#H-402 6/19/81

Memorandum 81-39

Subject: Study H-402 - Marketable Title (Dormant Mineral Rights)

A typical pattern in California conveyancing is a grant of real property with a reservation of mineral rights on the speculative chance that some time in the future gold or oil will be discovered on the property. The marketability of many parcels is impaired by such dormant mineral rights, the existence of which hinders not only the sale and development of the surface but also exploration and development of any minerals that might actually exist below the surface.

The owner of dormant mineral rights is not motivated to develop the minerals since undeveloped rights are not taxed and are not subject to loss through adverse possession by surface occupancy. The greatest value of dormant mineral rights to their owner is their effectual impairment of the fee, which may be worth something when the fee owner seeks to assemble an unencumbered parcel. Even if owners of dormant mineral rights are willing to relinquish the rights for a reasonable price, the fee owner may find it impossible to trace the ownership of the old rights and to obtain the interests of all current heirs and owners which may have been thought worthless and therefore not have been conveyed or willed.

Within the past decade, California law has eased the plight of the surface owner somewhat. Legislation enacted in 1971 allows the surface owner to bring a judicial action to terminate a right of entry by the mineral rights owner if the mineral rights are 20 years old and termination of the right of entry will not adversely affect the operations of the mineral rights owner. See Code Civ. Proc. §§ 772.010-772.060. A 1969 Supreme Court case, Gerhard v. Stephens, 68 C.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1969), permits the surface owner to terminate by judicial action the interest of an owner of oil and gas rights upon a showing that the oil and gas owner has abandoned the rights.

These provisions do not solve the problems. They are limited to interests in oil and gas and do not cover other mineral interests. They require a judicial proceeding and do not provide an effective means of clearing the record of dormant mineral interests. Proof of abandonment is difficult, since the surface owner must show not only nonuse but also

an intent to abandon. In Gerhard v. Stephens, for example, 47 years of nonuse by the mineral owners, coupled with such a number of cotenancy interests that a court appointed receiver would be needed to develop the mineral interests, was not sufficient to show abandonment as to all mineral interests.

The staff believes that as an initial step, the rule of Gerhard v. Stephens that oil and gas rights are subject to abandonment should be extended to all mineral rights. The case was based on a technical distinction between oil and gas and other mineral rights. Oil and gas, being fugacious, are not subject to corporeal ownership but only to a profit a prendre, which is an incorporeal hereditament. Incorporeal, but not corporeal, interests are subject to abandonment. Mineral rights in nonfugacious minerals are usually corporeal, and hence not subject to abandonment. This technical distinction has been criticized extensively by the commentators. See, e.g., Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227 (1969). The staff agrees with the analysis of the commentators that, "Compelling public-policy reasons dictate that mineral estates of any nature should be subject to abandonment without regard to their classification as corporeal or incorporeal." 21 Stan. L. Rev. at 1227.

While subjecting all mineral rights to abandonment opens up the possibility of terminating dormant interests by judicial action, it is not a completely satisfactory means of clearing land titles. A number of states have gone farther and provided that abandonment can occur as a result of nonuse alone--nonuse for the statutory period (e.g., 20 years) in effect creates a conclusive presumption of intent to abandon. Other states have used a Marketable Title Act type of scheme--failure to rerecord the mineral interest within a statutory period (e.g., 20 years) in effect creates a conclusive presumption of intent to abandon.

Each of these schemes has advantages and disadvantages. Abandonment by nonuse relies totally on facts outside the record and still requires a judicial determination; it also precludes a person from legitimately tying up undeveloped mineral interests on a long-term basis, for example for conservation reasons or for purposes of orderly development; but it does ensure that a mineral right that is not in fact dormant--that has been in use within the past 20 years--will not be lost. The rerecording scheme relies on the record alone and enables

transactions and title insurance without resort to judicial proceedings; however, it enables a person to tie up mineral rights on a long-term basis for speculative purposes by the simple act of rerecording, and creates the danger that a person will lose a valid, active mineral interest.

The staff believes that a rerecording scheme is the more preferable of these two schemes and recommends that such a scheme be adapted for use in California. We believe that the burden of rerecording every 20 years is a relatively modest one for a person who has a serious interest in preserving mineral rights. Conversely, a person who has a serious interest should be able to preserve the rights by simple rerecording without having to show actual use or development of the rights.

Our main purpose is to clear the record automatically of old mineral interests that no one desires to preserve but that nonetheless burden the records and impair the marketability of property. A 20-year expiration statute, with the option to preserve the interest for an additional 20 years at a time by recording a notice of intent to preserve, appears perfectly adequate to ensure this objective.

