

## Memorandum 83-33

Subject: Study H-402 - Dormant Mineral Rights (Revised Tentative Recommendation)

In connection with its marketable title recommendations, the Commission developed and distributed for comment in 1981 a tentative recommendation relating to dormant mineral rights. The tentative recommendation provided for expiration of a mineral right by operation of law if the right was dormant for a period of one year and no instrument affecting the right or a notice of intent to preserve the right was recorded for 20 years.

This tentative recommendation was unfavorably received, particularly by the oil companies. Among the problems pointed out were that a one-year dormancy period is too short, not allowing for temporary cessation of operations, that such a scheme is confiscatory and possibly unconstitutional, and that other alternatives for handling marketability problems created by dormant mineral rights should be explored.

In response to these comments the Commission withdrew the tentative recommendation for further consideration of the objections, to review other statutory schemes, and to await the decision of the United States Supreme Court in the case of Texaco v. Short, involving a challenge to the constitutionality of an Indiana dormant mineral rights statute comparable to the Commission's tentative recommendation.

We now have the decision in Texaco v. Short, 102 S. Ct. 781 (1982), which by a 5-4 decision upheld the constitutionality of the Indiana dormant mineral rights statute, stating, "We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest." The dissenters felt that the statute would be constitutional if applied prospectively, but if applied retroactively to mineral interests created before its enactment it would have to provide for notice to the mineral owner before the mineral interest could constitutionally be terminated.

This decision gives us substantial leeway in drafting dormant mineral rights legislation (as well as marketable title legislation generally). However, aside from the constitutionality of the legislation,

the staff believes we should attempt to accommodate to the extent practical the legitimate objections of affected persons concerned about the possible loss of a substantial property interest.

Although our initial effort in this area was to provide a mechanical, non-judicial means of terminating dormant mineral rights, our proposal generated substantial concern among affected persons. This was particularly true of the relatively short one-year nonuse period. The reason we recommended a short dormancy period was to enable a title insurer to insure title based on a factual investigation; if the statute were to require 20 years of nonuse before a mineral right expires, a title insurer would be unwilling to insure title and a court determination of dormancy would be required in every case to achieve marketability of title.

The staff believes that we must respond to the concerns of the affected persons by requiring 20 years of nonuse and a judicial determination of dormancy in order to terminate a mineral right. While this will not achieve the automatic termination feature we originally sought, it will give substantial protection to holders of mineral interests and yet still enable the surface owner to obtain marketable title in an appropriate case. In essence, the statute will enable an action to clear title on the ground of dormancy; this cannot be done under existing law except in limited cases and upon a difficult showing of intent to abandon.

The staff draft of this procedure also includes a requirement that, if the value of the mineral right being terminated is more than nominal, the court must value the right and require that payment of its value be made before the right is terminated. While such a provision is not constitutionally required, it will avoid the confiscatory aspect of the legislation. Moreover, in the staff's opinion it will not be a burdensome requirement for the surface owner since in the ordinary case we seek to deal with the value of the mineral right is nominal or zero.

As so drafted, the dormant mineral rights statute will be substantially different in character from the other marketable title provisions the Commission has proposed, since the other provisions are nonjudicial and automatic in operation. However, the Commission's initial decision in this area was to tailor a marketable title provision for each type of interest involved. Mineral rights are substantially different in character,

and have potentially greater value than, the other interests we have dealt with so far, so that substantially different treatment is warranted. If the Commission approves this approach, we will redistribute the revised tentative recommendation for comment.

