MINUTES OF THE MEETING
NATURAL RESOURCES COMMITTEE
MONTANA STATE SENATE

January 19, 1987

The meeting of the Senate Natural Resources Committee was called to order by Chairman Thomas Keating on January 19, 1987, at 1:00 p.m. in Room 405 of the State Capitol.

ROLL CALL: All members were present with the exception of Senator Stimatz who was excused.

CONSIDERATION OF SENATE BILL 86: Sen. Delwyn Gage, Senate District #5, sponsor, explained that the bill adopts the Uniform Dormant Mineral Interests Act (see Exhibit 1) that provides a method for terminating dormant mineral interests that impair marketability of real property and at the same time, provides a means of preserving the mineral interest. Sen. Gage noted that the bill was the result of the efforts of the Uniform Code Commission members of the State of Montana. The bill was presented at the national meeting and was recommended to be adopted by all of the states. Those on the State commission hesitated to introduce the bill because dormant mineral interest had been addressed in previous sessions, but the bill was introduced because of the National Code Commission's recommendation.

Sen. Gage informed the committee that fragmented mineral interest is a problem and is going to become bigger because heirs of the original mineral owner may be unconcerned about an apparently "valueless mineral interest, or may not even be aware of it. An example in Cut Bank was cited by Sen. Gage. In 1960 a royalty interest was owned by one elderly lady who bequeathed the interest to 16 heirs. Each succeeding generation had heirs; and in 1986, the royalty owners totaled 146. As the revenue begins to decrease, the attention to the mineral interest declines and the royalty owners or mineral rights owners don't bother to notify people when they leave the State, etc. These are becoming lost interests in terms of ownership.

Sen. Gage listed the provisions in the bill, including the following:

1) Definition of when the minerals are considered dormant.

2) Types of mineral interests that can be addressed.

3) Criteria to determine if the minerals have been used or are dormant.

4) Quiet Title action for acquiring dormant mineral interests.

5) Procedure when a person starts a dormant mineral action and another person comes in with a late filing declaring that the minerals are not dormant.

PROPONENTS: Ward Shanahan, Montana Mining Association, said that he had testified on bills like this for the last three sessions, and that in his opinion, the reason the bills didn't pass was because someone tried to attach a tax, thereby preventing a solution to a serious problem. Mr. Shanahan testified that he was in favor of SB 86, but was having a problem with the provision concerning due process of law on page 6, section 7, concerning late recording by mineral owner, because this is backwards from the way the procedure normally occurs. Mr. Shanahan said he was in the process of writing a proposed amendment that would correct the problem by granting a presumption of abandonment. (Exhibit 2) Mr. Shanahan ended his testimony by saying that this bill is long overdue in Montana.

Mons Teigen, representing Montana Stockgrowers Association and the Cattlemen's Association, told the committee that the bill merits senators' support. However, Mr. Tiegen favored the bill with the inclusion of the amendment by Ward Shanahan.

Gary Meland, Montana Land and Mineral Owners Association, explained that dormant mineral interests place a cloud on the title of the surface owner. SB 86 remedies that problem and would help the marketability of land that has a dormant mineral interest. Mr. Meland said that SB 86 would open up more acres for development and thereby provide a greater tax base for Montana. (Exhibit 3)

Representative Ted Schye, House District #18, testified in favor of SB 86.

Terry Carmody, Montana Farmers Union, indicated he wanted to be on record as supporting SB 86.

OPPONENTS: Gene Phillips, Kalispell, representing a small family trust royalty interest in the State of Montana, stated his concern about section 3--Definition of Mineral Interest--and said that "mineral interest" is defined in SB 86 as no where else in Montana statutes. It was Mr. Phillip's contention that royalty rights do not cause problems because royalties are paid on productive mineral rights. Mr. Phillips stated that he would like the definition of "mineral interests" to conform to existing law.

Nancy Cooney Zier, independent landperson, whose employment consists of examining records in offices of Clerk and Recorders, Clerks of Court, and County Treasurers, and sometimes the Assessors, made known that in her 30 years of work, she knew of no case where a dormant mineral interest had affected the marketability of land. She said there is no value placed on mineral rights even in situations involving mortgages unless there is production income. Ms. Cooney-Zier believes that SB 86 is a confiscation of property rights without compensation and is also a violation of the 14th Amendment of the Constitution of the United States. She referred to a leading case, Texaco v. Short, 454 U.S. 516 (1982). Ms. Cooney-Zier concluded by suggesting that if SB 86 were passed, an amendment should be added to require that a public auction must be held so that anyone having an interest in acquiring dormant mineral rights would have an opportunity to acquire them. Ms. Cooney-Zier said that the funds derived from the auctions could be placed in the State's general fund. (Exhibit 4)

Simon Dyke, Manhattan, explained he was not an opponent, but he needed help in his own personal situation. When Mr. Dyke attempted to file on mineral rights in his county, the Clerk and Recorder refused.

QUESTIONS (OR DISCUSSION) BY COMMITTEE: In reply to Sen. Halligan's question whether Sen. Gage had seen other models of bills such as SB 86, the answer was negative. Sen. Halligan commented that section 3 (2) was rather a broad definition of mineral rights." Sen. Gage explained that the intent of SB 86 was to include all mineral rights.

Mr. Shanahan testified that there is only limited ability to apply this action and this is when dormant mineral interests impair the marketability of real property. If dormant interests do not impair marketability, SB 86 would not be applicable. Mr. Shanahan explained that in

most cases, minerals have been dormant for a long time and if someone is interested in dormant minerals, it is the interested party's problem to search out the missing owners.

However, Ms. Cooney Zier said that hard minerals is different than oil and gas, in that if there is a producing property, the funds are held in an escrow account until the royalty owners are located.

Sen. Severson wanted to know when the 20-year period would begin. In reply, Sen. Gage stated a period of 20 years immediately preceding commencement of the termination action (p. 3, line 5 of SB 86).

Sen. Severson then asked if someone could have taken an action to preserve the use of a mineral interest in the preceding years and failed to record it. It was Sen. Gage's contention that if a person is really interested in the minerals, the person would be watching what is happening to those minerals, but the person would also have the opportunity to file a late notice that the mineral interest is not dormant.