One concern with the rerecording type system is that a person who has a legitimate nondormant mineral interest may lose the interest through an inadvertent failure to rerecord. To cure this problem the staff recommends that mineral rights not be cut off by the 20-year expiration period if the minerals have been in production or there have been operations to extract the minerals within the past 5 years. Thus a person actively developing or producing under the mineral interest is protected even without rerecording, so long as the use or occupancy of the property continues. This limitation will require resort to facts outside the record. However, the staff believes such a limitation is necessary if we are to cut off mineral rights by operation of law. A title insurer should have little problem ascertaining whether in fact there have been operations or production of the minerals within 5 years.

The staff has drafted the attached tentative recommendation in accordance with the discussion in this memorandum. The tentative recommendation draft includes general provisions, particularly provisions for recording a notice of intent to preserve an interest. We have drafted these provisions in general form (drawn from our earlier draft of a Marketable Record Title Law) because it appears we will want to

apply these same provisions to a number of other interests in property, which we will discuss in separate memoranda. We have also included a provision that requires county recorders to report yearly statistics on recording of notices of intent to preserve an interest; it would be useful to have this information to see how well the statutes are operating, but is it worth the cost?

If the Commission approves the tentative recommendation, we will distribute it to interested persons for comment.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STAFF DRAFT

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.[1] 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.[2]

This situation can persist indefinitely, since severed mineral rights can take the form of a fee interest.[3] 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 Hast. L.J. 835, 853 (1970); Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1231-1232 ("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 fee, 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 Pac. 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 C.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (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.[4]

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."[5] 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.[6]

Dormant mineral rights also impede development of the subsurface minerals. Many oil and gas leases, for example, make express the requirement that the holder of the mineral rights proceed diligently or the lease terminates.[7] 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.[8] 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,

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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).

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, 147-148 (1969).

7. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 12.42 (1974).

8. See discussion in 3 B. Witkin, Summary of California Law, Real Property § 557 (1973).

and mineral exploiters face the possibility of severe penalties if they drill without obtaining the consent of all the mineral-rights owners.[9]

The impediment of dormant mineral rights on both surface and subsurface 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 several mineral rights and therefore does not constitute adverse possession.[10]

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

> 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 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."
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> 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

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9. See discussion in Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1231-1233 (1969).

10. See Willemsen, Improving California's Quiet Title Laws, 21 Hast. L.J. 835, 853-854 (1970).

11. 68 C.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968) (citations and footnotes omitted).

12. See note 3, supra.

13. 68 C.2d at 887-889, 69 Cal. Rptr. at ___-___, 442 P.2d at ___-___.

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 proceeding to determine whether mineral rights have been abandoned and requires proof 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.[14] It appears that abandonment will be a useful basis for clearing title only infrequently.[15] Moreover, the possibility that there has been an off-record abandonment may have the effect of clouding otherwise good record titles to mineral rights.[16]

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

An extensive body of legal literature demonstrates the need for an effective means of clearing land titles of dormant mineral rights.[19]

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14. 68 C.2d at 893-895, 442 P.2d at 716-717, 69 Cal. Rptr. at 635-636.

15. See, e.g., discussion in Willemsen, Improving California's Quiet Title Laws, 21 Hast. 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 Hast. L.J. 835, 854-856 (1970); Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1233-1235 (1969); Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 150 (1969).

19. See, e.g., P. Basye, Clearing Land Titles § 38 (2d ed. 1970); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 239-247 (1960); Willemsen, Improving California's Quiet Title Laws, 21 Hast. L.J. 835 (1970); Comment, Abandonment of Mineral Rights,

Subjecting mineral rights to termination is in the public interest and 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[20] and most of the nearly two dozen states that now have marketable title acts apply the acts to mineral rights.[21]

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 mineral production has not occurred within a recent period of time, for example, within 10 or 20 years.[22] The major attraction of this model is that it enables proof of abandonment 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. Even a marginal effort by the mineral owner will keep the interest alive.[23] This model also precludes long-term holding of mineral rights for such purposes as future development, future price increases that will make development

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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 complete bibliography, see 1 H. Williams & C. Meyers, Oil and Gas Law § 216.7 n.1 (1980).

20. 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, 142-144 (1969).

21. See discussion in P. Basye, Clearing Land Titles §§ 171-193 (2d ed. 1970; 1979 pocket part). 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.

