LETTER OPINION
2012-L-11

October 10, 2012

The Honorable Stan Lyson
State Senator
1608 4th Avenue West
Williston, ND 58801-4127

Dear Senator Lyson:

Thank you for your letter asking whether an oil company may withhold royalties based on a title defect greater than 20 years old, where an affidavit of marketable title has been properly recorded and about the applicability of the Marketable Record Title Act to severed mineral interests. It is my opinion that the Marketable Record Title Act may be difficult to satisfy with respect to an estate in severed minerals in part due to the challenge of meeting the Act's possession requirement.

ANALYSIS

Severed minerals are typically created when a landowner sells land but reserves title to the minerals. The reservation "sever[s] the title to the minerals from the title to the surface."[1] After the mineral estate is severed, "the surface and minerals are held by separate and distinct titles . . . ."[2]

The Marketable Record Title Act, N.D.C.C. ch. 47-19.1, (Act) was enacted to "simplify[ ] and facilitat[e] real estate title transactions."[3] More particularly, "[t]he idea behind marketable title acts is that when one person has had a record title to land for a significant period of time, old claims or interests that are inconsistent should be

[1] N. Pacific Ry. v. Advance Realty Co., 78 N.W.2d 705, 713 (N.D. 1956); see also Nw. Impr. Co. v. Norris, 74 N.W.2d 497, 505 (N.D. 1955).
[2] Bilby v. Wire, 77 N.W.2d 882, 886 (N.D. 1956) (quoting Beulah Coal Mining Co. v. Heihn, 180 N.W. 787, 789 (N.D. 1920)).
[3] N.D.C.C. § 47-19.1-10.

extinguished."[4] These acts "extinguish old title defects automatically with the passage of time."[5]

North Dakota's Title Standards summarize the Act:

> The [Act] removes many title defects. The filing of an affidavit as prescribed in the Act evidences the removal of these defects. If the apparent defect is more than 20 years old and the present owner has an unbroken chain of title from an instrument of record more than 20 years, the marketable title affidavit removes the apparent defect. . . .[6]

The Act, however, does not mandate that any individual or company rely on it to resolve an ownership issue. The Act does not create a statutory right for mineral owners to receive royalty payments to which they may be otherwise entitled. Nor does it create for mineral owners a cause of action upon which to base litigation.[7]

You ask whether the Act applies to severed mineral interests, when affidavits of marketable title have been recorded to clear title of the severed mineral interests, and then add, "the concept of physical possession, as discussed in Sickler v. Pope, 326 N.W.2d 86 (N.D. 1982), being immaterial?"

The Act states that "possession" is a condition to its application. The Act provides: "Any person . . . who has an unbroken chain of title . . . under a deed . . . recorded for a period of twenty years or longer, and is in possession of such real estate, shall . . . have a marketable record title . . . ."[8] The Supreme Court describes this provision as follows:

> In order to come under the protection of this act one who claims an interest in real estate must have two qualifications. He must have an unbroken chain of title of record and he must be in possession of the interest which he claims.[9]

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[4] 3 Patton & Palomar on Land Titles, Sec. 563 (3rd ed.) (July 2011).
[5] Id.
[6] N.D.T.S., at Practice Guide, ch. III(E).
[7] The Act does create a cause of action for slander of title. N.D.C.C. § 47-19.1-09.
[8] N.D.C.C. § 47-19.1-01 (emphasis added).
[9] N. Pacific Ry. V. Advance Realty Co., 78 N.W.2d at 705, 719 (N.D. 1956) (emphasis added); see also Sickler v. Pope, 326 N.W.2d 86, 93-94 (N.D. 1982).

As a statutory provision, the "possession" element cannot be written off as "immaterial." Not only is it an affirmative requirement, but all words in a statute must be given meaning.[10]

The possession requirement has always been problematic when applying marketable title acts to severed minerals. There are inherent difficulties in establishing possession of a subsurface estate that has been severed from the surface estate, an issue addressed in adverse possession jurisprudence. "Without actual possession [of the mineral estate] there can be no adverse possession."[11] Even a mineral lease, "while evidence of possession, does not constitute actual possession sufficient for adverse possession of severed mineral interest."[12] "Where possession of the surface does not constitute possession of the minerals, there are problems as to the conduct required in establishing possession of the oil and gas rights."[13]

The Marketable Record Title Act's "possession" requirement was addressed in two North Dakota cases. In Northern Pacific Railway, the Court stated that the defendants could not take advantage of the Act because they did not show that they "exercised any dominion over or possession of the minerals separate and apart from the surface estate."[14] Therefore, they could not prove that they were "now in possession of any interest in the minerals," and consequently the Act "is not applicable to and has no effect upon the title to the minerals . . . ."[15] Similarly in Sickler the Court explained that the Act did not apply to protect Sickler's claim to the mineral estate because Sickler and her predecessors in interest could not satisfy the possession requirement of the Act.[16] The oil and gas lease executed by Sickler and her predecessors was evidence of possession, but did not constitute actual possession sufficient for adverse possession of the severed mineral interest.[17]

In sum, it is my opinion that the Act may be difficult to satisfy with respect to an estate in severed minerals in part due to the challenge of meeting the Act's possession requirement. In any event, and should a case be made where the Act was held to apply

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[10] E.g., Resolution Trust Corp. v. Dickinson Econo-Storage, 474 N.W.2d 50, 53 (N.D. 1991).
[11] Bilby v. Wire, 77 N.W.2d 882, 889 (N.D. 1956); see also Nelson v. Christianson, 343 N.W.2d 375, 378 (N.D. 1984); Burlington N., Inc. v. Hall, 322 N.W.2d 233, 240 (N.D. 1982); Yttredahl v. Fed. Farm Mort. Corp., 104 N.W.2d 705, 708 (N.D. 1960).
[12] Nelson, 343 N.W.2d at 378; 1 Williams & Meyers Oil & Gas Law, § 224.1, n.1 (2011).
[13] 1 Kuntz Treatise on the Law of Oil & Gas, § 10.1 (1987).
[14] N. Pacific Ry., 78 N.W.2d at 719.
[15] Id.
[16] Sickler v. Pope, 326 N.W.2d 86, 94 (N.D. 1982).
[17] Id.

and the criteria thereunder established, the result would not, in and of itself, give rise to an obligation to pay royalties or the right to receive them.

Sincerely,

Wayne Stenehjem
Attorney General

cmc/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[18]

[18] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).