LETTER OPINION
95-L-44

February 13, 1995

Mr. Charles Johnson
Commission Counsel
Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0480

Dear Mr. Johnson:

Thank you for your letter asking whether N.D.C.C. ch. 38-18.1 is self-executing, or whether the surface owner, to take title to the severed mineral estate, must obtain a court judgment?

If the terms of N.D.C.C. ch. 38-18.1 are met, title to the minerals passes to the surface owner. The surface owner may want to confirm title in a judicial action, but such action is not required. There are three reasons for this conclusion: the terms of ch. 38-18.1 itself, its legislative history, and case law.

N.D.C.C. ch. 38-18.1 describes a mechanism by which ownership of severed minerals -- minerals owned by one other than the owner of the surface estate -- can be transferred to the owner of the surface estate. The chapter provides that if minerals are "unused" for twenty years, they are "deemed to be abandoned," unless a mineral owner files a "statement of claim." N.D.C.C. § 38-18.1-02. Upon abandonment, title "vests" in the owner of the surface estate. Id. Actions constituting the "use" of minerals are described, as are the requirements for a proper statement of claim. N.D.C.C. §§ 38-18.1-03, 38-18.1-04. The operative language regarding ownership is in section 38-18.1-02: "Title to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment."

The Legislature's choice of the word "abandoned" is significant, for it typically means the absolute loss of ownership. To have abandoned property is to have lost "all right, title, claim, and possession" to it. Doughman v. Long, 536 N.E.2d 394, 399 (Ohio Ct. App. 1987); Commonwealth v. Carter, 344 A.2d 899, 902 (Pa. Super. Ct. 1975).

The Legislature's use of the word "vests" is also significant. Generally, it is defined as recognizing a fixed property right. "The standard definition of

'vest' is 'To give an immediate fixed right of present or future enjoyment.'" State v. Zupnik, 111 N.E.2d 42, 43 (Ohio 1952) (citation omitted). "'Vested' ordinarily means 'Fixed; accrued; settled; absolute.'" Robbins v. Robbins, 463 S.W.2d 876, 879 (Mo. 1971) (citing Black's Law Dictionary, 4th rev. ed.)

By using "abandoned" and "vests" to describe the mineral estate under N.D.C.C. ch. 38-18.1, the Legislature evidenced its intent that the law be self-executing.

N.D.C.C. ch. 38-18.1 was enacted in 1983. 1983 N.D. Sess. Laws ch. 413. It originated as House Bill No. 1084. Id. Arthur Bauer, a Bismarck attorney, supported the bill and testified:

> The courts may conclude that you can't perfect this title except through a quiet title. But let's let the courts take care of that. Possible your title will be sufficient. I can't think of any way to make perfect except to put a mandatory requirement in the law that everybody file a quiet title action and I don't think that it's very favorably felt in the legislature to burden the citizens of North Dakota with more legal actions, so I don't believe that it should be in the bill. It was included in 1625 not as a mandatory requirement but as a suggested requirement. Let's let that matter be taken care of down the line.

Hearing on H. 1084 Before the Sen. Finance and Taxation Comm., 48th N.D. Leg. (March 8, 1983) (Statement of Arthur Bauer).

Mr. Bauer's mention of "1625" refers to another bill that had been introduced but was later withdrawn. Like House Bill No. 1084, it dealt with transferring title of severed minerals to the surface owner. Section 4 of House Bill No. 1625 provided that the surface owner could commence an action under chapter 32-17, concerning quiet title actions, "to obtain a judicial determination of the extinguishment of the severed mineral interest . . . ." The section went on to state that if the minerals had been abandoned, the court "shall enter judgment determining that the severed mineral interest is extinguished, cancelling it of record and confirming that title has been vested in the owner or owners of the surface . . . ."

House Bill No. 1625 was withdrawn. Its provisions on judicial confirmation were not included in House Bill No. 1084. These factors, along with Mr. Bauer's comments, provide some indication that the Legislature believed the act to be self-executing, and that a transfer of title does not require any judicial action.

This conclusion is supported by the interpretation of dormant mineral acts in other jurisdictions. While the decisions do not directly address whether such laws are self-executing, in dicta they describe the acts as self-executing.

