May 1983

Retroactive Land Statutes—Indiana's Dormant Mineral Act Declared Constitutional

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STUDENT MATERIAL

RETROACTIVE LAND STATUTES — INDIANA'S DORMANT MINERAL ACT DECLARED CONSTITUTIONAL

I. INTRODUCTION

In recent years the legislatures of states with vast mineral deposits have attempted to construct schemes to resolve effectively the title and conveyancing difficulties caused by missing and unknown owners of highly fractionalized, severed mineral interests. Stale and abandoned interests are perceived by lawmakers and commentators as creating uncertainties in titles, inhibiting or preventing the development of the mineral interests and as impeding the development of the surface estate. Many of these unused interests extend perpetually, forever clouding titles and posing a threat to the full enjoyment of surface ownership. Given the attention focused on the precarious worldwide fossil fuel situation and the desire to extract minerals at a stepped-up pace, efforts have been made to eliminate obstacles to mineral exploration and development.

A number of states have enacted dormant mineral statutes. The pattern of these statutory mechanisms has been to provide for the extinction of unused, severed mineral interests unless certain affirmative actions are taken to preserve those interests. The statutes commonly call for either use or periodic re-recording of the interest. Generally, if the owner does not comply the interest lapses and the ownership of the mineral estate vests in the owner of the surface.

Dormant mineral statutes have encountered significant constitutional difficulties. The state supreme courts of Wisconsin, Nebraska, Minnesota, and

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3 See Polston, supra note 2 at 73, 77.
4 See Outerbridge, supra note 1 at 20-1.
6 E.g., IND. CODE ANN. § 32-5-11-1 (Burns 1980).
7 E.g., IND. CODE ANN. § 32-5-11-1, -3 (Burns 1980).
8 E.g., IND. CODE ANN. § 32-5-11-1 (Burns 1980).
Illinois\textsuperscript{12} have held such statutes unconstitutional. The 1982 case of \textit{Texaco, Inc. v. Short}\textsuperscript{13} presented the United States Supreme Court with the opportunity to address the various constitutional challenges lodged against this type of legislation.\textsuperscript{14} The Court held that the Indiana Mineral Lapse Act was constitutional because it furthers the legitimate state economic goal of encouraging the exploration and development of minerals.\textsuperscript{15}

\section*{II. Statement of the Case}

The Indiana Mineral Lapse Act,\textsuperscript{16} enacted in 1971, requires the record

\begin{quote}
32-5-11-1 \[46-1808\]. Lapse of mineral interest—Prevention.—Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved.

32-5-11-2 \[46-1809\]. Mineral interest—Definition—A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals.

32-5-11-3 \[46-1810\]. Use of mineral interests—Definition.—A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner therefor for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument.

32-5-11-4 \[46-1811\]. Statement of claim—Filing—Requirements.—The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty-year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed.

32-5-11-5 \[46-1812\]. Extinction of mineral interest—Exceptions.—Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) Was at the time of the expiration of the period provided in section four [32-5-11-
mineral interest holder to either attempt to discover or produce minerals or to periodically record a statement of claim, indicating a desire to keep active contact with the mineral estate. Failure to use or re-record the mineral interest within twenty years, or within the two year grace period granted by the Act, results in automatic forfeiture of the estate. However, the statute contains an exception which protects the interests of an owner of ten or more interests in the same county who files a statement of claim and inadvertently omits some of the interests. The statute does not require that notice be given to mineral interest owners before statutory forfeiture of the estate.

*Texaco, Inc. v. Short* was an action involving two cases which had been consolidated on appeal by the Supreme Court of Indiana. In the first case, the appellants included parties who claimed ownership of fractional mineral interests that had been severed in 1942 and 1944 and their oil and gas lessees whose leases were entered into in 1976 and 1977. Under the terms of the Indiana Mineral Lapse Act, the appellants’ mineral interests had statutorily lapsed in 1973 when the two year grace period expired since the mineral interest had not been used as defined by the Act. In April 1977 the surface owner published
a notice of lapse of mineral interest in an Indiana newspaper circulated in the county where the disputed mineral interest was located. Additionally, the surface owner mailed notices to all the appellants except the oil and gas lessees. The surface owner also filed an action seeking a declaratory judgment that the rights of the mineral owners had lapsed.18

In the second action, the mineral estate had been created in 1954.19 The mineral estate owners did not "use" the property until 1976 when a coal lease was executed with appellant Consolidated Coal Co. Because the mineral estate owners had not filed a statement of claim in the office of the county recorder, a statutory lapse occurred in March 1974. In 1977 the appellees gave notice of the lapse by newspaper publication and letter. The resulting lawsuit was brought by all parties in order to resolve the conflicting claims to the mineral interests.20

In both actions the appellants challenged the constitutionality of the Mineral Lapse Act on the following grounds:

