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May 3, 2010

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

RE: House Bill 320 and Senate Bill 288

Dear Governor O'Malley:

These identical bills offer two alternative mechanisms for addressing mineral interests that have been separated from the surface estate. Both mechanisms would be included in a new subtitle of the Environment Article ("EN") of the Annotated Code of Maryland. The legal issues related to these mechanisms were discussed in a 2009 advice letter, a copy of which is attached to this letter. *Letter of Assistant Attorney General Robert N. McDonald to Senator Brian E. Frosh* (March 27, 2009).

Summary of Bills

First, the bills establish a substantive rule that severed mineral interests are subject to termination if they are "dormant" during the preceding 20 years and an appropriate action is brought in accordance with the statute. EN §15-1203. However, no action may be brought until October 1, 2011, giving owners of severed mineral interests a one-year grace period from the effective date of the bills in which to act to preserve their rights. EN §15-1203(a)(1). Thereafter, EN §15-1203 would authorize an adjudicatory proceeding to terminate the dormant interest. The action, which must be brought in the circuit court of the jurisdiction in which the real property is located, is to be in the nature of quiet title action under the Real Property Article. EN §15-1203(b)(1), (d)(1). Notice must be given as required for such an action. *Id.* Upon adequate proof of nonuse of the mineral rights for the 20-year period preceding commencement of the action, the court may issue an order that terminates the severed mineral interest and merges it into the surface estate. EN §15-1203(d)(2). The court is to permit an owner of a severed mineral interest to record a late notice of intent to preserve that interest and dismiss the action, if the owner pays the litigation expenses of the surface owner. EN §15-1205.[1]

[1] This provision is not available to the owner of the mineral interest if the mineral interest has not been used for a period of 40 years or more. *See* EN §15-205(c).

The second mechanism, at EN §15-1206, includes no reference to dormancy and does not appear to require it. Rather it is designed to address severed mineral interests when the owners of those interests are missing or unknown. Section 15-1206 gives the owner of the surface estate the right to file a petition in the circuit court of the relevant county to establish a trust for any such "unknown or missing owners," as defined in the statute. EN §15-1206(b). "Unknown or missing" means any person "whose present identity or location cannot be determined from the records of the county where the severed mineral interest is located" of "by diligent inquiry in the vicinity of the owner's last known place of residence." EN §15-1201(g)(1); *see also* §15-1206(c)(2)(ii)(5). After notice and a hearing, the circuit court may place the severed mineral interest in a trust. If no unknown or missing owner comes forward within five years after creation of the trust, the trustee is directed to file a motion to wind up the trust and convey it to the surface owner. EN §15-1206(c)-(d). After notice and a hearing, the court may convey the mineral interest to the surface owner and terminate the trust.

One-Year Grace Period

As the prior advice letter indicated, judicial termination and conveyance of a severed mineral interest must accord due process to the owners of that interest. Due process is not violated by enactment, without specific notice, of a substantive rule which makes severed mineral interests terminable after 20 years of nonuse. *See, e.g., Texaco, Inc. v. Short*, 454 U.S. 516, 531-33 (1982); *Van Slooten v. Larsen*, 299 N.W.2d 704 (Mich. 1980).[2] In this respect, the only constitutional requirement is that property owners be given a "grace period" sufficient to familiarize themselves with the law and take measures necessary to preserve their rights. *Texaco, Inc. v. Short*, 454 U.S. at 532-33. Grace periods of two and three years have been upheld as reasonable in this context. *See also* Chapter 290, §§1-2, Laws of Maryland 2007 (providing three-year grace period and official publication of statutory requirements for new law allowing extinction of ground leases). By contrast, these bills provide a one-year grace period – that is, no action may be brought under EN §15-1203 until October 1, 2011, which would be one year after the bills became effective, if signed.

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[2] *See generally*, Annotation, "Validity and Construction of Statutes Providing for Reversion of Mineral Estates for Abandonment or Nonuse,"16 ALR4th 1029 (1982 & June 2009 Supp.). It is not completely certain that an automatic forfeiture statute of this kind would be valid under the Maryland Constitution. *See, e.g., Scarf v. Tacker*, 73 Md. 378, 21 A. 56 (1891) (finding unconstitutional a law requiring "missing" owners of military lots to register them at risk of forfeiture without a hearing).