Respectfully submitted,

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STAFF DRAFT

## REVISED TENTATIVE RECOMMENDATION

relating to

## DORMANT MINERAL RIGHTS

It is a common occurrence in California conveyancing that a grantor of real property reserves mineral rights from the grant, even though there may be no reasonably foreseeable possibility that the rights will ever be exploited.<sup>1</sup> The pattern of large-scale reservation of mineral rights on a speculative basis leaves many titles unnecessarily clouded and substantially impairs the marketability of otherwise useful real property.<sup>2</sup>

This situation can persist indefinitely, since severed mineral rights can take the form of a fee interest.<sup>3</sup> Even a grant of minerals following a typical reservation of mineral rights that by its terms is

1. See, e.g., Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 853 (1970); Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1231-32 ("Although there appear to be no statistics on the extent of the severance, it is a matter of common knowledge that mineral rights have been severed from large amounts of surface acreage in mineral-producing states.")
2. See, e.g., L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 241 (1960) ("Such interests are widely acquired on a speculative basis and present an intolerable situation after they have proved to be worthless.").
3. Grants or reservations of mineral rights can take innumerable forms including but not limited to a mineral interest, leasehold, easement, profit a prendre, rents, and royalties. California law distinguishes between fixed-location minerals such as ore, metal, and coal which are owned by the surface owner and which can be severed from the surface and conveyed in fee, and fugacious minerals such as oil and gas which are not owned by the surface owner and cannot be conveyed as a fee estate but only as a profit a prendre, a type of incorporeal hereditament. See, e.g., In re Waltz, 197 Cal. 263, 240 P. 19 (1925); Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935). A profit a prendre may be unlimited in duration by its terms, but is subject to abandonment. See, e.g., Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237 (1935); Gerhard v. Stephens, 68 Cal.2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

limited in duration may violate the Rule Against Perpetuities, so that what appears to be a limited mineral right is in fact a perpetual mineral right.<sup>4</sup>

The impairment of marketability caused by dormant mineral rights affects both surface and subsurface interests. A conveyance of subsurface mineral rights includes the right of access over the surface and restricts the use of the surface. The surface ownership "may be burdened in part, and, in very rare cases perhaps, in its totality, by the reasonable exercise of the rights of the owner of the oil and mineral estate."<sup>5</sup> Old mineral rights created in the 19th century can adversely affect the development of the surface in the 20th century despite changed conditions that have made development of the surface of greater importance to society as a whole than the undeveloped mineral rights and that have made the value of the undeveloped mineral rights insignificant in comparison with the value of the surface.<sup>6</sup>

Dormant mineral rights also impede development of the subsurface minerals. The existence of a dormant mineral interest discourages drilling and other mineral exploration efforts by increasing the risks associated with such operations: the owners of the interests are often difficult to identify and locate, and mineral exploiters face the possibility of severe penalties if they drill without obtaining the consent of all the mineral-rights owners, for example, by a requirement of accounting to nonconsenting owners (who run no risk) for a share of production.<sup>7</sup>

4. See, e.g., *Victory Oil Co. v. Hancock Oil Co.*, 125 Cal. App.2d 222, 270 P.2d 604 (1954) (executory interest following reservation of mineral rights that "shall continue for a period of twenty (20) years, and so long thereafter as oil, gas, or other minerals may or shall be produced therefrom in paying quantities" violates Rule Against Perpetuities). But see *Rousselot v. Spanier*, 60 Cal. App.3d 238, 181 Cal. Rptr. 438 (1976).
5. *Wall v. Shell Oil Co.*, 209 Cal. App.2d 504, 513, 25 Cal. Rptr. 908, 913 (1962).
6. See discussion in Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 147-48 (1969).
7. See discussion in Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1231-33 (1969).

For these reasons also many oil and gas leases make express the requirement that the holder of the mineral rights proceed diligently or the lease terminates.<sup>8</sup> The lease ties up the lessor's property for a long period and failure to develop its production involves the danger of depletion of the oil by wells on adjoining lands.<sup>9</sup>

The impediment of dormant mineral rights on both surface and sub-surface interests can make the real property practically unmarketable. When it becomes necessary or economically desirable to put together a full and unencumbered fee title, identifying and locating the owners of the retained mineral interest may be an impossible task. Negotiating for its purchase is often difficult, since the value of the mineral interest as an impairment of the fee title may exceed its intrinsic value as a source of possible future income from mineral exploitation. Where the mineral interests are owned in fee, quiet title actions are generally ineffective to clear title, since normal surface use is not hostile to severed mineral rights and therefore does not constitute adverse possession.<sup>10</sup>