Appellants claimed that the lack of prior notice of the lapse of their mineral rights deprived them of property without due process of law, that the statute effected a taking of private property without just compensation, and that the exception contained in the Act for owners of 10 or more mineral interests denied them the equal protection of the law; appellants based these arguments on the Fourteenth Amendment of the United States Constitution. Appellants also contended that the statute constituted an impairment of contracts in violation of Art. I, § 10, of the Constitution.21

The Indiana trial court found that the legitimate public purpose of the Act was to "facilitate the exploitation of energy sources."22 However, the trial court declared the statute unconstitutional as a deprivation of property without due process and as a taking without just compensation.23 On appeal, the Supreme Court of Indiana reversed.24 That court relied on the state economic interest and the benefit to the society in extinguishing unused mineral interests in order to make the "entire productive potential of the property again available for human use."25 The court found that the legislature was attempting to encourage the prompt exploitation of minerals in order to create economic benefits for the people and industries of the communities where development would

18 Id. Although the Act does not mandate that the surface owner provide notice to owners of less than ten interests, in practical application, in order to claim clear title to the mineral interest, the surface owner must provide notice. Notice is necessary to avoid the possibility that some holder of ten or more interests might later come forward to claim his rights. The difficulty for those in the appellants' position is that notice comes too late for the assertion of interests in their property rights.

19 454 U.S. at 521.
20 Id. at 522.
21 Id.
23 406 N.E.2d at 627.
24 Id.
25 Id.
result. This legitimate state interest was sufficient, according to the court, to justify the legislation.

On certiorari, the United States Supreme Court affirmed the decision of the Indiana Supreme Court. In a five to four decision, the Court held that the statutory lapse of the appellants’ mineral estate did not deprive the appellants of a property interest without adequate notice in violation of due process. A vigorous dissent argued that a form of pre-extinguishment notice, procedurally comparable to that statutorily provided with respect to mineral owners of ten interests or more, is consistent with the legislative purpose and constitutionally required.

III. PRIOR LAW AND COURT DECISIONS

A. General Property Law — The Nature of the Problem

Both common law rules and the commercial nature of severed mineral interests have contributed to the difficulties facing one who attempts to secure title or development rights to a severed mineral interest. The commercial nature of these interests contributes to the likelihood that the interests will be owned by a number of people who are not familiar with the property, the surface owner, or each other. Interests become fractionalized in the attempt to spread the cost of acquisition or in the sale of interests for profit. Problems often come into existence during periods of active mineral speculation, exploration or development when the mineral estate is divided into successively smaller fractions and conveyed to opportunists and speculators. In the wake of the boom these owners disappear; leaving only their name on a deed for a perpetual or extended mineral interest. Once severed, the passage of time further fractionalizes the interest through intestate succession.

The marketability problems caused by inaccessible mineral owners are inherent in a common law system. The system recognizes that the right to the privilege and benefit of the minerals beneath the land may be severed from the fee title and consequently treated as a separate estate in land, fully owned and enjoyed as a fee itself. Severed mineral interests are considered corporeal in nature and have been deemed to have all the sanctity of an estate in land.

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26 Id. at 631.
28 Id. at 538.
29 Id. at 554.
31 See Kuntz, Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interests, 22 Inst. on Oil & Gas L. & Tax'n. 81 (1971).
32 See Outerbridge, supra note 1, at 20-3.
33 Id. at 20-4.
34 See Kuntz, supra note 31, at 81-82.
Under common law they are not subject to abandonment by nonuse. These doctrines contribute to the continued existence of dormant mineral interests. Further, the estates are generally immune to the various means, such as adverse possession, tax sales, and marketable title acts, which have evolved for the purpose of keeping property in the stream of commerce.

Dormant mineral statutes constitute a legislative mechanism for dealing with phantom mineral owners. The objective of the legislation is to keep ownership of mineral interests in a marketable state. Thus, the statutes are aimed at clearing the records of ancient, unused interests through the concept of abandonment. As one court has noted: "[t]he abandonment concept,... frequently serves the very useful purpose of clearing title to land of mineral interest of long standing, the existence of which may impede exploration or development of the premises by reason of difficulty of ascertainment of present owners or of difficulty of obtaining the joinder of such owners."

B. Constitutional Challenges in State Courts

Prior to the United States Supreme Court decision in Texaco, a number of dormant mineral acts had been held unconstitutional by the highest courts of several states.

1. Nebraska

The Nebraska dormant mineral statute applied to all severed mineral interests and provided that the surface owner may institute an action for the termination of the mineral interests. According to the statute, a mineral interest was deemed abandoned if the owner had not publicly exercised the right of ownership by conveyance or other interest of record, by working the mineral estate through mining, producing or withdrawing minerals, or by recording a verified claim of interest in the county where the land is located within twenty-three years prior to the filing of the action by the surface owner. If the court found the interest abandoned, then the interest was extinguished and title vested in the surface owner.

