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In light of the holding of the California Supreme Court in *Gerhard v. Stephens* that an incorporeal interest in oil and gas of fee simple duration can be abandoned, the effect of this decision on the oil and gas industries in California and possible steps to protect the industries' holdings are examined. Conceding that the policy of clearing titles and promoting development is advanced by the court's utilization of the rationale of the common law doctrine of abandonment, the author suggests that the uncertainty generated from this decision should be eliminated by legislative measures to clear land titles of uncertain mineral rights.

THE GERHARD DOCTRINE OF ABANDONMENT--OUTLOOK FOR CALIFORNIA'S OIL AND GAS INDUSTRY

*Franklin D. Dodge**

THE California Supreme Court decision in the above mentioned case holding that drilling rights for oil and gas can be abandoned presents possible future difficulties to the oil and gas industry in California. The common law doctrine of abandonment provided the court with a tool for serving the rationale for its decision, *i.e.* "the very useful purpose of clearing title to land of mineral interests of long standing, the existence of which may impede exploration or development of the premises by reason of difficulty of ascertainment of present owners or of difficulty of obtaining the joinder of owners."¹

The questions raised by this decision are: what effect will the court's classification of a reserved mineral interest, or a conveyed mineral interest, as an incorporeal hereditament subject to abandonment have on large mineral interests held

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1. *Gerhard v. Stephens*, 442 P.2d 162, 69 Cal. Rptr. 612, 31 Oil & Gas Rep. 28, 46 (1968).

by oil and gas companies? What will be required in the way of an examination of oil and gas lease titles prior to commencement of drilling? If as a result of this decision, all mineral interests are vulnerable, what steps can be taken to overcome any presumption of abandonment?

Real property includes not only the surface of the ground, but also almost everything attached to the surface and everything above and below it. Thus, the owner of real property owns all solid minerals in place below the surface of the ground, such as sand, gravel, coal, ores and the like.²

It is possible to sever the ownership of the subsurface from that of the surface by a grant of the subsurface or by a conveyance of the surface with the grantor reserving the subsurface ownership.³ Upon the separation of the surface and the subsurface ownerships, there are "two separate fee simple estates in the land, each of which has the same status and rank."⁴ The subsurface owner has all the usual rights and benefits of real property including, by implication, the right to enter upon the surface of the land to extract and remove minerals.⁵

As with minerals, the right to extract oil and gas can be conveyed separately from the surface ownership or the property owner can convey the surface and reserve the drilling rights.⁶ However, oil and gas are peculiar minerals because they possess peculiar attributes, not common to other minerals, in that they have a disposition to wander or percolate and to

2. See generally, 2 MILLER & STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 300 (1968). See also CALIFORNIA CIV. CODE §§ 829 & 659.

3. Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788 (1935); Greenleaf v. S. A. Camp, Ginning Co., 150 Cal. App. 2d 385, 309 P.2d 943 (1957); Renshaw v. Happy Valley Water Co., 114 Cal. App. 2d 521, 250 P.2d 612 (1952).

4. Foss v. Central Pacific R.R. Co., 9 Cal. App. 2d 117, 49 P.2d 292 (1935). See Scadden Flat Gold Mining Co. v. Scadden 121 Cal. 33, 53 P. 440 (1898). See also Nevada Irrigation District v. Keystone Copper Corp. 224 Cal. App. 2d 523, 527, 20 Oil & Gas Rep. (1964). See generally 2 Miller & Starr, *supra* note 2, at Section 440.

5. Callahan v. Martin, *supra* note 3; Yuba Investment Co. v. Yuba Consolidated Gold Fields, 184 Cal. 469, 194 P. 19 (1920); Clark v. Dunal, 15 Cal. 85 (1860); Wetzel v. Superior Court, 119 Cal. App. 2d 703, 260, P.2d 242 (1953); Smpardos v. Piombo Construction Co., 111 Cal. App. 2d 415, 244 P.2d 435 (1952).

6. Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237 (1935); Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797 (1935); Callahan v. Martin, *supra* note 3, Carlson v. Lindauer, 119 Cal. App.2d 292, 259 P.2d 925 (1953). See also 146 A.L.R. 880, 29 A.L.R. 586, 7 U.C.L.A. L. REV. 399 (1960).

escape from underneath one part of the surface of the earth to another.⁷ For this reason, the law in California is that the owner of land does not have absolute title to oil and gas in place as corporeal real property, but rather has a property right in the exclusive right to drill on his property for those substances.⁸ In the case of *Gerhard v. Stephens*⁹ it was stated that an owner may not effectively transfer rights in property greater than those he himself is able to enjoy; thus under a deed by which the grantors purported to convey their entire interest in the oil, gas and other hydrocarbons underlying certain property, the grantees received no title to the oil and gas as corporeal real property, but rather, obtained the exclusive privilege of drilling for such substances, which right was a profit a prendre, an incorporeal hereditament.

Thus, where oil companies own title to land in fee simple and subsequently convey the surface estate reserving the drilling rights to themselves, the oil company is left with a profit a prendre. True, the recordation of such a deed reserving oil and gas to the grantor is constructive notice of the rights of the grantor to a subsequent purchaser or encumbrancer of the real property.¹⁰ But, according to *Gerhard* this interest being an incorporeal hereditament or interest in land is subject to abandonment. Similarly the conveyance of a right to drill separate from the surface ownership is a profit a prendre which is an estate in real property in the nature of an incorporeal hereditament,¹¹ and being such would likewise be subject to abandonment.

In addition to a conveyance or a grant with a reservation of the right to drill, this right can also be given by an oil and gas lease which permits the lessee to drill for oil and gas upon

7. Callahan v. Martin, *supra* note 3.

8. People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930); Callahan v. Martin, *supra* note 3; Dabney-Johnston Oil Corp. v. Walden, *supra* note 6; La Laguna Ranch Co. v. Dodge, 18 Cal. 2d 132, 114 P.2d 351, 135 A.L.R. 546 (1941); Tanner v. Title Ins. & Trust Co., 20 Cal. 2d 814, 129 P.2d 383 (1942); Berstein v. Bush, 29 Cal. 2d 773, 177 P.2d 913 (1947); Caffrey v. Fremin, 198 Cal. App. 2d 176, 17 Cal. Rptr. 668 (1961).

9. Gerhard v. Stephens, *supra* note 1.

10. Callahan v. Martin, *supra* note 3.

11. People v. Associated Oil Co., *supra* note 8; Callahan v. Martin, *supra* note 3; Dabney-Johnston Oil Corp. v. Walden, *supra* note 6; La Laguna Ranch Co. v. Dodge, *supra* note 8; Tanner v. Title Ins. & Trust Co., *supra* note 8; Berstein v. Bush, *supra* note 8; Caffrey v. Fremin, *supra* note 8; Wall v. Shell Oil Co., 209 Cal. App. 2d 504, 25 Cal. Rptr. 908 (1962); Renshaw v. Happy Valley Water Co. *supra* note 3.

certain property. An oil and gas lease¹² or an assignment of such a lease¹³ is almost always recorded by oil companies and upon recordation, it imparts constructive notice of the lease to subsequent purchasers and encumbrancers of the real property. However, this leasehold interest is also an incorporeal hereditament¹⁴ and the California courts have held that "Abandonment will more readily be found in the case of oil and gas leases than in most other instances."¹⁵

Thus it appears that regardless of which of these methods is utilized to obtain an interest in the mineral rights of any land in California, under the *Gerhard* doctrine, the holder of such interest holds no more than a servitude, or right in the land of another,¹⁶ which is not a possessory interest. The fundamental distinction between corporeal and incorporeal interests lies in the fact that the former is possessory and the latter is not;¹⁷ a nonpossessory interest such as the profits a prendre discussed herein therefore is an incorporeal hereditament and consequently, according to the California Supreme Court, subject to abandonment.¹⁸

As was pointed out above, where an oil company grants the surface estate and reserves the subsurface estate, or is conveyed the subsurface estate separately, there are two separate fee simple estates in the land,¹⁹ and a fee simple estate to which a perfect legal title is had, being a corporeal heredita-

12. Cal. Civ. Code § 1219.

13. *La Laguna Ranch Co. v. Dodge*, *supra* note 8; *Callahan v. Martin*, *supra* note 3; *Brown v. Capp*, 105 Cal. App. 2d 1, 232 P.2d 868 (1951).