The California Supreme Court has held in Gerhard v. Stephens<sup>11</sup> that since mineral interests in oil and gas are a profit a prendre, a type of incorporeal hereditament,<sup>12</sup> the mineral interests are subject to abandonment based on nonuse and intent to abandon:<sup>13</sup>

Commentators have noted that "The abandonment concept, when applied, frequently serves the very useful purpose of clearing title to land of mineral interest of long standing, the existence

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8. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 12.42 (1974).
  9. See discussion in 3 B. Witkin, Summary of California Law Real Property § 557 (8th ed. 1973).
  10. See Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 853-54 (1970).
  11. 68 Cal.2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968) (citations and footnotes omitted).
  12. See note 3 supra.
  13. 68 Cal.2d at 887-89.

of which may impede exploration or development of the premises by reason of difficulty of ascertainment of present owners or of difficulty of obtaining the joinder of such owners."

As stated in Dabney-Johnston, "the use of different terms of description may give rise to different legal incidents . . . ." By describing rights identical to those granted to the corporations as incorporeal hereditaments our court foreordained the conclusion we now reach. Moreover, a ruling that incorporeal hereditaments of the type involved may be abandoned tends to promote the marketability of title by facilitating the clearing of titles. To that extent it better fulfills the demands of a modern economic order. Further, it reduces the possibility of the resurrection of the ghosts of abandoned claims by which title searchers and forgotten owners collect the windfalls of accidental profit.

Gerhard v. Stephens does not offer a completely satisfactory solution to the problem of dormant mineral rights. It requires a judicial determination of intent to abandon. In Gerhard, for example, the court held that 47 years of nonuser, coupled with such a number of cotenancy interests that a court appointed receiver would be needed for development, was not sufficient to show abandonment as to all mineral interests.<sup>14</sup> It appears that abandonment will be a useful basis for clearing title only infrequently.<sup>15</sup> Moreover, the possibility that there has been an off-record abandonment may have the effect of clouding otherwise good record titles to mineral rights.<sup>16</sup>

Gerhard v. Stephens by its terms applies only to those mineral rights in fugacious minerals which are incorporeal hereditaments and therefore subject to abandonment.<sup>17</sup> Presumably mineral rights in nonfugacious minerals, which may take the form of a severed fee, are not subject to abandonment. Where a grant or reservation of mineral rights includes both fugacious and nonfugacious minerals, the grant apparently would be subject to abandonment only in part.<sup>18</sup>

14. 68 Cal.2d at 893-95, 442 P.2d at 716-17, 69 Cal. Rptr. at 635-36.

15. See, e.g., discussion in Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 856 (1970).

16. See, e.g., discussion in Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 150 (1969).

17. See, e.g., discussion in Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227 (1969).

18. See, e.g., discussions in Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 854-56 (1970); Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1233-35 (1969); Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 150 (1969).

In an effort to deal by statute with marketability problems, California has enacted a provision to enable termination of surface entry rights under a 20-year old oil and gas lease in certain counties where this will not adversely affect the operations of the oil and gas lessee,<sup>19</sup> and has limited a lease of land for production of oil and gas on other lands to 99 years.<sup>20</sup> However, these efforts to improve marketability of property subject to mineral rights are piecemeal and narrow in scope.

An extensive body of legal literature demonstrates the need for a more effective means of clearing land titles of dormant mineral rights.<sup>21</sup> Subjecting dormant mineral rights to termination is in the public interest and further legislative intervention in the continuing conflict between mineral and surface interests is necessary. About a dozen states have now enacted statutes to enable termination of dormant mineral rights<sup>22</sup> and most of the nearly two dozen states that now have marketable title acts apply the acts to mineral rights.<sup>23</sup>

The statutes of other jurisdictions that have confronted the problem of dormant mineral interests offer two basic models. One model is based on nonuse: a mineral right is extinguished if there have been

