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William P. Pearce

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# THE NORTH DAKOTA SUPREME COURT DEALS WITH THE ABANDONED MINERALS ACT

WILLIAM P. PEARCE\*

## ABSTRACT

A tract of land containing subsurface mineral interests may be visualized as two separate parts: (1) the surface of the land and (2) the underlying mineral interest. It is quite common in western North Dakota, for the ownership of the two parts of the tract to have been, at some earlier time, separated by a severance of the mineral interest from the surface, as the result of a sale, inheritance, or other form of transfer of real property interests. North Dakota is only one of a number of states that have created some form of statutory process dealing with what are commonly referred to as “abandoned” or “dormant” mineral interests. This is a process by which an owner of the surface of a tract is able to acquire a severed mineral interest, so as to reconnect it with the surface. The general theory behind this concept is that a mineral interest which has not been “used” for a specific unbroken period of years has, in effect, been abandoned by the mineral owner, so that it may be available for rejoinder with the surface.

Whether a surface owner can acquire the mineral interest depends on whether the interest has been “used,” at any time within a specified prior unbroken period of years. The nature of such “use” is specifically set out in the statutes in question. The surface owner is required to give notice to the mineral owner of an intention to invoke the process. The mineral owner, of course, is given an opportunity to respond and show that the interest has in fact been used and thus has not been abandoned. The 1983 North Dakota Abandoned Minerals Act, as amended, has come before the North Dakota Supreme Court on a number of occasions, dealing primarily with the notification issue. The principal purpose of this Article is to examine the North Dakota Supreme Court’s analysis of the issues in these cases.

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## I. INTRODUCTION

The ramifications of split ownership between the surface of lands in North Dakota and the possible existence of underlying mineral deposits, in particular oil and gas, have woven an interesting tapestry of legal principles over the years. This began in 1951, when oil first flowed out of the ground from the Clarence Iverson #1 Well, completed as the first producing oil well in North Dakota on April 14, 1951.<sup>1</sup> This, of course, set the stage for a new legal framework specifically built upon the need to answer the question of who owns the oil and gas, as well as other minerals. The status of the ownership of a mineral interest, which has not been “used” for a period of twenty years, is the subject of the 1983 North Dakota “Termination of Mineral Interest Act” (sometimes referred to as the North Dakota Abandoned Minerals Act). This Act allows for a possible change in ownership, as discussed in this Article. In the discussion below, this Article will use “the Act” to refer to the North Dakota “Termination of Mineral Interest” legislation.

At the outset, it is useful to explore briefly what exactly is meant when talking about the “ownership” of a mineral interest, and the broader question of the basic legal origin of the concept of “ownership.” These are concepts which we all use daily as a matter of course, and we take it for granted that we understand what we mean by this language. However, it is interesting to take a brief look behind the terminology to see what “ownership” really means.

### A. WHAT CONSTITUTES OWNERSHIP?

The separation, or “severance,” of the mineral interest from the surface interest creates a situation in which at least two persons share in the ownership of the land. In this situation, “land” is defined to mean the surface and everything underlying the surface.<sup>2</sup> It is often said that when a severance of the mineral estate, that is the minerals beneath the surface, has

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1. *Circular No. 204*, N.D. GEOLOGICAL SURV., (N.D. Indus. Comm’n Dep’t of Mineral Res., Bismarck, N.D.) June 1958, at 1.

2. There may be a question, of course, as to how the “surface” is defined in the context of hard minerals, such as lignite coal, that are mined by strip mining techniques, but for purposes of the discussion in this article, this question need not be addressed. North Dakota law does describe “subsurface minerals” as all naturally occurring elements and their compounds, volcanic ash, precious metals, carbonates, and natural mineral salts of boron, bromine, calcium, fluorine, iodine, lithium, magnesium, phosphorus, potassium, sodium, thorium, uranium, and sulfur, and their compounds but does not include sand and gravel and rocks crushed for sand and gravel. N.D. CENT. CODE. § 38-15-02 (2015).

taken place, the surface owner and the owner of the severed mineral interest each has a separate and distinct property right or estate in the land.<sup>3</sup> Simply stating that a person has a “property right” in, or “owns,” the severed mineral interest, however, does not explain the nature of the ownership. That question can be clarified only by looking behind the descriptive words “property” and “ownership:”

In the first place, it is necessary to distinguish between the right of ownership itself and the subject-matter of that right . . . It is necessary to realize, however, that although “property” is often used in this loose way to refer either to the thing itself or to the rights in that thing, the concept of ownership itself is quite distinct from any tangible things to which it may relate, for it is no more than the expression of a legal relationship resulting from a set of legal norms . . . For this purpose it may be said that ownership is not a single category of legal “right” but is a complex bundle of rights whose precise character will vary from legal system to legal system.<sup>4</sup>

The legal concept of “property” or “ownership of property,” therefore, does not represent a *thing* itself but rather certain rights. These rights are not between the owner and some object of ownership, but are rights between the owner and other persons with respect to that object.<sup>5</sup> This concept of the enjoyment by one person (the “owner”) of a certain bundle of rights in a thing, such as land, which are enforceable by the sanctions of the law against other persons, is at the heart of the traditional common law theory of private property.<sup>6</sup> As a general principle, the essence of private

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3. *E.g.*, *McDonald v. Antelope Land & Cattle Co.*, 294 N.W.2d 391, 396 (ND 1980)(“In North Dakota, after a mineral title is severed by reservation, the surface and minerals are held by separate and distinct titles, and each is a freehold estate of inheritance. The result is the same whether the severance is accomplished by reservation of minerals in a deed or by a deed conveying a mineral interest.”); *See generally* *Beulah Coal Mining Co. v. Heihn*, 46 N.D. 646, 180 N.W. 787 (1920).

4. DENNIS LLOYD, *THE IDEA OF LAW* 319, 323 (1964).

5. MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER* 45 (1933) (“A right is always against one or more individuals.”).

6. *See* OLIVER W. HOLMES, *THE COMMON LAW* 169, 193 (1963). Holmes defined a legal right as follows:

A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given to a man, he has a legal right . . . But what are the rights of ownership? . . . Within the limits proscribed by policy, the owner is allowed to exercise his natural powers over the subject matter

property is the right of the owner to exclude others from exercising power or control over, or enjoying the fruits of, some object or thing, subject to appropriate governmental restrictions.<sup>7</sup>

## B. SOURCE OF OWNERSHIP

Having established the general nature of *ownership* of a mineral interest, whether severed from the surface or remaining joined with the surface, the next question is *where* does ownership derive from? Generally speaking, ownership of land in most legal systems derives from the sovereign, who is perceived to own all of the land, including underlying minerals, in the country before any of it has been granted to other entities or persons.<sup>8</sup> In England, this meant the King.<sup>9</sup> In the United States, it meant that the United States itself owned all of the land in the country, or as we often say had “title” to the land.<sup>10</sup> Passage of “title,” reflects the passage of ownership from a prior owner to a new owner.<sup>11</sup> On the surface, it sounds like a simple system. The sovereign, whoever this may be – the King, the government of a republic like the United States, the Emperor, etc. – has ownership (title). The sovereign then grants that title to someone else by some kind of more or less official document, which may be called a charter, patent, deed, or some other kind of instrument. In practice, when the United States was first coming into being, it was not so simple, since the concept of title itself was sometimes murky:

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uninterfered with, and is more or less protected in excluding other people from such interference. The owner is allowed to exclude and is accountable to no one.

7. COHEN, *supra* note 5, at 57 (“To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state, as much as by the right to exclude others that is the essence of property.”).

8. WILLIAM F. WALSH, *A HISTORY OF ANGLO-AMERICAN LAW* 184 (2d ed. 1932) (“Land has always included trees and other natural growth thereon, the soil and minerals below the surface.”).

9. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 77 (1963) (“The king was ultimate lord of the soil and also the fountain of justice.”); Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 52 (1973) (“[Land] was parceled out in the Middle Ages in tiers of estates, with the king at the apex . . .”). Before the American Revolution and the formation of the United States, of course, the king of England owned the land constituting the American colonies, prior to the grant by him of ownership in some form to others, for example William Penn. Penn received a royal charter from King Charles II in 1681 to cover a debt of £16,000 owed by the monarch to Penn’s father Admiral William Penn. Under this royal charter, Penn became the “proprietor,” that is the owner, of a huge tract of land in what is now Pennsylvania. HANS FANTEL, *WILLIAM PENN: APOSTLE OF DISSENT* 147-48 (1974).

10. WALSH, *supra* note 8, at 171.

11. *Title*, *BLACK’S LAW DICTIONARY* (4th ed. 1968) (“Title is the means whereby the owner of lands has the just possession of his property.”).

There were chronic difficulties in determining title. Government surveys, for all their defects, made it possible to identify the physical aspects of the land. But title is a concept more elusive than longitude, more nebulous than a tree stump or a stream. Title became as vexatious and intractable a subject as the abolished law of tenure. Sometimes title depended upon the terms of some vast, ambiguous grant – from the federal government, or the King of Spain, or a dead proprietor. Or it had to take into account the patents (grants) of American state governments, possibly equivocal, possibly corrupt.<sup>12</sup>

The author of this quotation was referring to the medieval system of land “tenure,” prevalent in England after the Norman Conquest. The actual ownership of the land was in the sovereign, who would make a grant to a “vassal.”<sup>13</sup> A vassal is an aristocrat – a baron or other knight – who exercised control over his own group of fighting men and retainers.<sup>14</sup> The vassal “owned” the land in most senses, in that he could restrict others from trespassing upon it, and he enjoyed the fruits of the land.<sup>15</sup> However, ultimate ownership remained in the sovereign, who could reclaim it, for example, if the vassal broke his sworn oath to serve the sovereign and to come to his aid in times of war (which of course was a frequent occurrence).<sup>16</sup> The relationship between sovereign and vassal became fairly

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12. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 212 (1973).

13. DAVID C. DOUGLAS, *WILLIAM THE CONQUEROR, THE NORMAN IMPACT UPON ENGLAND* 268-74 (1964).

14. *Vassal*, BLACK'S LAW DICTIONARY 1723 (3d ed. 1968) (A vassal is “the holder of a fief on a feudal tenure, and by the obligation of performing feudal services. The correlative term was ‘lord.’ The vassal himself might be lord of some other vassal.”); *see also* J.C. HOLT, *MAGNA CARTA* 43 (1969) (Referring to royal patronage: “Kings could not restrict it to their immediate followers. All their tenants-in-chief were their immediate vassals with a claim upon the royal favour and expectation of reward.”); WILLIAM F. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* 12 (1965) (“The crown tenants, or tenants in chief, held their estates of the king; and by subinfeudation these barons required homage of mesne lords who held of them.”).

15. WALSH, *supra* note 8, at 100.

16. NORMAN F. CANTOR, *MEDIEVAL HISTORY: THE LIFE AND DEATH OF A CIVILIZATION* 218 (2nd ed. 1969) stating:

The granting of a fief [right in land] did not involve the giving of complete property rights over the estate to the vassal. He had the use of the income of the land as a reward for service and in order to make possible his outfitting as a knight. But technically the ultimate ownership of the land was still the lord's, who could recover if the vassal ceased to be loyal, and when the vassal died the fief automatically reverted to the lord.

*See also* WALSH, *supra* note 8, at 36 stating:



complex. In fact, one of the goals underlying the Magna Carta of 1215 was to define and regulate some of the mutual duties and responsibilities between them.<sup>17</sup>

## II. SEVERANCE OF A MINERAL INTEREST FROM THE SURFACE INTEREST

### A. SEPARATION OF INTERESTS

The “ownership” of the surface or of an underlying mineral interest, depends on the rights held by the owner of each one *vis-à-vis* the other.<sup>18</sup> Prior to any development of a mineral interest, the interest remains connected with, or perhaps related to, the surface interest in the land.<sup>19</sup> Fluid minerals, like oil and gas, are not fixed to the ground. The law has long recognized the Rule of Capture and the modifications of that rule with modern spacing and pooling regulations.<sup>20</sup> It is clearly no longer possible for the owner of oil and gas in a tract to get under the tract and suck out as much of the oil and gas as possible from adjacent tracts in addition to his own and then claim that ownership of everything thus “captured” in this manner belongs to him.

In many instances in western North Dakota over the years, as in many other states, the surface interest and the underlying mineral interest in tracts of land had become separated by deeds or reservations of mineral interest apart from the surface. The grantor in a mineral deed or the grantor of a surface tract who reserves or excepts the mineral interest from the grant holds a separate fee simple estate in the minerals in place, with all the of the

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The thegn [knight] owed military service depending in amount on the number of hides [about 120 acres each] of land held by him . . . The land did not owe this service; it was due from the thegn or ordinary freeholder to the king as lord of the nation; but it was regulated and determined on the basis of land ownership.

17. J. C. HOLT, *MAGNA CARTA* 207 (1965).

18. LLOYD, *supra* note 4, at 322-23.

19. N.D. CENT. CODE ANN. § 38-18.1-01 (West 2017) (A severed mineral interest is any interest in minerals owned by a person other than the owner of the surface estate.).

20. Under the classic Rule of Capture, oil and gas were perceived to be “fugacious,” that is freely flowing underground, and the mineral owner in a tract of land was entitled to anything he could produce by drilling on the tract he owned. *See* *Cont’l Res., Inc. v. Farrar Oil Co.*, 1997 ND 31, 559 N.W.2d 841 (“It was thought that oil, like water, flowed in underground streams, and the law analogized the ownership of oil to the ownership of water and wild animals that could be captured when they crossed one’s property.”). The draining of oil and gas from adjacent tracts owned by others was a necessary consequence but one which could theoretically be prevented by the drilling of “offset” wells. The original term of Rule of Capture derives from English common law and was applicable to water and animals as well. *Id.* In a basic sense, the concept was that whatever a person could take without invading or coming on the land of another person he was entitled to keep as his own.

legally protected rights available to an owner of real property.<sup>21</sup> The goal of the abandoned minerals legislation in North Dakota and other states has been to reattach the surface and minerals in a tract if it has been determined that the mineral interest is no longer being “used” in any of a number of ways set out in the statutes.<sup>22</sup> In this way, an “unused” mineral interest can revert to and become connected to the overlying surface where there has been a separation in the past.<sup>23</sup> This in turn necessarily means the surface owner has now become the owner of both the surface and the underlying mineral interest.<sup>24</sup> The fundamental underlying basis for this concept is that when a mineral interest owner has neglected to do anything with his interest for twenty years or more, he has in effect shown that he has no actual interest.<sup>25</sup> Accordingly, the owner is deemed to have abandoned the mineral interest.<sup>26</sup> At first blush, the twenty-year period may perhaps seem excessive when compared, for example, to the three-year period after which unclaimed sums payable as mineral proceeds are deemed abandoned.<sup>27</sup> The differences are substantial, however, not the least of which is that we are dealing with real property rather than personal property and the circumstances are very different.

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21. *Christman v. Emineth*, 212 N.W.2d 543, 550 (N.D. 1973).

22. The general thinking behind the abandoned minerals acts, at least to some extent, is that reuniting severed minerals with the overlying surface will stimulate economic development by promoting mineral exploration and development. See Phillip E. Norvell, *Dormancy Mineral Legislation: A Cure for the Malady or Another Affliction?*, 16 E. MIN. L. INST. ch. 12, 432-33 (1977) stating that:

Highly fractionalized ownership of severed mineral titles is endemic to areas where coal, oil and gas production and exploration are prevalent. The geometric increase in ownership of a severed mineral interest that occurs with each passing generation by testate and intestate succession, resulting in greater fractional ownership, *i.e.*, more owners of diminished fractional interests, impedes the development of coal, oil and gas prospects . . . Dormancy mineral legislation is the modern solution to the problems associated with severed mineral titles of ancient origin.

See also KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 119 (1989) (“Antebellum [*i.e.* pre-Civil War] judges treated property as a dynamic commodity to be employed for productive uses deemed in the interest of the public . . . The judicial formulation of the common law of property hastened economic growth in the name of the public good.”).

23. See N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017) (“Title to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment.”).

24. See *id.*

25. See *id.*

26. NAT. CONF. L. COMM’RS, UNIF. DORMANT MINERAL INTERESTS ACT 2 (1986), [http://www.uniformlaws.org/shared/docs/dormant%20mineral%20interests/udmia\\_final\\_86.pdf](http://www.uniformlaws.org/shared/docs/dormant%20mineral%20interests/udmia_final_86.pdf) (changed to Model Act 1999).

27. N.D. CENT. CODE ANN. § 47-30.1-16.1(1) (West 2017).

## B. SO-CALLED ABANDONED MINERALS ARE NOT REALLY LEGALLY ABANDONED

The characterization of statutes in various states which have addressed this issue as “abandoned minerals” acts is frankly a poor choice because it is contrary to the legal meaning of “abandoned.” To abandon property, under established common law principles, meant for the owner to perform some decisive act of leaving it, and to demonstrate by specific evidence of an intention to dispense with it.<sup>28</sup> The intention to abandon is the critical element.<sup>29</sup> Under the old common law tradition, two things must occur in order for property to have been abandoned, as stated above: (1) an act by the owner that clearly shows that he or she has given up rights to the property; and (2) an intention that demonstrates that the owner has knowingly relinquished control over it.<sup>30</sup> In fact, the general traditional common law rule was that real property cannot be abandoned:

Most starkly, the common law flatly prohibits the legal abandonment of the fee simple interest in land. A landowner who wants to sever his ties to the land must find a willing recipient of title, someone to whom he can either sell or give the parcel.<sup>31</sup>

The North Dakota Act, does not in any respect fall into the traditional definition of “abandonment,” but this term has clearly acquired a new meaning in the context of so-called “abandoned mineral interests.”

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28. Patrick J. Garver & Patricia J. Winmill, *Medicine for Ailing Mineral Titles: An Assessment of the Impact of Adverse Possession, Statutes of Limitation, and Dormant Mineral Acts*, 29 ROCKY MT. MIN. L. INST. 281 (1983).

29. *Abandonment*, BLACK’S LAW DICTIONARY (4th ed. 1968) defining abandonment as: ‘Abandonment’ includes both the intention to abandon and the external act by which the intention is carried into effect. In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry, for there can be no abandonment without the intention to abandon.