14. *Callahan v. Martin*, *supra* note 3.

15. *Hall v. Auger*, 82 Cal. App. 594, 549 (1927), *Romero v. Brewer*, 58 Cal. App. 2d 759, 763 (1943) *See also* *Wallace v. Imberton*, 197 Cal. App. 2d 392, 17 Cal. Rptr. 117, 150 Oil & Gas Rep. 439 (1960) finding that a lease had been extinguished by abandonment.

The interest granted by a lessor to a lessee in an oil and gas lease should not be confused with the incorporeal mineral interests of fee simple duration, *i.e.*, profits a prendre, discussed herein. *See generally*, 1 WILLIAMS & MEYERS, OIL AND GAS LAW, §§ 202 & 205.2 (1964); 36 CAL. JUR. 2d § 131-135 (1957). Many of the principles mentioned herein may find application to leasehold interests, however, such interests are not the specific consideration of this article.

16. DIGBY, THE HISTORY OF THE LAW OF REAL PROPERTY, 181-182 (5th Ed. 1897).

17. SUMMERS, OIL AND GAS § 51 at 165 (1927). For contrasting views as to the distinction between corporeal and incorporeal interests, *see* 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 209 (1964).

18. *Callahan v. Martin*, *supra* note 3, at 118; *Schiffman v. Richfield Oil Co.*, 8 Cal. 2d 211, 233 (1937), *see also*, 3 POWELL, REAL PROPERTY § 423 at note 91 (1952).

19. *Supra* note 2.

ment, is not subject to abandonment.²⁰ In these types of transactions, *Gerhard* would seem to present no problem to oil companies since a corporeal interest is involved.²¹ Rather, it is where the oil company is conveyed, or has conveyed the surface estate and merely reserved, the "exclusive right to drill" in the "mineral rights therein" or "all oil, gas and other hydrocarbons" that the problem arises for it is in these types of transactions that abandonment incorporeal interests are created.²²

Many oil companies hold incorporeal mineral interests in California lands for speculation or investment purposes. The drilling of oil wells requires a great expenditure of capital and the expected returns from successful drilling efforts must be sufficient to offset the expected costs to the oil company of drilling a certain number of dry holes. Thus many companies will purchase certain lands or the mineral rights therein which on geological data available to them appear to contain valuable oil and gas deposits, but may not do any actual exploration or other activities until this expense can be accommodated in the company's exploration budget. It can be seen that many operators, especially the major companies have more land under lease than they can explore, consequently the reason for farmout agreements and dry hole and bottom hole letters.²³ It has been argued that because of such practices some lands which may be potentially mineral-rich are burdened with dormant mineral rights owned by oil companies which, as the court pointed out in *Gerhard* may unnecessarily burden the exploration of natural resources and thereby thwart the demands of a modern economic order.²⁴ The court stated that a ruling that incorporeal hereditaments of the type involved herein may be abandoned "reduces the possibility of the resurrection of the ghosts of abandoned claims by which

20. 1. C.J.S. *Abandonment* § 5c, at 13 (1936).

21. In *Gerhard v. Stephens*, *supra* note 1, at 35-38, the court points out the distinction between corporeal and incorporeal hereditaments. *See also* 21 *Stan. L. Rev.* 1227, 1234 (1969).

22. An owner of all the mineral rights to certain property could presumably abandon the oil and gas but not the solid minerals. 21 *Stan. L. Rev. supra* note 21 at 1235; *See Gerhard v. Stephens, supra* note 1, at 59. *See also Nevada Irr. Dist. v. Keystone Copper Corp., supra* note 4 at 527. (quartz, gold and silver deposits.)

23. 1 *WILLIAMS & MEYERS, supra* note 17 at § 103.

