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A NEED FOR CLARIFICATION:
NORTH DAKOTA’S ABANDONED MINERAL STATUTE

SARA K. SORENSON*

ABSTRACT

North Dakota’s abandoned mineral statute plays an important role in the development of North Dakota’s mineral acres and the protection of surface owners who bear the burden of mineral development. This article proposes amendments to the statute in order to advance these interests.

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I. INTRODUCTION

For nearly thirty years, North Dakota has had an abandoned mineral statute, allowing surface owners to reclaim mineral interests that were previously severed from the surface estate.¹ The statute garnered very little attention until North Dakota's most recent oil boom, which began in roughly the mid-2000s.² Since then, the statute has been amended every year the legislature has been in session—in 2005, in 2007, and in 2009.³ This article proposes additional amendments in light of the North Dakota Supreme Court's explicit invitation to clarify the statute in *Johnson v. Taliaferro*⁴ and in an attempt to prevent litigation over potentially ambiguous provisions. First, however, an explanation of the genesis of the abandoned mineral statute will be provided. Then, this article will explain potential infirmities with the abandoned mineral statute in its current form. Finally, recommendations will be made for amending the statute.

II. BACKGROUND OF NORTH DAKOTA'S ABANDONED MINERAL STATUTE

As property has been conveyed in North Dakota, the mineral estate has often been severed from the surface estate, such that the party owning the surface estate is different from the party owning the mineral estate on the same tract of land.⁵ This happens a number of ways. For example, the original owner of both the mineral estate and the surface estate could transfer the entire surface estate and retain the mineral estate or a portion thereof, or vice-versa.⁶ As mineral estates are conveyed or transferred from generation to generation, the mineral estate often becomes fractionalized, as demonstrated by the following example:

A sells the surface and half of the mineral rights to . . . B. [B] then does the same thing by selling the surface and half of the remaining mineral rights to . . . C. At this point, . . . C owns the surface

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1. N.D. CENT. CODE §§ 38-18.1-01 to -08 (Supp. 2009).

2. *N.D. Oil Impact Tripled from 2005 to 2009*, MINOT DAILY NEWS, Jan. 26, 2011, <http://www.minotdailynews.com/page/content.detail/id/551235/N-D--oil-impact-tripled-from-2005-to-2009.html?nav=5583>. From 1983 until 2005, the statute was amended once. 1989 N.D. Laws 1186.

3. 2009 N.D. Laws 1216; 2007 N.D. Laws 1220; 2005 N.D. Laws 1254.

4. *Johnson v. Taliaferro*, 2011 ND 34, ¶ 20, 793 N.W.2d 804, 808 (VandeWalle, C.J., concurring specially).

5. *Surface Rights and Mineral Rights*, N.D. STATE UNIV. DEP'T OF AGRIBUSINESS & APPLIED ECONS. (Aug. 29, 2010), http://www.ndsu.edu/pubweb/~saxowsky/aglawtextbk/ref_topics/surfacemineralrights.htm.

6. *Id.*

and 25% of minerals, B owns 25% of minerals and A owns 50% of minerals. If A then bequeaths his or her property to three children as heirs, the surface and 25% of minerals will be owned by C, B owns 25% of the mineral rights, and [the children of A], A1, A2, and A3 each own 16.7% of the mineral rights.⁷

Accordingly, “a quarter section of land may have hundreds of individuals with severed mineral rights in relation to that quarter.”⁸

Until 1983, with the adoption of the abandoned mineral statute, there were “no countervailing influences in the law to reduce or limit the tendency of these fractional interests to be owned by unknown or unlocatable owners.”⁹ Prior to the abandoned mineral statute’s enactment, there was no requirement for these mineral owners to keep an updated address of record. In addition, although there have been attempts to do so, no real estate tax is imposed on mineral owners in North Dakota.¹⁰ From 1907 until 2009, county assessors were charged with listing and assessing mineral interests for tax purposes.¹¹ Because of the difficulty in locating the owners and assessing the value of the mineral interests, the law was never followed.¹² Finally, possession of the surface estate by the surface owner alone cannot constitute adverse possession of the mineral estate.¹³ A surface owner must actually begin exploiting the minerals in order to adversely possess the mineral estate.¹⁴