See also 1 W. BLAKE ODGERS & WALTER BLAKE ODGERS, JR., *THE COMMON LAW OF ENGLAND* 19 (10th ed. 1911). See also, *Johnson v. Mark*, 2013 ND 128, ¶ 22, 834 N.W.2d 291, 298 (FORDHAM L. REV. 222, 235 (1939); *City of Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. App. 1952) (“An essential element of abandonment is the intention to abandon and such intention must be shown by clear and satisfactory evidence. Abandonment may be shown by circumstances but the circumstances must disclose some definite act showing intention to abandon.”).

30. Timothy C. Dowd, *Oil and Gas Title Law - A Review of Fifty Common Problems -North Dakota*, 90 N.D. L. REV. 289, 304 (2014); see *Lost, Mislaid, and Abandoned Property*, 8 FORDHAM L. REV. 222, 235 (1939); *City of Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. App. 1952) (“An essential element of abandonment is the intention to abandon and such intention must be shown by clear and satisfactory evidence. Abandonment may be shown by circumstances but the circumstances must disclose some definite act showing intention to abandon.”).

31. Eduardo M. Penalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 200 (2010).

Presumably, the North Dakota Legislature would take the position that its adoption of the term “abandoned” in the context of this statute is an example of the rule that “[i]n this state there is no common law in any case in which the law is declared by the code.”<sup>32</sup> The North Dakota Century Code, however, does not define or describe the term “abandoned.”

### C. THERE IS NO TERMINATION OF MINERAL INTERESTS UNDER THE ACT

As mentioned above, the 1983 North Dakota “Abandoned Minerals Act” was originally described as an act for the “Termination of Mineral Interest.”<sup>33</sup> This was a curious use of the word “termination,” since the statute does not apply to termination of mineral interests in any sense. It is not exactly clear why North Dakota adopted the label “Termination of Mineral Interest”<sup>34</sup> to describe its “abandonment of mineral interests” statute, but that description is even less appropriate than referring to “abandonment.” It covers only the change of ownership of mineral interests which have been shown not to have been “used” for an unbroken period of twenty years.<sup>35</sup> A mineral interest continues to exist, regardless of the fact that ownership of the interest may have been changed, through the operation of the law, by a reversion of ownership to the surface owner. It is interesting to remember that “terminate” means to destroy or end whatever is being terminated, but the North Dakota statute in question does not in any manner seek to terminate the mineral interest. Quite to the contrary, the point in fact is the opposite: to maintain the mineral interest in effect after twenty years or more of nonuse. The mineral interest will pass into different hands if the surface owner is successful in acquiring it, but it certainly does not cease to exist. Ownership by the mineral owner is, of course, terminated when ownership of the mineral interest passes to the surface owner, but the mineral interest itself definitely is not terminated. In the body of the North Dakota statute, the terms “abandoned mineral interest” and “abandonment” are used and “termination” does not occur.<sup>36</sup>

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32. N.D. CENT. CODE ANN. § 1-01-06 (West 2017). This statute is indicative of the overall gradual change in American law from reliance on the English common law to newly-created statutory law. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 7 (1977) (“In short, common law doctrines were derived from natural principles of justice, statutes were acts of will; common law rules were discovered, statutes were made.”).

33. 1983 N.D. Laws 1283.

34. See N.D. CENT. CODE ANN. ch. 38-18.1 (West 2017).

35. *Id.* § 38-18.1-02.

36. See, e.g., N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017).

In any case, the preferable term would be “dormant mineral interests,” as is the case in some other states, rather than “abandoned” or “terminated” mineral interests. It is interesting, however, that even the Model Act discussed below uses the word “termination” at one point.

### III. BACKGROUND OF SEPARATE OWNERSHIP OF SURFACE AND MINERALS

This idea of separate ownership of the surface and the underlying mineral interest is a fairly modern concept. The English common law tradition contemplated that “ownership of land” included ownership of the surface and everything under and above it.<sup>37</sup> An exception was made for ownership of precious metals such as gold and silver, which belonged to the sovereign, who could be said to have reserved those mineral substances in any grant of rights in land to private persons.<sup>38</sup> American law, however, never recognized any inherent, or automatic, ownership of any severed minerals by the government in private lands.<sup>39</sup> Beginning in the nineteenth century, grants of land to individuals or to corporations, such as the railroads, from the vast domain of public lands in this country, did not even attempt to sever or reserve minerals in these public lands.<sup>40</sup>

Early in the twentieth century, it was apparent that coal, oil and gas, and other minerals constituted a potentially enormous source of public wealth.<sup>41</sup> Accordingly, mineral reservations became customary, and

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37. This is reflected in the grand old Latin legal maxim: *Cuius est solum, eius est usque ad coelum et ad inferos* (“Whoever owns the soil, owns from the center of the earth to the sky.”). *Shell Oil Co. v. Manley Oil Corp.*, 37 F. Supp. 289, 292 (D. Ill. 1941). The notion of owning to the sky above the surface has of course been greatly limited in modern times, or else airplanes and weather satellites would be constantly trespassing.

38. See A. Lucas, *Freehold Ownership of Oil and Gas in Introduction to Oil and Gas Law* 23 (1983), citing as an example the 1670 grant by the King of England of approximately one billion acres of land in the basin of Hudson’s Bay in Canada, comprising nearly one-half of Canada, covering everything from the surface to the center of the Earth, except reserving gold, silver, gems and precious stones that might be discovered.

39. A governmental entity may, of course, expressly reserve mineral rights in a grant of land, or acquire severed mineral interests from a private owner. See, e.g., *infra* note 41 (referencing the reservation of minerals in patents issued by the United States). North Dakota began, in 1939, to reserve a portion of the minerals in conveyances of its so-called “school lands,” that is the lands acquired from the federal government upon statehood, and now it is required by the state constitution that 100% of the mineral interests in a sale of state land must be reserved. See N.D. CONST. art. IX, § 5.

40. See generally Thomas E. Root, *Railroad Land Grants from Canals to Transcontinentals*, 1987 A.B.A. SEC. NAT. RES. L. (containing a detailed history of federal land grants to railroads and showing that mineral reservations only became standard in the latter part of the 1800’s).

41. See 30 U.S.C. § 81 (1909) (reserving coal to the United States in any land patent) and 43 U.S.C. § 299(a) (1916) (reserving all minerals to the United States in any land patent). This legislation clearly demonstrated that the United States had, by the early 1900’s, begun to

eventually mandatory, in many types of grants and other dispositions of public lands, particularly in the western United States.<sup>42</sup> As the practices of reserving minerals in private land transfers and separately transferring mineral interests gained favor, severed ownership of the surface and the underlying mineral interest in land became common.<sup>43</sup> North Dakota is typical of many western states in having widespread ownership of severed mineral interests, both private and governmental.<sup>44</sup>

One might raise a question whether the mineral interest and the surface are necessarily conceptually separate and different entities. In the context of surface mining of hard minerals like coal, it may be difficult as a practical matter to fully distinguish the mineral estate from the surface estate. In the case of oil and gas, however, it is clear that the surface and the underlying oil and gas occupy quite separate zones and there is no difficulty in distinguishing them. For example, the Clarence Iverson #1 Oil Well mentioned above was drilled to a total subsurface depth of 11,955 feet in what is referred to as the Madison Formation.<sup>45</sup> In any case, the courts have made it clear that the mineral interest and the surface interest are two separate and distinct legal interests.<sup>46</sup> In its early decision in *Beulah Coal Mining Co. v. Heihn*,<sup>47</sup> involving a conveyance of land with a reservation of

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recognize the importance of this wealth of mineral interests, particularly in western states where large land grants were made to assist railroads to reach to the west coast. *See id.*

42. *See id.* Reservation of coal in a federal patent, for example, became mandatory under several federal statutes, starting in 1909, and finally under a 1916 federal statute all minerals were included in the mandatory reservation.

43. ELWYN B. ROBINSON, HISTORY OF NORTH DAKOTA 458-59 (Univ. Neb. Press 1966) (“The discovery of oil on April 4, 1951, brought another revolution [following a highway construction revolution] in North Dakota life . . . The discovery set off an exciting boom.”). Review of North Dakota county deed records shows that, beginning as early as the late 1930’s and early 1940’s, mineral deeds and deeds containing mineral reservations began to appear, but the numbers greatly increased especially after the discovery of oil in the Iverson well. *See supra* note 1.

44. *See supra* note 1. After the 1951 discovery of oil in Williams County, North Dakota, mineral deeds or deeds containing mineral reservations began to multiply quickly in the county records offices. In addition to the many private mineral interests, the State of North Dakota owns substantial amounts of mineral interests arising from minerals located in the lands gifted to the state by the United States, consisting of two sections in every township (primarily Sections 16 and 36 in each township) in 1889 when North Dakota became a state. In addition, the state owns the riverbeds, including any underlying minerals in all rivers which were navigable at statehood, the largest of which is the Missouri River in the western part of the state. *See Hogue v. Bourgois*, 71 N.W.2d 47 (N.D. 1955).

45. *See* N.D. Geological Surv. Circular, *supra* note 1.

46. *See e.g.*, *Bilby v. Wire*, 77 N.W.2d 882 (N.D. 1956); *Nw. Improvement Co. v. Norris*, 74 N.W.2d 497 (N.D. 1955).

47. 180 N.W. 787 (N.D. 1920).

coal made by the grantor, the North Dakota Supreme Court made it clear that the mineral interest is a separate interest in real property, the ownership of which may validly be severed from the ownership of the surface.<sup>48</sup> The severance of a mineral interest may, of course, be accomplished by a mineral deed, separate from the surface, just as by a reservation or exception in a deed conveying the surface. In early judicial analyses, a reservation of minerals in a deed was sometimes conceptually treated as a conveyance of the reserved minerals back to the grantor by the grantee.<sup>49</sup> Referred to as the “grant back” theory, this has been characterized in modern times as resorting to unnecessary “hypertechnical legal reasoning.”<sup>50</sup> The acts of reserving a mineral interest from a conveyance of land or excepting the mineral interest from the conveyance are functionally identical.<sup>51</sup>

#### IV. THE 1983 NORTH DAKOTA ACT AND ITS EVOLUTION

##### A. BACKGROUND

The original North Dakota statute pertaining to “abandoned” mineral interests was enacted in 1983.<sup>52</sup> Although the legislative bill, which became the statute, was labelled “Abandoned Mineral Rights,” the first line of the actual text of the bill established the name by which it became listed in the North Dakota Century Code, as noted above:

An Act to provide for the *termination of mineral interest* [emphasis added] in land owned by persons other than the owners of the surface and for the vesting of title to dormant mineral interests in the surface owners in the absence of appropriate

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48. *Heihn*, 180 N.W. at 789 stating:

Minerals in place are land, and may be conveyed as other lands are conveyed . . . Contracts excepting ores and mineral from grants of land, with a reservation of the right to enter upon the portion thereof granted are in accordance with long-established usage and have been invariably held by the courts to be valid, and not to be contrary to, but in harmony with, public policy.

49. See *Christman v. Emineth*, 212 N.W.2d 543 (N.D. 1973).

50. *Reiss v. Rummel*, 232 N.W.2d 40, 47 (N.D. 1975).

51. *Christman v. Emineth*, 212 N.W.2d 543, 552 (N.D. 1973) (“[A] reservation, like an exception, is something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant”). In some states, however, different consequences may attach to the use of one term or the other in certain situations. see, e.g., *Coyne v. Butler*, 396 S.W.2d 474 (Tex. Civ. App. 1965).

52. 1983 N.D. Laws 1283 (“Abandoned Mineral Rights Act”).

developmental activities or the recording of a notice of claim of interest within a specified period.<sup>53</sup>

Already at this early stage there were three different characterizations of the legislation: (1) mineral interests which had been abandoned, (2) mineral interests which had been terminated and (3) mineral interest which had become dormant.<sup>54</sup> The goal was the same, however, regardless of how the method was described: namely to somehow reconnect a previously severed mineral interest to the surface from which it had been originally severed, if it could be demonstrated that the mineral interest had not been “used” for an unbroken period of twenty years.<sup>55</sup>

A substantial number of other states have enacted this kind of legislation, sometimes referred to as “dormant mineral” statutes. Probably the best known judicial opinion on this topic derives from the federal constitutional challenge brought to the United States Supreme Court in *Texaco, Inc. v. Short*,<sup>56</sup> which discussed the Indiana dormant mineral statute, which is similar to the North Dakota Act.<sup>57</sup> A variety of arguments were presented to the Court in the *Texaco* case, alleging the statute violated the United States Constitution, including taking of property without just compensation, a lack of state powers to enact the statute, violation of due process, and others.<sup>58</sup> However, the Court held, in a lengthy 5-4 opinion, that the Indiana dormant mineral statute did not create any federal constitutional violations.<sup>59</sup> The present Article discusses the cases that have gone to the North Dakota Supreme Court on issues under the North Dakota Act, but none of the decisions in these cases were based on either federal or state constitutional provisions.

## B. ORIGINAL PROVISIONS OF THE NORTH DAKOTA ACT

The North Dakota Abandoned Mineral Act (or Termination of Mineral Interest Act) has now been in place for nearly thirty-five years and, as is

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53. *Id.*

54. *Id.*; see also N.D. CENT. CODE ANN. ch. 38-18.1 (West 2017) (“Termination of Mineral Interest”); *Capps v. Weflen*, 2013 ND 16, 826 N.W.2d 605 (“final resolution of the dormant mineral dispute”).

55. Abandoned Mineral Rights Act, §§ 2-3.

56. 454 U.S. 516 (1982).

57. *Id.*

58. *Id.* For a lucid and detailed analysis of the taking issue as presented in this case, see Joshua E. Teichman, *Dormant Mineral Acts and Texaco, Inc. v. Short: Undermining the Taking Clause*, 32 AM. U. L. REV. 157 (1982).

59. *Texaco*, 454 U.S. at 516.



customary with wide-reaching legislation of this type, has undergone a number of changes since the 1983 enactment, some minor and others more significant.<sup>60</sup> The basic statement of the function of the Act has remained unchanged:

Any mineral interest shall, if unused for a period of twenty years, be deemed to be abandoned, unless a statement of claim is recorded in accordance with section 4 of this Act. Title to the abandoned mineral interest shall vest in the owner of the surface estate in the land in or under which the mineral interest is located on the date of abandonment.<sup>61</sup> This single sentence basically summarizes the process by which any mineral interest can be made to revert to the surface owner if there has been a twenty-year failure to use the interest.<sup>62</sup>

The provisions of the 1983 Act were divided into eight separate sections. The corresponding sections of the present North Dakota Century Code are listed below in brackets, which included two additional sections.

Section 1: Mineral interest defined [N.D.C.C. § 38-18.1-01].

Section 2: Statement of claims – Recording – Reversion [N.D.C.C. § 38-18.1-02].

Section 3: When Mineral interest deemed to be used [N.D.C.C. § 38-18.1-03].

Section 4: Statement of Claim – Recording – Time [N.D.C.C. § 38-18.1-04].

Section 5: Failure to record the statement of claim [N.D.C.C. § 38-18.1-05].

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60. See Mineral Interest Termination Act 1989 N.D. Laws 1186; Register of Deeds Changed to Recorder Act, 2001 N.D. Laws ch. 120 § 1; Termination of Mineral Interests Act, 2005 N.D. Laws 1254; Abandoned Mineral Succession Statements Act, 2007 N.D. Laws 1220; Act of Apr. 24, 2009, 2009 N.D. Laws ch. 317 § 1; Act of Mar. 19, 2015, 2015 N.D. Laws ch. 62 § 14(f).

61. Compare 1983 N.D. Laws 1283 (“Abandoned Mineral Rights Act”) with N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017). The Act of course does not apply to any mineral interest owned by a governmental entity. N.D. CENT. CODE ANN. § 38-18.1-08 (2017).

62. This does not happen, however, if the mineral owner has recorded a proper timely statement of claim, since in that case the mineral estate is deemed to have been used. N.D. CENT. CODE ANN. § 38-18.1.03(1)(f) (West 2017).

Section 6: Notice of lapse of mineral interest – Method. [N.D.C.C. § 38-18.1-06].

Section 7: Waiver prohibited [N.D.C.C. § 38-18.1-07].

Section 8: Non-applicability to governmental bodies [N.D.C.C. § 38-18.1-08].

Sections 7 and 8 do not add to the substantive content of the Act, nor have they surfaced in any of the litigated cases. Section 7 states that the provisions of the 1983 Act may not be waived at any time prior to the expiration of the twenty-year period. Section 8 states the Act does not apply to any mineral interest owned by any governmental body or agency and that Act is both prospective and retrospective. It does not appear to be necessary for these two sections to be discussed below.

### C. COMMENTS ON THE ORIGINAL 1983 PROVISIONS OF THE NORTH DAKOTA ACT

This Article will provide comments on each of the relevant above-mentioned sections. As stated above, however, Section 7 and Section 8, do not appear to require any individual discussion. The important sections (Sections 1-6) contain all of the provisions required for the Act to be utilized.

#### 1. *Section 1: Mineral interest defined:*

This section broadly defined “mineral interest” as an “interest in oil, gas, coal, clay, gravel, uranium and all other minerals of any kind and nature.”<sup>63</sup> With a broad definition of this kind it cannot fail to include every possible mineral.<sup>64</sup> Section 1 does provide that these substances are minerals “unless context or subject matter otherwise requires.” This is simply a precautionary statement, as it does not seem likely that such a context or subject is likely to arise.

#### 2. *Section 2: Statement of Claims – Recording – Reversion*

This section described the basic principle of the Act: If any mineral interest is “unused” for a period of twenty years or more, it is deemed to be

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63. N.D. CENT. CODE ANN. § 38-18.1-01 (West 2017).

64. There is a substantial body of North Dakota law, including court decisions and statutory provisions, establishing which substances are “minerals.” The definition above is sufficient for purposes of this Article.

abandoned unless a statement of claim, which is defined in Section 4, is recorded in the county where the interest is located.<sup>65</sup> If no statement of claim has been recorded, the abandoned mineral interest passes to the surface owner or owners as of the date of abandonment.<sup>66</sup> Although “date of abandonment” is not separately defined, it may be taken for granted that “abandonment” in any particular case occurs immediately after the end of the twenty-year period.