In Wheelock v. Heath, the Supreme Court of Nebraska declared the dormant mineral statute unconstitutional insofar as the statute applied retroactively. The case arose when the owner of the surface and a one-half mineral interest in the same tract brought an action to terminate and extinguish the

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36 See Polston, supra note 2, at 73-74.
37 Id. at 74.
38 Gerhard v. Stephens, 68 Cal. 2d 864, 887-88, 442 P.2d 692, 711, 69 Cal. Rptr. 612, 631 (1968). The court held that undivided interests in oil and gas, which California had previously characterized as incorporeal in nature, can be abandoned by nonuse coupled with the necessary intent to abandon.
39 See supra notes 9 to 12; see also infra notes 40-88 and accompanying text.
41 Id. at § 57-229.
42 Id. at § 57-230.
43 201 Neb. 835, 272 N.W.2d 768 (1978).
defendants' record mineral interest. The defendants had acquired their mineral interests more than twenty-three years prior to the filing of the actions and had not taken any of the steps required by the act to preserve their interests.

The court noted that at common law, legal title to land could not be lost by abandonment. The ownership of minerals was deemed a corporeal hereditament with all the attributes and incidents peculiar to ownership of land. The court found it dispositive that the statute deprived property owners of their subsurface rights without notice, hearing, or compensation. The discussion offered by the court was succinct and little analysis was provided.

2. Minnesota

The Minnesota Mineral Registration Act applied to all severed mineral interests and provided for the filing of statements of interest with the register of deeds or titles in the county where the interest is located. Failure to file the verified statement of interest within the statutory time period resulted in forfeiture of the interest to the state. The Minnesota Legislature provided for the general advertisement of the registration requirement by requiring the Commissioner of Natural Resources to publish the statute in a legal newspaper within each county and in two mining publications having nationwide circulation. The scheme deviated from the Indiana and other dormant mineral statutes in that provisions were included whereby persons claiming an ownership interest before forfeiture could recover the fair market value of his interest by commencing an action within six years after forfeiture. The provisions of the Minnesota statute expressly stated that forfeiture provisions of the act did not apply to mineral interests valued and taxed, so long as a tax is actually imposed. The Minnesota Legislature expressly set forth the purpose of the Act as follows:

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

The Minnesota Supreme Court in Contos v. Herbst ascertained that the registration and forfeiture provisions were constitutional. However, the court

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44 Id. at 840, 272 N.W.2d at 771.  
45 Id.  
46 Id. at 844, 272 N.W.2d at 773.  
47 MINN. STAT. ANN. §§ 93.52, -.55, -.58 (West 1977).  
48 Id. at § 93.55.  
49 Id. at § 93.58.  
50 Id. at § 93.55.  
51 Id.  
52 Id. at § 93.52.  
held that the procedures were unconstitutional because the notice provisions were inadequate in that there was no opportunity for a hearing prior to the forfeiture.\textsuperscript{54}

In rejecting the argument that the registration and forfeiture provisions violated due process the court employed an economic analysis. "Where an economic regulation is involved, due process requires that legislative enactments not be arbitrary or capricious; or, stated differently, that they be reasonable means to a permissive objective.\textsuperscript{55} The record contained evidence that a large number of the severed mineral interests are fractionalized and that determination of ownership is time consuming and hinders exploration and development of minerals.\textsuperscript{56} On the basis of this record, the court found that the registration requirement was not unreasonable.\textsuperscript{57} It was further determined that the means were rationally related and therefore not violative of due process.\textsuperscript{58}

In continuing its analysis, the court found that "[a]t a minimum the due process clause requires that deprivation of property be preceded by notice and an opportunity for a hearing appropriate to the case."\textsuperscript{59} The court relied extensively on \textit{Mullane v. Central Hanover Trust Co.}\textsuperscript{60} and determined that the state's efforts of notification through advertisement of the Act could not be said to be reasonably calculated to apprise owners of severed mineral interests of the pendency of the forfeiture. Therefore, advertisement was deemed inadequate where the mere failure to act results in forfeiture of the mineral estate.\textsuperscript{61} The court also used \textit{Mullane} to reach the conclusion that the statutory scheme was unconstitutional because it presented a clear violation of due process by failing to provide a pre-forfeiture hearing.\textsuperscript{62}

3. Illinois

A due process analysis similar to that used by the Minnesota court was employed by the Supreme Court of Illinois\textsuperscript{64} in declaring the Illinois Dormant Mineral Interests Act\textsuperscript{64} unconstitutional. That Act, however, applied only to

\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} at 741.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.} at 742.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Mullane v. Central Hanover Trust Co.}, 339 U.S. 306 (1950).
\textsuperscript{61} An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance. . . .
\textsuperscript{62} 339 U.S. at 314.
\textsuperscript{63} 278 N.W.2d at 743.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
severed interests in oil and gas. The Act declared that severed interests that have been unused for twenty-five years shall be deemed abandoned unless the owners of such interests record a written notice stating a desire to preserve the interest in the recorder's office of the county where the interest is located. A devise, sale, lease, mortgage, transfer by recorded instrument, as well as production from land or land pooled or unitized with the interest constituted use under the Illinois scheme. In the absence of one of the required acts, a statutory abandonment occurred and the severed interests automatically vested in the surface owners.