24. *Gerhard v. Stephens, supra* note 1 at 48.

title searchers and forgotten owners collect the windfalls of accidental profit usually attained through another party's efforts.'²⁵

In response to this need to protect the public interest several states have enacted statutes providing for such termination.²⁶ Several of these statutes provide for the forfeiture of mineral estates after the expiration of a designated period of time unless the interests are rerecorded within that period.²⁷ California has enacted no such statutory method of clearing land titles of uncertain mineral rights, thus it appears the court in *Gerhard* has filled the void by utilizing the doctrine of abandonment to extinguish such rights.²⁸

The decision in *Gerhard* is a harbinger of both good and bad news for California oil companies. The adoption of the abandonment doctrine reduces the risks faced by a driller in two significant respects. First, if a long-lost owner of the mineral rights should present a claim the driller may contend that the rights had in fact been abandoned, whereas the claimant would automatically prevail on the issue of ownership in a nonabandonment jurisdiction. Second, if the claimant does establish ownership the existence of the abandonment doctrine will facilitate the driller's attempt to limit his liability to good faith damages. He may claim reliance upon probable abandonment, a defense that could not be made in a nonabandonment jurisdiction.²⁹ This alleviates somewhat the often difficult task of oil and gas lease title examinations prior to drilling on lands where there are possible unknown interests. Unfortunately, however, the abandonment doctrine is a double-edged sword. For when the oil and gas company is the mineral-rights owner, its interest is subject to divestment if the requisite elements of abandonment are present.

The elements involved in the abandonment of a right in property are the voluntary relinquishment thereof by its owner with the intention of terminating his ownership, pos-

25. *Id.* at 48.

26. LA. CIV. CODE ANN. art. 789 (1952); LA. CIV. CODE ANN. art 3546 (1953); TENN. CODE ANN. § 64-704 (Supp. 1968). VA. CODE ANN. §§ 55-154 & 55-155.

27. IND. ANN. STAT. § 56-1101 to 1110 (Supp. 1968) (50 years); MICH. STAT. ANN. § 26.1163 (1) (Supp. 1968) (20 years); WIS. STAT. ANN. § 893.15 (1966) (30 years).

28. See STAN. L. REV. *supra* note 21 at 1233, *et seq.*

29. *Id.* at 1234.

session and control and without vesting ownership in another person.³⁰ Intent to abandon is generally a question of fact;³¹ an owner must intend to forego all further conforming uses of his property, and the trier of fact must find the conduct demonstrating the intent "so decisive and conclusive as to indicate a clear intent to abandon."³² Intent may be inferred from conduct³³ and may be implied in appropriate cases from long continued non-user.³⁴ Under the common law, any title to or interest in land other than a fee simple may be abandoned.³⁵

In the case of an easement or profit a prendre, it being an easement in essence,³⁶ it is a general rule that in order to constitute an abandonment, there must be non-user accompanied by unequivocal and decisive acts on the part of the dominant tenant, *e.g.*, an oil company, clearly showing an intention to abandon.³⁷ The abandonment depends solely upon the acts and intentions of the owner of an easement, for it is he who abandons the easement.³⁸ Intent, however, is an element which alludes definition and consequently suspends mineral rights owners such as oil and gas companies in a limbo of uncertainty. Indeed, it may be felt that contrary to their intent, oil companies may lose their mineral rights in lands merely by non-user itself.

For this reason it is helpful to know that while non-user alone does not extinguish the easement, a long continued non-user is some evidence of an intent to abandon.³⁹ It is essentially a negative element of abandonment for continued user irrefutably establishes the absence of the concurrent intent.⁴⁰

30. 1 C.J.S. *Abandonment*, § 1, at 4 (1936).

31. *Wiltsee v. Utley*, 79 Cal. App. 2d 71, 77, 179 P.2d 13, 17 (1947).

32. *Smith v. Worn*, 93 Cal. 206, 213 (1892).

33. 1 C.J.S. *supra* note 30 § 4, at 12.

34. 3 Powell *supra* note 18.

35. 1 C.J.S. *supra* note 30 § 4, at 12.

36. *Gerhard v. Stephens*, *supra* note 1 at 46.

37. *People v. Southern Pacific Co.*, 172 Cal. 692, 700 (1916).

38. *Lake Merced Golf & Country Club v. Ocean Shore R.R. Co.*, 206 Cal. App. 2d 421, 437 (1962).