In *Texaco v. Short*, an Indiana dormant mineral interests statute with a two-year grace period was upheld by a majority of five Justices, but without holding two years to be the constitutional minimum.[3] Instead, the Court deemed it sufficient if the grace period offered mineral owners an "adequate opportunity to become familiar" with the requirements of the law, a subject on which reviewing courts "show[ ] the greatest deference to the judgment of State legislatures." *Short*, 454 U.S. at 532. The reasonableness of the grace period is a function, among other things, of the number of persons affected, the means by which the information is disseminated, and the likelihood of harm to innocent persons from failure to receive adequate notice. *Id.* Justice Brennan, writing for the dissent, objected to the retroactive application of the law and to what four Justices considered to be inadequate notice of the "silent actions of legislatures." *Id.* at 549. In addition, the dissent noted the "novelty" of the automatic forfeiture provisions of the Indiana law, arguing that the requirement was "sufficiently unusual in character" and the triggering event "so commonplace" that the average person would have no reason to suspect that a mere failure to act would impair the person's property rights. *Id.* at 547.

Arguably, circumstances in 2010 are sufficiently different from those prevailing in the early 1980s that a legislature today might reasonably conclude that a shorter grace period provides adequate notice. First, dormant mineral interests acts are no longer a novelty. Probably a majority of states now impose some similar kind of obligation on owners of severed mineral interests, whether under dormant mineral acts or marketable title acts. Second, information technology has greatly simplified the process of discovering the "silent acts of legislatures." The requirements of the Act, for example, could be found through a simple Internet search. In other words, entirely new "means by which the information is disseminated" have evolved since the *Short* decision. As a practical matter, on-line information regarding new legislation in Maryland offers more effective notice to owners of severed mineral interests than did notice by publication in the 1970s or early 1980s, particularly for out-of-state owners. Thus, it is possible that changed circumstances alone might justify a shorter grace period.

Additional justification might be found in the differences between the proposed legislation in Maryland and the Indiana statute at issue in *Short*. In the bills before you, termination of the lapsed mineral interest is not self-executing, but requires judicial action.

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[3] We are not aware of any decisions concerning dormant mineral acts holding that a one-year grace period is inadequate or that at least two years is required. However, a Michigan court approved a somewhat analogous law that extinguished a possibility of reverter by reason of the owner's failure to file a statutorily required notice of intent to retain a right of termination. *See Ludington & Northern Railway v. Epworth*, 188 Mich. App. 25, 468 N.W.2d 884 (Ct. App., Mich. 1991). The Michigan statute at issue in *Epworth* provided only a one-year grace period, which the court found adequate.

Thus, actual pre-lapse notice would be provided to mineral owners before their rights are affected. The owner of an interest dormant for less than 40 years, for example, may file a late Notice of Interest to preserve ownership of the property, after payment of the surface owner's litigation expenses.[4] EN §15-1205(b). However, where the interest has been dormant for over 40 years, the mineral owner would not have the same opportunity to preserve the mineral interest. EN §15-1205(c). Accordingly, the constitutionality of the Act is at its most questionable as to this class of owners. On the other hand, the General Assembly might reasonably have concluded that the number of persons affected in this group would be significantly fewer or the likelihood of harm to innocent persons less. Another possible outcome is that a reviewing court might find EN §15-1205(c) to be unconstitutional but severable from the rest of the Act, allowing those owners also to preserve their property upon filing of a late notice and payment of reasonable litigation expenses.

As the foregoing discussion illustrates, while we would not say that the bills as passed are clearly unconstitutional, a longer grace period would significantly reduce the possibility that a court might find that termination of a particular mineral interest violated due process. Accordingly, it is our recommendation that the legislature consider amending the statute to enlarge the grace period to at least two years – *i.e.*, postponing the period during which an action may be brought under EN §15-1203 to at least October 1, 2012. If this is desired, it could be accomplished at the General Assembly's next session – before any actions could be brought under these bills with the current trigger date of October 1, 2011.

Notice to Unknown or Missing Owners

We also note a minor interpretive question with respect to the second mechanism allowing for the creation of a trust with respect to the mineral interests of "unknown or

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[4] This provision is identical to the approach outlined in the Uniform Dormant Mineral Interests Act. In relevant part, the comments on this provision explain:

> 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).

Uniform Dormant Mineral Interests Act, Comments of National Conference of Commissioners on Uniform State Laws, p. 5 (1986).

missing owners." In particular, "unknown or missing owner" is defined as "any person vested with a severed mineral interest whose present identity or location cannot be determined: (i) from the records of the county where the severed mineral interest is located; or (ii) by diligent inquiry in the vicinity of the owner's last known place of residence." EN §15-1201(g)(1). In order to petition for the termination of a trust and the conveyance of the severed mineral interests to the surface owner, the trustee must affirm that a "diligent inquiry" was conducted to locate the unknown or missing owner, including a search of certain records in the county where the property is located. EN §15-1206(c)(2)(ii)(5). Although the latter provision does not explicitly say so, the "diligent inquiry" required for a petition must also include a "diligent inquiry in the vicinity of the owner's last known place of residence," which may or may not be in the same county where the property is located. Otherwise, the trust provision would not apply at all, as it would not be certain that the owner was "unknown or missing", as defined in §15-1201(g).