19. 1971 Cal. Stats. ch. 1586, § 1, p. 3200, now codified as Code Civ. Proc. §§ 772.010-772.060.
20. Civil Code § 718f.
21. See, e.g., P. Basye, Clearing Land Titles § 38 (2d ed. 1970); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 239-47 (1960); Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835 (1970); Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227 (1969); Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136 (1969). For a more extensive bibliography, see 1 H. Williams & C. Meyers, Oil and Gas Law § 216.7 n.1 (1980).
22. For discussions of the statutes, see, e.g., P. Basye, Clearing Land Titles § 38 (2d ed. 1970); 1 H. Williams and C. Meyers, Oil & Gas Law § 216.7 (1980); Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 142-44 (1969).
23. See discussion in P. Basye, Clearing Land Titles §§ 171-193 (2d ed. 1970; Supp. 1979). The Uniform Simplification of Land Transfers Act (1977) follows the Model Marketable Title Act in making no exception for mineral interests (although providing an optional provision excepting mineral interests--Section 3-306(5)). The Uniform Act notes that whether or not the exception should be made is the "most controversial issue" with respect to marketable title legislation.

no operations for mineral production within a recent period of time, for example, within 10 or 20 years.<sup>24</sup> The major attraction of this model is that it enables extinguishment of dormant rights solely on the basis of nonuse; proof of intent to abandon is unnecessary. The major drawbacks of this model are that it requires resort to facts outside the record and that it requires a judicial proceeding to determine the fact of nonuse.<sup>25</sup> This model also precludes long-term holding of mineral rights for such purposes as future development, future price increases that will make development feasible, or assurance by a conservation organization or subdivider that the mineral rights will not be exploited.<sup>26</sup>

The other major statutory model is based on passage of time--a mineral right is extinguished a certain period of time after it is recorded, for example 20 years, unless during that period a notice of intent to preserve the interest is recorded.<sup>27</sup> The virtues of this model are that it enables clearing of title on the basis of facts in the record and without resort to judicial action, and it keeps the record mineral ownership current. Its major disadvantages are that it permits an inactive mineral owner to preserve the mineral rights on a purely speculative basis and to hold out for nuisance money indefinitely,<sup>28</sup> and that it creates the possibility that actively producing mineral rights will be lost through an inadvertent failure to record a notice of intent to preserve the mineral rights. Although this model has been criticized as a taking of property without notice or compensation, the United

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24. See, e.g., La. Civ. Code arts. 789, 3546 (19\_\_); Tenn. Code 64-704 (19\_\_).

25. Even a marginal effort by the mineral owner will keep the interest alive. See discussion in Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 142-44 (1969).

26. See discussion in Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 860 (1970).

27. See, e.g., Ind. Code Ann. § 56-1104 (19\_\_); Minn. Stat. Ann. 541.023 (19\_\_). The rights of a person in possession would not be affected.

28. See discussion in Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 860 (1970).

States Supreme Court has held that it satisfies constitutional requirements of due process.<sup>29</sup>

In addition to the two basic models, there are numerous variants and combinations of the two,<sup>30</sup> as well as statutes designed to enable development of mineral rights while protecting the interests of absent or unknown owners.<sup>31</sup>

Of the various available alternatives, the Law Revision Commission recommends a statute that combines the protections of the mineral rights owner while still enabling termination of dormant mineral rights. Under this statute, an action could be brought to terminate mineral rights that have been dormant for 20 years, provided the record also evidences no activity involving the minerals during that period, the holder of the mineral rights fails to record a notice of intent to preserve the mineral rights within that period, and no taxes are paid on the mineral rights within that period. To protect the interests of a person who through inadvertence fails to record, the statute provides for compensation to the mineral rights owner for the value of the mineral rights; in most cases of dormant mineral rights their value will be nominal or zero. This procedure will assure that active or valuable mineral interests are protected, but will not place an undue burden on marketability. In addition, there should be a five-year grace period for owners of mineral rights to record a notice of intent to preserve rights that would be immediately or within a short period affected by enactment of the statute. The combination of these protections will help ensure both the fairness and constitutionality of the statute.<sup>32</sup>

Because titles in California have been clouded over the years on a mass basis by reservation of mineral rights, such a statute will enable the gradual clearing of title records in appropriate cases. Comparable

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29. *Texaco v. Short*, 102 S. Ct. 781 (1982).