22. See, e.g., La. Civ. Code arts. 789, 3546; Tenn. Code 64-704.

23. See discussion in Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 142-144 (1969).

feasible, or assurance by a conservation organization or subdivider that the mineral rights will not be exploited.[24]

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.[25] 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,[26] 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.

In addition to the two basic models, there are numerous variants and combinations of the two.[27] California itself has enacted a statute to enable termination of surface rights under a 20-year old oil and gas lease where this will not adversely affect the operations of the oil and gas lessee.[28]

Of the various available alternatives, the Law Revision Commission recommends as most sound in practice and theory a statute that provides for termination of mineral rights after the passage of 20 years if the holder of the mineral rights fails to record within that time a notice of intent to preserve the mineral rights. To protect the interests of a person who through inadvertence fails to record, the statute should make clear that only mineral rights that have been dormant for at least 5 years may be terminated. This will assure that active mineral interests are protected, but will not place an undue burden on marketability or the ability of a title insurer to determine dormancy easily and accurately.

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

25. See, e.g., Ind. Ann. Stat. § 56-1104; Minn. Stat. Ann. 541.023.

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

27. See, e.g., Mich. Stats. 26.1163(1)-(4).

28. Cal. Stats. 1971, ch. 1586, p. 3200, § 1, now codified as Code Civ. Proc. §§ 772.010-772.060.

In addition, there should be a two-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.

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 clearing of title records on a mass basis. Similar 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, thereby rendering a rerecording statute ineffective.[29] 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. This should not preclude abandonment of dormant mineral rights, however, and the statute should should also make clear that all mineral rights, not just oil and gas rights, are subject to abandonment.

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

An act to add Title 5 (commencing with Section 880.020) to Part 2 of Division 2 of the Civil Code, relating to mineral rights.

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

SECTION 1. Title 5 (commencing with Section 880.020) is added to Part 2 of Division 2 of the Civil Code, to read:

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29. See, e.g, discussion in Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 143 (1969).

Civil Code §§ 880.020-883.040 (added)

SECTION 1. Title 5 (commencing with Section 880.020) is added to Part 2 of Division 2 of the Civil Code, to read:

TITLE 5. MARKETABLE RECORD TITLE

CHAPTER 1. GENERAL PROVISIONS

Article 1. Construction

§ 880.020. Declaration of policy and purposes

880.020. (a) The Legislature declares as public policy that:

(1) Real property is a basic resource of the people of the state and should be made freely alienable and marketable to the extent practicable.

(2) Interests in real property and defects in titles created at remote times, whether or not of record, often constitute unreasonable restraints on alienation and marketability of real property.

(3) Such interests and defects produce litigation to clear and quiet titles, cause delays in real property title transactions, and hinder marketability of real property.

(4) Real property title transactions should be possible with economy and expediency. The status and security of recorded real property titles should be determinable to the extent practicable from an examination of recent records only.

(b) It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of public policy by enabling persons to rely on record title to the extent provided in this title, subject only to the limitations expressly provided in this title and notwithstanding any provision or implication to the contrary in any other statute or in the common law. This title shall be liberally construed to effect the legislative purpose.

Comment. Subdivision (a) of Section 880.020 is drawn from North Carolina marketable title legislation, N.C. Gen. Stat. § 47B-1. The declaration of public policy is intended to demonstrate the significance of the state interest served by this title and the importance of the retroactive application of the law to the effectuation of that interest.

See In re Marriage of Bouquet, 16 Cal.3d 583, 592, 546 P.2d 1371, ____, 128 Cal. Rptr. 427, ____ (1976) (upholding changes in the community property laws as retroactively applied).

A statute may require recordation of previously executed instruments if a reasonable time is allowed for recordation. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 10.4 at 415-16 (1974). The burden on holders of old interests of recording a notice of intent to preserve is outweighed by the public good of more secure land transactions. See, e.g., Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 800, 825 (1957) (upholding Minnesota marketable title legislation):

> A number of marketable title acts have been passed by various states. Such limiting statutes are considered vital to all who are engaged in or concerned with the conveyance of real property. They proceed upon the theory that the economic advantages of being able to pass uncluttered title to land far outweigh any value which the outdated restrictions may have for the person in whose favor they operate. These statutes reflect the appraisal of state legislatures of the 'actual economic significance of these interests weighed against the inconvenience and expense caused by their continued existence for unlimited periods without regard to altered circumstances.' . . . They must be construed in the light of the public good in terms of more secure land transactions which outweighs the burden and risk imposed upon owners of old outstanding rights to record their interests.