Sen. Anderson indicated his concern of the potential violation of the Constitution's 14th Amendment of taking property without just compensation. Mr. Shanahan responded that this bill is not taking property for public use and the amendment he was preparing resolves the issue of taking property without due process of law.

Mr. Shanahan restated that there is a difference between Montana law and section 7 of SB 86. Under SB 86, if someone asserts a mineral interest, that person has to pay attorney's fees of the person who originally had the mineral interest. Mr. Shanahan explained that a person should not be penalized for asserting interest.

Mr. Shanahan explained that SB 86 provides for "quiet title" type procedures for minerals that are actually dormant and also provides 2 1/2 years before such an action can be brought. If a landowner finds a dormant mineral interest in his title, he may bring a quiet title type action. If after the quiet title action has been initiated and notice has been given and published in a newspaper, and there is no response, the legal presumption would then be that the interest has been abandoned. However, if notice is given

and the mineral owner is found, the mineral owner has the right to come in and prove that the interest has not been abandoned. Under SB 86, the mineral owner is given the right to assert his interest.

Sen. Halligan questioned the fact that Mr. Dyke's notice of mineral interest could not be filed. Sen. Keating explained that the document must have a notary acknowlegement in order for the Clerk and Recorder to file it. When a mineral interest owner can't operate or otherwise use or mine the minerals, Sen. Keating said it is best to file an affidavit of ownership and acknowledgement to establish where the mineral interest owner can be found.

Mr. Shanahan observed that SB 86, sec. 6, provides for preservation of a mineral interest whether or not the interest is being used.

Sen. Keating agreed and presented an example concerning a Texas widow who was the heir of minor mineral interest in 5 acres with current market value of $35. Had the widow initiated ancillary probate proceedings, the action would have cost her much more than the value of the minerals. The widow wanted to record her mineral interest and filed an affidavit of heirship in Texas court and the county where the property was located, including her name, address, and a description of the mineral interest. The Texas woman thereby complied with the intent of SB 86, sec. 6. Mr. Shanahan acknowledged that SB 86 legitimizes what people are already doing.

In response to a question from Sen. Keating about whether there is a distinction between royalty and mineral interest, Mr. Phillips, who is a surface, mineral, and royalty owner, replied that a mineral owner must be found before any exploration may take place and that a lease must be negotiated. Conversely, it is not necessary to find a royalty owner unless there is production.

Sen. Keating then asked if Mr. Phillips had even known a segregated mineral interest to have an effect on the value of surface land; and Mr. Phillips answered "yes, in the instance of gravel."

Sen. Keating remarked that sec. 1 (2) is not clear concerning whether marketability means surface, mineral, or royalty interests and perhaps the definition of property needs to be rewritten.

Mr. Shanahan reiterated that mineral acres include all interests in order to make the law completely fair from a legal standpoint.

Gary Meland commented that marketability varies greatly due to mineral interests when potential damage and disruption to the surface is considered.

CLOSING: Sen. Gage said there is no way to be fair to all people, but SB 86 serves as a vehicle whereby some problems can be alleviated. He suggested that people who own mineral interests must take care of them. Most of the time mineral interest is of no value, but when it comes time to selling the land, the mineral owner preserves its value. Concerning the taking of property without compensation, Sen. Gage admitted that SB 86 would do that, but the mineral interest is perceived as having no value.

There being no further questions, Sen. Keating adjourned the meeting and declared executive action would be taken at a later date.

Meeting adjourned at 2:45 p.m.

Thomas F. Keating

THOMAS F. KEATING, Chairman

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ROLL CALL

NATURAL RESOURCES COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date 1-19-87

NAME	PRESENT	ABSENT	EXCUSED
Sen. Tom Keating, Chairman	X		
Sen. Cecil Weeding, Vice Chairman	X		
Sen. John Anderson	X		
Sen. Mike Halligan	X		
Sen. Delwyn Gage	X		
Sen. Lawrence Stimatz			X
Sen. Larry Tveit	X		
Sen. "J.D." Lynch	X		
Sen. Sam Hofman	X		
Sen. William Yellowtail	X		
Sen. Elmer Severson	X		
Sen. Mike Walker	X		

Each day attach to minutes.

DATE 1-19-87

COMMITTEE ON Natural Resources

VISITORS' REGISTER

NAME	REPRESENTING/ADDRESS	BILL #	Check One: Support	Check One: Oppose
Lyman Dyke	Self Manhattan, MT. -59741	SB 86	✓	
Nancy Cooney	self - Billings MT	SB 86		✓
Janelle Fallan	Mont Petroleum	SB86		
Terry Carmody	Mont Farmers Union	SB 86	✓	
~~[illegible]~~	~~MPC~~	~~[illegible]~~		
[illegible] Johnson	self	S 86		
Doug [illegible]	MONTANA Oil & GAS	SB 86		
ART WITTICH	MPC	SB 86		
WARD SHANAHAN	SELF	SB 86	V w/AMD	
Gary Wicks	Montana Land & Minerals Assn	SB 86	✓	
[illegible]	" " " " "	SB 86	✓	
Russ [illegible]	NPRC	SB 86		
Ted Schye	Rep H.D. 18	SB 86	✓	
Mons Teigen	Mt Stgr & Cattlewomen	86	✓	
Don Baker	EQC; Stage [illegible] Helena MT			
Jim Baker	Montana Minority Manpower Management	—	—	—
Don Allen	Mt. Wood Products Assn.	SB 86		
John Delano	BNI			
Steve Phillips	SELF	SB 86	Amend	

(Please leave prepared statement with S...

NAME: Mons Teigen DATE: 1-9-87

ADDRESS: Helena

PHONE: 442-3420

REPRESENTING WHOM? MT Stockgrowers & Cattlewomen

APPEARING ON WHICH PROPOSAL: SB 86

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: This should help alleviate a growing problem to Montana land owners. As time goes on the proliferation of fractional mineral interests will increase.