The proliferation of fractionalized interests can have the effect of hampering mineral development:

[Fractionalized mineral interests] increase[] the likelihood that a potential developer will not be able to locate the owners of the interest to make the conveyance necessary to begin the development process. Without a recording requirement, the task of locating the necessary owners may be impossible or prohibitively expensive. Moreover, the alternative of attempting to develop the mineral interest without the owner’s consent is not attractive.¹⁵

7. *Id.*

8. H.R. Con. Res. 3045, 2009 Leg., 61st Sess. (N.D. 2009).

9. *Van Slooten v. Larsen*, 299 N.W.2d 704, 711 (Mich. 1980).

10. N.D. LEGIS. COUNCIL STAFF, SEVERED AND ABANDONED MINERALS: BACKGROUND MEMORANDUM, H.R. Con. Res. 3045, 61st Sess. (N.D. 2009).

11. *Id.*

12. *Id.*

13. *Burlington Northern, Inc. v. Hall*, 322 N.W.2d 233, 241 (N.D. 1982).

14. *Id.*

15. *Van Slooten v. Larsen*, 299 N.W.2d 704, 711 (Mich. 1980).

Also, if the mineral interests have been unused for a number of years, fractionalized interests create uncertainties in title.¹⁶ North Dakota has a long-standing policy of promoting mineral development in the state.¹⁷ Accordingly, it adopted an abandoned mineral statute in 1983, which requires mineral owners to either use the mineral interest or file a statement of claim to the mineral interest every twenty years.¹⁸ If the mineral interest owner does not fulfill either of these requirements, the surface owner may reclaim the severed mineral interest.¹⁹

While seeking to promote mineral development, the North Dakota Legislature has also recognized that “[e]xploration for and development of oil and gas reserves in this state interferes with the use, agricultural or otherwise, of the surface of certain land.”²⁰ Only about twenty-five percent of surface owners in North Dakota also own the mineral estate.²¹ In addition to fostering mineral development, North Dakota’s abandoned mineral statute can have the effect of protecting the surface owner from the burdensome effect of mineral development that is borne by the surface owner.²²

North Dakota recognizes that when a mineral estate is severed from the surface estate, the mineral estate is dominant.²³ This means that the surface owner, who does not own the mineral estate, must yield the use of the surface to the mineral owner so that the mineral owner may “explore, develop, and transport the minerals.”²⁴ North Dakota has enacted legislation to compensate the surface owner for damages from the effects of mineral development.²⁵ Because of the dominance of the mineral estate, however, the surface owner typically has little leverage to influence the location of roads, pipelines, well sites, and other physical obstructions that may burden the surface owner’s use of the property.²⁶ Farming becomes difficult and

16. *Texaco, Inc. v. Short*, 454 U.S. 516, 523 (1982).

17. N.D. CENT. CODE § 38-08-01 (Supp. 2009) (“It is hereby declared to be in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste[.]”).

18. *Id.* § 38-18.1-02.

19. *Id.* §§ 38-18.1-01 to -08.

20. *Id.* § 38-11.1-01.

21. Jill Schramm, *Surface Owners Want Stronger Rights*, MINOT DAILY NEWS, Aug. 28, 2010, <http://www.minotdailynews.com/page/content.detail/id/542401.html?nav=5010>.

22. *Id.*

23. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979).