In *Wilson v. Bishop*, the Supreme Court of Illinois held the Act to be unconstitutional because the procedural due process rights of the severed oil and gas interest owners were found to be denied by the statutory scheme. The court began its discussion with a recognition that interests in severed minerals are vested property rights entitled to the customary incidents of ownership. Thus, severed mineral interests were found to constitute protected property interests entitled to the procedural safeguards which due process demands.

A *Mullane* analysis was employed, as had been in *Contos*, and the court concluded that due process of law prohibited the deprivation of property without providing notice and an opportunity to be heard. The court held that the Illinois statute violated those rights.

4. Wisconsin

In contrast to the statutory provisions of the Illinois, Michigan, Nebraska and Indiana acts, which affect only unused interests, the Wisconsin statute required that all owners of severed minerals record their claims and pay an annual registration fee. Failure to comply resulted in reversion of the interest to the surface owner.

In *Chicago and Northwestern Transportation Co. v. Pedersen*, a railroad company that claimed more than 250,000 acres of mineral interests brought a declaratory judgment seeking to have enforcement of the Act enjoined. The Supreme Court of Wisconsin declared the entire statute unconstitutional, holding that the enforcement provisions denied procedural and substantive due process. The decision deemed that the fundamental right to an appropriate hearing and reasonable notice were lacking in the enforcement provisions of

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66 Id.
67 Id.
68 Id.
69 82 Ill. 2d 364, 412 N.E.2d 522 (1980).
70 Id. at 369, 412 N.E.2d at 524.
71 Id. at 369, 412 N.E.2d at 525.
72 Id.
73 Wis. STAT. ANN. § 700.30 (West 1981).
74 Id.
75 80 Wis. 2d 566, 259 N.W.2d 316 (1977).
the Act. The court questioned whether the purpose of clearing up mineral title uncertainty was so important as to permit the reversion of mineral rights resulting in a windfall to the surface owner. The court found an unreasonable exercise of police power in the statutory provision that allowed the forfeited rights to vest in the owner of the surface. The court stated, "[this procedure violates the rule that the legislature cannot take private property from one person for the private use of another."]

5. Michigan

In Van Slooten v. Larsen the Supreme Court of Michigan held that State's Dormant Mineral Act constitutional. The Michigan Act applies only to severed oil and gas interests and provides that if the owner of the interests fails to take actual possession, transfer the interests by recorded instrument, or record notice of claim of interests for a period of twenty years, the interests are deemed abandoned and title vests in the surface owner.

The Act was challenged on five grounds: (1) the Act unconstitutionally impaired the obligation of contract; (2) the Act violated constitutional protection against property deprivation without due process of law; (3) the Act violated due process by creating arbitrary and unreasonably conclusive presumptions of abandonment; (4) the Act violated due process because it contains no provisions for notice or hearing to determine the validity of abandonment before title vests in the surface estate; and (5) the Act violated the equal protection clause in that oil and gas interests are arbitrarily treated differently than hard minerals.

The Van Slooten court initially noted that the severed mineral interests constituted corporeal hereditaments that could not be abandoned at common law. However, the Statute was deemed to be an appropriate exercise of the state police power. The purpose of the Act was not to pass ownership to the surface owner, but rather to increase marketability. The resulting increase in

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76 Id. at 570-71, 259 N.W.2d at 318.
77 Id. at 575, 259 N.W.2d at 320.
78 Id. at 574, 259 N.W.2d at 320.
82 Id. at 37, 299 N.W.2d at 707.
83 Id. at 44, 299 N.W.2d at 709-10.
the development of fossil fuels would benefit the community with increased employment opportunities. The requirement to do certain specified acts to show ownership was deemed to place no undue burden on the owners, according to the court.

Additionally, the court found that a reasonable relationship existed between the remedy and the purpose. Conceptually, the court analogized the Statute to both recording statutes and marketable title acts; which have both been held constitutional. The defendant’s argument that the Act created an arbitrary and unreasonable conclusive presumption of the abandonment was rejected by the court.

The Mullane analysis was not specifically addressed by the court. Rather, a balancing test was employed whereby it was determined that the risks of wrongful deprivation are minimal compared with the interests encompassed by the Dormant Minerals Act. Finally, in addressing the equal protection issue, the court found that the legislature is not required to speak to every aspect of a problem at once.

