



ASTON'S MINING LAW CASE REVIEWS™

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DORMANT MINERAL STATUTES - PROTECTING MINERAL RIGHTS

Where there has been a separation of the mineral estate ownership (and rights to mine) from the surface estate ownership, several of the States have devised mineral statutes to ensure that reserved and deeded mineral rights are either used, or forfeited. If forfeited, they are returned to the surface estate. These statutes are usually called dormant mineral, mineral lapse, or marketable title statutes. These statutes generally specify that if the minerals are not actively pursued by some manner of evaluation, exploration, or mining activity, within a specified time limit, the two estates may be reunited by legal action into one fee simple estate by the surface owner. The purpose behind the statutes is to prevent dormancy of the minerals and to remove encumbrances to titles so that surface land can be put to productive use without fear of interference from future mining activity.

Although Indiana's dormant mineral statute is one of the best known, having made its way to the U.S. Supreme Court for constitutional challenge and being upheld (Texaco v. Short, U.S 1982), Georgia's mineral lapse statute, which is similar in nature and requirements with only work and time variations, underwent two trials in late 1990. The mining companies involved were Reynolds Metals and Georgia Marble. In the Reynolds case the decision was in favor of the mining company retaining its mineral interest. In the Georgia Marble case, the mining company lost its mineral estate, which was returned to the surface estate owner.

The Georgia statute is misnomered as an "adverse mineral possession" statute, in reality being a mineral lapse statute. The surface owner, in order to re-capture the mineral estate, need not assert any acts of dominion over the surface estate or the minerals below it, but is required only to allege and show that he has a deed to the property's surface, that the mineral rights have been severed from the fee simple estate, and that the requirements of non-use or nonpayment of taxes for a seven-year period by the owner of the mineral rights have been established. As the Georgia Supreme Court stated in the case

of Parker v. Reynolds Metals Co., the Georgia statute "has two purposes : to encourage the use of the state's mineral resources, and the collection of taxes, or to encourage the use of land free of interference by the holders of mineral rights who, neither use them, nor pay taxes upon them."

In the Parker v. Reynolds Metals Co. case there was a variation in statute application in that there was no actual separation of ownership of the surface and subsurface (mineral) estates. Parker owned 249 acres in Wilkinson Co., Georgia, in total fee simple; i.e., he owned both surface and the minerals. However, he challenged Reynolds' mining inactivity under the statute. In 1965, Parker had signed a mining lease agreement transferring his minerals to Reynolds Mining Co. (now Reynolds Metals).

The pertinent part of the lease at issue stated: "Reynolds shall have and hold the Leased Land for the purposes set forth in this Mining Lease Agreement for a term of fifty (50) years from and after the date first above written and for such longer time after such term has ended as Said Minerals are produced from the Leased Land by Reynolds; provided, however, that a temporary cessation of production due to unavoidable casualty, causes beyond the control of Reynolds, or ordinary and usual shutdowns for repairs and development of mines or excavations upon the leased land shall not operate to terminate this Mining Lease Agreement....." Since the agreement was made in 1965, Reynolds had, neither mined, nor paid taxes on the mineral land or the minerals in it. The plaintiffs filed their action on October 19, 1988, claiming that title to the mineral rights had reverted to them through "adverse possession", and as a consequence of Reynolds' inactivity for over 7 years.

The incongruity of Parker's claim in "adversely possessing" the minerals under his land was that one cannot adversely claim what one already owns.

An important and applicable part of the Georgia statute in this case was the exception in Subsection (f) which states: "nothing in this Code section shall apply to a lease for a **specific number of years**, nor to an owner of mineral rights who has leased the mineral rights in writing to a licensed mining operator." (Reynolds was the lessee and a licensed mine operator).

But lessor Parker argued that the lease was not for a "**specific number of years**" in accordance with the statute's subsection (f), and that its term was unlimited, i.e. perpetual or forever, and consequently, it violated the Rule against Perpetuities.

The Court probably would not have entertained Parker's action and complaint except for the question of "**perpetuity**" of the lease-contract between Parker and Reynolds, which might have led to its voidance by the Court if it were found to be in violation of the Rule. The lessor further claimed that the lease was too vague, indefinite and uncertain to be enforced.

The Supreme Court interpreted the leasehold as "an interest in the mineral rights for fifty years, which can then continue for the duration of any mining activities that begin during the initial fifty year period. If no mining is started during the fifty year period, then the lease will terminate at the conclusion of that time. If mining is started during the fifty year term, the lease will continue beyond that term for so long as the mining continues, but will cease once those activities stop, although mere interruptions in

mining caused by casualties, causes beyond the control of Reynolds or temporary shutdowns for repairs or development will not end the lease. The lease could therefore continue indefinitely... . If mining were to stop after the fifty year limit for any reason, except those listed in the lease, the mineral rights would revert back to the plaintiff (Parker) automatically without the action of this or any other statute. The agreement thus creates a lease to mine for a fifty year period and gives the defendant (Reynolds) an option to continue that must be exercised by mining within that period, and if this is done, the lease will last indefinitely. Clearly, this agreement is not too vague to be enforced."