Subdivision (b) is drawn from Section 9 of the Model Marketable Title Act. If the application of a particular statute or common law rule conflicts with the provisions of this title, this title governs.

12343

§ 880.030. Effect on other law

880.030. Nothing in this title shall be construed to:

(a) Extend the period for bringing an action or doing any other required act under a statute of limitation.

(b) Affect the operation of any statute governing the effect of recording or failure to record, except as specifically provided in this title.

Comment. Subdivision (a) of Section 880.030 is drawn from Section 7 of the Model Marketable Title Act and Section 3-308 of the Uniform Simplification of Land Transfers Act (1977). Subdivision (b) is drawn from Section 7 of the Model Act.

Article 2. Application of Title

§ 880.240. Interests excepted from title

880.240. The following interests are not subject to expiration pursuant to this title:

(a) The interest of a person using or occupying real property and the interest of a person under whom a person using or occupying real property claims, to the extent the use or occupancy would have been revealed by reasonable inspection or inquiry.

(b) An interest of the United States or pursuant to federal law in real property that is not subjected by federal law to the recording requirements of the state and that has not terminated under federal law.

(c) An interest of the state or a local public entity in real property.

Comment. Subdivision (a) of Section 880.240 is drawn from Section 3-306(2) of the Uniform Simplification of Land Transfers Act (1977). Subdivision (a) makes clear that if a person in possession claims under another person, whether by lease, license, or otherwise, the interest of the other person does not expire.

Subdivision (b) is drawn from Section 6 of the Model Marketable Title Act and Section 3-306(4) of the Uniform Act. The Comment to the Model Act states, "The exception as to claims of the United States would probably exist whether stated in the statute or not."

Subdivision (c) is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation.

16974

Article 3. Preservation of Interests

§ 880.310. Notice of intent to preserve interest

880.310. (a) An interest in real property may be preserved from expiration pursuant to this title by recordation of a notice of intent to preserve the interest within the period prescribed by statute. The running of the period prescribed by statute is not suspended by the disability or lack of knowledge of any person or tolled for any other reason.

(b) Recordation of a notice of intent to preserve an interest in real property after the period prescribed by statute does not preserve an interest that has previously expired pursuant to this title.

(c) Recordation of a notice of intent to preserve an interest in real property does not preclude a court from determining that an interest has been abandoned or is otherwise unenforceable, whether before or after the notice of intent to preserve the interest is recorded, and does not validate or make enforceable a claim or interest that is otherwise invalid or unenforceable.

Comment. Subidivison (a) of Section 880.310 is drawn from the first two sentences of Section 4(a) of the Model Marketable Title Act and Section 3-305 of the Uniform Simplification of Land Transfers Act (1977).

Subdivision (b) is comparable to Section 2(d) of the Model Act and Section 3-303(3) of the Uniform Act.

Subdivision (c) is drawn from Section 3-309 of the Uniform Act, with the addition of language to make clear that a notice of intent to preserve does not affect the validity of any interest in real property under law apart from this title.

28766

§ 880.320. Who may record notice

880.320. A notice of intent to preserve an interest in real property may be recorded by any of the following persons:

(a) A person who claims the interest.

(b) Another person acting on behalf of a claimant if the claimant is under a disability, unable to assert a claim on his or her own behalf, or one of a class whose identity cannot be established or is uncertain at the time of recording the notice of intent to preserve the interest.

Comment. Section 880.320 is drawn from the third sentence of Section 4(a) of the Model Marketable Title Act and Section 3-305 of the Uniform Simplification of Land Transfers Act (1977).

10003

§ 880.330. Contents of notice

880.330. Subject to all statutory requirements for recorded documents:

(a) A notice of intent to preserve an interest in real property shall be in writing and signed and verified by or on behalf of the claimant.

(b) The notice shall contain all of the following information:

(1) The name and mailing address of the claimant.

(2) A description of the interest claimed. The description shall include a reference by record location to the recorded document that creates or evidences the interest.

(3) A legal description of the real property in which the interest is claimed. The description may be the same as that contained in the recorded document that creates or evidences the interest.

Comment. Section 880.330 is drawn from portions of Sections 4(a) and (5) of the Model Marketable Title Act and from Sections 2-302(b) and 2-308(b) of the Uniform Simplification of Land Transfers Act (1977). Under subdivision (b), if the interest is a restriction that affects the use or enjoyment of more than one parcel of real property that was created by recorded document containing a general description of all of the parcels, the legal description required may be the same as the general description. The introductory portion of Section 890.330 makes clear that all other statutory requirements must be complied with. See, e.g., Section 1170 (recorded document must be duly acknowledged or proved and certified).