24. *Id.*

25. N.D. CENT. CODE §§ 38-11.1-01 to -10.

26. As of the time of this writing, House Bill 1241 is pending and would create section 38-11.1-04.1 of the North Dakota Century Code to require mineral developers to provide surface owners “[a]n offer to discuss and agree to consider accommodating any proposed changes to the proposed plan of work and oil and gas operations before commencement of oil and gas

inefficient when farmers with large, modern equipment have to navigate around oil and gas operations in the middle of their farming operation.²⁷ This problem may be alleviated if the surface owner owns the mineral rights beneath the surface because then the surface owner may bargain for specific provisions to be included in any oil and gas lease regarding well location and other physical obstructions.²⁸ The surface owner may also bargain for any other provision that would affect the surface production, such as requiring a particular form of reclamation of the surface once the oil and gas operations are complete.²⁹

In short, agriculture is and always has been an important part of North Dakota's economy; indeed, roughly ninety percent of North Dakota's land area is dedicated to farming.³⁰ Oil development is becoming an increasingly important part of North Dakota's economy, and North Dakota has now climbed to the fourth largest oil producing state, after Texas, Alaska, and California.³¹ The North Dakota abandoned mineral statute has the potential to reconcile these two seemingly incongruous and important North Dakota interests by providing a method to clear title of absentee mineral owners and, therefore, clearing the way for mineral development upon the surface, and at the same time giving the surface owner a potential stake and, thus, a potential say in how oil and gas operations are conducted on the surface owner's land.

III. POTENTIAL INFIRMITIES WITH NORTH DAKOTA'S ABANDONED MINERAL STATUTE AND PROPOSED AMENDMENTS

In order to give effect to the purposes of North Dakota's abandoned mineral statute, the statute should be clarified in three material respects: (1) clarifying when a mineral interest is deemed to be "used;" (2) expanding upon the description of the requirements of a reasonable inquiry; and (3) clarifying the provision regarding a quiet title action.

operations[.]” H.B. 1241, 2011 Leg., 62d Sess. (N.D. 2011). Certainly this proposal has good intentions and purports to allow surface owners a voice with regard to the placement of roads, pipelines, and well sites as well as other development plans. Given that the mineral developer has the final say, however, this requirement may be merely perfunctory.

27. Caroline Downs, *Group Strives for Improved Landowner Surface Rights*, KENMARE NEWS, Feb. 23, 2011, at 1.

28. See Ron Anderson, *North Dakota Oil & Gas Leasing Considerations*, EXTENSION BULLETIN 29, Oct. 2006, at 17 (listing proposed contract provisions that will reduce surface damages).

29. *Id.*

30. U.S. DEP'T OF AGRIC., AC-07-A-51, 2007 CENSUS OF AGRICULTURE, at 350 (Dec. 2009).

31. Ben Casselman, *Oil Industry Booms—in North Dakota*, WALL ST. J., Feb. 26, 2010, at 1.

A. THE ABANDONED MINERAL STATUTE SHOULD CLARIFY WHEN A MINERAL INTEREST IS DEEMED TO BE “USED”

As explained above, a surface owner may reclaim a previously severed mineral interest if the interest is unused for a period of twenty years.³² The abandoned mineral statute defines “use” as follows:

1. A mineral interest is deemed to be used when:
 - a. There are any minerals produced under that interest.
 - b. Operations are being conducted thereon 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 owners of such mineral interest.
 - d. The mineral interest on any tract is subject to a lease, mortgage, assignment, or conveyance of the mineral interest recorded in the office of the recorder in the county in which the mineral interest is located.
 - e. The mineral interest on any tract is subject to an order or an agreement to pool or unitize, recorded in the office of the recorder in the county in which the mineral interest is located.
 - f. Taxes are paid on the mineral interest by the owner or the owner’s agent.
 - g. A proper statement of claim is recorded as provided by section 38-18.1-04.
2. The 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 does not satisfy the requirements of this section and the mineral interest is not deemed to be used for purposes of this section. Interest on such account must be credited to the account and may not be used for any other purpose. A named or unnamed interest-bearing account, trust account, escrow account, or any similar type of account that has been in existence for three years is deemed to be abandoned

32. N.D. CENT. CODE § 38-18.1-02 (Supp. 2009).

property and must be treated as abandoned property under chapter 47-30.1. A lease given by a trustee remains valid.³³

