor of mineral exploration and development by upholding the constitutionality of Indiana's dormant mineral act. Instead, the Court appeared to be more concerned with letting the state handle a matter that is mostly of state interest. For example, the Court stated that it "shows the greatest deference to the judgment of state legislatures" and that "[a] legislative body is in a far better position than a court to form a correct judgment." 102 S. Ct. at 793. The Court also said they "refuse[d] to displace hastily the judgment of the Legislature." *Id.* at 794.
256. 102 S. Ct. at 794.
257. *Id.*
258. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

because of this distinction.[259] The Court concluded by stating that "neither [argument] has merit"[260] and that the Indiana act has "no procedural defect."[261]

The four justice dissent framed the due process issue as follows:

> [W]hether the State of Indiana has deprived these appellants of due process of law by extinguishing their pre-existing property interests without regard to whether they knew, and without providing any meaningful mechanism by which they might have learned, of the immediate taking of their property or their obligations under the law.[262]

The dissent emphasized the notions of fairness, rationality, and practicality.[263] Justice Brennan concluded that notice should be required because the registration statute is unusual in character and because it is triggered by commonplace circumstances under which an average mineral owner would not realize he had a legal obligation.[264]

VI. CONCLUSION — ARE DORMANT MINERAL STATUTES THE ANSWER?

The United States Supreme Court has upheld the constitutionality of one dormant mineral statute[265] and has dismissed an appeal of a state court decision that upheld the constitutionality of another.[266] These decisions do not change the earlier state court determinations that dormant mineral acts in Illinois, Nebraska, and Wisconsin are unconstitutional. Nor do they declare any similar, yet unenacted, statutes constitutional.[267] A state court that is considering a newly enacted dormant mineral act, or a state court that, in light of the *Texaco*[268] case, has decided to reconsider a previous decision regarding the constitutionality of a

259. 102 S. Ct. at 795. The court in *Texaco* stated that "[t]he reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act." *Id.*

260. *Id.* at 793.

261. *Id.* at 796.

262. *Id.* at 798 (Brennan, J., dissenting). The dissent did not say that the statute is unconstitutional in its prospective application, but only retrospectively. *Id.* at 798, 805.

263. *Id.* at 800.

264. *Id.* at 802-03.

265. Texaco, Inc. v. Short, 102 S. Ct. 781 (1982).

266. Larsen v. Van Slooten, 102 S. Ct. 1242 (1982).

267. The *Texaco* court remarked in a footnote that it was not deciding if a state could presume abandonment of a severed mineral interest if "the statutory period of nonuse is shorter than that involved here [20 years]" or if "the interest affected is such that concepts of 'use' or 'nonuse' have little meaning." 102 S. Ct. at 795 n.28.

268. Texaco, Inc. v. Short, 102 S. Ct. 781 (1982).

dormant mineral statute, can declare the statute void on grounds other than violation of the federal Constitution. For example, the terms of most dormant mineral statutes vary. Therefore, courts can attempt to distinguish their decisions from *Texaco* based on these variances. State courts also have the option to decide that the state constitution has more stringent requirements than the federal Constitution, and they can invalidate an act on a violation of the state constitution.[269] In addition, a dormant mineral statute may be invalidated because of a conflict with legal principles of abandonment or with the state's classification of severed mineral interests as corporeal.[270]

The North Dakota Legislature has considered enacting a dormant mineral act to deal with abandoned severed mineral interests,[271] and it will probably consider this issue again in the future. The Indiana statute upheld by the United States Supreme Court is not the best model for every state.[272] Each state legislature must consider its own philosophy towards mineral development and towards legislation that affects the private ownership of real property. Assuming that a severed mineral interest in North Dakota is a corporeal interest, a dormant mineral statute would change the general rule that prohibits abandonment of such an interest.[273] Another problem might arise because of a special section in the North Dakota Constitution, which provides that the state may not make "donations" to any individual.[274] Arguably, this section could prohibit North Dakota from utilizing a traditional dormant mineral statute that vests the abandoned mineral interest with the surface estate. Also, state courts could interpret the North Dakota Constitution's due process clause,[275] which is different from the federal clause, more strictly than the *Texaco* court interpreted the federal due process clause, thereby requiring notice and a hearing before loss of the minerals. The

269. *See, e.g.*, Wilson v. Bishop, 82 Ill. 2d 364, 366, 412 N.E.2d 522, 523, 526 (1980) (Illinois act violates the due process and contract clauses of the Illinois Constitution); Wheelock v. Heath, 201 Neb. 835, 845, 272 N.W.2d 768, 774 (1978) (Nebraska act violates the due process and contracts clauses of the Nebraska Constitution).