### 3. *Section 3: When Mineral Interest Deemed to be Used*

This section is very important because it specifies under what activity or condition a mineral interest is deemed to have been “used.”<sup>67</sup> This is the core of the Act, since at least one of these activities must have occurred during the twenty-year period. If that is not the case, then the process for possibly having the mineral interest revert to the surface can take place. Any of the eight kinds of activities or scenarios would constitute “use” of a mineral interest, as follows:

- (a) If any minerals are produced under that interest.
- (b) If operations are being conducted on the tract for injection, withdrawal, storage, or disposal of water, gas or other fluid substances.
- (c) In the case of solid minerals there is production from a common vein or seam by the mineral owner.
- (d) The mineral interest on the tract is subject to a lease, mortgage, assignment, and conveyance (this was amended in 1989 to “*or* conveyance”) recorded in the county in question. It must be taken for granted that this means such a document that has been recorded in the office of the county register of deeds (now county recorder) within the previous twenty years.
- (e) The mineral interest is subject to an order or agreement to pool or unitize recorded in the office of the county register of deeds (now county recorder).

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65. Abandoned Mineral Rights Act § 2.

66. *Id.* (“Title to the abandoned mineral interest shall vest in the owner or owners of the surface estate in the land in or under which the mineral estate is located on the date of abandonment.”).

67. *Id.* § 3.

(f) Taxes are paid on the mineral interest by the mineral owner. (This presumably means real property taxes, which do not exist on mineral interests in North Dakota. This type of “use” was removed from the statute, though not until 2015.).

(g) A proper statement of claim is recorded, as specified in Section 4 below.

(h) The owner or lessee utilizes the mineral interest in a manner pursuant to, or authorized by, the instrument creating the mineral interest.<sup>68</sup>

These various kinds of activities or situations, for the most part, created reasonably plausible criteria for the purposes of the Act, except that (h) was a very strange circular and essentially meaningless definition in that it was effectively attempting to define “use” in terms of itself, by inserting the word “utilize.” What the drafters might have had in mind is not clear, but in any case, (h) no longer exists in the present form of the statute, having been eliminated in a 2009 amendment.<sup>69</sup>

It is interesting that the various definitions for “use” have not come before the Court at all. The questions which the Court has dealt with are mostly related to the remaining provisions of the statute, pertaining to the notice of lapse by the surface owner directed to the mineral owner asserting the lack of any use for a twenty-year or longer hiatus, and the statement of claim which the mineral owner may assert in an attempt to defeat the surface owner’s claim.

#### 4. *Section 4: Statement of Claim – Recording – Time*

This section, logically follows Section 3(g), which made reference to the statement of claim.<sup>70</sup> There are three parts, as follows:

(a) The statement of claim by the mineral owner was required to be recorded in the county records prior to the end of the twenty-year period (with a two-year grace period after the effective date of the Act, *i.e.* August 1985).<sup>71</sup>

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68. *Id.*

69. *See* Act of Apr. 24, 2009, 2009 N.D. Laws ch. 317 § 1.

70. There is currently no longer a Section 3(g), because the original Section 3(f), relating to the paying of taxes was eliminated, so that it became the new Section 3(f). *See* Act of Mar. 19, 2015, 2015 N.D. Laws ch. 62 § 14.

71. Abandoned Mineral Rights Act, 1983 N.D. Laws 1283, 1284.

(b) The statement of claim was required to contain the name and address of the record mineral owner, together with a legal description of the tract on or under which the mineral interest is located, and the type of mineral interest involved.<sup>72</sup>

(c) The statement of claim was required to be recorded in the office of the county records in which the mineral interest is located.<sup>73</sup>

Subsection (c) actually overlaps (a), since it simply repeats that the mineral owner must record it, and the county recorder's office [formerly register of deeds' office] is the only place in which that can be done.

#### 5. *Section 5: Failure to record the statement of claim*

Failure to record the statement of claim in a timely fashion did not in fact cause the mineral interest to be lost to the mineral owner if the owner did one of the following three things:

- (1) Owned one or more mineral interests in the county in which the mineral interest in question was located at the time of the expiration of the 20-year period; or
- (2) Inadvertently failed to preserve the mineral interest in question; or
- (3) Within sixty days after publication of the notice of lapse (discussed in Section 6 below) recorded a statement of claim.<sup>74</sup>

Section 5 was somewhat peculiar and superfluous, attributable perhaps to the fact that the 1983 Act was the first legislation of this kind to be created in North Dakota. The first option under Section 5 does not make much sense because it allows the mineral owner to avoid the time limit simply because of ownership of other unrelated mineral interests in the same county. The second option would certainly have created litigation around the question of what is precisely meant by "inadvertently" (which was stricken in 1989, as stated below). The third option is covered in Section 6 below.

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72. *Id.* § 4(2). In North Dakota this would be, for the most part, oil and gas.

73. *Id.* § 4(3).

74. *Id.* § 5(3).

6. *Section 6: Notice of Lapse of mineral Interest – Method.*

Section 6 is the critical provision for the surface owner and is essentially the only part of the statute that has come before the North Dakota Supreme Court multiple times, as discussed below. These notice of lapse provisions were originally stated as follows and have undergone some significant amending since 1983.

(1) Any person intending to succeed to ownership of a mineral interest that has lapsed after the twenty-year period must give notice of the lapse by publication in the official newspaper of the county where the interest is located.

(2) The publication of the notice of lapse shall be made once each week for three successive weeks. However, if the address of the mineral owner is “shown of record or can be determined upon reasonable inquiry,” notice must also be made by mailing a copy of the notice to the mineral owner within ten days after the last publication.

(3) The notice of lapse must contain the name of the record owner of the mineral interest; a description of the land on which the mineral interest in question is located; and the name of the person giving the notice.

(4) A copy of the notice and an affidavit of service of the notice, if recorded in the county records of the county in which the mineral interest is located, is prima facie notice in any legal proceedings that such notice has been given.<sup>75</sup>

The 1983 Act did not expressly state that the notice of lapse must be recorded, but this was amended in 1989 so that recording of the notice of lapse is now required.<sup>76</sup> The provision in subsection (4) pertaining to legal proceedings seems to suggest that the drafters may have anticipated the likelihood of litigation arising under the Act, as has in fact occurred.<sup>77</sup> Conceptually, the original aim was to allow the ownership of what were deemed to be “unused mineral interests” to pass to the surface owner, if the

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75. *Id.* § 6.

76. 1989 N.D. Laws ch. 441 § 4.

77. *Spring Creek Ranch, LLC. v. Svenberg*, 1999 ND 113, 595 N.W.2d 323 was the first case to reach the North Dakota Supreme Court on the abandoned minerals issue. Subsequent cases are discussed individually *infra* Part VI.

various steps set out in the statute were taken.<sup>78</sup> Upon completion of those steps, title to the mineral interest would vest automatically in the surface owner, without the necessity of a recordable judgment or other document to confirm the surface owner's title.<sup>79</sup> This has not necessarily been the case, as evidenced by the litigation and the 2009 amendment which inserted a new provision for quiet title actions discussed below.<sup>80</sup>

Under the 1983 Act, a surface owner intending to succeed to the ownership of a mineral interest upon its lapse was required to give notice by publication once every week for three weeks in the county newspaper.<sup>81</sup> If the address of the mineral owner was of record, or could be determined by reasonable inquiry, notice was also required to be given by mailing a copy of the notice of lapse to the mineral owner within ten days after the last publication.<sup>82</sup> This requirement is essentially the same in the current statute, except that additional provisions have been added, as described below.<sup>83</sup> In addition, a substantial number of cases before the North Dakota Supreme Court have dealt with the notice requirement, in particular with the "reasonable inquiry" provision, as discussed in detail below.

A mineral owner could forestall any attempt by the surface owner to acquire the mineral interest by recording a statement of claim in the county recorder's office.<sup>84</sup> The statement of claim was required to contain the address of the mineral owner, and a legal description of the land in question with a statement of the type of mineral interest involved.<sup>85</sup> Under the 2009 amendments to the 1983 Act, the statement of claim would remain effective to cancel the impending lapse of the mineral interest so long as it was recorded within sixty days after the first publication of the surface owner's notice of lapse.<sup>86</sup> Although the statute was not as clearly written as it could

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78. 1983 N.D. Laws 1283 which states:

AN ACT to provide for the termination of mineral interest in land owned by persons other than the owners of the surface and for the vesting of title to dormant mineral interests in the surface owners in the absence of appropriate developmental activities or the recording of a notice of claim of interest within a specified period.

79. See 2009 N.D. Laws, ch. 317 § 2 (codified at N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017)).

80. See 2009 N.D. Laws, ch. 317 § 5, at 11 (codified at N.D. CENT. CODE ANN. § 38-18.1-06.1 (West 2017)).

81. 1983 N.D. Laws 1285.

82. *Id.*

83. N.D. CENT. CODE ANN. § 38-18.1-06 (West 2017).

84. 1983 N.D. Laws 1284.

85. *Id.*

86. 2009 N.D. Laws, ch. 317 § 3 (codified at N.D. CENT. CODE ANN. § 38-18.1-05(1) (West 2017)).

be, it is clear that a statement of claim could be recorded prior to the end of the twenty-year period, not in response to a notice of lapse but simply as a means of protecting the mineral owner's interest.<sup>87</sup> In other words, after the enactment in 1983 and for twenty years thereafter, owners of mineral interests could simply record statements of claim of ownership to protect their interests, even if there had been no existing notice of lapse.<sup>88</sup> One would expect that there would have been a substantial number of such statements of claim recorded in the county records during the twenty years following 1983, and this was in fact the case.<sup>89</sup>

### C. SUBSEQUENT AMENDMENTS TO THE 1983 ACT

#### 1. 1989 Amendments

Several small, though important, changes were made in the Act in the 1989 legislative session, clarifying oversights in the original provisions.<sup>90</sup> In the original 1983 version, a mineral interest was deemed to be abandoned if it was unused for twenty years.<sup>91</sup> This was ambiguous because there was no specification of the beginning point of the twenty years. For example, it could apply to some twenty-year period far in the past. This was clarified in a 1989 amendment by including the language "twenty years, immediately preceding the first publication of the notice [of lapse]."<sup>92</sup>

Another clarification was made by inserting the word "first" so that the sixty-day period for filing a statement of claim was sixty days after the *first* publication of the notice of lapse.<sup>93</sup> The word "inadvertently" was stricken, thereby eliminating the possible problem raised by the meaning of that word in Section 3(2).<sup>94</sup> The other very minor change is not relevant.<sup>95</sup>

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87. 2009 N.D. Laws, ch. 317 § 2; 2009 N.D. Laws, ch. 317 § 4.

88. 2009 N.D. Laws, ch. 317 § 4 (codified at N.D. CENT. CODE ANN. § 38-18.1-06 (West 2017)).

89. In the 2009 amendments to the North Dakota Act a provision was added to the section on statements of claim clarifying that a statement of claim may be recorded by a person other than the record owner of the mineral interest so long as it is accompanied by a reference to the name of the record owner. N.D. CENT CODE ANN § 38-18.1-04 (West 2017).

90. 1989 N.D. Laws 1186.

91. 1983 N.D. Laws 1283.

92. 1989 N.D. Laws 1186.

93. *Id.*

94. *Id.*

95. *Id.* (changed "inadvertently failed" to "has failed," referring to recording statements of claim).



## 2. 2001 Amendment

A change that was made in the 2001 session was not a specific amendment to the Act, but simply an overall change in all relevant North Dakota statutes. The 2001 amendment changed the county officer in charge of recording documentation of land titles from “register of deeds” to “county recorder.”<sup>96</sup> This change is reflected in subsequent versions of the Act.

## 3. 2005 Amendments

The only change made in the 2005 legislative session was to add a section providing that payment of royalties, bonus payments, or any other payment to a named or unnamed interest-bearing account, trust account, escrow account, or any similar type of account on behalf of a person who cannot be located is not deemed to be “use” of a mineral interest for purposes of the Act.<sup>97</sup> There is some further language in this section pertaining to such accounts, but it does not relate directly to the abandonment of mineral interests issue.<sup>98</sup> It simply provides that any such payable account that has been in existence for three years and has not been claimed is deemed to be abandoned property.<sup>99</sup> An account of this kind is, of course, personal property, so that this amendment is not relevant to real property mineral interests.<sup>100</sup> Personal property can be readily abandoned and is deemed abandoned under North Dakota law after such a three-year period.<sup>101</sup>

## 4. 2007 Amendments

The only relevant change made to the Act in the 2007 legislative session was the addition of a provision to the effect that a surface owner who succeeds to the ownership of a mineral interest upon a lapse under the Act is “entitled to record a statement of succession in interest indicating that the owner has succeeded to ownership of the mineral interest.”<sup>102</sup> This would constitute recorded proof that the mineral interest had reverted to

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96. 2001 N.D. Laws ch. 120 § 1.

97. 2005 N.D. Laws 1255.

98. *Id.*

99. *Id.*

100. *See* N.D. CENT. CODE ANN. § 47-01-03 (West 2017).

101. *See* N.D. CENT. CODE ANN. § 47-30.1-02 (West 2017) (Uniform Unclaimed Property Act).

102. 2007 N.D. Laws 1220; *see also* N.D. CENT. CODE ANN. § 38-18.1-06(5) (West 2017).

ownership by the named surface owner, without the necessity of the surface owner obtaining a judgment in a quiet title action.<sup>103</sup> A document of this kind, however, would not be legally equivalent to an actual judgment in favor of the surface owner, as there would always be a possibility, though not a likelihood, for a fraudulent statement of succession to be recorded.<sup>104</sup> This was presumably a reason for the possibility of a quiet title action, added to the Act in 2009, as discussed below.

#### 5. 2009 Amendments

A fairly extensive revision of portions of the 1983 Act was carried out in the 2009 legislative session.<sup>105</sup> These revisions are set out in Sections 1 through 5 of the “2009 Amendment,” which are not necessarily the same section numbers as laid out in the 1983 Act itself.

Section 1 of the 2009 amendment contains a single very logical change, striking from the original 1983 list of activities that had been deemed to constitute a “use” of a mineral interest the following language: “The owner or lessee utilizes the mineral interest in a manner pursuant to, or authorized by the instrument creating the mineral interest.”<sup>106</sup> Eliminating this language was a wise choice since, as discussed above, this original language was circular and essentially meaningless.

Section 2 of the 2009 amendment made a minor change by eliminating the original 1983 provision for an extra two-year period in connection with the recording of a statement of claim, which was no longer applicable after July 1, 1985.<sup>107</sup> A more substantive change was made by the addition of the following language added to subsection 4 of the 2009 amendments, pertaining to the recording of the statement of claim and clarifying that a statement of claim made by a person who was not the record mineral owner must be accompanied by identification of the actual record owner:

A statement of claim filed after July 31, 2009, by a person other than the owner of record of the mineral interest is not effective to preserve a mineral interest unless accompanied by a reference to

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103. 2007 N.D. Laws 1220.

104. *Id.*

105. 2009 N.D. Laws ch. 317.

106. *See id.* (striking N.D. CENT. CODE ANN. § 38-18.1-03(1)(h) (West 2014)).

107. 2009 N.D. Laws ch. 317 § 2.

the name of the record owner under whom the owner of the mineral interest claims.<sup>108</sup>

It is not clear why this was deemed necessary, as any attorney or agent acting for the mineral owner would normally automatically include the name of the record owner. It is possible that there may have been a concern that there were persons who were not the mineral owners, but who went around and recorded false statements of claim or statements that might not have been completely legitimate.

Section 3 of the 2009 amendments completely replaces the original 1983 Section 4, and in its place lists two activities that will prevent a mineral owner's failure to timely record a statement of claim from causing a mineral interest to be "extinguished" due to the expiration of the twenty-year period.<sup>109</sup> Specifically, the two activities are (1) filing a statement of claim with the county recorder within sixty days after first publication of the notice of lapse, or (2) filing with the county recorder documentation showing that at least one of the activities that the statute deems to be "uses" took place during the twenty-year period immediately preceding the first publication of the notice of lapse.<sup>110</sup> The word "extinguished," which is a holdover from the original 1983 provision is an odd choice, since the whole process is about "abandoned" or "dormant" mineral interests. A mineral interest that reverts to the surface owner has not disappeared or been extinguished, but has simply become owned by another person or persons. No change in the nature of the mineral interest occurs by way of such a transfer of ownership. The mineral interest is never "extinguished, nor is it "terminated," as discussed above.

The amendment then goes on to state that there is no extinguishment of the mineral interest if a person other than the record mineral owner files with the county recorder within sixty days after the first publication of the lapse notice an affidavit or declaration, under oath, which includes an explanation of the factual and legal bases for the person's assertion of title to the mineral interest.<sup>111</sup> This explanation must be accompanied by supporting documentation or an explanation as to why documentation is unavailable.<sup>112</sup>

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108. *Id.*

109. 2009 N.D. Laws ch. 317 § 3.

110. *Id.*

111. *Id.* at § 3(2).

112. *Id.*

Section 4 of the 2009 amendments makes a very important addition, to its subsection 2, pertaining to the “reasonable inquiry” language. The original 1983 Act specified that if the address of the mineral owner is “shown of record *or* can be determined upon reasonable inquiry,” the surface owner must, in addition to the publication of the notice of lapse, mail a copy of it to the mineral owner.<sup>113</sup> The original statute, however, did not contain any clues as to what might constitute a reasonable inquiry.

The issue of whether a reasonable inquiry is required in the attempt to locate an address of the mineral owner does not arise unless there is actually no record address of any kind.<sup>114</sup> That is, it is not a matter of whether the surface owner may satisfy the need for an address to mail a notice of lapse either by searching the county records or by conducting a reasonable inquiry in some other way.<sup>115</sup> In other words, the underlined word “or” above does not mean that the surface owner could decide to do either one or the other.<sup>116</sup> This has been made very clear in the North Dakota Supreme Court decisions discussed below; a reasonable inquiry is appropriate only when no address of record can be located.<sup>117</sup>

The “reasonable inquiry” requirement dates back to the original 1983 Act, but there had been no statutory provision as to what was meant by that term until the 2009 amendment. The 2009 amendment reads as follows:

To constitute a reasonable inquiry . . . the owner or owners of the surface estate or the owner’s authorized agent must conduct a search of:

- a. The county recorder’s records for the existence of any uses as defined in section 38-18.1-03 by the owner of the mineral estate;

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113. 1983 N.D. Laws 1285.