39. *Home R.E. Co. v. Los Angeles Pac. Co.*, 163 Cal. 710, 714 (1912). *See e.g. Lake Merced Golf & Country Club v. Ocean Shore R.R. Co.*, *supra* note 32 at 436-437; *Ocean Shore R.R. Co. v. Doelger*, 179 Cal. App. 2d 222, 232 (1960); *Flanagan v. San Marcos Silk Co.*, 106 Cal. App. 2d 458, 463 (1951). Nonuser need not extend over any substantial period of time. (*Cf. Flanagan v. San Marcos Silk Co.*, *supra* at 460, 463).

40. *See Moon v. Rollins*, 35 Cal. 333, 333-339 (1868); RESTATEMENT OF PROPERTY §§ 504, *com.d.*; *see also Ocean Shore R.R. Co. v. Doelger*, *supra* note 39 at 232; *Conn. v. San Pedro*, 103 Cal. App. 496, 500 (1930).

The Restatement points out that "Non-use does not of itself produce an abandonment no matter how long continued. It but evidences the necessary intention. Its effectiveness as evidence is dependent upon the circumstances."⁴¹ Thus it must fairly be shown that non-user by lessee is coupled with an intent to relinquish all rights in the premises;⁴² and the intention with which an act is done is a question of fact, to be determined by the trial court or jury from a consideration of the conduct of the party and the surrounding circumstances.⁴³

Oil companies may ask what type of conduct is necessary to negate the inference that there is an intent to abandon manifested. Responding to this query with the statement that it is a question of fact to be determined by a trial court or jury offers little solace. What steps are necessary to protect vulnerable mineral interests? The court in *Gerhard* found the the mineral interest owners' predecessors failed to include their interests in the estates of those who became deceased. The mineral interest owners never set foot on the surface of the land, they never attempted to search for oil nor lease to others to drill for oil, nor to inquire of the defendants concerning the property nor to demand of them some interest in the proceeds of oil leases, nor to have their fractional shares set apart and assessed for tax purposes. The court had to determine whether the trial court could reasonably have found the necessary intent to abandon on the basis of the plaintiffs' 47 years of non-user, their apparent lack of concern with their interests, and their failure to give any visible indication of intent to make future use of the property.⁴⁴ Yet, in the light of all these elements which seem to evidence an intent to abandon, the court stated in regard to several of the plaintiffs:

In order to protect the owner of an unlimited profit a prendre or other incorporeal hereditament against 'involuntary' abandonment under circumstances in which conflicting inferences may be drawn from his nonuser [sic] we hold that the trial court must find either that the owner's future use of the right could

41. RESTATEMENT OF PROPERTY, § 504, *com.d.*; see *People v. Ocean Shore R.R. Co.*, 32 Cal. 2d 406, 419 (1948).

42. *Berry v. Kelly*, 90 Cal. App. 2d 486, 203 P.2d 80 (1949).

43. *Gerhard v. Stephens*, *supra* note 1 at 51.

44. *Id.* at 54.

result only from a palpably unsound business judgment . . . or that the owner has given a further indication of his intention to abandon.⁴⁵

The court points out that an *individual* must have his intent judged on a truly subjective standard when dealing with his business judgment.⁴⁶ The court's emphasis on the standard to be employed when judging an individual's business judgment implies that when judging a "non individual", such as an oil and gas company, consideration will not be given to such elements of subjective intent as personal pride in, and attachment to, property rights which may cause individual owners to adopt a less functional approach to the management of his possessions.

For example, as mentioned previously, oil companies are not unwont to accumulate vast mineral interest holdings in land which they feel to be potentially mineral-rich.⁴⁷ These lands are frequently held for speculation, sometimes for very long periods of time until it is felt the time is opportune to commence activities. This may occur when there is a sufficient budget to accommodate the activities, or when some other party has been successful in its endeavors on neighboring land, or when another operator is found who will assume the cost and risks involved in conducting activities upon the land for a share in the profits, if any, therefrom. It can readily be seen that each of these circumstances depend to some degree upon "economic exigencies" and "external realities" which will effect any evaluation of non-user when it is used as evidence of the requisite intent. Thus, it would appear that it would be extremely difficult to prove the necessary elements for abandonment, *i.e.*, non-user and intent, in a case against

45. *Id.* at 55. As to the other plaintiffs' the trial court's finding of abandonment was upheld on the additional evidence that the plaintiff's distributees, rejected the shares which represented any interest they may have had in the land together with their inactivity for an extended period of time—almost a half century, *Id.* at 58.