As explained above, one of the purposes of the abandoned mineral statute is to remove uncertainties in title with regard to forgotten and abandoned mineral interests.³⁴ Accordingly, under the statutes defining “use,” mineral owners should be required to take some sort of affirmative action to either use or cause their minerals to be used so there is an indication that the mineral interests are not forgotten or abandoned. When reading the abandoned mineral statute as a whole, the abandoned mineral statute appears to require affirmative action on the part of the mineral owner in order to preserve his or her interests. Thus, for example, a mineral owner cannot “use” his or her interest merely by the accrual of royalties with regard to his or her interest.³⁵

While the statute overall seems to indicate an intent for the mineral owner to take affirmative action to preserve his or her mineral interest, portions of the statute, when read in isolation, could be read to require no action upon the part of the mineral owner in order for the mineral interest to be deemed “used.” For example, a mineral interest is deemed to be used when “[t]here are any minerals produced under that interest.”³⁶ The requirements of the statute are written in a passive voice, so it is not always clear that the mineral owner has to take an affirmative action to preserve the mineral interest. In other words, in subdivision (1)(a), it is unclear as to *whom* is required to be responsible for the production of minerals under that interest.³⁷

It is conceivable that someone other than the mineral owner could take action to have minerals produced under the mineral owner’s interest. It is also possible for a mineral owner to accrue royalties even if the owner has taken no affirmative action to use the mineral interests. North Dakota allows forced pooling.³⁸ Thus, if there are two or more separately owned tracts within a spacing unit,³⁹ the North Dakota Industrial Commission may “enter an order pooling all interests in the spacing unit for the development

33. *Id.* § 38-18.1-03.

34. *See* *Texaco, Inc. v. Short*, 454 U.S. 516, 523 (1982).

35. N.D. CENT. CODE § 38-18.1-03(2).

36. *Id.* § 38-18.1-03(1)(a).

37. *Id.* In contrast, subdivision (1)(c) specifically provides there is “use” if production is “by the owners of such mineral interest.” *Id.* § 38-18.1-03(1)(c).

38. *Id.* § 38-08-08.

39. Set by the North Dakota Industrial Commission, a spacing unit is the size and particular area of land on which a well may be drilled. *Id.* § 38-08-07. A typical spacing unit in the Bakken Shale producing areas is typically either one section (640 acres) or two sections (1280 acres), with a two-section spacing unit being the most common. *See Surface Owner Info Center*, N.D. PETROLEUM COUNCIL (2010), <http://www.ndoil.org/?id=184&page=Surface+Owner+Info+Center>.

and operations thereof.”⁴⁰ The mineral owner whose interest has been pooled is then entitled to be paid a royalty when there is production within the spacing unit, even if the mineral owner has done absolutely nothing, not even entered into a lease, to foster the mineral development.⁴¹

The payment of royalties to the mineral owner does not satisfy the definition of “use” under North Dakota’s abandoned mineral statute.⁴² Yet, a mineral interest is deemed to be used if “[t]here are any minerals produced under that interest.”⁴³ These two provisions are seemingly incongruous if subsection (1)(a) is read to mean that *any* production constitutes a use—even production by someone other than the mineral owner or the mineral owner’s agent—because the payment of royalties implies that minerals are being produced under the owner’s interest.⁴⁴ In other words, once there is production generated from the owner’s interest, royalties are paid. Accordingly, it does not make sense to say that “production of minerals” *by anyone* constitutes a “use” when the “payment of royalties” does not. These two provisions can be reconciled, however, by reading the statute to require an affirmative use *by the mineral owner* to preserve the mineral interest. This interpretation squares with the intent behind the statute to cure uncertainties in title by allowing for the reclamation of unused and forgotten mineral interests.⁴⁵

To make it clear that an affirmative use is required by the mineral owner in order to preserve his or her interest, an amendment to the statute is proposed as follows, with underlined provisions indicating proposed additional language and stricken-out language indicating proposed deletions:

1. A mineral interest is deemed to be used when:
 - a. There are any minerals produced under that interest by the owner of such mineral interest.
 - b. Operations are being conducted thereon for injection, withdrawal, storage, or disposal of water, gas, or other fluid substances by the owner of such mineral interest.

40. N.D. CENT. CODE § 38-08-08(1).

41. *Id.* § 38-08-08.

42. *Id.* § 38-18.1-03(2).