30. See, e.g., Mich. Stat. Ann. 26.1163(1)-(4) (19\_\_).

31. See, e.g., Kan. Stat. § 55-219 *et seq.* (\_\_\_\_); Miss Code Ann. § 11-17-33 (\_\_\_\_); Neb. Rev. Stat. §§ 57-210-57-212.01 (\_\_\_\_); Okla. Stat. Ann. Tit. 52 § 521 *et seq.* (\_\_\_\_); Tex. Rev. Civ. Stat. Ann. Art. 2320b (\_\_\_\_).

32. *Cf. Donlan v. Weaver*, 118 Cal. App.3d 675, 173 Cal. Rptr. 566 (1981) (constitutionality of statute enabling termination of right of surface entry under oil or gas lease).

statutes have been criticized on the ground that the major holders of mineral interests will be unlikely to let their interests lapse by failure to record a notice of intent to preserve their interest, thereby rendering the statute ineffective.<sup>33</sup> The Commission believes that a person who desires to preserve a valid mineral interest and who takes active steps to preserve the interest by recording should be permitted to do so.

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The Commission's recommendation would be effectuated by enactment of the following measure.

An act to add Chapter 3 (commencing with Section 883.110) to Title 5 of Part 2 of Division 2 of, and to repeal Section 794 of, the Civil Code, relating to mineral rights.

The people of the State of California do enact as follows:

18304

Civil Code § 794 (repealed)

SECTION 1. Section 794 of the Civil Code is repealed.

~~794. When the term of any oil, gas or other mineral lease has expired, or such a lease has been abandoned by the lessee or his assignee or other successor in interest, the lessee or his assignee or other successor in interest shall, on demand by the lessor or his successor in interest or his heirs or grantees, execute, acknowledge and deliver, or cause to be recorded, a deed quitclaiming all his interest in and to the lands and minerals covered by the terms of the lease; provided, however, that where said expiration or abandonment covers less than the entire interest of said lessee, assignee or successor in and to said land or minerals, such lessee, assignee or successor shall execute, acknowledge and deliver an appropriate instrument or notice of surrender or termination covering that interest which has expired or been abandoned. Failure of the lessee or his assignee or other successor in interest to execute the~~

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33. Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 143 (1969).

deed, instrument or notice required by this section within 30 days after demand therefor shall make him liable to the lessor or his successor in interest or his heirs or grantees for all damages which may be sustained by them as a result of his refusal, and for reasonable attorney's fees to be fixed by the court. He shall also forfeit the sum of one hundred fifty dollars (\$150).

Comment. The substance of former Section 794 is continued in Section 883.140 (clearing record of expired or abandoned mineral right lease).

18306

Civil Code §§ 883.110-883.270 (added)

SEC. 2. Chapter 3 (commencing with Section 883.110) is added to Title 5 of Part 2 of Division 2 of the Civil Code, to read:

CHAPTER 3. MINERAL RIGHTS

Article 1. General Provisions

§ 883.110. "Mineral right" defined

883.110. As used in this chapter, "mineral right" means an interest in minerals, regardless of character, whether fugacious or non-fugacious, organic or inorganic, that is created by grant or reservation, regardless of form, whether a fee or lesser interest, mineral, royalty, or leasehold, absolute or fractional, corporeal or incorporeal, and includes express or implied appurtenant surface rights.

Comment. Section 883.110 defines mineral rights broadly to include a fee interest as well as any lesser interest and to include oil and gas as well as in-place minerals such as ores, metals, and coal. Cf. In re Waltz, 197 Cal. 263, 240 P. 19 (1925) (characterizing mineral rights). Section 883.110 also makes clear that for the purposes of this chapter, surface rights appurtenant to a mineral interest are included within the meaning of "mineral right." Cf. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935) (grant of minerals includes implied right of entry to extract them).