46. *Id.* at 55. The court stated that "An extended nonuser, when considered in light of these 'economic exigencies' and 'external realities' . . . cannot by itself support the trial court's finding of intent to abandon. Although the acquisition of such an interest in oil and gas may be entirely speculative and the owner may well intend to foresake his interest if the 'oil boom' which induced his purpose collapsed, plaintiffs and their predecessors incurring no significant detriment by retaining their interest, might well have contemplated that the property might again become valuable because of the efforts of others." *Id.* at 55.

47. *Supra* at 6.

an oil and gas company⁴⁸ because its very nature and purpose is involved with holding mineral interests in land which in its business judgment is felt to contain oil, gas, or other hydrocarbons, and which, at an opportune time, it intends to exploit.

Certainly this was not the type of inactivity the court in *Gerhard* had in mind when it discussed the objectives of promoting the marketability of titles and fulfilling the demands of a modern economic order.⁴⁹ This is not to say that oil and gas companies cannot because of their nature and purpose abandon their mineral interest in land.⁵⁰ Rather, it is to say that the result of this decision imposes no real injury to legitimate interests such as those of the oil and gas industry because the uncertainty of proving the rather amorphous element of intent to abandon is on the party who would seek to wrest the interest away, and, relying on the court's *dicta* in *Gerhard*, it appears that it would be an onerous task for a party to prove that an oil company has abandoned its mineral interests in land when considered in light of "economic exigencies" and "external realities."

Of course, this legal foothold may be felt to be too tenuous for those who are not disposed to this interpretation of the court's *dicta*. There are other methods, theoretically possible though sometimes impracticable, of safeguarding these valuable interests and which provide a more stable standard on which to rely.

Severed mineral rights are subject to property taxation.⁵¹ The court in *Gerhard* points out that the holding of the case in no way leaves open the possibility that owners of valuable property rights will contrary to their desires lose their rights.⁵² It points out that a conscientious owner of such a right can fully protect himself by applying for separate assessment.⁵³

48. See CAL. CIV. CODE §§ 1864 *et seq.*

49. *Gerhard v. Stephens*, *supra* note 1 at 48.

50. Leasehold interest may expressly give the lessee the right to abandon drilling operations under certain circumstances. For instance, the lessee may be given the right to abandon operations by reason of encountering formations recognized by geological experience as unfavorable to the production of oil and gas in paying quantities.

51. CAL. REV. & TAX CODE § 104(6) (West 1956).

52. *Gerhard v. Stephens*, *supra* note 1 at 48.

53. *Id.* at 48; see CAL. REV. & TAX CODE, *supra* note 51 at § 2803 *cf.* *Smith v. Anderson*, 67 A.C. 646, 652 [26 Oil & Gas Rep. 151] (1967).

However, assessment of the value of such interests prior to their discovery is difficult of ascertainment for it is not known whether minerals are present nor, if there are, in what quantities.⁵⁴ For this reason, some counties do not make any assessment or taxation on the value of unexploited mineral estates, or put a zero value on such estates, until such estates are exploited.⁵⁵ Mineral interests in lands which lie within such counties, utilizing the zero value assessment, could have a separate valuation made according to the ruling in *Smith v. Anderson*,⁵⁶ however, since the valuation assessed is zero, it would appear that until there was exploitation of the mineral interests there would be no payment of taxes and, consequently no overt act manifesting an intent not to abandon. On the other hand, some counties⁵⁷ place a valuation on mineral interest in land as high as ten dollars an acre whether or not the mineral interests are exploited. To seek a separate valuation for severed minerals in such counties may be so costly as to be prohibitive. As a result, the owner of the severed mineral estate in some counties may or may not be identified as the owner of the mineral rights and may or may not run the risk of having his claim to such rights extinguished.⁵⁸ Thus, the effectiveness of this procedure is rather limited.