Our attorney has prepared a report on this bill which I will supply you with tomorrow.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

UNIFORM DORMANT MINERAL INTERESTS ACT*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIFTH YEAR
IN BOSTON, MASSACHUSETTS
AUGUST 1-8, 1986

With Prefatory Note and Comments

* The following text is subject to revision by the Style Committee of the National Conference of Commissioners on Uniform State Laws. Final copies of the Act with style changes can be obtained for a nominal charge from the Headquarters Office of the National Conference of Commissioners on Uniform State Laws, 645 North Michigan Avenue, Suite 510, Chicago, IL 60611, after January 1, 1987.

UNIFORM DORMANT MINERAL INTERESTS ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Dormant Mineral Interests Act was as follows:

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Final, approved copies of this Act are available on 8-inch IBM Displaywriter diskettes, and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
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UNIFORM DORMANT MINERAL INTERESTS ACT

PREFATORY NOTE

Nature of Mineral Interests

Transactions involving mineral interests may take several different forms. A lease permits the lessee to enter the land and remove minerals for a specified period of time; whether a lease creates a separate title to the real estate varies from state to state. A profit is an interest in land that permits the owner of the profit to remove minerals; however, the profit does not entitle its owner to possession of the land. A fee title or other interests in minerals may be created by severance.

A severance of mineral interests occurs where all or a portion of mineral interests are owned apart from the ownership of the surface. A severance may occur in one of two ways. First, a surface owner who also owns a mineral interest may reserve all or a portion of the mineral interest upon transfer of the surface. In the deed conveying the surface of the land to the buyer, the seller reserves a mineral interest in some or all of the minerals beneath the surface. Certain types of sellers, such as railroad companies, often include a reservation of mineral interests as a matter of course in all deeds.

Second, a person who owns both the surface of the land and a mineral interest may convey all or a portion of the mineral interest to another person. This practice is common in areas where minerals have been recently discovered, because many landowners wish to capitalize immediately on the speculative value of the subsurface rights.

Severed mineral interests may be owned in the same manner as the surface of the land, that is, in fee simple. In some jurisdictions, however, an oil and gas right (as opposed to an interest in nonfugacious minerals) is a nonpossessory interest (an incorporeal hereditament).

Potential Problems Relating to Dormant Mineral Interests

Dormant mineral interests in general, and severed mineral interests in particular, may present difficulties if the owner of the interest is missing or unknown. Under the common law, a fee simple interest in land cannot be extinguished or abandoned by nonuse and it is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals. Thus, it is possible that the only document appearing in the public record may be the document initially creating the mineral interest. Subsequent mineral owners, such as the heirs of the original mineral owner, may

be unconcerned about an apparently valueless mineral interest and may not even be aware of it; hence their interests may not appear of record.

If mineral owners are missing or unknown, it may create problems for anyone interested in exploring or mining, because it may be difficult or impossible to obtain rights to develop the minerals. An exploration or mining company may be liable to the missing or unknown owners if exploration or mining proceeds without proper leases. Surface owners are also concerned with the ownership of the minerals beneath their property. A mineral interest includes the right of reasonable entry on the surface for purposes of mineral extraction; this can effectively preclude development of the surface, and constitutes a significant impairment of marketability.

On the other hand, the owner of a dormant mineral interest is not motivated to develop the minerals since undeveloped rights may not be taxed and may not be subject to loss through adverse possession by surface occupancy. The greatest value of a dormant mineral interest to the mineral owner may be its effectual impairment of the surface estate, which may have hold-up value when a person seeks to assemble an unencumbered fee. Even if one owner of a dormant mineral interest is willing to relinquish the interest for a reasonable price, the surface owner may find it impossible to trace the ownership of other fractional shares in the old interest.

An extensive body of legal literature demonstrates the need for an effective means of clearing land titles of dormant mineral interests. Public policy favors subjecting dormant mineral interests to termination, and legislative intervention in the continuing conflict between mineral and surface interests may be necessary in some jurisdictions. More than one-fourth of the states have now enacted special statutes to enable termination of dormant mineral interests, and some of the nearly two dozen states that now have marketable title acts apply the acts to mineral interests.

Approaches to the Dormant Mineral Problem

The jurisdictions that have attempted to deal with dormant mineral interests have adopted a wide variety of solutions, with mixed success. The basic schemes described below constitute some of the main approaches that have been used, although many states have adopted variants or have combined features of these schemes.

Abandonment. The common law concept of abandonment of mineral interests provides useful relief in some situations. As a general rule, severed mineral interests that are regarded as separate possessory estates are not subject to abandonment. But less than fee interests in the nature of a lease or profit may be subject to abandonment. In some jurisdictions the scope of the abandonment remedy has been broadened to extend to oil and gas rights on the basis that these minerals, being fugacious, are owned in the form of an incorporeal hereditament, and hence are subject to abandonment.

The abandonment remedy is limited both in scope and by practical proof problems. Abandonment requires a difficult showing of intent to abandon; nonuse of the mineral interest alone is not sufficient evidence of intent to abandon. However, the remedy is useful in some situations and should be retained along with enactment of dormant mineral legislation.

Nonuse. A number of statutes have made nonuse of a mineral interest for a term of years, e.g. 20 years, the basis for termination of the mineral interest. Such a statute in effect makes nonuse for the prescribed period conclusive evidence of intent to abandon.

The nonuse scheme has advantages and disadvantages. Its major attraction is that it enables extinguishment of dormant interests solely on the basis of nonuse; proof of intent to abandon is unnecessary. Its major drawbacks are that it requires resort to facts outside the record and it requires a judicial proceeding to determine the fact of nonuse. It also precludes long-term holding of mineral rights for such purposes as future development, future price increases that will make development feasible, or assurance by a conservation organization or subdivider that the mineral rights will not be exploited.

The nonuse concept should be incorporated in any dormant mineral statute. Even a statute based exclusively on recording, such as the Uniform Simplification of Land Transfers Act (USLTA) discussed below, does not terminate the right of a person who has an active legitimate mineral interest but who through inadvertence fails to record.