C. State Court Summary

In sum, the basic constitutional challenges leveled against dormant mineral acts are that the statutes effect a deprivation of property without due process of law, constitute a taking of property without just compensation, and impair contractual obligations. At the time the United States Supreme Court tackled the issue, four out of five states had declared, at least in part, that dormant mineral statutes were unconstitutional.

IV. Supreme Court Analysis

A. State Police Power

The threshold question addressed by the United States Supreme Court in Texaco, Inc. v. Short, was whether a state has the power to provide that property rights of owners of severed mineral interests shall be extinguished if owners do not comply with conditions mandated by the state. Although the Court recognized that Indiana considers severed mineral estates vested property interests entitled to the same protection as fee simple interests, the Court found that states do have the power to permit unused interests in property to revert to another after the passage of time. Thus, the Court was not misled into applying antiquated vested rights doctrines to modern, economic, public welfare oriented legislation.

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84 Id., 299 N.W.2d at 710.
85 Id. at 46-47, 299 N.W.2d at 711.
86 Id. at 47-48, 299 N.W.2d at 712.
87 Id. at 54, 299 N.W.2d at 715.
88 Id. at 55, 299 N.W.2d at 716.
90 Id. at 525-26.
91 For a discussion of the Court's treatment of economic and public welfare legislation see G.
The Supreme Court has, from an early time, upheld the authority of state legislatures to enact measures that allow unused and abandoned property interests to be transferred to another. The major feature of any mineral lapse act is its declaration that mineral interests are terminable. Certainly, the legal dimensions of mineral interests are not greater than fee simple titles which, under the laws of adverse possession, are terminable.

Although the Court did not specifically state that it found the Indiana Mineral Lapse Act analogous to marketable title acts, recording statutes, and statutes of limitations, the analysis used and the cases cited suggest that the Court perceived parallels between the schemes. Indeed, the appellees in their Motion to Dismiss argued that such schemes serve the same purposes and policy objectives as dormant mineral statutes. For example, marketable title acts operate upon record title and render it marketable as against defects arising prior to the root of title. Ambiguities and defects creating doubts concerning marketability are resolved by the acts. The acts require beneficiaries to re-record, as is required by the dormant mineral statutes, in order to prevent forfeiture. Noncompliance may result in a forfeiture of title which at common law was recognized as fully vested. Thus, like dormant mineral statutes, the inactivity of the estate holder is the basis of a title transfer for the benefit of the public welfare. Marketable title acts have not been held to be per se denials of property without due process of law.

Courts have often tended to uphold statutes deemed to alter only the remedies available to enforce existing property rights, but have condemned enactments that affected the corresponding right. The appellants in Texaco attempted to characterize the Indiana Act as unconstitutionally affecting rights as opposed to remedies. The appellants' argument was essentially that the Mineral Lapse Act "allow[s] no cause of action or remedy to arise before the title owner's substantive rights are terminated, while, on the other hand, statutes of limitation affect remedies only after a cause of action has accrued thereby allowing the threatened owner his day in court." The Court soundly rejected this type of argument and noted that when the "practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the constitutional analysis is the same."

As the Court correctly realized, the key inquiry should not be whether the law affects a right or a remedy, but rather, whether the actions of the state

GUNTHER, CONSTITUTIONAL LAW 534-44, 562-69 (10th ed. 1980).

93 454 U.S. at 526-29.
94 Appellee's Motion to Dismiss at 3, Texaco, Inc. v. Short, 454 U.S. 516 (1982).
97 Comment, supra note 95, at 461.
98 454 U.S. at 526.
99 Comment, supra note 95, at 466.
100 454 U.S. at 528.
furthered a legitimate state goal and were rationally exercised. With reliance on *Miller v. Schoene*,\(^{101}\) the Court correctly employed a balancing test stating that the state "has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State."\(^{102}\)

**B. Taking Challenge**

The Court dealt succinctly with the appellants’ claim that the Mineral Lapse Act constitutes a taking of private property without compensation in violation of the fourteenth amendment. One of the earliest specific rights incorporated into the due process guarantee of the fourteenth amendment was the fifth amendment’s command that private property shall not be taken for public use without just compensation. However, disagreement has risen as to when governmental actions give rise to a duty to compensate. Attempts have been made to distinguish governmental takings from mere regulations.\(^{103}\) The Court apparently ignored such efforts and tersely concluded that "it is the owner’s failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no ‘taking’ that requires compensation."\(^{104}\)

The Court’s conclusion is somewhat unsatisfactory because no discussion is provided as to whether there is a reasonable relationship between the exercise of the police power and the operation of the challenged statute. However, in view of the modern Court’s expansive interpretation of the police power and the Court’s lack of scrutiny of economic regulations, the majority’s hands-off analysis is not surprising.\(^{105}\)

What is confusing is that the dissenters did not directly address the regulation-taking issue. Three of the four dissenting justices had recently joined in the dissent in *San Diego Gas and Electric Co. v. City of San Diego*,\(^{106}\) which provided an articulation of the possibility of compensation in some circumstances. Justice Brennan, dissenting said:

The typical “taking” occurs when a government entity formally condemns a landowner’s property and obtains the fee simple pursuant to its sovereign power of eminent domain. However, a “taking” may also occur without a formal condemnation proceeding or transfer of fee simple. This court long ago recognized that “[i]t would be a very curious and unsatisfactory result, if in construing [the Just Compensation Clause] . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without

\(^{101}\) *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding the power of Virginia to destroy ornamental cedar trees on private property that threatened the State’s apple industry).