10048

§ 883.120. Federal mineral reservations excluded

883.120. This chapter does not apply to a mineral right reserved to the United States, whether in a patent, pursuant to federal law, or otherwise, or to an oil or gas lease, mining claim, or other mineral

right of a person entitled pursuant thereto, to the extent provided in Section 880.240.

Comment. Section 883.120 is a specific application of Section 880.240 (interest of United States not subject to expiration), and is included for purposes of cross-referencing.

17009

§ 883.130. Law governing abandonment not affected

883.130. Nothing in this chapter limits or affects the common law governing abandonment of a mineral right or any other procedure provided by statute for clearing an abandoned mineral right from title to real property.

Comment. Section 883.130 makes clear that although this chapter includes a statute by which a dormant mineral right may be terminated (see Sections 883.210-883.270), this chapter is not intended to limit the common law of abandonment of mineral rights. See, e.g., *Gerhard v. Stephens*, 68 Cal.2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968) (mineral right in oil and gas subject to abandonment). Thus, for example, nothing in this article affects the common law determination of abandonment of an oil or gas lease. See, e.g., *Banks v. Calstar Petroleum Co.*, 82 Cal. App.2d 789, 187 P.2d 127 (1947); *Berry v. Kelly*, 90 Cal. App.2d 486, 203 P.2d 80 (1949). Nor is this chapter the exclusive means by which title to property may be cleared of an abandoned mineral right. See, e.g., Code Civ. Proc. §§ 760.010-764.070 (quiet title).

27632

§ 883.140. Clearing record of expired or abandoned mineral right lease

883.140. (a) As used in this section:

(1) "Lessee" includes an assignee or other successor in interest of the lessee.

(2) "Lessor" includes a successor in interest or heir or grantee of the lessor.

(b) If the term of a mineral right lease has expired or a mineral right lease has been abandoned by the lessee, the lessee shall, within 30 days after demand therefor by the lessor, execute, acknowledge, and deliver, or cause to be recorded, a deed quitclaiming all interest in and to the mineral rights covered by the lease. If the expiration or abandonment covers less than the entire interest of the lessee, the lessee shall execute, acknowledge, and deliver an appropriate instrument

or notice of surrender or termination that covers the interest that has expired or been abandoned.

(c) If the lessee fails to comply with the requirements of this section, the lessee is liable for all damages sustained by the lessor as a result of the failure, including but not limited to court costs and reasonable attorney's fees in an action to clear title to the lessor's interest. The lessee shall also forfeit to the lessor the sum of one hundred fifty dollars (\$150).

(d) Nothing in this section makes a quitclaim deed or other instrument or notice of surrender or termination, or a demand therefor, a condition precedent to an action to clear title to the lessor's interest.

Comment. Section 883.140 continues the substance of former Section 794. Cf. Section 886.020 and Comment thereto (release of contract for sale of real property).

27930

Article 2. Termination of Dormant Mineral Right

§ 883.210. Action authorized

883.210. The owner of real property subject to a mineral right may bring an action to terminate the mineral right pursuant to this article if the mineral right is dormant and its existence impairs the marketability of the real property, including use or development of surface or subsurface interests.

Comment. Section 883.210 authorizes termination of dormant mineral rights that impair marketability, subject to the limitations and conditions in this article. This is consistent with public policy to enable and encourage full use and development of real property, including both surface and subsurface interests. Section 880.020 (declaration of policy and purposes). Section 883.210 is also consistent with the common law rule that mineral rights in oil and gas are subject to abandonment, and applies to mineral rights in other substances as well. See Sections 883.110 ("mineral right" defined) and 883.130 (law governing abandonment not affected) and Comments thereto; cf. Section 883.140 (clearing record of expired or abandoned mineral right lease). This article supplements common law principles of abandonment by providing a separate and independent basis for terminating a dormant mineral right.

§ 883.220. Dormancy

883.220. For the purpose of this article, a mineral right is dormant if all of the following conditions are satisfied for a period of 20 years immediately preceding commencement of the action to terminate the mineral right:

(a) There is no production of the minerals and no exploration, drilling, mining, development, or other operations that affect the minerals, whether on the surface of the real property or other property unitized or pooled with the real property or at a remote location.