30151

§ 880.340. Form of notice

880.340. Subject to all statutory requirements for recorded documents, a notice of intent to preserve an interest in real property shall be in substantially the following form:

RECORDING INFORMATION

Recording requested by:
After recording return to:

FOR USE OF COUNTY RECORDER

Indexing instructions. This notice must be indexed as follows: Grantor and grantee index--claimant is grantor.

NOTICE OF INTENT TO PRESERVE INTEREST

This notice is intended to preserve an interest in real property from extinguishment pursuant to Title 5 (commencing with Section 890.010) of Part 2 of Division 2 of the Civil Code (Marketable Record Title).

Claimant	Name: Mailing address:
Interest	Description (e.g., mineral rights): Record location of document creating or evidencing interest:
Real Property	Legal description (may be same as in recorded document creating or evidencing interest):

I assert under penalty of perjury that this notice is not recorded for the purpose of slandering title to real property and I am informed and believe that the information contained in this notice is true.

Signed:_____ Date:_____

_____
(claimant)

_____
(person acting on behalf of claimant)

Acknowledgment or Proof and Certification

Comment. Section 880.340 incorporates the requirements of Section 880.330 (contents of notice). The introductory portion of Section 880.340 makes clear that all other statutory requirements must be complied with. See, e.g., Gov't Code § 27361.6 (printed forms).

§ 880.350. Recording and indexing notice

880.350. (a) A notice of intent to preserve an interest in real property shall be recorded in the county in which the real property is situated.

(b) The county recorder shall index a notice of intent to preserve an interest in real property in the index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the claimant under the notice shall be deemed to be the grantor.

Comment. Section 880.350 is drawn from a portion of Section 5 of the Model Marketable Title Act. The manner of recording the notice is prescribed in Government Code Section 27322 and the fee for recording is prescribed in Government Code Section 27361 et seq.

09733

§ 880.360. Slander of title by recording notice

880.360. A person shall not record a notice of intent to preserve an interest in real property for the purpose of slandering title to the real property. If the court in an action or proceeding to establish or quiet title determines that a person recorded a notice of intent to preserve an interest for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording.

Comment. Section 880.360 is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation, and makes clear that recordation of a notice of intent to preserve an interest under this title is not privileged. Section 890.360 does not affect the elements of the cause of action for slander of title and codifies the measure of recovery for slander of title, with the addition of reasonable attorney's fees. See 4 B. Witkin, Summary of California Law, Torts § 328 (8th ed. 1974).

07426

§ 880.370. Grace period for recording notice

880.370. If the period prescribed by statute during which a notice of intent to preserve an interest in real property must be recorded expires before, on, or within two years after the operative of the statute, the period is extended until two years after the operative date of the statute.

Comment. Section 880.370 is drawn from Section 10 of the Model Marketable Title Act and Section 7-701(d) of the Uniform Simplification of Land Transfers Act (1977).

12823

[CHAPTER 2. ANCIENT MORTGAGES AND DEEDS OF TRUST]

CHAPTER 3. DORMANT MINERAL RIGHTS

§ 883.010. Definitions

883.010. As used in this chapter:

(a) Mineral rights are "dormant" if there are no operations or production that affects the minerals.

(b) "Mineral rights" means any interest created by grant or reservation, whether in the form of a fee, leasehold, easement, profit a prendre, rents, royalties, or other possessory or nonpossessory interest in fugacious or nonfugacious minerals, whether organic or inorganic, and includes express or implied appurtenant surface rights.

Comment. Section 883.010 defines mineral rights broadly to include a fee interest as well as an incorporeal hereditament 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 Pac. 19 (1925) (characterizing mineral rights). Section 883.010 also makes clear that for the purposes of this chapter, surface rights appurtenant to a mineral interest are included within the meaning of "mineral rights." Cf. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935) (grant of minerals includes implied right of entry to extract them).

15341

§ 883.020. Abandonment of dormant mineral rights

883.020. Notwithstanding any other provision of this chapter, dormant mineral rights are subject to abandonment.

Comment. Section 883.020 codifies the rule of Gerhard v. Stephens, 68 C.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968), that mineral rights in oil and gas are subject to abandonment and extends the rule to mineral rights in other substances. Section 883.020 applies regardless of the characterization of the mineral rights as a fee, an incorporeal hereditament, or any other legal classification. See Section 883.010 ("mineral rights" defined).