\(^{102}\) 454 U.S. at 529-30.

\(^{103}\) See GUNTER, supra note 91, at 545.

\(^{104}\) 454 U.S. at 530.

\(^{105}\) See GUNTER, supra note 91, at 544-53.

making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.\textsuperscript{107}

It would seem that an argument can fairly be made that the Mineral Lapse Act is simply a defacto exercise of the power of eminent domain. Although "there is no formula to determine where regulation ends and taking begins,"\textsuperscript{108} the Court has on numerous occasions recognized in passing the vitality of the general principle that a regulation can effect a taking.\textsuperscript{109} Rather than chastising the mineral interest owner for neglect, the Court should have entered into a taking-regulation analysis. This is especially true since the "State has taken the initiative in seeking to regulate heretofore unregulated incorporeal interests in land under circumstances in which a need for heightened attentiveness to the law cannot reasonably be apprehended by the mineral interest owner."\textsuperscript{110}

What seems particularly unfair is that the mineral interests were created long prior to the passage of the Act: the Act was passed in 1971 and by 1973 the interest was extinguished. This extinguishment occurs despite the fact that the appellants have done nothing illegal and have not interfered with the rights of others. They could have acted to protect their interests only if they knew of the statutory requirements.

C. Contract Clause Challenge

The Court also held that the Mineral Lapse Act does not unconstitutionally impair the obligation of contracts.\textsuperscript{111} The determinative factor was that the leases involved were not executed until after the automatic, statutory lapse of the mineral rights.\textsuperscript{112} Therefore, the question was not truly one of impairment of contract. The leases conveyed nothing since the statutory lapse had already occurred. The real issue was whether the forfeiture itself was constitutional. As one commentator accurately noted:

When a dormant mineral statute recognizes a transaction or transfer involving the severed interest as a "use," thereby preserving title for the record holder, the contract clause should never come into play. If a gas or other mineral lease is entered into before the recording period expires, the contractual transaction renews title for another twenty years. On the other hand, if a lease is entered into after the re-recording period expires, the forfeiture would have already occurred in favor of the disseisor-surface owner. Such a lease would be void and therefore could not be impaired. In other words, the lease would not be abridged by the statute in a retroactive manner since the operation of the dor-

\textsuperscript{107} Id. at 651 (Brennan, J., dissenting) (quoting Pumpelly v. Green Bay Co., 13 Wall. 166, 177-78 (1872)).


\textsuperscript{110} 454 U.S. at 550 (Brennan, J., dissenting).

\textsuperscript{111} Id. at 531.

\textsuperscript{112} Id.
Thus, this aspect of the Court's decision appears to be sound and indeed was not disputed by the dissent.

D. Equal Protection Challenge

The appellants also contended that the special exception permitting mineral owners to retain an interest violated the equal protection clause. To take advantage of the exception, the owner must have owned at least ten interests in the county, must have made a diligent effort to preserve all the interests and must have been successful in preserving some. The failure to re-record must also have been the result of inadvertence and a statement of claim must be filed within sixty days after receiving notice of lapse.

In the absence of a record containing any factual data, the Court relied solely on the State's perceived economic interest. The Indiana Supreme Court had stated:

Minerals exist within the earth in strata and formations which do not necessarily coincide with the manner in which man has chosen to divide the surface area. Consequently, it is commonly necessary to assemble several mineral interests in order to render the extraction of minerals safe and profitable. The Legislature could reasonably have concluded that those meeting the criteria set forth above include those most likely to assemble such interest and actually produce minerals. The separate classification of interests so held within these essential clusters is rationally related to the legitimate objectives of the enactment and is consequently not contrary to the requirements of state and federal equal protection.

The Court's conclusion was in accord with other decisions in the area of economic and social concern where legislative choices are given a great degree of deference by the Court. In New Orleans v. Dukes, the Court noted that economic regulations are subject to a deferential standard of review, that "the classification challenged must be rationally related to a legitimate state interest," and that "rational distinctions may be made with substantially less than mathematical exactitude." Thus the Court, applying minimal review, found the legislative purpose of encouraging single ownership of multiple interests to be legitimate and found that the protection afforded such owners furthered the Act's purpose.

The difficulty in accepting the Court's conclusion is that the reason for the ten interest exemption can probably be best explained by recognizing that lobbyists for the larger mineral interest holders were able to effectively protect themselves while smaller interest holders were not.