Finally, although the bills do not, and need not, specify in detail the duties of the trustee to the unknown or missing owners, we believe that in some circumstances a duty to conduct a wider search would be recognized. For example – depending on the value of the trust assets, the number of years elapsed since the severed mineral interest was created, the possible number of unknown or missing owners and the expense of identifying or locating them, as well as other factors – we believe a court supervising the trust would likely authorize the trustee to use a portion of the trust assets to undertake additional reasonable efforts to find trust beneficiaries. Nothing in the current bills would prevent that. Accordingly, it is our view that the trustee provisions adequately protect the rights of unknown or missing owners.

Very truly yours,

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The Honorable Wendell R. Beitzel
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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

March 27, 2009

Honorable Brian E. Frosh
Chairman, Judicial Proceedings Committee
Miller Senate Office Building, Suite 2E
Annapolis, Maryland 21401

Re: Senate Bill 775

Dear Senator Frosh:

You provided a reprint of the current version of Senate Bill 775 – Maryland *Dormant Mineral Interests Act* and posed certain questions about the bill. As general background, enclosed please find a prior advice letter on the general topic of laws concerning dormant mineral interests. Advice Letter to Senator George Edwards (September 23, 2008).

You have asked specifically about the absence of notice provisions in the current version of Senate Bill 775 and whether the bill in its current form satisfies the requirements of due process. As you pointed out, the bill fails to reference the quiet title procedures contemplated in the Uniform Act on which it is based.[1] Thus, it appears that the current version of the bill lacks an element included in the Uniform Act to comply with the due process requirements. In addition, the amendment that added trust procedures to the bill could be modified to enhance the due process accorded unknown or missing owners of mineral interests.

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[1] *Uniform Dormant Mineral Interests Act*, drafted by the National Conference of Commissioners of Uniform State Laws (approved August 1-8, 1986). Section 4(a) of the Uniform Act provides in relevant part: "The action must be in the nature of and requires the same notice 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."

Proposed Maryland Dormant Minerals Act

Senate Bill 775, in its current form, offers two alternative mechanisms for addressing mineral interests which have been separated from the surface estate. First, the bill establishes a substantive rule that severed mineral interests are subject to termination if they are "dormant" during the preceding 20 years and an appropriate action is brought in accordance with the statute. Proposed §15-1203.[2] However, no action may be brought until October 1, 2014, giving owners of severed mineral interests a five-year grace period in which to preserve their rights. Proposed §15-1203(a)(1). Thereafter, the bill would authorize an adjudicatory proceeding to terminate the dormant interest. The filing of the action sets the time from which the dormancy is measured. Beyond this, however, no procedure is indicated in the bill except that the action must be brought "in the circuit court of the jurisdiction in which the real property is located." Proposed §15-1203(c)(1). Presumably, upon adequate proof of nonuse of the mineral rights, the surface owner would be entitled to a judgment vesting title in the surface estate.

The second mechanism, set out in proposed §15-1206, includes no reference to dormancy and does not appear to require it. Here, the statutory procedures are available wherever there are one or more severed mineral interests whose owners are missing or unknown. Proposed §15-1206 gives certain interested persons a right to institute proceedings in the circuit court of the relevant county to establish a trust for any such "unknown or missing owners," as defined in the statute. Proposed §15-1206(b). "Unknown or missing" means any person "whose present identity or location cannot be determined from the *records of the county* where the severed mineral interest is located." Proposed §15-1201(g)(1) (emphasis added); *see also* proposed §15-1206(c)(2)(ii)(5)(A). Again, no notice or other procedures are specifically identified or referenced. If no unknown or missing owner comes forward within five years, the trustee is directed to file a motion to wind up the trust and convey it to the surface owner. Proposed §15-1206(c)-(d).

Pre-Lapse Notice is not Required

Due Process is not violated by enactment, without specific notice, of a substantive rule that makes severed mineral interests terminable after 20 years of nonuse. *See, e.g., Texaco,*

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[2] The bill would a new subtitle 12 to Title 15 of the Environment Article.

Inc. v. Short, 454 U.S. 516, 531-33 (1982); *Van Slooten v. Larsen*, 299 N.W.2d 704 (Mich. 1980).[3] In this respect, the only constitutional requirement is that property owners be given a "grace period" sufficient to familiarize themselves with the law and take measures necessary to preserve their rights. *Texaco, Inc. v. Short*, 454 U.S. at 532-33. Grace periods of two and three years have been upheld as reasonable in this context. By contrast, Senate Bill 775 provides a five-year period. Proposed §15-1203. Nevertheless, to the extent there are concerns about mineral owners' opportunity to learn of their new responsibilities under the law, the General Assembly's 2007 legislation affecting ground rents provides an example of additional measures that have been taken to publicize a law. *See* Chapter 290, §2, Laws of Maryland 2007.