Recording. Another approach found in several jurisdictions, as well as in USLTA, is based on passage of time without recording. Under this approach a mineral interest is extinguished a certain period of time after it is recorded, for example 30 years, unless during that period a notice of intent to preserve the interest is recorded. 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 owner to preserve the mineral rights on a purely speculative basis and to hold out for nuisance money indefinitely, and it creates the possibility that actively producing mineral rights will be lost through inadvertent failure to record a notice of intent to preserve the mineral rights. The recording concept is useful, however, and should be a key element in any dormant mineral legislation.

Trust for unknown mineral owners. A quite different approach to protecting the rights of mineral owners is found in a number of jurisdictions, based on the concept of a trust fund created for unknown mineral owners. The basic purpose of such statutes is to permit development of the minerals even though not all mineral owners can be located, paying into a trust the share of the proceeds allocable to the absent owners. The usefulness of this scheme is limited in one of the main situations we are concerned with, which is to enable surface development where there is no substantial mineral

value. The committee has concluded that this concept is beyond the scope of the dormant mineral statute, although it could be the subject of a subsequent Act.

Escheat. A few states have treated dormant minerals as abandoned property subject to escheat. This concept is similar to the treatment given personal property in the Uniform Unclaimed Property Act. This approach has the same shortcomings as the trust for unknown mineral owners.

Constitutionality. Constitutional issues have been raised concerning retroactive application of a dormant mineral statute to existing mineral interests. The leading case, Texaco v. Short, 454 U.S. 516 (1982), held the Indiana dormant mineral statute constitutional by a narrow 5-4 margin. The Indiana statute provides that a mineral right lapses if it is not used for a period of 20 years and no reservation of rights is recorded during that time. No prior notice to the mineral owner is required. The statute includes a two-year grace period after enactment during which notices of preservation of the mineral interest may be recorded.

A combination nonuse/recording scheme thus satisfies federal due process requirements. Whether such a scheme would satisfy the due process requirements of the various states is not clear. Comparable dormant mineral legislation has been voided by several state courts for failure to satisfy state due process requirements. Uniform legislation, if it is to succeed in all states where it is enacted, will need to be clearly constitutional under various state standards. This means that some sort of prior notice to the mineral owner is most likely necessary.

Draft Statute

A combination of approaches appears to be best for uniform legislation. The politics of this area of the law are quite intense in the mineral producing states, and the positions and interests of the various pressure groups differ from state to state. It should be remembered that the dormant mineral portion of USLTA was felt to be the most controversial aspect of that act.

A statute that combines a number of different protections for the mineral owner, but that still enables termination of dormant mineral rights, is likely to be the most successful. Such a combination may also help ensure the constitutionality of the act from state to state. For these reasons, the draft statute developed by the committee consists of a workable combination of the most widely accepted approaches found in jurisdictions with existing dormant mineral legislation, together with prior notice protection for the mineral owner.

Under the draft statute, the surface owner may bring an action to terminate a mineral interest that has been dormant for 20 years, provided the record also evidences no activity involving the mineral interest during that period, the owner of the mineral interest fails

to record a notice of intent to preserve the mineral interest within that period, and no taxes are paid on the mineral interest within that period. To protect the rights of a dormant mineral owner who through inadvertence fails to record, the statute enables late recording upon payment of the litigation expenses incurred by the surface owner; this remedy is not available to the mineral owner, however, if the mineral interest has been dormant for more than 40 years (i.e., there has been no use, taxation, or recording of any kind affecting the minerals for that period). The statute provides a two-year grace period for owners of mineral interests to record a notice of intent to preserve interests that would be immediately or within a short period affected by enactment of the statute.

This procedure will assure that active or valuable mineral interests are protected, but will not place an undue burden on marketability. The combination of protections will help ensure the fairness, as well as the constitutionality, of the statute.

The committee believes that clearing title to real property should not be an end in itself and should not be achieved at the expense of a mineral owner who wishes to retain the mineral interest. In many cases the interest was negotiated and bargained for and represents a substantial investment. The objective is to clear title of worthless mineral interests and mineral interests about which no one cares. The draft statute embodies this philosophy.

UNIFORM DORMANT MINERAL INTERESTS ACT

SECTION 1. STATEMENT OF POLICY.

(a) The public policy of this State is to enable and encourage marketability of real property and to mitigate the adverse effect of dormant mineral interests on the full use and development of both surface estate and mineral interests in real property.

(b) This [Act] shall be construed to effectuate its purpose to provide a means for termination of dormant mineral interests that impair marketability of real property.

COMMENT

This section is a legislative finding and declaration of the substantial interest of the state in dormant mineral legislation.

SECTION 2. DEFINITIONS.

As used in this [Act]:

(a) "Mineral interest" means an interest in a mineral estate, however created and regardless of form, whether absolute or fractional, divided or undivided, corporeal or incorporeal, including a fee simple or any lesser interest or any kind of royalty, production payment, executive right, nonexecutive right, leasehold, or lien, in minerals, regardless of character.

(b) "Minerals" includes gas, oil, coal, other gaseous, liquid, and solid hydrocarbons, oil shale, cement material, sand and gravel, road material, building stone, chemical substance, gemstone, metallic, fissionable, and nonfissionable ores, colloidal and other clay, steam and other geothermal resource, and any other substance defined as a mineral by the law of this State.

COMMENT

The definitions in this section are broadly drafted to include all the various forms of minerals and mineral interests. This includes both fugacious and non-fugacious, as well as organic and inorganic, minerals. The Act does not distinguish among minerals based on their character, but treats all minerals the same.

The reference to liens in subsection (a) includes both contractual and noncontractual, voluntary and involuntary, liens on minerals and mineral interests. It should be noted that the duration of a lien may be subject to general laws governing liens. For example, a lien that by state law has a duration of 10 years may not be given a life of 20 years simply by recording a notice of intent to preserve the lien pursuant to Section 5 (preservation of mineral interest by notice), just as a mineral lease which by its own terms has a duration of 5 years is not extended by recordation of a notice of intent to preserve the lease. Likewise, if state law requires specific filings, recordings, or other acts for enforceability of a lien, those acts must be complied with even though the lien is not dormant within the meaning of this Act. Conversely, an instrument that creates a security interest which, by its terms, endures more than 20 years, cannot avoid the effect of the 20 year statute. See Section 4(c) (termination of dormant mineral interest).