The Court found that even though the lease could be extended indefinitely after the initial fifty year period, it was not violative of the Rule against Perpetuities. Had the lease been found to be a "perpetual **option**", it would have violated the Rule and the lease would have been void. The Court held it be only a perpetual lease, or a perpetual right to renew the lease, and did not violate the Rule.

In summation, the Supreme Court of Georgia held: (1) the mineral lease, with initial 50-year period which could be extended indefinitely if lessee began mining within that period and operated continuously was one for a specific number of years and thus was not subject to Georgia statute allowing owner of the surface estate to recover the mineral interests upon non-use and nonpayment of taxes for seven years by the owner of the mineral rights, and (2) lease did not violate the Rule against Perpetuities under Georgia law.

In Georgia Marble Co. v Whitlock, the surface owners brought an action against the mining company, who had owned the mineral estate/rights since 1924, to gain title under the Georgia mineral lapse statute (O.C.G.A. 44-5-168). The statute in pertinent part states : " the owner of the real property in fee simple may gain title to such mineral rights by adverse possession if the owner of the mineral rights has neither worked nor attempted to work the mineral rights, nor paid any taxes due on them for the seven years immediately preceding the filing of a petition to gain title by adverse possession." The trial court found for the surface owners, which re-united the surface and mineral estates. Georgia Marble appealed to the Supreme Court of Georgia.

Georgia Marble admitted that it had neither worked, nor attempted to work the mineral rights. It alleged that it had paid taxes on those rights, hence, had retained them. The question of whether the taxes on the mineral estate had been properly paid was the issue before the court.

The evidence showed that in the early 1970's the county tax officials had changed its billing procedures for property taxes. Before the change in procedure, the County would individually list on its digests all taxpayers' properties and the tax due thereon. After the change, the County would not individually list all properties but merely showed on the tax digest a lump-sum valuation and the amount of taxes due. Georgia Marble had made an agreement with the County tax officials to avoid the loss of unmined mineral interests under 44-5-168, to file a general annual return for all mineral rights owned by Georgia Marble without specifying those rights in any way and by paying an annual lump-sum as the

taxes for the unspecified rights from 1982 to 1987. Georgia Marble returned its unspecified mineral interest values ranging from \$75,000 to \$110,000.

The county tax digests indicated only the lump-sum valuation of properties and tax due thereon. Consequently, the court found it necessary to look at extrinsic evidence to determine whether the company had paid taxes on the specific mineral interest in this case.

The trial court held that statute 44-5-168 would be satisfied either if Georgia Marble had returned the mineral interest *or* if tax officials had considered and valued it, and that in either of those events, it would be reasonable to infer that Pickens County tax officials included the tax due on the interest in the lump-sum reflected on the tax digests.

The court found that Georgia Marble had never returned its mineral interest in the Whitlocks' property, and that Pickens County tax officials had never considered and valued the mineral interest.

The agreement between owner of mineral interest and county tax officials that owner would pay taxes on lump-sum valuation to protect all of its mineral interests from loss by adverse possession did not constitute the payment of taxes due on mineral interest in a specific property, and thus did not preclude fee owners from gaining title to mineral interests by adverse possession, where such an agreement was in violation of taxing laws.

In its final issue, Georgia Marble argued that the statute was unconstitutional and effected an uncompensated taking of property. Although the statute had been previously upheld as constitutional, the Supreme Court pointed out that under the statute, "the State had not taken Georgia Marble's property. Georgia Marble had simply failed to make any use of it or pay taxes on it, and let its rights in the property lapse. The statute offered three ways for the mineral owner to protect its property; viz, work it; attempt to work it in a 7-year period; or pay taxes on it. The state has the 'police power' to condition the permanent retention of those property rights on reasonable conditions that indicate a present intention to retain those rights."

The Court concluded that the statute did "not work a taking of property without just compensation".

CONCLUSION: To preserve your company's mineral interests and rights, know the particular state's dormant and lapse mineral statute requirements where the land is located; conform to the work required; and, determine whether paying taxes alone will suffice to maintain the mineral interest. If the mineral interests are not appraised by the local tax officials, request that a tax amount be set on the mineral estate.

MICHIGAN COURT APPLIES DORMANT MINERAL STATUTE

By: R. Lee Aston, PhD., J.D., LL.M., E.M.

In Gibbs v. Sun Exploration Co. et al, the Court of Appeals of Michigan decided in April 1992 that mineral rights which were severed from the surface estate in 1935, were not perpetuated upon the death of the mineral estate owner for his failure to mention and describe the location of the mineral property in his will. It should be noted that the decedent, Smock, had never recorded the mineral reservation at any prior time.

Upon the death of the owner in 1962, the probate court entered an Order assigning the residue of the owner's estate. It was duly recorded with the Register of Deeds. The trial court found for Sun Exploration that the mineral estate interests had been perpetuated by virtue of the recordation of the Will's residue estate.