114. *Id.* The statutory language itself seems to imply that either a record mailing address or instead an address obtained by a reasonable inquiry can be used. This, however, is not how the North Dakota Supreme Court has construed the statute. *See* cases cited in note 117.

115. *See* *Sorenson v. Felton*, 2011 ND 33, 793 N.W.2d 799; *see also* *Sorenson v. Alinder*, 2011 ND 36, 793 N.W.2d 797. In these cases, the Court first ruled that if a record address of the mineral owner existed it must be used instead of making a reasonable inquiry. Subsequent decisions, discussed *infra*, confirmed this, and made it clear that there was no option between the two if there was in fact an address of record.

116. *See* parenthetical *supra* note 115.

117. *See* *Johnson v. Taliaferro*, 2011 ND 34, 793 N.W.2d 804; *Capps v. Weflen*, 2014 ND 201, 855 N.W.2d 637; *Nelson v. McAlester Fuel Co.* 2017 ND 49, 891 N.W.2d 126; and *Huebner v. Furlinger*, 2017 ND 145, 896 N.W.2d 258, discussed *infra*.

- b. The clerk of court’s records for the existence of any judgments, liens, or probate records which identify the owner of the mineral interest;
- c. The social security death index for the last-known residence of the owner of the mineral interest, if deceased; and
- d. One or more public internet databases to locate or identify the owner of the mineral interest or any known heirs of the owner. The owner or owners of the surface estate are not required to conduct internet searches on private fee internet databases.<sup>118</sup>

The first requirement in conducting a reasonable inquiry – the search of the county recorder’s records for the existence of any of the defined uses of a mineral interest – appears unlikely to produce any useful information. The statutory “uses,” apart from actually reading a statement of claim, are:

- a. minerals of some kind are being produced from the tract in question
- b. operations are underway for injection, withdrawal, storage or disposal
- c. solid minerals are being produced from a common vein or seam
- d. the mineral interest is subject to a lease, mortgage, assignment or conveyance
- e. the interest is subject to a pooling or unitization order<sup>119</sup>

Only a minority of these uses would normally be expected to produce any document that would be likely to have been filed in the county recorder’s office. Leases, mortgages, assignments or conveyances are normally placed of record.<sup>120</sup> Information on operations in (b), however, does not normally appear in the county records, nor would any documentation on production of solid minerals from a common vein or

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118. 2009 N.D. Laws ch. 317 § 4.

119. N.D. CENT. CODE ANN. § 38-18.1-03(1)(a)-(e) (West 2017).

120. N.D. CENT. CODE ANN. § 11-18-01(1) (West 2017) (Explaining that only documents relating to ownership of relevant property are filed with the county recorder, and indexed to specific tracts of land. The recorder only maintains a record of “each patent, deed, mortgage, bill of sale, security agreement, judgment [pertaining to land], decree, lien, certificate of sale and other instruments required to be filed or admitted to record . . .”).

seam.<sup>121</sup> If affidavits of production are recorded to maintain leases in effect, it is possible that the production of oil and gas could result in information on names of mineral owners. However, the lease information might sometimes be obsolete as to their addresses.<sup>122</sup> In any case, the names of lessors would already have been located under (d).<sup>123</sup> The same would normally be true for pooling or unitization orders, which are issued by the North Dakota Industrial Commission but normally are not recorded.<sup>124</sup>

The second and third requirements for conducting a “reasonable inquiry,” that is the clerk of court’s records and social security death index, might possibly provide some information on addresses.<sup>125</sup> The fourth one, regarding the search of a public internet database, appears to be quite vaguely described.<sup>126</sup> There is no definition of a “public internet database,” so that litigation would be likely to try to establish whether this requirement had been satisfied or not. It would seem that there would be such a large number of “public internet databases” that search of any random one of them would be meaningless. Since there is no limitation on the description of a “public internet database,” it could be claimed that any public internet database could suffice. However, this would almost inevitably lead to legal disputes as to whether or not the statutory provision had been satisfied. The drafters’ intention was probably appropriate, but the vague language of “one or more public databases” appears too broad to have any meaning.

The final 2009 amendment adds an entirely new feature not based on anything in the original 1983 Act, entitled “Perfecting title in surface owner.”<sup>127</sup> This new section provides that upon completion of the notice of lapse requirements the surface owner may bring a quiet title action to perfect title to the mineral interest by obtaining a judgment in his or her favor, which could then be recordable in the county in question.<sup>128</sup> The curious thing, however, is that the surface owner had always been able, under already existing North Dakota law, to bring a quiet title action to

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121. *Id.*

122. If minerals have been produced for a considerable number of years under leases executed a number of years ago, it cannot be assumed that the address of record in the lease is still the current address of the mineral owner.

123. 2009 N.D. Laws ch. 317 § 1.

124. *Id.*

125. There would be no certainty, however, that such address information would be current.

126. 2009 N.D. Laws ch. 317 § 4.

127. 2009 N.D. Laws ch. 317 § 5 (codified at N.D. CENT. CODE ANN. § 38-18.1-06.1 (West 2017)).

128. *Id.*

obtain a judgment confirming title.<sup>129</sup> In fact, the amendment itself provides that the action it was creating was subject to the same procedure as set out in existing law.<sup>130</sup> Such a judgment is then “deemed conclusive except for fraud, misrepresentation or other misconduct.”<sup>131</sup>

It is odd that it must have been felt necessary to provide this separate statutory quiet title action provision when the surface owner could certainly bring an action under the existing traditional quiet title action statutes. There is one difference in this new quiet title section, however, though it does not appear to shed any light on a need for a separate statute. In subsection 2 of Section 5 of the 2009 amendments it is stated that evidence must be presented to the district court establishing that all procedures required by the abandoned minerals act were properly completed, and that *a reasonable inquiry* (emphasis added), as defined in Section 4 of the 2009 amendment, was conducted.<sup>132</sup> As discussed above, however, and as stated in a number of North Dakota Supreme Court cases discussed below, there is no requirement for a reasonable inquiry if there is an address of record of the mineral owner.<sup>133</sup> It appears, therefore, that this special quiet title action is not available for cases in which there has been an address of record, which is probably the most common scenario, based on the Court decisions discussed below.<sup>134</sup> In those cases, since a reasonable inquiry would not have been made unless the surface owner chose to make a non-required one, the surface owner could ignore the new provision and simply use the traditional quiet title action provisions instead:

An action may be maintained by any person having an estate or an interest in, or lien or encumbrance upon, real property, whether in or out of possession thereof and whether such property is vacant or unoccupied, against any person claiming an estate or interest in, or

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129. See N.D. CENT. CODE ANN. § 32-17-01 (West 2017).

130. 2009 N.D. Laws ch. 317 § 5 (“This action must be brought in the same manner and is subject to the same procedure as an action to quiet title pursuant to chapter 32-17.”).

131. N.D. CENT. CODE ANN. § 38-18.1-06.1 (West 2017). This would be true, of course, with almost any judgment.

132. 2009 N.D. Laws ch. 317 § 5 (codified at N.D. CENT. CODE ANN § 38-18.1-06(6) (West 2017)).

133. See parenthetical *supra* note 117.

134. In the North Dakota Supreme Court opinions discussed *infra*, a principal issue has been the matter of the address of record of the mineral owner, and it is not clear whether the new Section 5 in the 2009 amendments, which is entitled “Perfecting title in surface owners” and which adds provisions for a quiet action, has been used in any of the cases. If so, a reasonable inquiry would have been required.

lien or encumbrance upon, the same, for the purpose of determining such adverse estate, interest, lien or encumbrance.<sup>135</sup>

The successful surface owner certainly has a mineral interest in the property because the Act provides that title vests in the surface owner upon abandonment.<sup>136</sup> Perhaps it could be argued that mineral interests cannot be “vacant or unoccupied,” and therefore, this traditional quiet title statute could not be applicable. This would be a specious argument since the statute clearly applies to interests of any kind in real property, and mineral interests still in place are certainly real property.

It is also interesting in this context that the North Dakota Supreme Court has expressly stated the Termination of Minerals Interest Act is totally separate from a quiet title action: “We have drawn a clear distinction between the statutory abandoned minerals procedure under N.D.C.C. ch. 38-18.1 and a subsequent quiet title action, and have emphasized they are entirely separate, distinct procedures.”<sup>137</sup>

It is clear, however, what the Court means; the statutory procedure passes the title to the surface owner, who may elect to judicially confirm the passage of title.<sup>138</sup> Technically, though, the quiet title action in § 38-18.1-06.1 is a part of the Termination of Mineral Interest Act.

The 2009 amendments also included a minor change from the language in the 1983 Act, which allowed “any person” intending to succeed to the ownership of a mineral interest to give notice of lapse.<sup>139</sup> Although the 1983 language did not place any kind of limitation on who was authorized to publish and mail a notice of lapse, it was presumably the intent of the drafters that surface owners were the only persons entitled to do this.<sup>140</sup> This language was replaced in 2009 by the language “the owner or owners

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135. N.D. CENT. CODE ANN. § 32-17-01 (West 2017).

136. N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017) (“Title to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment.”).

137. *Peterson v. Jasmanka*, 2014 ND 40, 842 N.W.2d 920, 925.

138. The only likely reason for bringing a quiet title action would appear to be for a successful surface owner to obtain a judgment of a court that could then be placed on record so there would no question about ownership of the mineral interest. The “statement of succession in interest” which the surface owner is entitled to record, showing the passage of ownership from the mineral owner, added as 2007 N.D. Laws 1220 (codified at N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017)) as stated above, would show the transfer of record, but is not equivalent to an actual judgment by a court.

139. 1983 N.D. Laws 1285.

140. *See supra* note 66, showing that the purpose of the Act was to allow “the surface owners,” and not simply “any person,” at random to acquire a dormant mineral interest.



of the surface estate in the land in or under which the mineral interest is located.”<sup>141</sup> This change might appear minor, but it makes it clear that it must be a surface owner who creates the notice of lapse. Not just anybody could go out and try to acquire abandoned mineral interests.

#### 6. 2015 Amendment

The 2009 amendments to the Act, therefore, created the most significant changes. A very minor change was made in the 2015 legislative session, by striking “taxes are paid on the mineral interest” from the list of deemed “uses” of a mineral interest.<sup>142</sup> It was simply a tidying up of the statute, since North Dakota does not assess property taxes on mineral interests as such.<sup>143</sup>

### V. THE MODEL DORMANT MINERAL INTERESTS ACT

Given the amount of interest that has been given to this issue in mineral law, and the number of states (50% at least) which have now enacted statutes dealing with the issue it is not surprising that there is a Model Dormant Mineral Interests Act.<sup>144</sup> Originally named the Uniform Dormant Minerals Interests Act, it was drafted by the National Commissioners on Uniform State Law at its annual conference in August 1986, and approved by the American Bar Association on February 16, 1987.<sup>145</sup> The name change was approved by the Executive Committee on January 17, 1999.<sup>146</sup> This was logical since Uniform Laws are generally drafted to become the law in the states where they are adopted, whereas Model Acts are usually not enacted as such, but rather are intended to provide guides for

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141. 2009 N.D. Laws ch. 317 § 4(1). Those entitled to make use of the Act are: the owner or owners of the surface estate in the land in or under which the mineral interest is located intending to succeed to the ownership of a mineral interest upon its lapse shall give notice of the lapse of the mineral interest by publication [in addition to the notice by mail].

142. 2015 N.D. Laws, ch. 62 § 14(f), at 9.

143. There was an old “mineral rights privilege tax” on severed minerals (N.D. CENT. CODE ANN. § 57-49-01), which was repealed in 1955. Several of the North Dakota taxes on the extraction and production of minerals such as oil and coal are referred to in the relevant tax statutes as “property” taxes in certain specific contexts, but there is no general property tax assessment of minerals in place. *See*, for example, N.D. CENT. CODE ANN. § 57-51-02.1 (West 2017) (oil and gas gross production tax), and N.D. CENT. CODE ANN. § 57-65-04 (West 2017) (potash extraction tax).

144. This will be referred to for purposes of this discussion as “The Model Act.”

145. MODEL DORMANT MINERAL INTERESTS ACT (1986).

146. *Id.* The Conference changed the designation of the Dormant Mineral Interests Act from Uniform to Model as approved by the Executive Committee on January 17, 1999.

formulating individual state laws. A model act is not usually meant to be enacted exactly as it is written, but is provided by suggestion to the various state legislatures, from which they create their own law. It is somewhat like a blueprint for an actual statute, as modified by legislative action in each particular state. Since approval of the Model Act was not final until 1987, the 1983 North Dakota Act cannot be said to have been specifically influenced by it, but there are, of course, similarities between them.

#### A. MODEL ACT: SECTION 1

This section is simply a statement of policy. It lays out the purpose for which a state might be interested in adopting the Act. It is a more appropriate name, in my opinion, for this kind of legislation, as it does not refer to a mineral interest as being abandoned, terminated or extinguished, but rather as having been unused, i.e. “dormant,” for the specified period of time.

- (a) The public policy of this State is to enable and encourage marketability of real property and to mitigate the adverse effect of dormant mineral interests on the full use and development of both surface and mineral interests in real property.
- (b) This [Act] shall be construed to effectuate its purpose to provide a means for termination of dormant mineral interests that impair marketability of real property<sup>147</sup>

The notion of marketability of real property runs throughout the discussions of dormant or abandoned minerals, though it does not seem that this would be a logical goal to aim for in all cases. For example, when there is a dormant, *i.e.* unused, mineral interest underlying the surface, it would seem that the fact that it remains dormant would mean that it is unlikely that there will be disruptive surface activities in a search for underlying minerals, so that the value of the surface may be impaired rather than improved by use of the mineral interest. The argument that full use and development of the surface would be advanced by reversion of the mineral interest to the surface interest seems unduly simplistic in some cases.

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147. MODEL DORMANT MINERAL INTERESTS ACT (1986).

## B. MODEL ACT: SECTION 2

This section defines “mineral interest” as an interest in a mineral estate, however created and regardless of form. It also defines “minerals, as such, listing a substantial variety. Even steam and geothermal interests, which would not normally seem to be minerals, are specifically included:

- (1) “Mineral interest” means an interest in a mineral estate, however created and regardless of form, whether absolute or fractional, divided or undivided, corporeal or incorporeal, including a fee simple or any lesser interest or any kind of royalty, production payment, executive right, nonexecutive right, leasehold, or lien, in minerals, regardless of character.
- (2) “Minerals” includes gas, oil, coal, and other gaseous, liquid and solid hydrocarbons, oil shale, etc. . . . steam and other geothermal resources, and any other substances defined as a mineral by the law of this State.”<sup>148</sup>

Subsection 2 lists many other substances as minerals. However, for North Dakota purposes, they need not be listed, as the North Dakota Century Code defines “minerals” in various places and the North Dakota Supreme Court has addressed the issue in a number of opinions over the years. The listing of “steam and other geothermal sources” is curious. Those are not minerals in North Dakota and it is difficult to visualize how any state would define them as “minerals,” but presumably the drafters did not want to overlook any possibility, and a state could conceivably define steam as a “mineral” if it actually chose to do so. The Comment to Section 2 in the Model Act does state “The definitions in this section are broadly drafted to include all the various forms of minerals and mineral interests.” It is difficult, however, to imagine steam being abandoned or dormant. Probably what is meant is a site at which steam could be utilized.

## C. MODEL ACT: SECTION 3

Section 3 simply states that the Model Act does not apply to mineral interests owned by the United States, an Indian tribe, a state, or a state agency, unless otherwise provided by federal or state law or by treaties, and

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148. *Id.* § 2.

does not affect water rights.<sup>149</sup> The Comment to this section does point out that while Section 2 defines the term “minerals,” it is not intended to redefine minerals and mineral interests for purposes other than the Model Act.<sup>150</sup>

#### D. MODEL ACT: SECTION 4

Section 4 contains the important basic substance of the Model Act, with provisions similar to those in the North Dakota Act, summarized below.

Subsection 4(a) provides that the surface owner may maintain an action to terminate a dormant mineral interest.<sup>151</sup> “Dormant” means, as in North Dakota, that the mineral interest has been unused for a period of twenty or more years preceding commencement of the action.<sup>152</sup> The action must be in the same nature and require the same notice as a quiet title action, and may be maintained whether the owner of the mineral’s whereabouts is known or unknown.<sup>153</sup>

Subsection 4(b) provides a list of the activities that would constitute “use,” as follows:

- (1) Active mineral operations on or below the surface of the real property in question or other property unitized or pooled therewith, including production, geophysical exploration, exploratory or developmental drilling, mining, exploitation and development, but not including injection of substances for purposes of disposal or storage.
- (2) Payment of taxes on a separate assessment of the mineral interest or a transfer or severance tax relating to the mineral interest.
- (3) Recordation of an instrument that creates, reserves, or otherwise evidences a claim to the mineral interests, including an instrument that transfers, leases or divides the interest.

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149. *Id.* § 3.

150. *See supra* text accompanying note 22.