The definition of "minerals" in subsection (b) is inclusive and not exclusive. "Coal" and other solid hydrocarbons within the meaning of subsection (b) includes lignite, leonardite, and other grades of coal. This Act is not intended to affect water law but is intended to affect minerals dissolved or suspended in water. See Section 3 (exclusions).

While Section 2 defines the terms "minerals" and "mineral interest" broadly, the definitions serve the limited function of determining mineral interests that are terminated pursuant to this Act. They are not intended to redefine minerals and mineral interests for purposes of state law other than this Act.

SECTION 3. EXCLUSIONS.

(a) This [Act] does not apply to:

(1) A mineral interest of the United States or an Indian tribe, except to the extent permitted by federal law.

(2) A mineral interest of this State or an agency or political subdivision of this State, except to the extent permitted by state law other than this [Act].

(b) This [Act] does not affect water rights.

(c) This [Act] does not affect the meaning of the terms "minerals" or "mineral interest" for purposes other than this [Act].

COMMENT

Public entities are excepted by this section because they have perpetual existence and can be located if it becomes necessary to terminate by negotiation a mineral interest held by the public entity. A jurisdiction enacting this statute should also exclude from its operation interests protected by statute, such as environmental or natural resource conservation or preservation statutes.

This Act does not affect mineral interests of Indian tribes, groups, or individuals (including corporations formed under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1600 et seq.) to the extent that the interests are protected against divestiture by superseding federal treaties or statutes.

Although this Act affects minerals dissolved or suspended in water, it is not intended to affect water law. See Comment to Section 2 (definitions).

While Section 2 (definitions) defines the terms "minerals" and "mineral interest" broadly, the definitions serve the limited function of determining mineral interests that are terminated pursuant to this Act. They are not intended to redefine minerals and mineral interests for purposes of state law other than this Act.

SECTION 4. TERMINATION OF DORMANT MINERAL INTEREST.

(a) The surface owner of real property subject to a mineral interest may maintain an action to terminate a dormant mineral interest. A mineral interest is dormant for the purpose of this [Act] if the interest is unused within the meaning of subsection (b) for 20 years or more immediately preceding commencement of the action and has not been preserved pursuant to Section 5. The action must be in the nature of and requires the same notice as as is required in an action to quiet title. The action may be maintained whether or not the owner of the mineral interest or the owner's whereabouts is known or unknown. Disability or lack of knowledge of any kind on the part of any person does not suspend the running of the 20-year period.

(b) For the purpose of this section, any of the following actions taken by or under authority of the owner of a mineral

interest in relation to any mineral that is part of the mineral interest constitutes use of the entire mineral interest:

(1) Active mineral operations on or below the surface of the real property or other property unitized or pooled with the real property, including production, geophysical exploration, exploratory or developmental drilling, mining, exploitation, and development, but not including injection of substances for purposes of disposal or storage. Active mineral operations constitute use of any mineral interest owned by any person in any mineral that is the object of the operations.

(2) Payment of taxes on a separate assessment of the mineral interest or of a transfer or severance tax relating to the mineral interest.

(3) Recordation of an instrument that creates, reserves, or otherwise evidences a claim to or the continued existence of the mineral interest, including an instrument that transfers, leases, or divides the interest. Recordation of an instrument constitutes use of (i) any recorded interest owned by any person in any mineral that is the subject of the instrument, and (ii) any recorded mineral interest in the property owned by any party to the instrument.

(4) Recordation of a judgment or decree that makes specific reference to the mineral interest.

(c) This section applies notwithstanding any provision to the contrary in the instrument that creates, reserves, transfers, leases, divides, or otherwise evidences the claim to or the continued existence of the mineral interest or in another recorded document unless the instrument or other recorded document provides an earlier termination date.

COMMENT

This section defines dormancy for the purpose of termination of a mineral interest pursuant to this Act. The dormancy period selected is 20 years—a not uncommon period among the various jurisdictions.

Subsection (a) provides for a court proceeding in the nature of a quiet title action to terminate a dormant mineral interest. The device of a court proceeding ensures notice to the mineral owner personally or by publication as may be appropriate to the circumstances and a reliable determination of dormancy.

Subsection (b) ties the determination of dormancy to nonuse. Each paragraph of subsection (b) describes an activity that constitutes use of a mineral interest for purposes of the dormancy determination. In addition, a mineral interest is not dormant if a notice of intent to preserve the interest is recorded pursuant to Section 5 (preservation of mineral interest).

Paragraph (b)(1) provides for preservation of a mineral interest by active mineral operations. Repressuring may be considered an active mineral operation if made for the purpose of secondary recovery operations. A shut-in well is not an active mineral operation and therefore would not suffice to save the mineral interest from dormancy.

Paragraph (b)(1) is intended to preserve in its entirety a mineral interest where there are active operations directed toward any mineral that is included within the interest. Thus if there are fractional owners of a mineral interest, activity by one owner is considered activity by all owners. Other interests owned by other persons in the minerals that are the object of the operations are also preserved by the operations. For example, oil and gas operations by a fractional oil, gas and coal owner would save not only the interests of other fractional oil and gas owners but also the interests of oil and gas lessees and royalty owners holding under either the oil and gas owner or any fractional owner, as well as the interests of holders of any other mineral interest in the oil and gas that is the object of the operations. The oil and gas operations suffice to save the coal interest of the oil, gas, and coal owner, as well as other minerals included in any of the affected mineral interests, not just the interest in oil and gas that is the subject of the particular operations. This is the case regardless whether the mineral interest was acquired in one instrument or by several instruments. However, oil and gas operations by a fractional oil, gas, and coal owner would not save the mineral interest of a fractional coal owner if the interest does not include oil and gas.

Under paragraph (b)(2), taxes must be actually paid within the preceding 20 years to suffice as a qualifying use of the mineral interest.

Paragraph (b)(3) is intended to cover any recorded instrument evidencing an intention to own or affect an interest in the minerals, including a recorded oil, gas, or mineral lease, regardless whether such a lease is recognized as an interest in land in the particular jurisdiction.