(b) No separate property tax assessment is made of the mineral right.

(c) No instrument creating, reserving, transferring, or otherwise evidencing the mineral right is recorded.

Comment. Section 883.220 defines dormancy for the purpose of this article; it does not affect the common law of abandonment. See Section 883.130 (law governing abandonment not affected). The 20-year period prescribed in Section 883.220 is consistent with the 20-year period prescribed by statute for termination of a right of entry or occupation of surface lands under an oil or gas lease. Code Civ. Proc. §§ 772.010-772.060. The 20-year period can be extended indefinitely by recordation of a notice of intent to preserve the mineral right. Section 883.230 (preservation of mineral right).

31065

§ 883.230. Preservation of mineral right

883.230. (a) An owner of a mineral right may at any time record a notice of intent to preserve the mineral right.

(b) Notwithstanding any other provision of this title, a mineral right is not dormant for the purpose of this article if a notice of intent to preserve the mineral right is recorded within 20 years immediately preceding commencement of the action to terminate the mineral right.

Comment. Section 883.230 makes recording a notice of intent to preserve a mineral right conclusive evidence of non-dormancy for purposes of this article. Recording a notice of intent to preserve also creates a presumption affecting the burden of proof that the claimant has not abandoned the mineral right for purposes of a determination of abandonment pursuant to common law. Section 880.310 (notice of intent to preserve interest).

§ 883.240. Court procedure

883.240. (a) An action to terminate a mineral right pursuant to this article shall be brought in the superior court of the county in which the real property subject to the mineral right is located.

(b) The action shall be brought in the same manner and shall be subject to the same procedure as an action to quiet title pursuant to Chapter 4 (commencing with Section 760.010) of Title 10 of Part 2 of the Code of Civil Procedure, to the extent applicable.

Comment. Section 883.240 incorporates, insofar as applicable, the general quiet title procedures for an action to terminate a dormant mineral right pursuant to this article. See Code Civ. Proc. §§ 760.010-764.070.

31189

§ 883.250. Compensation for mineral right

883.250. (a) In an action to terminate a mineral right pursuant to this article the court shall determine whether the mineral right has a value that is more than nominal. If the court determines that the value of the mineral right is more than nominal, the court shall determine the market value of the mineral right and shall not make an order terminating the mineral right except upon payment of the market value into court for the owner of the mineral right.

(b) If an owner of the mineral right is unknown or otherwise has not appeared in the action, notice of the payment into court shall be given in the same manner as summons was served and the payment shall be deposited in the county treasury for the benefit of the owner.

Comment. Section 883.250 provides for compensation to the owner of a dormant mineral right of more than nominal value terminated pursuant to this article. It is anticipated that in the ordinary case the market value of a dormant mineral right will be nominal or non-existent.

31197

§ 883.260. Effect of termination

883.260. A court order terminating a mineral right pursuant to this article makes the mineral right unenforceable and is equivalent for all purposes to a conveyance of the mineral right to the owner of the

real property. A mineral right terminated pursuant to this article is deemed to have expired.

Comment. Section 883.260 makes clear that termination of an abandoned mineral right has the effect of a reconveyance to the surface owner. See also Section 883.240 (court procedure) and Code Civ. Proc. §§ 764.010-764.070 (effect of quiet title judgment).

32120

§ 883.270. Transitional provision

883.270. Subject to Section 880.370 (grace period for recording notice), this article applies on the operative date to all mineral rights, whether executed or recorded before, on, or after the operative date.

Comment. Section 883.270 makes clear the legislative intent to apply this article immediately to existing mineral interests. Section 880.370 provides a five-year grace period for recording a notice of intent to preserve a mineral interest that would be subject to termination pursuant to this article before, on, or within five years after the operative date of this article. See Sections 883.230 (preservation of mineral right) and 880.370 (grace period for recording notice) and Comments thereto.