151. MODEL DORMANT MINERAL INTERESTS ACT § 4(a) (1986).

152. *Id.*

153. *Id.*

(4) Recordation of a judgment or decree that makes specific reference to the mineral interest.<sup>154</sup>

This list of uses is generally similar to the North Dakota one discussed above,<sup>155</sup> and also to the Indiana statute addressed by the U.S. Supreme Court in *Texaco v. Short*,<sup>156</sup> although it does not include production from a common vein or seam in the case of solid minerals.<sup>157</sup> The specification of payment of taxes assessed on the mineral interest is the same as in the original North Dakota Act discussed above, which was eventually removed in 2015 since there was no such tax.<sup>158</sup> The Model Act provision on taxes is somewhat more expansive, including a severance tax,<sup>159</sup> but it does not seem plausible that there would be a severance tax on dormant or abandoned mineral interests, since there could have been no severance of minerals that were dormant or abandoned. North Dakota, of course, has mineral severance taxes on oil and gas, as well as coal, but that is a separate matter from a property tax on minerals in the ground.<sup>160</sup>

There is also a subsection 4(c), which provides that Section 2 applies regardless of “any provision to the contrary in the instrument that creates, reserves, transfers, leases, divides, or otherwise evidences the claim to or the continued existence of the mineral interest or in another recorded document, barring an earlier termination in the instrument.”<sup>161</sup> This could have been stated more clearly, but the purpose of Subsection 4(c) is explained in the Comment to Section 4.<sup>162</sup>

Subsection (c) is intended to preclude a mineral owner from evading the purpose of this Act by contracting for a very long or indefinite duration of the mineral interest.<sup>163</sup> A lien on minerals having a thirty-year duration, for example, would be subject to termination after twenty years under this Act if there were no further activities involving the minerals or mineral interest. This would clearly be the case under the North Dakota Act, since

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154. *Id.* § 4(b).

155. N.D. CENT. CODE § 38-18.1-03 (2017).

156. 454 U.S. 516 (1982).

157. N.D. CENT. CODE § 38-18.1-03(c) (2017).

158. 2015 N.D. Laws § 14(1)(f).

159. *See* MODEL DORMANT MINERAL INTERESTS ACT § 4(b)(2).

160. The North Dakota severance tax on oil and gas is set out in N.D. CENT. CODE ch. 57-51 and ch. 57-51.1 (West 2017); the coal severance tax is set out in N.D. CENT. CODE. ch. 57-61 (West 2017).

161. MODEL DORMANT MINERAL INTERESTS ACT § 4 (1986).

162. *Id.* § 4 Comment.

163. *Id.* § 4 Comment to subsection (c).

any unbroken twenty-year period would allow the surface owner to make a claim.<sup>164</sup>

#### E. MODEL ACT: SECTION 5

This section moves to the providing of some form of notification from the mineral owner of his or her claim to retain the mineral interest, in other words to defeat an attempt by the surface owner for reversion of the interest to the surface.<sup>165</sup> This process is different from the usual North Dakota statement of claim process, but the goal is the same. Subsection 5(a) provides that a mineral owner may at any time record a notice of intent to preserve the minerals or some part thereof.<sup>166</sup> A mineral interest is not deemed to be dormant if the notice has been recorded within twenty years prior to the commencement of the action to terminate the mineral interest under Section 4 discussed above.<sup>167</sup>

This is fundamentally different, therefore, from the North Dakota procedure, where the mineral owner files a statement of claim following the receipt of a notice of lapse from the surface owner.<sup>168</sup> The goal is the same: to provide a procedure by which the mineral owner can resist or stave off a reversion of the mineral interest to the surface owner. The main variation in procedures, of course, is that in the Model Act there must be a court action commenced, which will provide notice to the mineral owner of the surface owner's attempt to recover the mineral interest.<sup>169</sup> The commencement of such a legal action serves to bring the matter to the attention of the mineral owner but not in the same way as in North Dakota, where there is no mandatory legal action commenced by the surface owner.<sup>170</sup> Instead, he or she publishes a notice of lapse for three weeks and mails a copy to the mineral owner's last recorded address.<sup>171</sup> It is possible in North Dakota, of course, and this does occur here, for a mineral owner to record a protective statement of claim even if there is no current procedure underway by a surface owner attempting to acquire the mineral interest.

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164. N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017).

165. MODEL DORMANT MINERAL INTERESTS ACT § 5.

166. *Id.*

167. *Id.* § 5(a).

168. N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017).

169. *See* MODEL DORMANT MINERAL INTERESTS ACT § (4)(a).

170. The commencement of a court action under the Model Act would, of course, create notice to the mineral owner by the service of process.

171. N.D. CENT. CODE ANN. § 38-18.1-06(2) (West 2017).

The rest of Section 5 of the Model Act contains mostly details relating to the contents of the notice of the mineral owner's intent to preserve the interest and the legal descriptions that need to be included.<sup>172</sup> There is a rather unusual provision concerning how the mineral owner's notice could include all of his or her other interests within the same county.<sup>173</sup> The official Comment to this subsection states:

Paragraph (3)(c) permits a blanket recording as to all interests in the county, provided that there is a prior recorded instrument, or a judgment whether or not recorded, that establishes the name of the mineral owner in the county records. The blanket recording provision is a practical necessity for large mineral owners.<sup>174</sup>

There is no comparable provision in the North Dakota statute, and it seems unlikely that any state would adopt a provision which would allow all of the mineral interests of an owner in an entire county to be protected by the recording of a single notice. It would, of course, be possible for a North Dakota mineral owner in a county to record a statement of claim that identified all of the interest owned, so long as the recorded statement is then indexed in the record as to each separate interest.

#### F. MODEL ACT: SECTION 6

Subsection 6(a) simply defines "litigation expenses" for purposes of Subsection 6(b).<sup>175</sup> Subsection 6(b) is rather strange. It provides when a court action has been commenced under Section 4:

[T]he court shall permit the owner of the mineral interest to record a late notice of intent to preserve the mineral interest as a condition of dismissal of the action, upon payment into court for the benefit of the surface owner of the real property the litigation expenses attributable to the mineral interest or portion thereof as to which the noticed is recorded.<sup>176</sup>

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172. MODEL DORMANT MINERAL INTERESTS ACT § 5.

173. MODEL DORMANT MINERAL INTERESTS ACT § 5(c)(3).

174. *Id.* § 5 cmt.

175. *See* MODEL DORMANT MINERAL INTERESTS ACT § 6(a).

176. *Id.* § 6(b).

A late notice of intent would be one which was not filed prior to the commencement of a court action, since that is the deadline for filing notice under Section 4.<sup>177</sup> This Model Act provision apparently means that once an action has been commenced and a notice is not filed until after that, the court will recognize the late-filed notice and permit the surface owner to dismiss the action if the mineral owner will pay the surface owner's litigation expenses.<sup>178</sup> Presumably, the court will then confirm the title in the mineral owner, since the surface owner will have had his court action dismissed in exchange for receiving the litigation expenses. This would not be an easy question for the surface owner to consider and choose, since it would be difficult to estimate the value of the mineral interest he or she might have been able to acquire in contrast to the litigation expenses received if the action is dismissed.

This is interesting and quite unusual, but of course, it has no bearing on the North Dakota statute, since reversion of the mineral interest is self-executing without a court judgment if the proper notice of lapse has been given by the surface owner and there is no statement of claim.<sup>179</sup> Furthermore, the Model Act's Section 6 does not apply in an action in which a mineral interest has been unused for a period of 40 or more years.<sup>180</sup>

#### G. MODEL ACT: SECTION 7

Section 7 of the Model Act simply states that terminating a mineral interest merges the terminated interest with the surface estate in shares proportionate to the ownership of the surface estate.<sup>181</sup> As stated above, this author cannot agree with the description of the mineral estate as "terminated," although this term has been fairly widely adopted. To "terminate" anything is to destroy its existence.<sup>182</sup> When a mineral interest reverts to the overlying surface estate, however, the mineral does not cease to exist. It simply has been re-connected to the surface interest. The terms "abandoned" and "dormant" are certainly superior, since they connote the actual situation: a mineral interest that continues to exist but in the hands of the surface owner. The word "terminated" is not really satisfactory, since it

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177. *Id.* § 5(a).

178. *Id.* § 6(b).

179. N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017).

180. MODEL DORMANT MINERAL INTERESTS ACT § 6(c).

181. *See id.* § 7.

182. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (2d ed. 1979) (Termination means "the end of something.").



suggests a condition which does not exist.<sup>183</sup> The term “abandoned” does not really meet with my approval either, of course, as discussed above but this is a technicality.

#### H. MODEL ACT: SECTIONS 8-13

These provisions are non-substantive as to the basic issue and have accordingly not been summarized here (savings and transitional provisions, uniformity of application and construction, short title, severability clause, effective date and repeals of existing statutes). The Model Act has not been widely adopted as such. A number of the provisions contained in it, however, are similar or parallel to the provisions in states which have adopted some form of this legislation.

### VI. THE NORTH DAKOTA SUPREME COURT MEETS THE TERMINATION OF MINERALS ACT

Inevitably, of course, the North Dakota Abandoned Minerals Act (or, as described in the North Dakota Century Code, the Termination of Mineral Interest Act)<sup>184</sup> began to come before the North Dakota Supreme Court.<sup>185</sup> This is legislation that potentially has very significant consequences in terms of ownership and loss of ownership of real property.<sup>186</sup> It came as no surprise, therefore, that the Court would become involved. After the *Texaco, Inc. v. Short* decision by the U.S. Supreme Court, there were no effective constitutional questions at stake.<sup>187</sup>

#### A. *SPRING CREEK RANCH, LLC v. SVENBERG*

The first North Dakota case before the Court involving the abandoned mineral issue, was *Spring Creek Ranch, LLC v. Svenberg*.<sup>188</sup> This case involved activities that took place prior to all of the amendments made to the North Dakota Act, except the minor changes made in 1989, as discussed above.<sup>189</sup> The scenario in this case is straightforward. Spring Creek had

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183. For this reason, the author of this Article cannot approve of the North Dakota statute’s description in the Century Code as “Termination of Mineral Interest.” N.D. CENT. CODE ch. 38-18.1 (West 2017).

184. Referred to hereinafter as “the Act.”

185. Further references to “the Supreme Court” mean the North Dakota Supreme Court.

186. Ownership of a mineral interest is, of course, ownership of real property. *Geostar Corp. v. Parkway Petroleum, Inc.*, 495 N.W.2d 61 (N.D. 1993).

187. *See Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

188. *Spring Creek Ranch, LLC v. Svenberg*, 1999 ND 113, 595 N.W.2d 323.

189. *See supra* text accompanying note 92.

acquired the surface and one-half of the mineral interest, the other half mineral interest being owned by Svenberg.<sup>190</sup> The 1983 Act provided that a surface owner seeking to acquire the mineral interest, or any part of it, must give notice of lapse of the interest by publication once each week for three weeks.<sup>191</sup> This was done by the surface owner.<sup>192</sup> The critical statutory requirement, however, was that:

[I]f the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made.<sup>193</sup>

At this point in the history of the legislation, it was considered appropriate for the surface owner to bring a quiet title action to confirm the passage of title if the mineral owner had not filed a timely statement of claim, although the North Dakota statute provided that the interest vested if the appropriate actions were taken under the provisions of the Abandoned Mineral Rights Act.<sup>194</sup> The mineral owner's address was not shown of record, and the district court concluded that Spring Creek had made a diligent, but unsuccessful, effort to locate the address.<sup>195</sup> This was held to have satisfied the reasonable inquiry requirement, so that judgment was granted in favor of the surface owner.<sup>196</sup> There had been no dispute as to whether the mineral interest had been used within the last twenty years, but simply whether the notice of lapse had been properly given.<sup>197</sup> The district court accordingly granted summary judgment in favor of the surface owner, Spring Creek.<sup>198</sup>

The Supreme Court on appeal focused its attention on the meaning of the vague "reasonable inquiry" requirement.<sup>199</sup> The surface owner argued that a search of the records of the county Register of Deeds (now Recorder),

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190. See *Svenberg*, ¶¶ 2-7, 595 N.W.2d at 324-25.

191. 1983 N.D. Laws 1285.

192. *Id.*

193. *Id.*

194. 1983 N.D. Laws 1283.

195. See *Svenberg*, ¶ 5, 595 N.W.2d at 325.

196. *Id.*, ¶ 8, 595 N.W.2d at 326.

197. See *id.* ¶ 11, 595 N.W.2d at 326 ("Whether the successors' interest was unused for the statutorily mandated twenty years is not in dispute in this case.").

198. *Id.* ¶ 1, 595 N.W.2d at 324.

199. *Id.* ¶¶ 15-20, 595 N.W.2d at 327-29.

which would contain copies of any transfers of interests in the property, was sufficient, although Spring Creek actually had searched the records in the County Clerk of Court's office, the County Sheriff's office, and the records of the County Auditor and County Treasurer as a precaution, and found no relevant information.<sup>200</sup> At this stage of the legislation, "reasonable inquiry" was an undefined standard, but as a practical matter searches were being made in a number of locations.<sup>201</sup> Whether a search constituted a "reasonable inquiry" at this point in time was, accordingly a question of fact, as there were no statutory standards defining the steps that must be taken to constitute such an inquiry:

Whether Spring Creek made a reasonable inquiry to ascertain the addresses of the mineral interest owners is a material fact necessary to the ultimate decision whether Spring Creek strictly complied with N.D.C.C. chapter 38-18.1. Based on the record, reasonable minds could differ when deciding whether Spring Creek's inquiry was reasonable. Because reasonable minds could reach more than one conclusion from the facts, we conclude the trial court erred when deciding Spring Creek made a reasonable inquiry as a matter of law. Summary judgment was therefore inappropriate.<sup>202</sup>

Accordingly, the Court remanded the case for further proceedings consistent with its opinion.<sup>203</sup> At this early stage of construing the Act, therefore, the issue of the sufficiency of providing the notice of lapse to the mineral owner was the central matter. Proceeding through the following cases, one will see that this continues to be the primary focus, although there have been changes, both in the statutes and in the Court's focus that attempt to solve this issue. In addition, the apparent belief that a quiet title action was necessary for the title to vest will fade away, but the bringing of a quiet title action in any case seems to continue to have been the usual procedure.

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200. *Id.* ¶ 15, 595 N.W.2d at 327.

201. *Svenberg*, ¶ 15, 595 N.W.2d at 327.

202. *Id.* ¶ 20, 595 N.W.2d at 328-29.

203. *Id.* ¶ 23, 595 N.W.2d at 329.

B. *MILLER V. DIAMOND RESOURCES, INC.*

The next case before the Court that had any connection with the Act was *Miller v. Diamond Resources, Inc.*<sup>204</sup> However, it did not deal with any substantive issue under the Act. The case dealt with an alleged negligence question concerning proximate cause in mailing the notice of lapse and did not contain any holding bearing on the Act itself.<sup>205</sup>

C. *HALVORSON V. STARR*

*Halvorson v. Starr* is a good example of how careful the surface owners must to be in order to satisfy the notice of lapse requirements.<sup>206</sup> The background is typical of these cases, in that the surface owners sought to acquire the underlying mineral interest by publishing and mailing the notice of lapse.<sup>207</sup> The deadline for mailing a copy of the notice to the mineral owner is ten days after the last publication is made, which has remained the same since the original 1983 statute.<sup>208</sup> The date of last publication was Tuesday, March 21, 1990, but the surface owners mailed a copy of the notice of lapse to the record owner on Monday, April 2, 1990.<sup>209</sup> This was the eleventh day, since the day of the mailing is not counted but the last day of course is counted under the statutory provision for counting of days.<sup>210</sup>

The surface owners, as customary, brought a quiet title action to secure a judgment.<sup>211</sup> There would have been eleven days in this particular case if, as the surface owners argued, the number of days was counted as in the 1997 amendment to N.D.C.C. §1-03-05, under which neither Saturday nor Sunday were counted.<sup>212</sup> The amendment was not effective until 1997, since statutory changes are not retroactive unless so specified.<sup>213</sup> Since under the statute in effect in 1990, March 31 (Saturday) was included, so

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204. 2005 ND 150, 703 N.W.2d 316.

205. *Miller*, ¶ 9, 703 N.W.2d at 320.

206. *Halvorson v. Starr*, 2010 ND 133, 785 N.W.2d 248.

207. *Id.* ¶¶ 2-3, 785 N.W.2d at 249.

208. N.D. CENT. CODE ANN. § 38-18.1-06(2) (West 2017).

209. *Halvorson*, 2005 ND 150, ¶ 2, 785 N.W.2d at 249.

210. N.D. CENT. CODE ANN. § 1-02-15 (West 2017) (“The time in which any act provided by law is to be done is computed by excluding the first day and including that last, unless the last is a holiday, and then it also is excluded.”).

211. *Halvorson*, ¶ 3, 785 N.W.2d at 249. *See also supra* note 138 and accompanying text. (As shown above, N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017) provides that the mineral interest vests in the surface owner if the appropriate statutory steps have been taken.)

212. 1997 N.D. Laws, ch. 52 § 1 (“Acts performed on Saturdays”).

213. N.D. CENT. CODE ANN. § 1-02-10 (West 2017).

that it was 10th day and April 1 (Sunday) was excluded, April 2 was therefore the 11th day, which meant that the mailing of the notice of lapse had been a day too late.<sup>214</sup> Therefore, since the required deadline for the mailing of the notice of lapse had not been met, the Court ruled in favor of the mineral owners.<sup>215</sup>

#### D. *SORENSEN V. FELTON*

*Sorenson v. Felton* was the first case to be dated after the 1989, 2005 and 2007 amendments to the Act, discussed above, but the occurrences in question in the case occurred in January 2007, prior to the 2007 amendments, so that they are not applicable.<sup>216</sup> This was an appeal from a quiet title action brought by the surface owner, Sorenson, seeking to acquire the mineral interest owned of record by Felton.<sup>217</sup> There had been no use of the mineral interest for more than twenty years, so that the sole issue was whether a copy of the notice of lapse published by Sorenson in January 2007 had been properly mailed in accordance with the statute then in effect.<sup>218</sup> The notice was mailed to the address that appeared in a recorded personal representative's deed distributing the mineral interest to Felton in 1984.<sup>219</sup> Sorenson had also conducted an unsuccessful internet inquiry in an attempt to verify a current address for Felton.<sup>220</sup> The issue before the Court, therefore, was whether the statutory provisions for the mailing of a copy of the notice of lapse to the mineral owner had been followed.<sup>221</sup> Since the 1983 provisions were still in effect, the requirement was:

[I]f the address of the mineral owner is shown of record *or can be determined upon reasonable inquiry* [emphasis added] . . . notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made.<sup>222</sup>

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214. See *Halvorson*, ¶ 11, 785 N.W.2d at 252.

215. *Id.* at ¶ 13, 785 N.W.2d at 253.