Under paragraph (b)(3), recordation has the effect of preserving not only the interests of the parties to the instrument in the minerals that are the subject of the instrument, but also the recorded

interests of nonparties in the subject minerals, as well as other recorded interests of the parties in other minerals in the same property. Thus recordation of an oil and gas lease between a fractional owner and lessee preserves the interest in oil and gas not only of the fractional owner but also of the co-owners; moreover, the recordation preserves the interest of the fractional owner in other minerals that are not the subject of the lease, whether the other minerals were acquired by the same instrument by which the oil and gas interest was acquired or by a separate instrument.

Recordation of a judgment or decree under paragraph (b)(4) includes entry or recordation in a judgment book in a jurisdiction where such an entry or recordation becomes part of the property records. The judgment or decree must make specific reference to the mineral interest in order to preserve it. Thus a general judgment lien or other recordation of civil process such as an attachment or sheriff's deed of a nonspecific nature would not constitute use of the mineral interest within the meaning of paragraph (b)(4).

Subsection (c) is intended to preclude a mineral owner from evading the purpose of this Act by contracting for a very long or indefinite duration of the mineral interest. A lien on minerals having a 30 year duration, for example, would be subject to termination after 20 years under this Act if there were no further activities involving the minerals or mineral interest. A person seeking to keep the lien for its full 30 year duration could do so by recording a notice of intent to preserve the lien pursuant to Section 5 (preservation of mineral interest by notice). It should be noted that recordation of a notice of intent to preserve the lien would not extend the lien beyond the date upon which it terminates by its own terms.

SECTION 5. PRESERVATION OF MINERAL INTEREST BY NOTICE.

(a) The owner of a mineral interest may record at any time a notice of intent to preserve the mineral interest or a part thereof. The mineral interest is preserved in each county in which the notice is recorded. A mineral interest is not dormant if the notice is recorded within 20 years immediately preceding commencement of the action to terminate the mineral interest or pursuant to Section 6 after commencement of the action.

(b) The notice may be executed by an owner of the mineral interest or by another person acting on behalf of the owner, including an owner who is under a disability or unable to assert a

claim on the owner's own behalf or whose identity cannot be established or is uncertain at the time of execution of the notice. The notice may be executed by or on behalf of a co-owner for the benefit of any or all co-owners or by or on behalf of an owner for the benefit of any or all persons claiming under the owner or persons under whom the owner claims.

(c) The notice must contain the name of the owner of the mineral interest or the co-owners or other persons for whom the mineral interest is to be preserved or, if the identity of the owner cannot be established or is uncertain, the name of the class of which the owner is a member, and must identify the mineral interest or part thereof to be preserved by one of the following means:

(1) A reference to the location in the records of the instrument that creates, reserves, or otherwise evidences the interest or of the judgment or decree that confirms the interest.

(2) A legal description of the mineral interest. [If the owner of a mineral interest claims the mineral interest under an instrument that is not of record or claims under a recorded instrument that does not specifically identify that owner, a legal description is not effective to preserve a mineral interest unless accompanied by a reference to the name of the record owner under whom the owner of the mineral interest claims. In such a case, the record of the notice of intent to preserve the mineral interest must be indexed under the name of the record owner as well as under the name of the owner of the mineral interest.]

(3) A reference generally and without specificity to any or all mineral interests of the owner in any real property situated in the county. The reference is not effective to preserve a particular mineral interest unless there is, in the county, in the name of the person claiming to be the owner of the interest, (i) a previously recorded instrument that creates, reserves, or otherwise evidences that interest or (ii) a judgment or decree that confirms that interest.

COMMENT

This section is broadly drawn to permit a mineral owner to preserve not only his or her own interest but also any or all related interests. For example, the mineral owner may share ownership with one or more other persons. This section permits but does not require the mineral owner to preserve the interests of any or all of the co-owners by specifying the interests to be preserved. Likewise, the mineral interest being preserved may be subject to an overriding royalty or sublease or executive interest. In this situation, the mineral owner may elect also to preserve any or all of the interests subject to it, by specifying the interests in the notice of intent to preserve. The mineral owner may also elect to preserve the interest as to some or all of the minerals included in the interest.

Where the mineral interest being preserved is of limited duration, recordation of a notice under this section does not extend the interest beyond the time the interest expires by its own terms. Where the mineral interest being preserved is a lien, recordation of the notice does not excuse compliance with any other applicable conditions or requirements for preservation of the lien.

The bracketed language in paragraph (c)(2) is for use in a jurisdiction that does not have a tract index system. It is intended to assist in indexing a notice of intent to preserve an interest despite a gap in the recorded mineral chain of title.

Paragraph (c)(3) permits a blanket recording as to all interests in the county, provided that there is a prior recorded instrument, or a judgment whether or not recorded, that establishes the name of the mineral owner in the county records. The blanket recording provision is a practical necessity for large mineral owners. Where a county does not have a general index of grantors and grantees, it will be necessary to establish a separate index of notices of intent to preserve mineral interests for purposes of the blanket recording.

SECTION 6. LATE RECORDING BY MINERAL OWNER.

(a) In this section, "litigation expenses" means costs and expenses that the court determines are reasonably and necessarily incurred in preparing for and prosecuting an action, including reasonable attorney's fees.

(b) In an action to terminate a mineral interest pursuant to this [Act], the court shall permit the owner of the mineral interest to record a late notice of intent to preserve the mineral interest as a condition of dismissal of the action, upon payment into court for the benefit of the surface owner of the real property the litigation expenses attributable to the mineral interest or portion thereof as to which the notice is recorded.

(c) This section does not apply in an action in which a mineral interest has been unused within the meaning of Section 4(b) for 40 or more years immediately preceding commencement of the action.

COMMENT

This section applies only where the mineral owner seeks to make a late recording in order to obtain dismissal of the action. The section is not intended to require payment of litigation expenses as a condition of dismissal where the mineral owner secures dismissal upon proof that the mineral interest is not dormant by virtue of recordation or use of the property within the previous 20 years, as prescribed in Section 4 (termination of dormant mineral interest). Moreover, the remedy provided by this section is available only if there has been some recordation or use of the property within the previous 40 years.

SECTION 7. EFFECT OF TERMINATION.