Mineral rights are subject to abandonment, notwithstanding the provisions of this chapter for expiration of dormant mineral rights after a prescribed period of time. See Section 883.030 (expiration of dormant mineral rights). Although recording a notice of intent to

preserve the rights may be evidence of an intent not to abandon, there nonetheless may be abandonment before expiration of the prescribed period. See Section 880.310(c) (notice of intent to preserve interest).

13618

§ 883.030. Expiration of dormant mineral rights

883.030. (a) Dormant mineral rights expire at the latest of the following times:

(1) After the mineral rights are dormant for a period of 5 years.

(2) Twenty years after the date the instrument creating the mineral rights is recorded.

(3) Twenty years after the date a notice of intent to preserve the mineral rights is recorded. A notice of intent to preserve the mineral rights shall be recorded within 20 years after the date the instrument creating the mineral rights is recorded or, if another notice of intent to preserve the mineral rights is recorded, within 20 years after the date the other notice of intent to preserve the mineral rights is recorded.

(b) This section applies notwithstanding any provision to the contrary in the instrument creating the mineral rights or in another recorded document unless the instrument or other recorded document provides an earlier expiration date.

Comment. Section 883.030 provides for expiration of dormant mineral rights after 20 years or such later time as the mineral rights have been dormant for a five-year period, notwithstanding a longer or an indefinite period provided in the instrument creating the mineral rights. The expiration period 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. See Sections 772.010-772.060. Section 883.030 does not affect mineral rights in active production or that have been in active production within 5 years. See Section 883.010 ("dormant" mineral rights defined).

The expiration period can be extended for up to 20 years at a time by recordation of a notice of intent to preserve the mineral rights. See Section 880.310 (notice of intent to preserve interest). Recordation of a notice of intent to preserve the mineral rights does not necessarily preclude abandonment of the mineral rights. See Section 883.020 (abandonment of dormant mineral rights) and Comment thereto.

Mineral rights do not expire under Section 883.030 unless there is both nonuse for a period of at least 5 years and failure to record a notice of intent to preserve within 20 years.

§ 883.040. Effect of expiration

883.040. Expiration of dormant mineral rights pursuant to this chapter makes the mineral rights unenforceable and is equivalent for all purposes to a termination of the mineral rights of record and a conveyance of the mineral rights to the fee owner of the surface interest, and execution and recording of a termination and conveyance is not necessary to terminate and convey or evidence the termination and conveyance of the mineral rights.

Comment. Section 883.040 provides for the clearing of record title to real property by operation of law after mineral rights have expired under Section 883.030 (expiration of dormant mineral rights). Title can be cleared by judicial decree prior to the time prescribed in Section 883.030 in case of an abandonment of mineral rights. See Section 883.020 (abandonment of mineral rights).

30944

§ 883.050. Transitional provision

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

Comment. Section 883.050 makes clear the legislative intent to apply this chapter immediately to existing mineral interests. Section 880.370 provides a two-year grace period for recording a notice of intent to preserve a mineral interest that expires by operation of this chapter before, on, or within two years after the operative date of this chapter. See Section 880.370 (grace period for recording notice) and Comment thereto.

27644

Government Code § 27296 (amended)

SEC. 2. Section 27296 of the Government Code is amended to read:

27296. The county recorder in each county shall complete a yearly statistical report of documents filed and recorded on the form herein described. Such a report shall be submitted to the office of the Insurance Commissioner. The county recorder may either charge for copies of this report or may disburse the report without fee for public information. Certified and noncertified copies of any records issued by the county recorder shall not be included in this report.

The statistical report form shall be substantially as follows:

Documents Recorded and Filed

Year

Deeds . . . . . .
Deeds of Trust and Mortgages . . . . . .
Notices of Intent to Preserve an Interest . . . . . .
Reconveyances . . . . . .
Trustee's Deeds . . . . . .
Total number of documents recorded and filed . . . .

Comment. Section 27296 is amended to enable monitoring of the Marketable Record Title legislation. See Civil Code § 880.310 (notice of intent to preserve an interest in real property).

16969

Uncodified Section (added)

SEC. 3. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the Legislature finds and declares that there are savings as well as costs in this act which, in the aggregate, do not result in additional net costs.

Comment. Section 3 recognizes that any costs of recording and indexing notices of intent to preserve an interest are offset by the fees for recording and indexing pursuant to Government Code Section 27361 et seq.