216. *Sorenson v. Felton*, 2011 ND 33, 793 N.W.2d 799.

217. *Id.* ¶¶ 3-5, 793 N.W.2d at 801.

218. *Id.* ¶¶ 10-13, 793 N.W.2d at 802-03.

219. *Id.* ¶¶ 3-4, 793 N.W.2d at 801.

220. *Id.*

221. *Id.* ¶¶ 10-13, 793 N.W.2d 802-03.

222. 1983 N.D. Laws ch. 413, § 6(2) (N.D. CENT. CODE § 38-18.1-06(2) (West 2017)).

The mineral owner was eventually located, residing in another state, by a petroleum landman, and, although the Court's opinion does not actually state this, it is clear that the notice mailed to the mineral owner's no longer current 1984 address was not delivered to her.<sup>223</sup> She did record a statement of claim in January 2008, which was of course substantially later than the sixty-day period following the date of first publication as required by the statute.<sup>224</sup> This was not an issue, however, as the question was the validity of the attempt to mail the notice of lapse.<sup>225</sup> Timely recording of a statement of claim by the mineral owner would prevent the vesting of title in a surface owner, but such vesting does not occur in any case where the requirement pertaining to the notice of lapse has not been met.<sup>226</sup>

Since this was a quiet title action, there was a judgment from the district court, which ruled that the surface owner did not strictly comply with the statute because he did not conduct a reasonable inquiry.<sup>227</sup> At this stage of the law, prior to the 2009 amendments, the statute contained no language as to what constituted a reasonable inquiry. This was also not a question before the Court, however, since it held that a reasonable inquiry was not required if an attempt to mail the notice to an address of record was made.<sup>228</sup> The statute does not require a reasonable inquiry to be made to seek a current address if the notice has been mailed to an address of record:

It is undisputed that Sorenson complied with the publication requirements. Then section 38-18.1-06(2) requires notice by mail "if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry . . . The word 'or' is disjunctive in nature and ordinarily indicates an alternative between different things or actions . . . The words "shown of record" and "determined upon reasonable inquiry" relate to separate and alternative considerations for how a surface owner is to obtain the mineral owner's address for mailing the notice . . . These phrases have independent legal significance because each requires different conduct based on the information available to the

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223. *Sorenson*, ¶ 5, 793 N.W.2d at 801.

224. 1989 N.D. Laws ch. 441 § 3(1) (N.D. CENT. CODE § 38-18.1-05(2) (West 2017)).

225. *See Sorenson*, ¶¶ 10-15, 793 N.W.2d at 802-03.

226. N.D. CENT. CODE ANN. § 38-18.1-06 (West 2017).

227. *See Sorenson*, ¶ 6, 793 N.W.2d at 801.

228. *Id.* ¶ 14-15, 793 N.W.2d at 803.

surface owner. Therefore, we conclude the word ‘or’ is disjunctive in section 38-18.1-06(2).<sup>229</sup>

Accordingly, the Court held that mailing the notice to a record address for the mineral owner is sufficient, without requiring any reasonable inquiry to be made stating that “Under our construction, Sorenson was required to conduct a reasonable inquiry only if Felton’s address was not shown of record. Here, Felton’s address was shown of record so no additional inquiry was required.”<sup>230</sup>

The mineral owner had argued that the result would be absurd because a surface owner with knowledge of the correct mailing address could intentionally send notice to an incorrect record address.<sup>231</sup> The Court, however, did not accept this as a valid objection by stating:

Rather, our judicial review in this case is limited to determining the law’s meaning according to the rules of construction . . . When those rules are applied here, there is not an absurd result because Felton would have received notice if she had kept her address of record current.<sup>232</sup>

Applying these rules, therefore, the Court reversed the judgment of the district court and ruled in favor of the surface owner, since he had mailed the notice to a record address, albeit not the correct current address, which was not of record.<sup>233</sup> No inquiry was required to determine whether it was current or not.<sup>234</sup> As will be seen below, this decision became a benchmark for further cases in which similar situations existed. It could be argued that the Court misinterpreted the statutory language “if the address of the mineral interest owner is shown,” because in this case the actual address was not shown of record, since the address of record was not the actual address. That is, if the statute was intended to mean the mineral owner’s current address at the time of the mailing of the notice of lapse, then the mailing by Sorenson was not made to Felton’s current address. As described in this case, and in the cases discussed below, the “address of the

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229. *Id.* ¶¶ 11-13, 793 N.W.2d at 802-03.

230. *Id.* ¶ 14, 793 N.W.2d at 803.

231. *Id.*

232. *Id.*

233. *Sorenson*, ¶ 17, 793 N.W.2d at 804.

234. *Id.* ¶ 15, 793 N.W.2d at 802-03.

mineral owner” has come to mean whatever is the most recent recorded address, whether it is current or not, even if the mineral owner is deceased.<sup>235</sup>

E. *SORENSEN V. ALINDER*

*Sorenson v. Alindor* is nearly an identical case to *Sorenson v. Felton*, even involving the same surface owner and the same time frames.<sup>236</sup> The occurrences in question occurred in January 2007, and thus took place prior to the 2007 amendments, rendering them inapplicable. This was also an appeal from a quiet title action brought by the surface owner, Sorenson, seeking to acquire the mineral interest owned of record by the successors of Ken Alinder and Edna Alinder.<sup>237</sup> There had also been no use of the mineral interest for more than twenty years.<sup>238</sup> The notice of lapse was published and Sorenson timely mailed the notice to Ken and Edna Alinder, the mineral owners of record who had acquired the mineral interest in 1953 and who died in 1980 and 1999, respectively.<sup>239</sup> The notice of lapse was timely mailed to their record address in 2007.<sup>240</sup> No reasonable inquiry as to a current address had been made.<sup>241</sup> The Court’s analysis is the same as in the *Felton* case, concluding that a reasonable inquiry is required only when the mineral owner’s address does not appear of record.<sup>242</sup> Accordingly, the Court’s holding was that the lower court had erred in requiring Sorenson to conduct a reasonable inquiry, so that the case was remanded in order for the district court to enter a quiet title judgment in favor of the surface owner, since a copy of the notice of lapse had been mailed to an address of record even though the mineral owners were

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235. It was specifically clarified in *Capps v. Weflen*, 2014 ND 201, 855 N.W.2d 63 discussed *infra*, that the fact that the record owner of the mineral interest is deceased is not relevant to the question of the address of record.

236. *Sorenson v. Alinder*, 2011 ND 36, 793 N.W.2d 797.

237. *Id.* ¶ 3, 793 N.W.2d at 798.

238. *Id.* ¶ 2 (“Because more than 50 years had passed without the Alinders having used the minerals, Sorenson published notice of the lapse in January 2007.”).

239. *Id.*

240. *Id.*

241. *Id.* ¶ 3.

242. *Alinder*, ¶ 6, 793 N.W.2d 799 stating:

In *Sorenson v. Felton* . . . we construed N.D.C.C. § 38-18.1-06(2) and held this section requires a ‘reasonable inquiry’ only when the mineral owner’s address does not appear of record . . . [T]he district court erred in requiring Sorenson to also conduct a ‘reasonable inquiry’ to establish compliance with N.D.C.C. § 38-18.1-06.



deceased.<sup>243</sup> A further discussion concerning the validity of notices of lapse mailed to deceased persons is located below in the discussion of *Capps v. Weftlen*.

F. *JOHNSON V. TALIAFERRO*

*Johnson v. Taliaferro* was also decided in 2011, but added a new element, namely the quiet title provisions that were part of the 2009 amendments to the Act.<sup>244</sup> As discussed above, a whole new section was added to the original Act, providing for “perfecting title in the surface owner” by means of a quiet title action.<sup>245</sup> This is not mandatory in order to vest title in the surface owner, since title vests as of the date of abandonment if the surface owner has given the proper notice of lapse and the mineral owner has not filed a timely statement of claim to prevent such vesting of title.<sup>246</sup>

It was apparently decided in 2009 that a specific quiet title action provision should be included, probably in order to have a recordable judgment as to the ownership.<sup>247</sup> The source of the issue in *Johnson v. Taliaferro* was not the concept of a quiet title action in and of itself, but the fact that this new quiet title section requires a reasonable inquiry to be made by the surface owner.<sup>248</sup> This is not contrary to the holdings in the two *Sorenson* cases of course because the 2009 amendments were not yet in effect in those cases.<sup>249</sup> Those two cases were indeed quiet title actions, but they had been brought under the traditional quiet title action statute, which had been in effect long before 1983 and had no specific connection with mineral abandonment issues.<sup>250</sup>

The mineral owner, Taliaferro, argued that his situation was different from those in the *Sorenson* cases, because his quiet title action was brought in 2010, after the new quiet title section had been added to the Act by the

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243. The original owners, Russell Alinder and Edna Alinder, had died, respectively, in 1980 and 1999. *Id.* ¶ 2, 793 N.W.2d at 798.

244. *Johnson v. Taliaferro*, 2011 ND 34, 793 N.W.2d 804.

245. 2009 N.D. Laws ch. 317 § 5 (N.D. CENT. CODE ANN. § 38-18.1-06.1 (West 2017)).

246. N.D. CENT. CODE ANN. §38-18.1-02 (West 2017).

247. 2009 N.D. Laws ch. 317 § 5.

248. *Id.* § 5(2).

249. *See Sorenson v. Felton*, 2011 ND 33, 793 N.W.2d 799. *See also Sorenson v. Alinder*, 2011 ND 36, 793 N.W.2d 797. (The quiet title actions in both *Sorenson v. Alinder* and *Sorenson v. Felton* were commenced in 2008).

250. *See* N.D. CENT. CODE ANN. § 32-17-01 (West 2017).

2009 amendments.<sup>251</sup> Under this new section, the reasonable inquiry is a required element in order for the surface owner to win his case, but only if his case is a quiet title action under the 2009 amendment.<sup>252</sup> Under the 2009 amendment, the surface owner is required to submit evidence to the district court establishing that all required procedures under the Act were properly conducted and that a reasonable inquiry was made.<sup>253</sup> Then judgment quieting title in the surface owner could be granted:

If the district court finds that the surface owner has complied with all procedures of the chapter and has conducted a reasonable inquiry, the district court shall issue its findings of fact, conclusions of law, and enter judgment perfecting title to the mineral interest in the owner or owners of the surface estate.<sup>254</sup>

The factual background was similar in the *Taliaferro* case to the *Sorenson* cases, in that a notice of lapse had been mailed to an address of record of the mineral owner, but it was not received.<sup>255</sup> Under the rulings in the two *Sorenson* cases, therefore, the required notice had been made by the mailing, and there was no requirement to make a reasonable inquiry, or any kind of inquiry, as to a current address.<sup>256</sup> The Court rejected the mineral owner's claim that the new 2009 quiet title section applied, because the title had already vested in the surface owner through the mailing of the notice and the fact that the mineral owner did not record a statement of claim.<sup>257</sup> The Court further stated that "We held in *Sorenson v. Felton* . . . that section 38-18.1-06 N.D.C.C. requires reasonable inquiry only when the mineral owner's address does not appear of record."<sup>258</sup>

In response to the mineral owner's argument that the 2009 amendments applied in his 2010 quiet title action, the Court pointed out that both before and after the 2009 amendments, the Abandoned Minerals Act provided that

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251. 2009 N.D. Laws ch. 317 § 5. *Johnson v. Taliaferro*, 2011 ND 34, ¶ 10, 793 N.W.2d 804, 806 ("Taliaferro argues section 38-18.1-06, N.D.C.C., requires a surface owner to conduct a reasonable inquiry to find a mineral owner's current address, even when an address appears of record.")

252. *See* 2009 N.D. Laws ch. 317 § 5(2).

253. *Id.*

254. N.D. CENT. CODE ANN. § 38-18.1-06.1(2) (West 2017).

255. *See Taliaferro*, ¶ 5, 793 N.W.2d at 805.

256. *See Sorenson v. Felton*, 2011 ND 33, 793 N.W.2d 799. *see also Sorenson v. Alinder*, 2011 ND 36, 793 N.W.2d 797.

257. *Id.*

258. *Taliaferro*, ¶ 11, 793 N.W.2d. at 806.

title vests in the surface owner on the date of abandonment.<sup>259</sup> Therefore, the reasonable inquiry requirement in the quiet title provisions in the 2009 amendments could not operate to undo the vesting of title.<sup>260</sup> The Court found that “The quiet title requirements in N.D.C.C. § 38-18.1-06(2) cannot be used to deprive the Johnsons of an interest in the minerals that has already vested under N.D.C.C. § 38-18.1-02. (2004).”<sup>261</sup>

Bringing a quiet title action under this new section of the Act is not a requirement for the surface owner.<sup>262</sup> The new 2009 quiet title statutory provisions state that the surface owner or owners “may maintain an action in district court.”<sup>263</sup> In fact, it would seem simpler to bring a quiet title action under N.D.C.C. ch. 32-17, which does not have any reference to a requirement for a reasonable inquiry. In any case, now since the 2007 amendments to the Act provide that the successful surface owner who succeeds to a mineral interest after a lapse is entitled to record a statement of succession in interest, there may be no strong motive at all in going through a quiet title action to obtain a recordable judgment.<sup>264</sup>

The interaction of the 2009 quiet title action amendment and the automatic vesting of title when the requirements of mailing the notice of lapse have been satisfied, and no timely statement of claim has been recorded, creates an uncertainty set out in Chief Justice VandeWalle’s concurring opinion in the *Taliaferro* case, where the Chief Justice stated:

But, I note our decision does not resolve the issue of whether or not, in light of the 2009 amendments to N.D.C.C. §38-18.1-06.1(2), a quiet title action would lie or whether or not a severed mineral interest would even be considered abandoned under the provisions of N.D.C.C. 38-18.1-06 if the procedures under 38-18.1-06 were begun after the 2009 amendments to §38-18.1-06.1(2) became effective and no reasonable inquiry was conducted. I believe this is an open question that invites further legislative clarification or awaits a judicial determination.<sup>265</sup>

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259. N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017).

260. *Id.*

261. *Taliaferro*, ¶ 17, 793 N.W.2d at 808.

262. The title of this section is “Perfecting title in surface owner.” Title, however, vests without a quiet title judgment. *See* N.D. CENT. CODE § 38-18.1-02 (2017).

263. 2009 N.D. Laws ch. 317 § 5(1), at 11.

264. 2007 N.D. Laws ch. 313 § 2, at 1220 (codified as amended at N.D. CENT. CODE ANN. § 38-18.1-02 (West 2017)).

265. *Taliaferro*, ¶ 20, 793 N.W.2d at 808 (VandeWalle, C.J., concurring).

### G. *LARSON V. NORHEIM*

*Larson v. Norheim*<sup>266</sup> is a minor case that simply deals with the question of proper execution of a statement of claim recorded under the Act. A notice of lapse had been published and mailed to the mineral owners' address of record, relating to several mineral interests.<sup>267</sup> Within the sixty-day period following the first publication of the notice, the heirs of the record mineral owners recorded a statement of claim on June 27, 2007.<sup>268</sup> The only issue was whether the persons who signed the statement of claim were not the heirs, but rather persons who had agreed orally with the heirs to sign the document, which listed the names of the heirs of the deceased owners of the mineral interests.<sup>269</sup> There was no written agency agreement for the signing of the statement by the non-heirs, which the Court did not find to be significant and held that the oral agreement was sufficient.<sup>270</sup> This is completely consistent with the provision that goes back to the original 1983 Act, providing that the statement of claim must be recorded by the owner of the mineral interest or the owner's representative and contain the names of the owners.<sup>271</sup> This was the sole issue in this case.<sup>272</sup>

### H. *PETERSON V. JASMANKA*

*Peterson v. Jasmanka* involved an attempt by a mineral owner to vacate a 1990 default judgment which had quieted title in the surface owners.<sup>273</sup> They had complied with all the requirements of the Act, including the publication and mailing of the notice of lapse to the mineral owner's most recent address of record.<sup>274</sup> The current mineral owner, the successor to the original owner, Lester Jasmanka, who had died in 1963, moved in 2012 to vacate the default judgment twenty-two years after it had been entered.<sup>275</sup> The alleged basis for the motion to vacate was based on the novel theory that the district court lacked personal jurisdiction to enter a judgment because there had had been improper service of the notice of

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266. 2013 ND 60, 830 N.W.2d 85.

267. *Norheim*, ¶ 3, 830 N.W.2d at 87.

268. *Id.* ¶ 4.

269. *Id.* ¶ 8, 830 N.W.2d at 88.

270. *Id.* ¶ 13, 830 N.W.2d at 90.

271. N.D. CENT. CODE ANN. § 38-18.1-04(1) (West 2017).

272. *Norheim*, ¶ 18, 830 N.W.2d at 91-92.

273. 2014 ND 40, 842 N.W.2d 920.

274. *Id.* ¶ 3, 842 N.W.2d at 922-23.

275. *Id.* ¶ 5, 842 N.W.2d at 923.

lapse.<sup>276</sup> The alleged improper service was apparently based on the claim that the notice had to be mailed to both of the two slightly different addresses for Jasmanka that appeared in the record.<sup>277</sup> In fact there was no basis for this, as the notice had been mailed to the most recent record address.<sup>278</sup> In any case, the Court did not need to address that issue, since it held that there was no personal jurisdiction issue under the Act:

The statutory procedure is wholly self-executing, and once the notice procedure under the statute is completed, title to the mineral interest vests in the surface owner as of the date of abandonment, without the necessity of a subsequent quiet title action . . . We have drawn a clear distinction between the statutory abandoned minerals procedure under N.D.C.C. ch. 38-18.1 and a separate quiet title action, and have emphasized they are entirely separate, distinct procedures . . . Whether the surface owner complied with the statute, including the notice provisions, and thereby acquired title to the minerals is purely a substantive issue on the merits in the quiet title action and is not relevant to personal jurisdiction.<sup>279</sup>

All of the cases discussed above have been quiet title actions, since there needs to be some kind of existing judgment to go before the North Dakota Supreme Court. Presumably, these cases were based on the general quiet title action provisions in N.D.C.C. ch. 32-17, since the “perfecting title in surface owners” quiet title section (N.D.C.C. § 38-18.1-06.1) was only added to the statute by the 2009 amendments, discussed above. The attempt to vacate the 1990 quiet title judgment based on a personal jurisdiction issue purportedly arising from the Act appears to have been a far-fetched notion. There would have been no difference in the Court’s analysis if this case had fallen under the 2009 amendments. The Court reiterated the statement it made in *Halvorson v. Starr*<sup>280</sup> that the notice requirement under the Act “is not part of a civil action, or part of any procedure in the district court.”<sup>281</sup>

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276. *Id.* ¶ 8, 842 N.W.2d at 924.