A court order terminating a mineral interest [, when recorded,] merges the terminated mineral interest, including express and implied appurtenant surface rights and obligations,

with the surface estate in shares proportionate to the ownership of the surface estate, subject to existing liens for taxes or assessments.

COMMENT

In some states it is standard practice for judgments such as this to be recorded. In other states entry of judgment alone may suffice to make the judgment part of the land records.

Merger of a terminated mineral interest with the surface is subject not only to existing tax liens and assessments, but also to other outstanding liens on the mineral interest. However, an outstanding lien on a mineral interest is itself a mineral interest that may be subject to termination under this Act. It should be noted that termination of a mineral interest under this Act that has been tax-deeded to the state or other public entity is subject to compliance with relevant requirements for release of tax-deeded property.

The appurtenant surface rights and obligations referred to in Section 7 include the right of entry on the surface and the obligation of support of the surface. However, termination of the support obligation of the surface under this Act does not terminate any support obligations owed to adjacent surface owners.

It is possible under this section for a surface owner to acquire greater mineral interests than the surface owner started with. Assume, for example, there are equal co-owners of the surface, one of whom conveys his or her undivided 50% share of minerals. Upon termination of the conveyed mineral interest under this Act, the interest would merge with the surface estate in proportion to the ownership of the surface estate, so that each owner would acquire one-half of the mineral interest. The end result is that the conveying surface owner would hold an undivided one-fourth of the minerals and the non-conveying surface owner would hold an undivided three-fourths of the minerals. This result is proper since the reversion represents a windfall to the surface estate in general and to the conveying owner in particular, who has previously received the value of the mineral interest.

In the example above, assume that the conveyed mineral interest is not terminated, but instead the owner of the mineral interest executes a 30-year mineral lease. If the lease is terminated under this Act after 20 years have run, the interest in the remaining 10 years of the lease would merge with the surface estate in proportionate shares, at the end of which time it would expire, leaving the interest of the mineral owner unencumbered.

SECTION 8. SAVINGS AND TRANSITIONAL PROVISIONS.

(a) Except as otherwise provided in this section, this [Act] applies to all mineral interests, whether created before, on, or after its effective date.

(b) An action may not be maintained to terminate a mineral interest pursuant to this [Act] until [two] years after the effective date of the [Act].

(c) This [Act] does not limit or affect any other procedure provided by law for clearing an abandoned mineral interest from title to real property.

(d) This [Act] does not affect the validity of the termination of any mineral interest made pursuant to any predecessor statute on dormant mineral interests. The repeal by this [Act] of any statute on dormant mineral interests takes effect [two] years after the effective date of this [Act].

COMMENT

The [two]-year grace period provided by this section is to enable a mineral owner to take steps to record a notice of intent to preserve an interest that would otherwise be subject to termination immediately upon the effective date because of the application of the Act to existing mineral interests. Thus, a mineral owner may record a notice of intent to preserve an interest during the [two]-year period even though no action may be brought during the [two]-year period. Subsection (d) is intended for those states that repeal an existing dormant mineral statute upon enactment of this Act.

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 10. SHORT TITLE.

This [Act] may be cited as the Uniform Dormant Mineral Interests Act.

SECTION 11. SEVERABILITY CLAUSE.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect any other provision or application of this [Act] that can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 12. EFFECTIVE DATE.

This [Act] takes effect _____.

SECTION 13. REPEALS.

The following acts and parts of acts are repealed:

(a) _____.

(b) _____.

(c) _____.

SENATE NATURAL RESOURCE
EXHIBIT NO. 2
DATE 1-19-82
BILL NO. SB86

PROPOSED AMENDMENT TO SENATE BILL 86

Mr. Chairman and Members of the Committee:

We request the following amendment to the introduced bill (Senate Bill 86):

Page 7, lines 9 through 21.
Strike: section 8 in its entirety
Insert: "Section 8. Prima facie case, appearance by dormant owner, conclusive presumption. In an action to terminate a mineral interest pursuant to (this act) if the surface owner establishes that the activities referred to in [section 5(2)(a)] were not ongoing at the time the action was commenced and that no notice has been filed as provided in [section 6] these facts are sufficient to establish a prima facie case of abandonment of a dormant mineral interest, and unless the owner of the mineral interest after service of process pursuant to the Montana Rules of Civil Procedure appears to establish that the mineral interest is not dormant because the activities referred to in [section 5(2)(a)] occurred at some time during the immediately preceding 20 years, the court having jurisdiction of the action may conclusively presume that the mineral interest has been abandoned and may proceed and enter an appropriate order and judgment terminating the mineral interest."

We respectfully submit that the proposed amendment corrects a defect in the present section 8 of the bill and provides appropriate due process of law to the owner of the dormant mineral interest.

Respectfully,

MONTANA MINING ASSOCIATION

Ward A. Shanahan,
Member of the Board

cc: Chairman, Natural Resources,
Senator Keating
Senator Gage
Senator Halligan
Senator Weeding
Senator Stimatz
Senator Yellowtail
Senator Lynch
Senator Walker
Senator Anderson
Senator Tveit
Senator Hoffman
Senator Severson
Gary Langley

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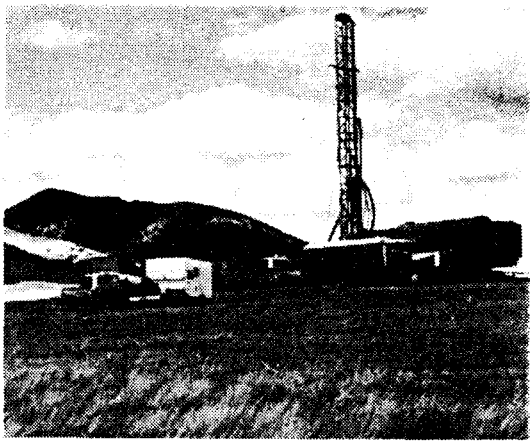

19 January 1987

SENATE NATURAL RESOURCES
EXHIBIT NO. 3
DATE 1-19-87
BILL NO. SB 86

TO: Natural Resources Committee

FROM: Gary Meland, President, Montana Land & Mineral Owners Ass'n

RE: Uniform Dormant Mineral Interests Act

The Montana Land & Mineral Owners Association, an organization of approximately 250 members encompasing about one and one-half million acres in Hill, Blaine, and Chouteau counties, would ask your support of the Uniform Dormant Mineral Interests Act.