43. *Id.* § 38-18.1-03(1)(a).

44. Indeed, if royalty payments are not being paid within 150 days after production, the operator of the well is required to pay interest at the rate of 18% per annum until paid. *See id.* § 47-16-39.1.

45. *Id.* §§ 38-18.1-01 to -08.

- c. In the case of solid minerals, there is production from a common vein or seam by the owners of such mineral interest.
- d. The mineral interest on any tract is subject to a lease, mortgage, assignment, or conveyance of the mineral interest recorded in the office of the recorder in the county in which the mineral interest is located.
- e. The mineral interest on any tract is subject to an order or an agreement to pool or unitize, recorded in the office of the recorder in the county in which the mineral interest is located.
- f. Taxes are paid on the mineral interest by the owner or the owner's agent.
- g. A proper statement of claim is recorded as provided by section 38-18.1-04.

If the statute were amended as set forth above, to require an affirmative action by the mineral owner to preserve his or her interest, then the statute would perform its function of clearing title to those minerals that are abandoned or forgotten.

B. THE ABANDONED MINERAL STATUTE SHOULD EXPAND UPON THE DESCRIPTION OF THE REQUIREMENTS FOR A "REASONABLE INQUIRY"

Under some circumstances,⁴⁶ in order to reclaim severed mineral interests, the surface owner is required to conduct a "reasonable inquiry" for the address of the record owner of the mineral interests and then provide notice to the mineral owner of the impending lapse of his or her interest.⁴⁷ In 1999, the North Dakota Supreme Court determined whether a "reasonable inquiry" had been conducted was a fact question.⁴⁸ Likely with the laudable goal of making this determination easier, the 2009 legislature set forth specific inquiries the surface owner must make to satisfy the reasonable inquiry requirement:

46. The North Dakota Supreme Court has held pursuant to the pre-2009 abandoned mineral statute and for mineral interests reclaimed prior to 2009, a surface owner is not required to conduct a reasonable inquiry if the mineral owner's address appears of record. *See Johnson v. Taliaferro*, 2011 ND 34, ¶ 17, 793 N.W.2d 804, 807-08; *Sorenson v. Felton*, 2011 ND 33, ¶ 14, 793 N.W.2d 799, 803. However, the court has indicated it is unclear whether the 2009 amendments require a reasonable inquiry in every case, even when the mineral owner's address appears of record. *See Taliaferro*, ¶ 20, 793 N.W.2d at 808.

47. N.D. CENT. CODE § 38-18.1-06.

48. *Spring Creek Ranch v. Svenberg*, 1999 ND 113, ¶ 20, 595 N.W.2d 323, 328.

To constitute a reasonable inquiry as provided in subsection 2, 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 interest;
- 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.⁴⁹

The 2009 legislation, while providing direction on how to conduct a reasonable inquiry, has also created additional questions. If all of the delineated steps are followed, can the court find that the surface owner has conducted a reasonable inquiry? Or, is additional inquiry required depending on what the search reveals? Does the reference to the county recorder's records and the clerk of court's records refer to the records located in the county in which the mineral interest is located? Who are "known heirs," and are they required to receive notice?⁵⁰ Also, what would be required to "identify the owner of the mineral interest?"

In order to provide a clear answer to these questions and to supply a roadmap to the surface owner as to what is required to constitute a reasonable inquiry, the following amendments are proposed to section 38-18.1-06(6):

To constitute a reasonable inquiry as provided in subsection 2, 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 interest;~~⁵¹

49. N.D. CENT. CODE § 38-18.1-06(6).

50. The statute only requires notice be given to the owner, not the "known heirs of the owner." *See id.* § 38-18.1-06(2).

51. Deleting this section is proposed because if there are any "uses" as defined in section 38-18.1-03, the mineral interest does not lapse. *Id.* § 38-18.1-02. Moreover, if there are any addresses of record for the mineral owner, it is already required that notice be sent to that address. *Id.* § 38-18.1-06(2). Accordingly, this section does not appear to accomplish any substantive purpose.