277. *Id.* ¶ 20, 842 N.W.2d at 926.

278. *Id.* ¶ 3, 842 N.W.2d at 923.

279. *Jasmanka*, ¶¶ 12-14, 842 N.W.2d at 925.

280. 2010 ND 133, 785 N.W.2d 248 (N.D. 2010).

281. *Jasmanka*, ¶ 17, 842 N.W.2d at 926.

I. *ESTATE OF CHRISTESON V. GILSTAD*

In *Estate of Christeson v. Gilstad*,<sup>282</sup> the Court was presented with a slight change of topic from the previous cases that dealt with the questions of record addresses. The question here was whether it was sufficient for the actual legal owner of the mineral interest to have executed a mineral lease or was it necessary that it be executed by the record owner, who was not the actual owner, in order to establish that there was a valid lease to constitute a “use” under the Act, so as to prevent the reversion of the mineral interest to the surface owner.<sup>283</sup> The mineral interest in question was a one-eighth interest owned by Edyth Christeson.<sup>284</sup> She died in 1983, leaving her husband Emmett as her sole heir.<sup>285</sup> There was no administration of her estate, however, and therefore, there was no record owner except Edyth, although the interest had passed automatically upon her death to Emmett under the laws of succession.<sup>286</sup> Her husband Emmett remarried, and he and his new wife Eleanor executed an oil and gas lease in 1989 which was recorded.<sup>287</sup>

The surface owners (Gilstads) published a notice of lapse of mineral interest in 2007 and mailed copies to Edyth and Emmett, both then deceased, at their address of record.<sup>288</sup> The surface owners did not contest Emmett’s ownership, but contended that only a lease signed by the record owner of the mineral interest could qualify as a “use.”<sup>289</sup> The Court held in favor of Emmett’s successor as the actual mineral owner, whose interest was not of record, on the grounds that the statute did not require that the recorded lease needed to be executed by the actual record owner of the mineral interest.<sup>290</sup> The record, of course, still showed Edyth as the owner.<sup>291</sup> The Court found that it was sufficient that there was a lease of record within the twenty-year period by stating:

Section 38-18.1-03(1)(d) does not on its face require that a lease be executed by a record owner to be deemed a use of the mineral

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282. 2013 ND 50, 829 N.W.2d 453 (N.D. 2013).

283. *Christeson*, ¶ 7, 829 N.W.2d at 455.

284. *Id.* ¶ 2, 829 N.W.2d at 454.

285. *Id.* ¶ 9, 829 N.W.2d at 455.

286. *Id.*

287. *Id.*

288. *Id.* ¶ 4, 829 N.W.2d at 454.

289. *Christeson*, ¶ 10, 829 N.W.2d at 456.

290. *Id.* ¶ 16, 829 N.W.2d at 457.

291. *Id.* ¶ 9, 829 N.W.2d at 455.

interest which will preclude a finding of abandonment under N.D.C.C. § 38-18.1-02 . . . Section 38-18.1-03(1)(d) N.D.C.C. does not require that the lease be executed by the owner of record, but merely provides that the recording of a lease of the mineral interest is deemed to be a use under N.D.C.C. ch. 38-18.1.<sup>292</sup>

This certainly appears to be the appropriate result. The statute simply states that a *use* is underway if a mineral interest on any tract is subject to a lease recorded in the county in which the mineral interest is located.<sup>293</sup> There would be no purpose in rejecting the lease, which was a valid use of the mineral interest, simply because it had been signed by an actual owner other than by the deceased record owner. It is not particularly unusual, as is apparent in title searching in rural North Dakota, for there to have been no administration of an estate. The heirs simply succeed to the deceased's interests based on the statutory succession rules.<sup>294</sup>

#### J. *CAPPS V. WEFLÉN*

Later in the same year in which *Peterson v. Jasmanka* was decided, the North Dakota Supreme Court issued an opinion in *Capps v. Weflen*.<sup>295</sup> This case came to the rather startling conclusion that even if the record owners were deceased and the surface owners were aware of that fact, the mailing of the copy of the notice of lapse to the last record address of the owners was sufficient to satisfy the statute.<sup>296</sup> This appears to be quite a futile process. The court action, like the other cases above, was a quiet title proceeding brought by the Capps who owned a mineral interest that was either one-fourth or one-half, depending on the construction of a deed.<sup>297</sup> The Weflens already owned a one-half mineral interest in the tract in question, conveyed to them by the previous owner of one-hundred percent of the mineral interest (Ruth Nelson).<sup>298</sup>

The issue between the Capps and the Weflens was not so much based on the abandoned minerals concept, as it was on the question whether a

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292. *Id.* ¶¶ 12, 15, 829 N.W.2d at 456-57.

293. N.D. CENT. CODE ANN. § 38-18.1-03(1)(d) (West 2017).

294. N.D. CENT. CODE ANN. § 30.1-04-01 (West 2017) ("Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this title, except as modified by decedent's will.").

295. 2014 ND 201, 855 N.W.2d 637.

296. *Capps*, ¶ 10, 855 N.W.2d at 643.

297. *Id.* ¶ 4, 855 N.W.2d at 641.

298. *Id.* ¶ 2, 855 N.W.2d at 640.

deed from Nelson had conveyed only a 1/4 or a whole 1/2 mineral interest to Capps.<sup>299</sup> The abandoned minerals issue came into play because if the interest conveyed was a whole 1/2, then the heirs of Nelson had nothing left and there was nothing the Weflens could acquire from them under an abandoned mineral procedure.<sup>300</sup> If, on the other hand, Capps had acquired only a 1/4 mineral interest, then the Nelson heirs owned 1/4 and this was the interest sought by the Weflens under the abandoned minerals procedure.<sup>301</sup> Accordingly, the surface owners carried out the required three-week publication of the notice of lapse and mailed copies of the notice to both of the last known addresses of the mineral owner.<sup>302</sup> The record contained a mailing address for Ruth Nelson, but apparently no evidence of the fact that she was deceased, who her successors were, or who the owners of either the 1/2 or the 1/4 mineral interest were.<sup>303</sup> The district court ruled that the surface owners had not complied with the notice requirement, because they were aware that the Weflens knew of the death of Ruth Nelson, so that the mailing of the notice would have been ineffective.<sup>304</sup>

It could probably have been argued then that their deaths resulted in the mailing of notice having no effect and that they would need to make a reasonable inquiry instead, but this argument was apparently not made. In any case, this would not have prevailed, in view of the Court's holding in the *Taliaferro* case. The district court in *Capps* had stated that mailing notice to a dead person was "absurd."<sup>305</sup> The Supreme Court, however, stated that "because the abandoned mineral statutes are in derogation of the common law, courts 'must review for strict construction and application of statutory requirements,'"<sup>306</sup> citing its opinion in the *Spring Creek* case. In other words, specific statutory rules which are not consistent with common law tradition must be very strictly construed. The Weflens had mailed the notice of lapse to Nelson's record address, in fact two separate address for her on record, and this was consistent with the clear language of the statute:

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299. *Id.* ¶ 4, 855 N.W.2d at 641.

300. *Id.*

301. *Id.*

302. *Capps*, ¶ 3, 855 N.W.2d at 640.

303. *Id.*

304. *Id.* ¶ 4, 855 N.W.2d at 641-42.

305. *Id.* ¶ 9, 855 N.W.2d at 642.

306. *Id.* See *supra* the earlier discussion in this article as to the common law regarding abandonment of real property.



First, whether the Weflens had actual knowledge of Nelson's death at the time of mailing is disputed, but this not a material fact . . . Here the Weflens attempted to notify Nelson by mail through two of her addresses that were 'of record' . . . In *Alinder*<sup>307</sup> . . . this Court made it clear than when the mineral interest owners of record are deceased, the notice must still be mailed to the address of the deceased owners of record . . . We conclude a surface owner is required to conduct a reasonable inquiry only if the mineral owner's address does not appear of record, even if the surface owner knows the mineral owner whose address appears of record is deceased.<sup>308</sup>

In addition to the reference back to the *Alinder* case, the Court also mentioned that in that case it had relied upon its decisions in the *Felton* and *Taliaferro* cases.<sup>309</sup> The application of the mailing requirement of notices to deceased owners, however was not quite so emphasized in those cases as in *Capps*.<sup>310</sup> The clear holding that mailing a notice of lapse to a deceased person is sufficient is conceptually a rather bizarre notion, since it is clear that the deceased person will not be able read the notice. It may be, of course, that the heirs or successors of the deceased might be living at the same address, so that the notice would come to their attention, but this is purely speculative. The Court's analysis, however, is sound only in that it follows the literal and explicit language of the statute, which is "address of record," as opposed to something like "address at which the intended recipient is living."

A logical solution to this problem might be to amend the statute again, so that if the record mineral owner is known by the surface owner to be deceased a reasonable inquiry must be required, just as though there had

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307. See *Alinder*, 2011 ND 36, ¶ 6, 793 N.W.2d 797.

308. *Capps*, ¶¶ 10-13, 855 N.W.2d at 642-44.

309. See *Sorenson v. Felton*, 2011 ND 33, 793 N.W.2d 799. See also *Sorenson v. Alinder*, 2011 ND 36, 793 N.W.2d 797.

310. *Capps*, ¶¶ 10-12, 855 N.W.2d at 642-44 stating:

This Court in *Alinder* . . . relied upon *Felton* and *Taliaferro* in ruling no reasonable inquiry was required where the surface owner mailed the notice of lapse to the mineral owners' address of record in 2007, even though the mineral interest owners had died in 1980 and 1999, respectively . . . *Alinder* reinforces our conclusion in *Felton* that the address of record need not be the mineral interest owner's correct address for the mailing of the notice of lapse to satisfy the statutory requirement . . . Because the possibility of death is not confined to the elderly, a surface owner could not be certain whether the mineral owner of record was deceased. The surface owner would be required to make a 'reasonable inquiry' in every case. . . .

been no addresses of record. This could, of course, generate a new problem if surface owners who actually knew of the death of the mineral owner of record might claim, to avoid the reasonable inquiry requirement, that they had no such knowledge. In any case, in this particular instance, the Court held in favor of the surface owners, on the grounds that the notice to the deceased mineral owners was sufficient to meet the statutory requirement.<sup>311</sup> Even though the Court's analysis could possibly be said to be arguably correct, as based on a very strict reading of the statute, this express holding by the Court in *Capps* has attained a certain notoriety in the legal community.

K. *YESEL V. BRANDON*

*Yesel v. Brandon* is a somewhat peculiar case, injecting the question of whether the Termination of Mineral Interest statutes covers royalty interests as well as mineral interests.<sup>312</sup> A royalty interest is, of course, in a sense, a piece of a mineral interest. It is an interest carved out of a mineral interest which gives the owner a percentage return on oil and gas (or other minerals) when produced and saved.<sup>313</sup> For example, A may have purchased a 5% royalty interest in B's 100% (or lesser) mineral interest in a tract. Then suppose the mineral owner leases his interest and the lessee then uses the mineral interest in the most obvious manner among the various categories of "use" listed in the Act, that is by developing and producing the minerals. The royalty owner is, of course, entitled to 5% of the produced minerals, without having had to provide any of the costs of exploration, development and production. The mineral interest is actually being used in several ways: minerals are produced, operations are being conducted and the mineral interest is subject to a lease.<sup>314</sup>

Then suppose that the mineral interest is not being used in any of the ways described in the statute. The surface owner, as in all the cases described above, can then publish and mail a notice of lapse to try to acquire the mineral owner's interest. Does the Act allow the surface owner to also acquire the outstanding 5% royalty interest owned by A? When the surface owner has successfully acquired the abandoned mineral interest, however, that interest is burdened with the outstanding royalty interest,

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311. *Id.* ¶ 13, 855 N.W.2d at 644.

312. 2015 ND 195, 867 N.W.2d 677.

313. 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 202.3, 25-26 (2016).

314. *See* N.D. CENT. CODE ANN. § 38-18.1-03(1) (West 2017).

since it existed separately from the mineral interest.<sup>315</sup> There would be no basis upon which the surface owner could have acquired something that was not part of the abandoned mineral interest. A royalty owner has no power to do anything with the interest he acquired, except sell it to someone else, since a royalty owner has no power to explore, develop or produce any minerals.<sup>316</sup> He or she simply must wait for minerals to be produced and saved before receiving anything. A royalty owner is sometimes described as owning a “non-participating royalty” interest, as the Court does in the *Yesel* case.<sup>317</sup>

In this case the surface owner, brought a quiet title action against the royalty owners, claiming the interests had been abandoned by nonuse.<sup>318</sup> The response from the royalty owners was, of course, that the royalty interests which were related to the mineral interest could not have been abandoned because the tract had been under lease within the previous twenty years and was subject to a pooling order and there was a producing well within the pooled area.<sup>319</sup> The surface owner argued that the list of “uses” under the abandoned mineral statutes did not apply to royalty interests.<sup>320</sup> This was a fairly feeble argument, and the Court held that it was unnecessary to make that specific decision because the relationship between the mineral interest and the royalty interest from which it came meant that if the mineral interest was being used the royalty interest necessarily was also being used:

As discussed above, an owner of a royalty interest cannot develop or produce the minerals related to the royalty interest. A royalty owner receives a share of the proceeds from the production of the minerals. Therefore, we conclude royalty interest cannot be considered abandoned if the related mineral interest is being used under N.D.C.C. § 38-18.1-03(1), and find it unnecessary in this case to address whether the abandoned mineral statutes contained in N.D.C.C. ch. 38-18.1 apply to royalty interests. To the extent

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315. No change in ownership of a mineral interest can change the fact that the mineral interest may be burdened with a prior existing royalty interest. Accordingly, since that is the case, an abandoned mineral interest which passes to the surface owner will continue to be burdened by the royalty interest.

316. WILLIAMS & MEYERS, *supra* note 313, at 26.

317. *See Yesel*, ¶ 2, 867 N.W.2d at 679.

318. *Id.* ¶ 3.

319. *Id.* ¶ 4.

320. *Id.* ¶ 8, 867 N.W.2d at 680.

N.D.C.C. ch. 38-18.1 may apply to royalty interests, we conclude a royalty interest is used if the related mineral interest is used under N.D.C.C. § 38-18.1-03(1).<sup>321</sup>

Accordingly, the Court held in favor of the royalty owners.<sup>322</sup> The decision in this case is surely correct, and it seems unlikely that any future case will raise this issue again. It simply makes no sense to attempt to sever the royalty estate from the mineral estate from which it exists. A royalty interest does not exist independently from the mineral interest from which it was carved, since the royalty interest is only meaningful or valuable to the extent the mineral interest is meaningful or valuable. Only when a mineral interest has been developed and minerals are actually produced from the development does a related royalty interest have any value or significance. A royalty interest cannot, therefore, be treated as an independent entity for purposes of determining there has been an abandonment under the statute.

*L. NELSON V. MCALESTER FUEL CO.*

It probably could be claimed that *Nelson v. McAlester Fuel Co.* is “more of the same,” and it is true that the circumstances are similar to several of the cases discussed above, but the Court’s emphasis is somewhat different in this recent case.<sup>323</sup> As usual, the issue does not center around the question of whether the mineral owner was at fault for failure to file a timely statement of claim. The critical issue, as usual, was whether the surface owner seeking to acquire the mineral interest gave the statutorily required notice of lapse.<sup>324</sup> That question does, of course, underlie the matter of recording a statement of claim as well, because if the notice was not effective, then the mineral owner was not required to file a statement of claim to protect his interest.<sup>325</sup>

Nelson, the surface owner, published a typical notice of lapse for three consecutive weeks and then mailed a copy of the notice to P.O. Box 210 in Magnolia, Arkansas, which was the mineral owner’s address on a 1958 oil and gas lease.<sup>326</sup> A 1968 oil and gas lease, however, bore the address of

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321. *Id.* ¶ 13, 867 N.W.2d at 682.

322. *Id.*

323. 2017 ND 49, 891 N.W.2d 126.

324. *Nelson*, ¶ 11, 891 N.W.2d at 130.

325. N.D. CENT. CODE ANN. § 38-18.1-06(2) (West 2017).

326. *Nelson*, ¶ 2, 891 N.W.2d at 128. The Court’s opinion refers to this as a “notice of claim,” but it was clearly intended to mean a notice of lapse mailed by the surface owner.

P.O. Box 10 in Magnolia.<sup>327</sup> The district court ruled against the surface owner, on the basis that he had mailed the notice of lapse to the 1958 address rather than the more recent 1968 address.<sup>328</sup> As opposed to the *Capps* case scenario, where the notice of lapse was mailed to both of the addresses of record, in this case the notice was mailed only to Box 10, the 1958 address.<sup>329</sup> This was fatal to Nelson's attempt to secure the mineral interest:

In this case, the record reflects the existence of two different addresses of record. Nelson sent notice of lapse to the older record address appearing on the 1958 mineral deed. The record shows Nelson was aware of the more recent document containing the most recent address of record . . . Here, the issue is whether a surface owner seeking to claim abandoned mineral interests complies with the statute by mailing notice to a single address of record when a newer address of record is known to the surface owner. We cannot say Nelson complied with the statute by mailing notice of lapse to the older of the two addresses.<sup>330</sup>

Although the statute itself does not expressly specify that it is the most recent address that is the one that must be used, common sense and the precise language of the statute confirm that is the case. If any address of record were allowed to be used, there might be a tendency for surface owners to select the oldest address of record in the hope that the record owner could no longer be located or was deceased. As the Court stated, "the address" must mean the most recent one:

To broadly interpret the phrase "the address of the mineral interest owner . . . shown of record" to mean *any* address shown of record would render meaningless the legislature's use of "the" before "address of the mineral interest owner." . . . As a result, we interpret this phrase in the statute to indicate a surface owner must send notice to the most recent address of record in order to comply with N.D.C.C. §38-18.1-06(2) (2004).<sup>331</sup>

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327. *Id.*

328. *Id.* ¶ 17, 891 N.W.2d at 132.