As this country gets older by generations, severed mineral interests become a bigger problem with every will that is probated. As mineral interests are split, they have a much greater chance of becoming dormant.

Dormant mineral interests, in general, may present difficulties if the owner of the interest is missing or unknown. Under the common law a fee simple interest in land cannot be extinguished or abandoned by non-use, and it is not necessary to record or to maintain current property records in order to preserve an ownership interest in minerals. Thus it is possible that the only document appearing in the public record may be the document initially creating the mineral interest.

Subsequent owners such as heirs of the original owner may be unconcerned about an apparently valueless mineral interest, or may not even be aware of it. Hence their interests may not appear of record.

If mineral owners are missing or unknown, it may create problems for anyone interested in exploring or mining because it may be difficult or impossible to obtain rights to develop the minerals.

On the other hand, the owner of a dormant mineral interest is not motivated to develop the minerals, since undeveloped rights may not be taxed and may not be subject to loss through adverse possession by surface occupancy.

The greatest value of a dormant mineral interest to the mineral owner may be its effectual impairment of the surface estate. Even if one owner of a dormant mineral interest is willing to relenquish the interest for a reasonable price, the surface owner may find it impossible to trace the ownership of other fractional shares in the old interest. The result is a cloud on the title of the surface owner that assures full-value for the land will never be realized.

We believe the Uniform Dormant Mineral Interests Act provides the remedy that is needed. It clearly defines a dormant mineral estate -- in terms of time, of use, and of legal notice, using the legal means the same as any other action to quiet title with the same notice requirements.

We think this bill will do a couple things for the good of Montana. It will help the marketability of the land that had dormant mineral interests. It will also ease the problem of not being able to locate mineral owners at a great cost to developers and exploration people in the oil and gas industry, thereby opening up more acres for development and a greater tax base for Montana.

SENATE NATURAL RESOURCES
EXHIBIT NO. 4
DATE 1-19-87
BILL NO. SB 86

Mr. Chairman, members of the committee, I would like to thank you for the opportunity of addressing the issues raised by SB 86 in the 50th Legislature. My name is Nancy Cooney Zier, I am an independent landperson residing at Billings struggling to survive in an industry which has, as some of you know, suffered drastically through the last three or four years here in the State of Montana.

My job, when I can find employment, consists of travelling to a County Courthouse and examining the records in the offices of the Clerk & Recorder, the Clerk of Court, the Treasurer, and sometimes the Assessor. I examine documents from inception of title by Patent and work forward through the years to the present time. As a result of my examination, a report is turned into the client listing my determination of the mineral/royalty/surface ownership on a particular tract of land in addition to the oil and gas leasehold ownership.

While this proposed legislation is <u>not</u> onerous to the oil and gas industry per se, I would like to state that in my nearly 30 years' experience in the industry, I have not known a "lost" mineral owner to discourage or preclude oil and gas exploration on a tract of land considered having a high probability of production. There are, I believe, statutes in place which provide that a lease can be issued by a Court having jurisdiction over the lands in question should the particular dormant mineral interest be of such a nature that a company would not proceed to drill without having some kind of a lease in place. In the event that production on such a tract is established, the royalty payments provided for under such a lease will be held in an escrow account pending location of the dormant owner or the heirs.

Several years ago, one of the people in my employ had spent the better part of his life as an appraiser for farm and ranch loans. We had a conversation one day about the impact of mineral rights being reserved from a sale, or being included in a sale because I was curious as to the value placed on such rights by mortgage companies.

The gentleman told me that there are no values placed on mineral rights when considering a mortgage unless there is production income which would affect the reduction of the mortgage at a more advanced rate. For this reason, I would doubt that a dormant mineral right has any effect at all on the marketability of a real property.

Supposing an act such as SB 86 is put in place. As a mineral title examiner, I may have some difficulty establishing whether or not the interest has lapsed for non-use. This might raise numerous questions involving data not locatable in any Courthouse. There may have been a test drilled on the property within the 20 years preceding, but which was not capable of commercial production and was subsequently plugged and abandoned. Would this constitute use? If the said production or activity on this particular tract is considered sufficient, does it extend the mineral rights in perpetuity, or do we start marking another "twenty-year dormancy" period? Would the production of hydrocarbons in such an instance also be sufficient to preserve other minerals, such as coal? Would payment payment of rents on an oil and gas lease, or oil/gas royalties, prevent the lapse of "other" mineral rights?

Questions such as these would pose an extensive and possibly expensive investigation of facts outside the record before I would care to sign my name to a title report stating the validity of <u>any</u> mineral interest.

Assuming I could ascertain no data, would I be able to conclude that the "dormant mineral right" had lapsed for non-use because the record did not show a statement of claim as having been filed? In view of the fact that such a statement of claim could be filed within an hour's time after the completion of my examination, I would want to advise my client that continuing "last hour" examinations be made of the record prior to entering the property for exploration purposes.

More importantly, I believe that SB86 is confiscation of a property right without consideration. The surface owner, in purchasing the real property, is made aware of the outstanding mineral rights at the time of purchase when he or his attorney examines

the abstract or the title insurance policy. Therefore, he is not an uninformed party in the transaction. For the surface owner to, at some point in time down the road, take it upon himself to "capture" the property right of another is an arbitrary act and in violation of the Fourteenth Amendment of the U.S. Constitution.

As in many quiet title actions, I forsee many difficulties in determining whether or not a capture as proposed under SB 86 is a valid capture. And, as in many other instances, expensive litigation to determine who is the correct owner. And so forth.

I would propose, if the committee passes favorably on SB 86, that language be added to provide that perhaps a public auction be held on dormant mineral interests so that anyone having an interest in acquiring such mineral rights have an opportunity to acquire them. In such a way, the funds derived from the "auctions" could be placed in the State general fund for a reduction of our budget deficit.

In closing, I would like to thank you for your attention and to say that I will be available for questions should any of you have one.