113 Comment, supra note 95, at 491 (original emphasis).
114 454 U.S. at 539.
118 See Polston, supra note 2, at 100-01.
E. Due Process Challenge

The most serious challenge to dormant mineral interest statutes is that such schemes deny procedural due process. As discussed earlier, several state supreme courts, by relying on Mullane v. Central Hanover Bank and Trust Co.,\(^{119}\) have found dormant mineral statutes constitutionally defective as a consequence of the lack of notice and hearing requirements.

1. Majority Opinion

The United States Supreme Court explicitly determined that the Mullane rationale does not apply to dormant mineral statutes.\(^{120}\) In so finding, the Court relied on the notion that “persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.”\(^{121}\) Emphasis was placed on the fact that the legislature provided a two-year grace period to allow property owners to become familiar with the statute.

The majority distinguished between the notice and hearing requirements necessary when an adjudicatory proceeding is held to deprive owners of property interests and the requirements needed for the self-executing feature of a statute that simply cuts off interests.\(^{122}\) The Court found that the due process standards set forth in Mullane are applicable only to a judicial proceeding that is to be accorded finality.\(^{123}\)

The analysis of the Court appears to be logically sound. In Mullane, the Court concluded that notice by publication given to the beneficiaries of a common fund of a judicial settlement of accounts by the trustee was constitutionally sufficient.\(^{124}\) The Court in Texaco attached significance to the fact that the Mullane opinion emphasized that “[i]n the case before us there is of course no abandonment.”\(^{125}\) But, perhaps the best explanation of the Court’s decision is that it recognized that there were essentially two fundamentally different concepts coming into play in the Mullane and dormant mineral statute situations. Procedural due process requirements evolved to limit the judicial process rather than the legislative process. Certainly procedural due process did not develop to require that the legislature give formal due process notice of every law passed which may not have been anticipated. Indeed, the Court stated: “it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights.”\(^{126}\)

\(^{120}\) 454 U.S. at 535.
\(^{121}\) Id. at 532.
\(^{122}\) Id. at 534-35.
\(^{123}\) Id. at 535.
\(^{124}\) 339 U.S. at 318.
\(^{125}\) 339 U.S. at 316.
\(^{126}\) 454 U.S. at 536.
2. Dissenting Opinion

There is, however, a certain sense of unfairness generated by the effect of the Mineral Lapse Act. In a strong dissent, four justices agreed that the state had the power to control, limit, and define interests in land, agreed that the State legislature had legitimate interests in encouraging the identification of the owners of mineral interests, and even agreed that extinguishment might be an appropriate sanction for failure to comply. The majority and dissent diverge in the amount of importance to be accorded retroactive application of the statute. The dissenters argued that retroactive application of the statute does not afford mineral interest owners adequate or meaningful notice of their duty to act to preserve their mineral interests.

The dissent recognized that it is generally necessary to charge citizens with knowledge of the law and that the State cannot afford to notify each citizen affected by changes in the law. However, the dissent contended that an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by employing the legal maxim that "citizens are presumed to know the law." There are certain limited circumstances in which reliance on the maxim is simply not consistent with the Constitution.

The dissent relied on Lambert v. California for support. Lambert involved a Los Angeles ordinance which made it unlawful for any person with a prior felony conviction to be in or remain in the city for more than five days without registering. Ms. Lambert was charged with violating this ordinance and was convicted, fined and placed on three years probation. The United States Supreme Court reversed, noting that Lambert's conduct—a mere failure to register—was wholly passive. The Lambert Court stated: "[t]he rule that 'ignorance of the law will not excuse' is deep in our law, as is the principle that of all the powers of local government, the police power is 'one of least limitable.' On the other hand, due process places some limits on its exercise." The dissent recognized that Lambert involved a criminal sanction and of course suggests "no general requirement that a state take affirmative steps to inform its citizenry of their obligations under a particular statute before imposing legal sanctions for violations."

The dissent believed that Texaco like Lambert, involved "the necessity of notice in the context of a registration statute sufficiently unusual in character, and triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations." The dissent deemed this to be particularly true because property owners are not diligent, attentive businessmen maintain-

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127 Id. at 540.
128 Id. at 542.
129 Id. at 544.
130 355 U.S. 225 (1957).
131 Id. at 228 (citations omitted).
132 454 U.S. at 546.
133 Id. at 547.
ing daily surveillance over the actions of a silent legislature. Thus, the dissenting justices concluded that some form of notice is constitutionally required prior to the extinguishment of mineral interests.

In examining what type of notice is required, the dissenters realized that a state could not practically inform all appropriate parties of impending lapse of mineral interests. The dissenters went so far as to recognize that "a state need not make provision for notice with respect to the retroactive application of a statute where it would defeat a legitimate state interest, or would be infeasible in the context of the statutory scheme." In balancing, the dissent contended that it was difficult to see "how the state's interest is served by not requiring the surface owner to notify the mineral rights owner before taking title to his interest."