On appeal by the surface owner, the question before the Appeals court was "whether an Order assigning the residue of the probated estate of the owner of the mineral estate, which was recorded with the Register of Deeds but does not describe the property, constitutes a transfer of the rights under Section 1 of the (Michigan) Dormant Mineral Act (DMA) sufficient to preclude abandonment."

Although the trial court had found for the mineral estate owners that the mineral rights had been preserved by the will's recording and implied inclusion in the estate's residue, the Appeals Court reversed the lower court's finding and held that the mineral rights reverted to the surface estate owner.

In its reversal, the Appeals court found that the Legislature's property description requirement in Section 2 of the DMA was "to simplify the process of locating owners of particular mineral rights." It also noted that Section 5 of the Marketable Record Title Act (MRTA) requires "an accurate and full description of all land affected by such notice which description shall be set forth in particular terms and not by general inclusions." The Appeals Court stated that the two Acts were to be read together and "Because the (Probate Court's) Order purporting to interrupt the running of the 20-year period did not comply with the requirements of the DMA, ... the trial court erred ... in reaching the opposite conclusion."

MINERAL RIGHTS SAVED BY KANSAS DORMANT MINERAL STATUTE

By: R. Lee Aston, PhD, J.D., LL.M., E.M.

In a claim by the surface owner to capture the separately-owned mineral estate, the Kansas Court of Appeals, in *Scully v. Overall*, 840 P.2d 1211 (Kan.App. 1992), held that the mineral interests were not extinguished or vested in the surface owner after 20 years of non-use.

Mineral estate owners in states with dormant or mineral lapse statutes should be aware of the potential for losing their mineral rights in states with such statutes. In a 1990 Georgia case, a Georgia stone quarrier lost a property it had held since 1924 under Georgia's lapse statute. In a 1992 Michigan case, *Gibbs v. Sun Oil Exploration Co.*, mineral rights were lost under that state's dormant mineral statute.

Where there has been a separation of the mineral estate ownership (and rights to mine) from the surface estate ownership, 14 states have devised mineral statutes to ensure that reserved and deeded mineral rights are either used, or forfeited (Florida, Georgia, Illinois, Indiana, Kentucky, Kansas, Michigan, Nebraska, North Carolina, North Dakota, Oregon, South Dakota, Virginia, and Wisconsin.) If forfeited, they are returned to the surface estate. The statutes generally specify that if the reserved minerals are not actively pursued by some manner of evaluation, exploration, mining activity, or payment of taxes, within a specified time limit, the two estates may be reunited by legal action of the surface owner into one fee simple estate.

Under the Kansas dormant mineral statute, the required period of inactivity is 20 years before the surface owner may file a claim on the mineral estate. In the *Scully* case, Scully had purchased the surface property in 1961 from Overall, who reserved the mineral rights. Overall had done nothing about the minerals since the severance from the surface. In August 1991, Scully published a notice of lapse of mineral interest in the local newspaper, and filed a notice of lapse at the courthouse. A few days later, Overall received a copy of the notice by registered mail from Scully. Overall filed a statement of claim on August 14, 1991 with the Register of Deeds. In December 1991, Scully filed a petition in court to quiet title of the mineral estate, to which Overall moved for judgement on the pleadings (dismissal for no cause of action). The

trial court granted Overall's motion holding that Overall's mineral interests were not extinguished nor vested in Scully as a matter of law. The Court of Appeal affirmed.

The Kansas statute allows the mineral interest owner 60 days after publication notice of the dormancy of the mineral estate, or after receiving notice from the surface owner, to file a statement of claim with the register of deeds. Filing by the mineral owner saves the loss of his mineral interest. Overall had clearly filed a statement of claim of his mineral interests within the statutory 60-day period.

Mineral Rights owner loses under Georgia Mineral Lapse Statute

By: R. Lee Aston, PhD., J.D., LL.M., E.M.

In *Fisch v. Randall Mill Corp.*, 426 S.E.2d 883 (Ga.1993), a surface property owner petitioned for declaratory judgment seeking absolute title to the mineral rights on his property. Randall Mill was the surface owner where Fisch claimed an unspecified interest in the mineral rights as the descendant of the 1850 owner of the property.

Under the Georgia Mineral Lapse statute, where there has been a separation of the minerals estate from the surface estate, the owner of the surface estate may gain title to the minerals if the owner of the mineral rights has neither worked, nor attempted to work the mineral rights, nor paid any taxes due on them for seven years since the date of the conveyance or for seven years immediately preceding filing of the petition by the surface owner.

Fisch argued that he attempted to work the minerals by "regularly walking the property, by collecting 10 to 12 rock samples for analysis, studying geological maps, making several trips to the courthouse to try to pay taxes, and by attempting to locate other heirs.

The Supreme Court of Georgia held that Fisch's acts did not constitute, as a matter of law, the working or attempting to work his mineral rights as required by the statute. Neither had Fisch paid taxes on the minerals.