The Michigan dormant minerals act, like North Dakota's, states that upon certain circumstances the minerals are "deemed abandoned" and "vest as of the date of such abandonment in the owner . . . of the surface . . . ." Van Slooten v. Larsen, 299 N.W.2d 704, 707 n.1 (Mich. 1980). The court, in considering a challenge to the act's constitutionality, described it as self-executing. For example, the court stated that the surface owner may "receive title to the [mineral] interest upon the owner's failure to record . . . ." Id. at 710. It referred to the act as "vesting title in the owner of the surface estate." Id. at 716. The dissent thought the law unconstitutional because it "terminates" the mineral owner's estate and achieves "total forfeiture." Id. at 719 (Levin, J., dissenting). Michigan lower courts also construed, again in dicta, the act as immediately transferring title to the surface owner. Van Slooten v. Larsen, 272 N.W.2d 675, 677 (Mich. Ct. App. 1979) (upon abandonment under the statute the minerals "become the property of the surface owner"); Bickel v. Fairchild, 268 N.W.2d 881, 883 (Mich. Ct. App. 1978)) (the act requires mineral owners to do something "or lose their property").

The Illinois act states that minerals are "deemed abandoned," unless certain factors are found, and that upon abandonment the minerals "shall vest" in the owner of the surface. Wilson v. Bishop, 412 N.E.2d 522, 523 (Ill. 1980). The court described the process as "a statutory abandonment" and that the minerals vest "automatically" in the surface owner. Id. at 525.

The Minnesota version of the dormant minerals act was considered in Contos v. Herbst, 278 N.W.2d 732 (Minn. 1979), appeal dismissed sub nom. Prest v. Herbst, 444 U.S. 804 (1979). The Minnesota statute stated that if the mineral owner "'fails to file the verified statement . . . the mineral interest shall forfeit to the state.'" Id. at 743. The court described the statute as itself resulting in "forfeiture" of the minerals, id. at 742; as "extinguish[ing]" title, id. at 745; and as "automatically" resulting in "divestiture." Id. at 746.

The Wisconsin dormant minerals act provides for "reversion" to the surface owner. Chicago & Northwestern Transportation Co. v. Pedersen, 259 N.W.2d 316, 317 (Wis. 1977). The court understood the act as automatically transferring title to the surface owner, and because this occurred without a hearing found the law unconstitutional. Id. at 319, 320.

In Short v. Texaco, Inc., 406 N.E.2d 625 (Ind. 1980), aff'd 454 U.S. 516 (1982), both the Indiana Supreme Court and the United States Supreme Court understood the Indiana statute to be self-executing. The Indiana statute

stated that unless a statement of claim is filed, the mineral interest is "extinguished" and "ownership shall revert" to the surface owner. 454 U.S. at 518 n.3. The Indiana Supreme Court stated that the act "is self-executing and does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs." 406 N.E.2d at 628. The court also stated that the act "does not provide for any adjudicatory process by a court or administrative agency . . . . The act simply spells out the conditions which when existing mandate the extinguishment of an interest." Id. at 629. The United States Supreme Court also clearly understood the act as being self-executing. 454 U.S. at 518, 521, 526, 533, 535. The dissent described the law as "self-executing." Id. at 552. (Brennan, J., dissenting).

Legislatures that did want a court to confirm or order termination of the mineral interest were fully able to place such a requirement in their dormant mineral acts. E.g. Wheelock v. Heath, 272 N.W.2d 768, 769-70 (Neb. 1978).

In your letter you mention that the North Dakota Mineral Title Standards, § 13-01, "suggests that a quiet title action is necessary to establish legal title to the minerals." The comment states that "a quiet title action is required to determine that the surface owner had succeeded to the ownership of the dormant mineral interest." I disagree. No authority is cited in the comment. The drafters of the comment may have made this statement because of language in Texaco, Inc. v. Short, 454 U.S. 516 (1982) to which the comment refers on a different point. That decision contains the following: "[I]t is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur." 454 U.S. at 533. The Illinois Supreme Court stated: "If a court should be called upon to determine whether such conditions [of nonuse] arose in a particular case so as to have effected the loss of an interest, the owner of such interest would be entitled to notice and an opportunity to be heard." 406 N.E.2d at 629. Neither court, however, stated or implied that a judicial action is necessary to convey the minerals to the surface owner. Read in context, each stated that should a judicial action be brought by the surface owner to confirm title or by the mineral owner to reassert title, all due process protections apply. Neither court ruled that a judicial action is necessary to convey title.

In summary, the language of N.D.C.C. ch. 38-18.1 stating that title to the minerals is "abandoned" and then "vests" in the surface owner, the legislative history suggesting that a requirement for judicial confirmation was considered but rejected, and the interpretation given similar statutes in other jurisdictions, leads to the conclusion that chapter 38-18.1 is self-executing. If its terms are met, title to the mineral estate is conveyed to the surface owner. This does not mean that the surface owner cannot bring an action to confirm title, but doing so is not a condition to acquiring title to the minerals. Therefore, it is my opinion that submission of documentation that

the party claiming ownership of abandoned minerals has complied with the requirements of N.D.C.C. ch. 38-18.1 is sufficient to comply with N.D.C.C. § 38-14.1-14(1)(k).

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

CMC/dmm