270. *See, e.g.*, Wheelock v. Heath, 201 Neb. at 835, 839-42, 272 N.W.2d at 771-72.

271. *See supra* note 7.

272. *See* IND. CODE ANN. §§ 32-5-11-1 to -8 (Burns 1980). The Indiana act does have some good points. For example, it does not use the term "abandonment," but instead discusses a reversion. *Id.* § 32-5-11-1. One problem area in the Indiana act is the special exception for large developers. *Id.* § 32-5-11-5. This section may be subject to attack as violative of the equal protection clause.

273. *See supra* notes 52-58 and accompanying text.

274. N.D. CONST. art. X, § 18. Note also that § 47-01-10 of the North Dakota Century Code provides that "[t]he state is the owner . . . of all property of which there is no other owner." N.D. CENT. CODE § 47-01-10 (1978).

275. N.D. CONST. art I, § 9. North Dakota's civil due process clause provides: "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay." *Id.*

United States Supreme Court hinted that more notice might be advisable when it stated that "the question in this case is whether additional notice is constitutionally required, and not whether such notice might better serve the purposes of the statute."[276]

The State of Minnesota has passed legislation that seems to balance a mineral owner's property interests with the public policy of encouraging mineral development.[277] Although the statute requires the affirmative act of recordation by the severed mineral owners, it is arguable that this burden is necessary to the public's interest in development of natural resources. The Minnesota statute does not present two of the serious problems that other dormant mineral acts have encountered. The mineral interest forfeits to the state rather than the surface owner, and notice and a hearing are provided before the forfeiture.[278] The Minnesota Legislature added the procedural due process requirements of notice and a hearing[279] without defeating the dormant mineral act's purpose of identifying and clarifying severed mineral interests to encourage mineral development.[280]

If a state can draft a dormant mineral act that is consistent with common law rules of abandonment and that does not violate the due process clause, this, along with a constitutional tax, could solve the problems associated with dormant severed minerals.[281] The interests of the public, landowners, mineral owners, and developers must be considered and balanced when states, like North Dakota, attempt to devise effective and equitable solutions to the problems of dormant severed mineral interests.

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276. 102 S. Ct. at 797 n.34.

277. MINN. STAT. §§ 93.52-.58 (1981).

278. *Id.* § 93.55.

279. MINN. STAT. § 93.55(2) (1981). Procedural due process is based upon a notion of fairness. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 501 (1978). *See also* Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972). State courts can and should impose procedural due process requirements upon legislative enactments that deprive a person of a vested property interest in an unfair manner.

280. *See supra* note 76 for the statement of purpose behind Minnesota's dormant mineral act.

281. If the North Dakota Legislature feels that the solution of a traditional dormant mineral statute and taxation of severed mineral interests creates too many constitutional problems, there is another method that could be used to deal with abandoned severed mineral interests. The legislature could create its own "abandoned and unclaimed mineral act," similar to the North Dakota Disposition of Abandoned and Unclaimed Property Act. *See* N.D. CENT. CODE §§ 47-30-01 to -28 (1978 & Supp. 1981) (covers personal property).

Arguably, because the state already has a system in existence for personal property, it also could manage the abandoned mineral interests. But, objections can also be made to an "abandoned and unclaimed mineral act." *See* Note, *Severed Mineral Interests, supra* note 5, at 459. One obvious problem this type of legislation would face is that it reverses two common law theories: that real property cannot be abandoned and that intent and actions by the owner are necessary for abandonment. For a procedure whereby abandoned mineral interests would be held in trust in perpetuity by the state after notice and a hearing until claimed by the owner, see N.D. LEG. RES. COMM. REP. 31, 41st Sess. (1969).