Adjudication of Rights Requires Adequate Pre-Hearing Notice

In *Texaco, Inc. v. Short*, the leading case on this subject, the Supreme Court upheld Indiana's Dormant Minerals Act even though that law contained no provision for a hearing of any kind. Instead, the Indiana law directed that a severed mineral interest that was not used for a period of 20 years *automatically lapsed* and reverted to the surface owner, unless a statement of interest was filed within the two-year grace period following passage of the act. 454 U.S. at 524 n.14. Because of the self-executing nature of the statute, the Indiana scheme did not require any judicial machinery, nor any provision for giving notice prior to an adjudicatory hearing.[4] Even so, following the automatic lapse and reversion of a dormant mineral interest, a surface owner in Indiana could bring a quiet title action to judicially establish the owner's absolute ownership rights in the property. Writing for the majority, Justice Stevens observed:

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[3] *See generally* Annotation, *Validity and Construction of Statutes Providing for Reversion of Mineral Estates for Abandonment or Nonuse*, 16 ALR4th 1029 (1982 & 2008 Supp.). It is not completely certain that an automatic forfeiture statute of this kind would be valid under the Maryland Constitution. *See, e.g., Scharf v. Tasker*, 73 Md. 378, 21 A. 56 (1891) (finding unconstitutional a law requiring "missing" owners of Military Lots to register them at risk of forfeiture without a hearing).

[4] The Michigan statute at issue in *Van Slooten* worked in the same way. "Because the due process guarantees do not require a hearing prior to vesting title in the owner of the surface estate, we do not accept defendant's claim that the absence of any provision in the statute for *notice* of such a hearing renders it constitutionally infirm." *Van Slooten v. Larsen*, 299 N.W.2d at 716.

> It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause – including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard – must be provided.

Id. at 534. Unlike the dormant minerals statutes of Indiana and Michigan, the law proposed for Maryland requires an adjudication to terminate the severed minerals interest. Therefore, it is constitutionally required that adequate notice be given to all parties which may be adversely affected by the proceeding. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Generally, such parties are entitled to more than publication notice if the party's name and address are reasonably ascertainable. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983); *see also St. George Antiochian Orthodox Christian Church v. Aggarwal*, 326 Md. 90, 95 (1992). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

The termination proceeding referenced in proposed §15-1203 of the bill may contemplate a quiet title action as provided for in §14-108 of the Real Property Article. If so, it would seem advisable to point to these procedures directly in the statutory text, as is done in the Uniform Act. In addition, Maryland Rule 2-122 specifies how service of process may be effected on missing parties in *in rem* or *quasi in rem* proceedings after "reasonable efforts have been made in good faith" to locate all interested parties. *See Jenkins v. City of College Park*, 379 Md. 142, 157-59 (2003) (applying Md. Rule 2-122). Incorporating existing procedures – including rules reasonably calculated to provide actual notice of the hearing – would ensure that the proposed bill satisfies due process requirements as to notice and related matters.

Potential Due Process Issue in Trust Provision

In proposed §15-1201(g) and §15-1206, "unknown or missing" mineral owners are defined so broadly that "reasonably ascertainable" parties may be denied due process. Specifically, by limiting, in all cases, the required search to "county records," there is a substantial risk that persons who could be located with good faith efforts and "due diligence" may not receive the type of notice which due process requires. *See, e.g., Mullane*, 339 U.S.

at 317 (requiring direct notice where the interests or whereabouts of persons affected can, with due diligence, be ascertained).

In other mineral receivership statutes, before a receiver or trustee will be appointed, the surface owner or other plaintiff must prove they have made a diligent but unsuccessful effort to locate the missing owners, setting forth in detail what those efforts were. *See, e.g.*, 765 Il. Comp. Stat. 515/5. While statutes in other states sometimes define unknown or missing parties by reference to searches restricted to county records, the statutes generally require a broader search than the county records alone. *See* 765 Il. Comp Stat.515/1 ("person or entity ... whose present identity or location cannot be determined from the records of the county ... and by diligent inquiry in the vicinity of the owner's last known place of residence ..."); 58 Pa. Stat. §701.3 ("owners ... whose present residence or other addresses cannot be found by reasonable efforts to do so"); W.Va. Code, §55-12A-2 ("whose present identity and location cannot be determined from the records of the clerk of the county commission ... or by diligent inquiry in the vicinity of the owner's last known place of residence"). To our knowledge, there are no reported cases directly addressing the due process requirements for such statutes. However, it appears that the statute would be more likely to be upheld against a constitutional challenge if the statute did not necessarily limit the search to the records of a single county.

I hope that this information is responsive to your inquiry.

Very truly yours,

Robert N. McDonald*
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Opinions and Advice

* Jeffrey Darsie contributed significantly to the preparation of this letter.