In support of this contention, the dissenters noted that as to the mineral interest owner who owns ten mineral interests in the county, the statute requires notice before those interests are terminated. The person charged with responsibility for such notice is the surface owner. In practical operation, such notice will be provided in most cases to avoid the possibility that a surface owner or potential purchaser would be damaged by the owner of ten or more interests coming forward to claim his rights. The problem is that such notice comes too late for owners of fewer than ten interests to assert their claims. Thus, why not have the same notice requirements for all mineral interest owners? The dissenters concluded that "[a]s applied to mineral interest owners who were without knowledge of their legal obligations, and who were not permitted to file a saving statement of claim within same period following the giving of statutory notice by the surface owner, the statute operates unconstitutionally."

The dissent and majority fundamentally disagree about whether the lapse of mineral interest created by the Mineral Lapse Act is a circumstance so unusual or unique that the presumption of knowledge of the law does not apply. There is merit in the dissent's argument, particularly since the majority does not explain how the State's interest would be eroded if the surface owner were required to give notice.

The State interest in promoting development by resolving conveyancing problems created by unknown and missing interest holders is legitimate. But the use of that interest to sustain the Act in Texaco was questionable. The surface owner's ability to provide mineral owners with notice of the action is evidence that the mineral owners' identity was known. The mineral owners' response in defending the action demonstrates that they had not abandoned their interests.

134 Id.
135 Id. at 551.
136 Id. at 552.
137 Id. at 553-54.
138 Id. at 554.
139 Id.
V. Conclusion

The United States Supreme Court declared retroactive dormant mineral statutes constitutional in Texaco, Inc. v. Short. The Court rejected the proposition, used by a number of state supreme courts, that Mullane procedural due process requirements apply to retroactive land statutes. Both the majority and dissenting opinions placed limits on the application of the Mullane analysis. Thus, Mullane is specifically restricted to adjudicatory processes and has no application to situations involving self-executing legislative enactments.

In refusing to accept the notion that the Indiana Dormant Mineral Act presents an unusual case where the presumption of knowledge of the law should not apply, the Court ignored the spirit of Lambert. Further, the Texaco decision represents a move toward a narrow conception of due process requirements when statutes impose an affirmative duty to act and penalize failure to act with deprivation of a property interest.

Under the Court's analysis in Texaco, the statutes declared unconstitutional by various state supreme courts would pass federal constitutional muster. However, this does not suggest that state courts must henceforth declare dormant mineral statutes constitutional. Rather, state courts may find that the state's constitutional threshold is higher than that provided by the federal standards. The constraint placed on state courts by Texaco is that they will no longer be able to employ and rely upon Mullane procedural due process requirements to strike the statutes down.

Dormant mineral statutes may be criticized on the grounds that their practical effect is not to clear titles of stale claims, but rather to put clouds on all mineral titles more than twenty years old whether used or unused. This is because it is virtually impossible to evaluate whether the interests are being used, as defined in the statutes, from the land records alone. Further, in many counties it is extremely difficult to tell whether ten or more interests are owned by a single party. The net effect of the statutes is to take ownership from one class of interest holders and give it to another class of property holders.

The acts do not require that the owners actually produce or develop their mineral interests. Instead, all that is required is that one either use or record. The only purpose served by such re-recording is to guarantee that mineral interest owners be locatable so that if someone desires to exploit the mineral, the owner can be easily identified. Therefore, it seems inequitable and arbitrary that owners who are easily identified are treated the same as problem causing phantom owners.

It may be reasonably suggested that the state-claimed interest in fostering further development of a valuable resource is merely a smokescreen for the desire to eliminate severed mineral owners as a class of property owners. The primary objective of dormant mineral acts may in reality be to provide for both a degree of economical and environmental equilibrium between surface and subsurface rights and ecological reform. Indeed, this was the position taken by Save Our Cumberland Mountains in an amici curiae brief filed in
Texaco which urged affirmance of the Indiana Supreme Court decision.\textsuperscript{140}

The United States Supreme Court did not address this motive, however, preferring instead to assume that since the purpose of the Act could have been to encourage development, the Act was a rational exercise of the State's police power. It remains to be seen whether the Court would view elevation of the rights of surface owners as an acceptable motive for enactment of a dormant mineral statute. However, since scrutiny of legislative motive is minimal at best,\textsuperscript{141} states will be protected in enacting dormant mineral statutes by simply asserting development as the motive.

Finally, the result of the Texaco decision will surely be an increase in intensive legislative activity focusing on the problems created by dormant mineral interests.

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\textsuperscript{140} See Amici Curiae Brief of Save Our Cumberland Mountains, Texaco, Inc. v. Short, 454 U.S. 516 (1982).