- b.a. The clerk of court's records, in the office of the county recorder in which the mineral interest in question is located, for the existence of any judgments, liens, or probate records which identify the address of the owner of the mineral interest;
- e-b. If the search referenced in subsection (6)(ab) reveals that the owner is deceased, the social security death index for the last-known residence of the owner of the mineral interest, and
- d.c. ~~One or more public internet databases to locate or identify the owner of the mineral interest or any known heirs of the owner~~ to search for the address of the mineral owner. If the search referenced in subsection (6)(ab) reveals that the owner is deceased and also reveals the heirs and/or devisees of the mineral owner, then one or more public internet databases should be searched for the address(es) of the heirs and/or devisees of the mineral owner. The owner or owners of the surface estate are not required to conduct internet searches on private fee internet databases.

If the owner or owners of the surface estate or the owner's authorized agent completes all of the searches set forth in this subsection, then a "reasonable inquiry" has been performed. If the owner or owners of the surface estate or the owner's authorized agent surface owner finds any addresses for the mineral owner or the heirs and/or devisees of the mineral owner, then notice, as provided in subsection 2, must be mailed to the mineral owner or the heirs and/or devisees of the mineral owner.

The abandoned mineral statute was intended to be simple enough so that a surface owner could reclaim the mineral interest without resorting to assistance from a lawyer.⁵² The proposed amendments, with additional explanation to clarify the requirements of what constitutes a "reasonable inquiry," attempt to accomplish that goal.

52. In 2007, Representative David Drovdal explained the abandoned mineral statute was intended to be simple enough for a surface owner to reclaim his or her minerals: "My comment was that Attorneys are needed many a time. I don't believe our Century Code should be used as job security for attorneys and that the law should be plain enough so if a person wishes to do their own paperwork they can." *Hearing on H.B. 1045 Before the S. Judiciary Comm.*, 2007 Leg., 60th Sess. (N.D. 2007) (testimony of Rep. David Drovdahl); *see also* N.D. Op. Att'y Gen. 95-L-44 (1995).

C. THE ABANDONED MINERAL STATUTE SHOULD BE CLARIFIED
WITH REGARD TO THE PROVISION PERTAINING TO A QUIET
TITLE ACTION

Provided the surface owner has taken all of the appropriate steps to reclaim the severed mineral interest, the ownership of the mineral interest vests in the surface owner upon the first publication of the notice of lapse.⁵³ Pursuant to a North Dakota Attorney General Opinion interpreting the pre-2009 amendments and the legislative history of the abandoned mineral statute, the abandoned mineral statute was intended to be self-executing in order to avoid quiet title actions in every instance in which a mineral interest is reclaimed by the surface owner.⁵⁴ Nonetheless, the 2009 amendments to the abandoned mineral statute indicate the surface owner has the option of bringing a quiet title action:

Upon completion of the procedure provided in section 38-18.1-06, the owner or owners of the surface estate may maintain an action in district court in the county in which the minerals are located and obtain a judgment in quiet title in the owner or owners of the surface estate. 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 32-17.⁵⁵

Under the 2009 amendments, the option of whether to bring a quiet title action appears to remain discretionary,⁵⁶ 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.⁵⁷

However, potential confusion has arisen with the addition of the provision specifically providing for a quiet title action. The confusion centers around the language of the quiet title provision, which provides that in order to quiet title pursuant to section 38-18.1-06.1 of the North Dakota Century Code, “the owner or owners of the surface estate shall submit evidence to the district court establishing that all procedures required by

53. *Johnson v. Taliaferro*, 2011 ND 34, ¶ 17, 793 N.W.2d 804, 807-08 (quoting N.D. CENT. CODE § 38-18.1-02 (2004 & Supp. 2009)) (“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.”).

54. N.D. Op. Att’y Gen. 95-L-44 (1995).

55. N.D. CENT. CODE § 38-18.1-06.1(1).

56. The statute provides, “[T]he owner or owners of the surface estate *may* maintain an action in district court in the county in which the minerals are located and obtain a judgment in quiet title[.]” *Id.* § 38-18.1-06.1(1). The use of the word “may” connotes discretion. *See Strand v. Cass County*, 2008 ND 149, ¶ 12, 753 N.W.2d 872, 876 (N.D. 2008) (referring to “may” as discretionary language).