329. *Id.* ¶ 16, 891 N.W.2d at 132.

330. *Id.* ¶ 16, 891 N.W.2d at 132.

331. *Id.* ¶ 18, 891 N.W.2d at 132-33.

In this case, Nelson failed to do so. As a result, the district court properly concluded Nelson failed to satisfy the notice requirements of the statute, and therefore the mineral interest never vested in Nelson and remained with McAlester.<sup>332</sup> Accordingly, the Court affirmed the district court's decision in favor of the mineral owner.<sup>333</sup>

*M. HUEBNER V. FURLINGER*

*Huebner v. Furlinger*<sup>334</sup> deals, as most of the other cases do, with an issue pertaining to the notice of lapse. As with all of the other cases, as well, the appeal to the Supreme Court arises from a quiet title action in the district court.<sup>335</sup> The surface owners published their notice of lapse, as required, and mailed a copy of the notice to the mineral owner at her record address in Florida.<sup>336</sup> The address was taken from a 1982 personal representative's deed, but one variation was made, which was to supplement the address with a zip code, absent from the deed.<sup>337</sup> The mineral interest in question was a one-fourth interest, owned one-eighth by Elsie Furlinger and one-eighth by her sister Janet Hill.<sup>338</sup> The interest of Janet Hill had been ruled by the district court to not have passed to the surface owners because they had not sent a notice of lapse to her recorded address.<sup>339</sup> This was approved by the North Dakota Supreme Court, so that the Court's opinion, primarily applied to the Furlinger interest.<sup>340</sup>

The Court points out that the 2009 and 2007 amendments did not affect this case, since the notice of lapse was dated in 2006.<sup>341</sup> This was presumably noted because the 2009 amendment, as discussed above, added to the statute the new section entitled "perfecting title in surface owner," under which a surface owner can obtain a judgment establishing ownership of the mineral interest, but does specify that a reasonable inquiry must be conducted.<sup>342</sup> As pointed out above, this section creates a curious anomaly, as it would appear to be possible to bring the quiet title action under

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332. *Id.*

333. *Nelson*, ¶ 26, 891 N.W.2d at 135.

334. 2017 ND 145, 896 N.W.2d 258.

335. *Huebner*, ¶ 1, 896 N.W.2d at 259.

336. *Id.* ¶ 6, 896 N.W.2d at 260.

337. *Id.*

338. *Id.* ¶ 7.

339. *Id.* ¶ 6.

340. *Huebner*, ¶ 10, 896 N.W.2d at 261.

341. *Id.* ¶ 9, N.W.2d at 261.

342. 2009 N.D. Laws ch. 317, § 5 (codified at N.D. CENT. CODE ANN. § 38-18.1-06.1(2) (West 2017)).

N.D.C.C. ch. 32-17, which would not require a reasonable inquiry.<sup>343</sup> In most of the cases discussed above, a quiet title action was brought, based on the traditional quiet title action statutes, because they were brought earlier than the effective date of the 2009 amendment which created the new quiet title procedure for abandoned mineral cases. A confusing situation had arisen due to the two different quiet title statutes. This was summarized in a 2010 law review article:

Under the 2009 amendments, the option of whether to bring a quiet title action appears to remain discretionary, as it did prior to the 2009 amendments in which the mineral owner had the option of bringing a quiet title action pursuant to chapter 32-17 of the North Dakota Century Code . . . However, potential confusion has arisen with the addition of the provision specifically providing for a quiet title action . . . Prior to the adoption of section 38-18.1-06.1, surface owners commenced quiet title actions pursuant to chapter 32-17. There is no indication that section 38-18.1-06.1 was meant to usurp the method for quieting title prior to the 2009 amendments; indeed the statute indicates whether a person brings a quiet title action at all is optional.<sup>344</sup>

The central issue in *Huebner* was of course not the quiet title action confusion but rather the mailing address.<sup>345</sup> The Court points out in its opinion, that the problem was the different zip codes in the two addresses.<sup>346</sup> The dates of the two recorded documents, were not far apart.<sup>347</sup> The opinion states that the oil and gas lease was signed on February 22, 1982.<sup>348</sup> The personal representative's deed was also dated in 1982, though the opinion does not supply the actual date.<sup>349</sup> In any case the Court labels the deed as the most recent document.<sup>350</sup> The crux of the analysis was that this deed did not include a zip code:

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343. N.D. CENT. CODE ANN. ch. 32-17 (West 2017).

344. Sara K. Sorenson, *A Need for Clarification: North Dakota's Abandoned Mineral Statute*, 86 N.D. L. REV. 521, 532-34 (2010).

345. *Huebner*, ¶ 9, 896 N.W.2d at 261.

346. *Id.* ¶ 11, 896 N.W.2d at 261.

347. *Id.* ¶ 3, 896 N.W.2d at 260.

348. *Id.*

349. *Id.*

350. *Id.* ¶ 20, 896 N.W.2d at 263.

Here, the 1982 personal representative's deed is the most recent address of record. However, it does not include a zip code. The issue in this case is whether a surface owner complies with the notice requirements of N.D.C.C. §38-18.1-06(2) by supplementing an address of record with a zip code.<sup>351</sup>

The relevant statutory provision states the requirement of the publication of a notice of lapse for three successive weeks and then reads "however, if the address of the mineral interest owner is shown of record," and then continues with the requirement of mailing a copy of the notice.<sup>352</sup> The Court follows the exact language in the statute: "We interpret the phrase 'shown of record' to require the surface owner to send notice to the address *as it appears* (emphasis added) in the recorded document."<sup>353</sup>

Since the address on the recorded personal representative's deed, which did not contain a zip code, is the most recent address, the insertion by the surface owner of a zip code in the mailed notice of lapse altered the address so that it was no longer the address "as shown of record:"

By not mailing notice to the address, as it appears in the record, the mailing requirements of N.D.C.C. § 38-18.1-062 (2006) were not complied with. This analysis is supported by our conclusion in *Capps v. Weflen* . . . that the address of record need not be the mineral owner's correct address for the mailing of the notice of lapse to satisfy the statutory requirement.<sup>354</sup>

It is interesting that the Court was not actually so much concerned as to whether the inserted zip code was correct, which it apparently was not, but rather that a zip code was inserted at all, thereby changing the address of record. The result in the case would probably have been the same if the issue had been whether the zip code was correct, as it apparently was not, since it was differed from the zip code that appeared in the address of the recorded oil and gas lease.

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351. *Huebner*, ¶ 20, 896 N.W.2d at 263-64.

352. N.D. CENT. CODE. § 38-18.1-06(2) (2017).

353. *Huebner*, ¶ 21, 896 N.W.2d at 264.

354. *Id.* ¶ 24, 896 N.W.2d at 264.



N. *SORENSEN V. BAKKEN INVESTMENTS, LLC*

*Sorenson v. Bakken Investments, LLC*<sup>355</sup> does not actually deal directly with the Termination of Mineral Interests Act and is mentioned here only because the Act is referenced in the opinion. The actual issue was a question of collateral estoppel concerning an attempt to vacate a judgment that had been entered in a quiet title action based on a claim made under the Act.<sup>356</sup> It is not clear from the opinion whether the quiet title action in question was brought under the “perfecting title in surface owner” provisions in the new quiet title action statute in 2009,<sup>357</sup> which is possible since the action was commenced in 2010, after the 2009 amendments were in effect. The Court does, however, quote from the long-established North Dakota quiet title provisions in N.D.C.C. 32-17-01.<sup>358</sup> It seems likely, therefore that the action was brought under the original quiet title action provisions in Chapter 32-17 rather than under the more recent provisions in the 2009 amendments.

## VII. CONCLUSION

As reflected in the discussion above, the North Dakota Supreme Court has established a fairly strict standard to be met with respect to the mailing of the notice of lapse, by any surface owner who seeks to acquire an “abandoned mineral interest” on his or her land. It is interesting that nearly all of the cases with which the Court has dealt in connection with this statute revolve around the surface owner’s notice of lapse provisions. This is logical since, apart from statements of claim that have been recorded in advance of receipt of a notice of lapse, those notices are the initial stimulus for the recording of claims by the mineral owners.

There do not seem to be any issues that arise through any kind of successful challenge by a surface owner as to whether the record mineral owner has correctly met the requirements for the recording of a statement of claim. Presumably, a statement of claim that contains a serious defect

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355. 2017 ND 127, 895 N.W.2d 302.

356. *Bakken Invs.*, ¶ 1, 895 N.W.2d at 304.

357. N.D. CENT. CODE. § 38-18.1-06.1 (2017).

358. N.D. CENT. CODE. ch. 32-17 (2017) stating:

An action may be maintained by any person having an estate or an interest in, or lien or encumbrance upon, real property, whether in or out of possession thereof and whether such property is vacant or unoccupied, against any person claiming an estate or interest in, or lien or encumbrance upon, the same, for the purpose of determining such adverse estate, interest, lien, or encumbrances.

would defeat the mineral owner's claim and would therefore allow the surface owner to acquire the mineral interest.

It is possible, of course, that the Court might be more lenient in a case involving the validity of the recorded statement of claim, on the grounds that any kind of recorded statement referencing the record mineral owner's interest would be sufficient to demonstrate that the mineral interest had not been abandoned, thus defeating the surface owner's attempt to acquire it. The statutes are a little confusing, in providing that the statement of claim must be filed prior to the end of the twenty-year period and then also providing that failure to file will not cause the mineral interest to be "extinguished," if the statement of claim or documentation that any of the statutory "uses" has occurred, is filed within sixty days after the first publication of the notice of lapse.<sup>359</sup> In any case, it is clear that there is a sixty-day period after the first publication of notice, and this would usually be the time in which the statement of claim, containing the name and address of the mineral owner, as well as the legal description of the land and the type of mineral, would be recorded, since it would be done in response to the notice.<sup>360</sup> For example, under the requirement to state the type of mineral requirement, suppose that the mineral owner, without consulting an attorney or reading the statute, simply lists "all minerals." Perhaps this is far-fetched, but would this statement cover any minerals at all if they were not specifically listed? In all of the cases discussed above, it appears that oil and gas is the mineral type in question, but would they be included if not listed as "oil and gas," or perhaps "hydrocarbons"? In order to reach the question of the validity of the statement of claim, of course, it would be necessary first for the surface owner to properly mail a copy of the notice of the lapse.<sup>361</sup> This is a significant hurdle for the surface owner, as demonstrated by the cases discussed above.<sup>362</sup>

All in all, the North Dakota Termination of Mineral Interests Act reflects a valid legislative goal. The purpose of this statute, and the statutes of the other states which have been enacted to deal with this issue is a laudable one: Dormant mineral statutes were enacted in many states to

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359. N.D. CENT. CODE. § 38-18.1-05 (2017).

360. N.D. CENT. CODE. § 38-18.1-06 (2017).

361. *Id.*

362. Under the Common Law tradition, of course, a plaintiff was required to plead the strength of his own case rather than to focus on any weakness in his opponent's case.

address the problem of fractionalized and unproductive mineral interests interfering with the development of mineral or surface estates.<sup>363</sup>

The intent of the North Dakota statute, as evidenced in the original North Dakota Legislature hearings on this issue was to provide a mechanism for eliminating old “unused” mineral and royalty interests from the record so as to simplify leasing of minerals and eliminate title problems arising from unlocatable heirs and successors by allowing for a procedure under which the mineral or royalty interest passes to the current surface owner.

While the implementation of this goal has probably been to some degree accomplished, it has required a significant amount of litigation, reflected in the North Dakota Supreme Court decisions discussed above. It has also led, in at least one instance to inconsistent statutory provisions, such as the conflict between the classical quiet title action described in N.D.C.C. ch. 32-17 and the specific quiet title action procedure that was attached to the Act in 2009. The traditional quiet title action contains no requirement for a reasonable inquiry to locate the address of the mineral owner. On the other hand, the Court’s decisions have firmly established that no reasonable inquiry is necessary if there is an address of record, whereas the 2009 quiet title action provisions require a reasonable inquiry to be conducted.<sup>364</sup> It is difficult to resolve this requirement with the statement in the same 2009 amendment stating that such a quiet title action would be essentially the same as one conducted under the traditional statute: “This action must be brought in the same manner and is subject to the same procedure as an action to quiet title pursuant to chapter 32-17.”<sup>365</sup>

Based on the dates involved in most, and probably in all, of the North Dakota Supreme Court cases discussed above, the plaintiffs must have brought their quiet title actions under Chapter 32-17. Several could have been brought after the 2009 amendment took effect, but this is unlikely since there is no indication in the opinions that a reasonable inquiry had been conducted. On the whole, the North Dakota Termination of Minerals Act has met some of the desired goals, but there are flaws that should be addressed, particularly the conflicting quiet title action provisions and perhaps an overly strict reading of the statutes that allows a notice of lapse mailed to a known deceased record mineral owner to satisfy the requirement.

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363. Janna A. Aginsky & Frank Erisman, *Dormant no More: Fracking Boom Causes States to Revisit Dormant Mineral Statutes*; (A.B.A., Section of Environment, Energy and Resources, Mining and Mineral Extraction Committee Newsletter) Aug. 31, 2015, at 1.

364. N.D. CENT. CODE. § 30-18.1-06.1(2) (2017).

365. N.D. CENT. CODE. § 30-18.1-06.1(1) (2017).

An inherent element, of course, in any of the abandoned minerals statutes enacted by North Dakota and various other states is the inevitability of contention between the surface owner and the mineral owner, as the surface owner seeks to acquire the mineral interest and the mineral owner seeks to retain it. The mineral owner presumably views the surface owner as a thief or a kind of poacher, seeking to acquire something for nothing, while the surface owner views an unused mineral interest as a barrier to the development of mineral resources. The logical argument from the surface owner's point of view would be that since the mineral owner has not used the interest for at least 20 years, there is likely to be no use of in the future unless ownership passes to the surface owner. The mineral owner's argument would be that the mere fact of failure to use a specific interest for twenty years could have a number of reasons, depending on preoccupation with other tracts owned, location of areas where the bulk of mineral activity was underway, lack of present funds to develop the mineral interests in a timely manner, etc. Clearly there is no ultimate solution that could satisfy both sides of the dispute, but, with some changes, as discussed above, perhaps an accommodation could be reached. In any case, it can be agreed that mineral interests are not being terminated or extinguished by becoming reunited with the overlying surface interest.

The internal tension between protecting individual property rights while encouraging economic activity that is at the heart of the dormant mineral statutes is still evident in every court decision interpreting these statutes, and providing procedural clarity and consistency in the application of these statutes may be the only way to ease it.<sup>366</sup>

One progressive step forward, for example, was the 2009 North Dakota amendment specifying the steps that must be taken to constitute a reasonable inquiry. Although the existing North Dakota Supreme Court cases do not deal with any instances where this statutory provision came into play, it may likely prove useful in future situations.<sup>367</sup>

### VIII. FINAL THOUGHTS

A final thought which might come to mind after the above discussion of the "abandoned minerals" issue in North Dakota, is whether the Marketable Record Title Act might be an alternative approach to the question. Under that Act, any person who holds an unbroken chain of title

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366. Aginsky, *supra* note 362, at 8.

367. See Gregory D. Russell and Lauren N. Fromme, *Dormant Minerals Acts: Addressing Severed Mineral Interests in a Fractional World*, 33 ENERGY & MIN. L. INST. 8, 295 (2012).

to an interest in real property “under a conveyance or other title transaction that has been of record for a period of twenty years or longer, and is in possession of the interest is deemed to have a marketable record title to the interest.”<sup>368</sup> It might seem that this could establish the ownership by the record mineral owner without the necessity of the filing of the statement of claim required under the Termination of Mineral Interest Act to avoid the surface owner’s attempt to acquire the mineral interest, as discussed at length above. The question would be whether the person seeking to rely upon the Marketable Record Title Act is actually in “possession” of the mineral interest.” This is answered by a statutory link made between these two Acts created by a 2013 legislative amendment to the Marketable Record Title Act:

The holder of an interest in severed minerals is deemed in possession of the minerals if that person has used the minerals as defined in section 38-18.1-03 and the use is stated in the affidavit of possession provided for in this section.<sup>369</sup>

In other words, it appears that the owner of the mineral interest would be able, by filing such an affidavit of possession under the Marketable Record Title Act, to accomplish essentially the same thing as if he or she had filed a statement of claim under the Termination of Mineral Interest Act.

It has also been suggested that the North Dakota adverse possession statute<sup>370</sup> could have some impact in these kinds of situations. The adverse possession criteria, however, do not fit in this context, as pointed out in a 1994 law review article on mineral ownership:

If the mineral estate is successfully severed from the surface by one who has the ability to do so, then acts performed with respect to the surface no longer have any possessory significance with respect to the now separate mineral estate. It can now be regarded as a separate, but buried tract of land; if the law of adverse

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368. N.D. CENT CODE 47-19.1-01 (2017).

369. *Id.* § 47-19.1-07; § 38-18.1-03 (2017) is, of course, the section of the Termination of Mineral Interest which defines what is meant by “use.”

370. *Id.* § 47-06-03.

possession is to operate with respect to it, the basis must be an actual possession of the minerals themselves . . .

The doctrine of adverse possession as applied by the common law to the mineral estate provides a means of terminating the mineral estate due to extended nonuse only when the mineral estate is severed after the period of possession begins.<sup>371</sup>

This description of the apparent inability of the adverse possession doctrine to be available or helpful in the context of the acquisition of title to severed mineral interests by a surface owner is confirmed in a recent decision by the North Dakota Supreme Court in *Black Stone Minerals Co. v. Brokaw*.<sup>372</sup>

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371. Ronald W. Polston, *Mineral Ownership Theory: Doctrine in Disarray*, 70 N.D. L. REV. 541, 560 (1994).

372. 2017 ND 110, 893 N.W.2d 498 (2017) (holding that “no one could have adversely possessed the minerals” until the first well was spudded in the tract in question).