57. *See, e.g., Sorenson v. Felton*, 2011 ND 33, ¶ 9, 793 N.W.2d 799, 802 (hearing a case in which the surface owner brought a quiet title action prior to the 2009 amendments).

this chapter were properly completed *and that a reasonable inquiry as defined by subsection 6 of section 38-18.1-06 was conducted . . .*”⁵⁸ The new language creates confusion because the North Dakota Supreme Court has recently determined under the pre-2009 amendments, a reasonable inquiry is only required if the mineral owner’s address does not appear of record.⁵⁹ In order to reach this conclusion, the supreme court interpreted language that was unchanged by the 2009 amendments.⁶⁰

Thus, following the 2009 amendments, the abandoned mineral statute provides in one section that a “reasonable inquiry” is not required, but yet in another section provides that a “reasonable inquiry” is required if the mineral owner seeks to quiet title to the reclaimed minerals pursuant to section 38-18.1-06.1.⁶¹ In a special concurrence, Chief Justice VandeWalle indicated this confusion will need to be resolved either by the legislature or by subsequent litigation.⁶²

While the issue has not yet been resolved, an argument can be made that section 38-18.1-06.1 is not the exclusive method for quieting title to minerals reclaimed under the abandoned mineral statute. Rather, section 38-18.1-06 provides the method for quieting title when there is a question about whether a reasonable inquiry was conducted.⁶³ If, however, the mineral owner’s address appears on record, no reasonable inquiry is required, and, arguably, title can be quieted pursuant to chapter 32-17 of the North Dakota Century Code without resort to the provisions of 38-18.1-06.

Prior to the adoption of section 38-18.1-06.1, surface owners commenced quiet title actions pursuant to chapter 32-17.⁶⁴ There is no indica-

58. N.D. CENT. CODE § 38-18.1-06.1(2) (emphasis added).

59. *Felton*, ¶ 14, 793 N.W.2d at 803 (“Under our construction, Sorenson was required to conduct a reasonable inquiry only if Felton’s address was not shown of record.”).

60. The court was interpreting section 38-18.1-06(2) of the North Dakota Century Code, which requires notice by mail “if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry[.]” *Id.* (citing N.D. CENT. CODE § 38-18.1-06(2) (2004)). This provision was unchanged following the 2009 amendments. *See* N.D. CENT. CODE § 38-18.1-06(2) (Supp. 2009).

61. *Johnson v. Taliaferro*, 2011 ND 34, ¶ 15, 793 N.W.2d 804, 807.

62. *Id.* ¶ 20, 793 N.W.2d at 808 (VandeWalle, C.J., concurring specially). The Chief Justice stated:

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.

Id.

63. N.D. CENT. CODE § 38-18.1-06.

64. *See* *Spring Creek Ranch v. Svenberg*, 1999 ND 113, ¶ 20, 595 N.W.2d 323, 328.

tion 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.⁶⁵ Nonetheless, legislative clarification on this issue would be helpful to definitively resolve the issue.

To reconcile the quiet title provision with the portion of the statute that indicates a reasonable inquiry is not needed in every instance, the following amendment is proposed to section 38-18.1-06.1(2) of the North Dakota Century Code:

In an action brought under this section, the owner or owners of the surface estate shall submit evidence to the district court establishing that all procedures required by this chapter were properly completed and that, if necessary, a reasonable inquiry as defined by subsection 6 of section 38-18.1-06 was conducted. If the district court finds that the surface owner has complied with all procedures of the chapter and, if necessary, 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.

IV. CONCLUSION

The abandoned mineral statute is intended to advance the important purposes of promoting mineral development and clearing uncertainties in mineral titles. However, advancement is slowed by a statute that is sufficiently unclear to require litigation to devise its meaning. Accordingly, legislative action is urged to clarify the abandoned mineral statute.

65. See N.D. CENT. CODE § 38-18.1-06.