The California Supreme Court has said that an interest in minerals which is recorded gives constructive notice thereof.⁵⁹ But the *Gerhard* decision qualifies such protection by holding that the interests may be lost to another party, even though recorded, if abandonment is found. It would appear that in order that such an intent to abandon be negated, a procedure similar to that employed by the aforementioned states, *i.e.* rerecording, could be utilized. Such a rerecording of one's mineral interest in land could serve a similar purpose by identifying the entity who holds the interest in the land and manifesting a continuing intention to retain such interests.

54. *See, e.g.* *Red Bluff Developers v. County of Tehama*, 258 Cal. App. 2d 668, 66 Cal. Rptr. 229 (1968).

55. *See, e.g.* *Nevada Irrigation Dist. v. Keystone Copper Corp.*, 224 Cal. App. 2d 523, 528, 36 Cal. Rptr. 775, 779 (1964).

56. *Supra* note 53.

57. *E.g.*, Orange County, California.

58. *See* 21 Stan. L. Rev. *supra* note 21, at 1231.

59. *Supra* note 10.

California has no statutory authority providing for re-recording mineral interests in land such as those states mentioned above.⁶⁰ California requires that there be a statute authorizing or permitting an interest to be placed of record and giving the recording the effect of constructive notice.⁶¹ Recordation of an instrument not entitled to be recorded does not give constructive notice⁶² either of its existence or of its terms.⁶³ Thus, although mineral interests in land acquired by deed or grant, or a grant with reservation, are recordable and such recordation gives constructive notice thereof, it is submitted that since there is no statutory authority for rerecording a mineral interest for the purpose of giving constructive notice of an intent not to abandon, the utilization of such a procedure would afford little or no protection to a mineral interest owner. It is not uncommon in practice, however, for one to rerecord an interest in land. Indeed, instruments are quite often rerecorded for a myriad of different reasons ranging from inadvertence to the fact that the instrument had already been recorded properly to curing a defectively recorded instrument.⁶⁴ Such acts of rerecording are given the same legal effect of constructive notice as an original recording. Since generally it is the purpose of the recording statutes to impart notice of the contents of the recorded instrument to third persons,⁶⁵ it would appear that a rerecording of a once-recorded mineral interest together with the filing of a letter of intent stating the purpose for the rerecording which is generally made a part of the record when a rerecording is made, would effectively resolve the dilemma of having unidentified

60. *Supra* at 7.

61. *Driefus v. Marx*, 40 Cal. App. 2d 461, 104 P.2d 1080 (1940).

62. *Mesick v. Sunderland*, 6 Cal. 297 (1856); *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 P. 1071 (1895); *Page v. Rogers*, 31 Cal. 293 (1866); *People v. O'Brien*, 96 Cal. 171, 31 P. 45 (1892); *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 137 P. 21 (1913); *Henrici v. South Feather Land & Water Co.*, 177 Cal. 442, 170 P. 1135 (1918).

63. *Black v. Solano Co.*, 114 Cal. App. 170, 299 P. 843 (1931); *McLane v. Van Eaton*, 60 Cal. App. 2d 612, 141 P.2d 483 (1943); *Stafford v. Ballinger*, 199 Cal. App. 2d 289, 18 Cal. Rptr. 568 (1962).

64. *Eg.* to correct defects in deeds and other instruments of record which have been declared to impart notice of subsequent purchasers. *Touchard v. Keyes*, 21 Cal. 202 (1862); *Wallace v. Moody*, 26 Cal. 387 (1864); *McMinh v. O'Connor*, 27 Cal. 238 (1865).

65. *Chamberlain v. Bell*, 7 Cal. 292 (1957); *Smith v. Dall*, 15 Cal. 510 (1860) overruled on another point by *Dutton v. Werschauer*, 21 Cal. 609 (1963); *Hager v. Spect*, 52 Cal. 579 (1887); *Warnock v. Harlow*, 96 Cal. 298, 31 P. 166 (1892); *Los Angeles v. Morgan*, 105 Cal. App. 2d 726, 234 P.2d 319 (1951).

entities holding up the marketability of mineral interests, and also the problem of establishing whether or not there is an intent to abandon. The rerecordation would be an overt act manifesting an intent to retain one's rights in land. It would appear in the chain of title on the record in any title search and would consequently impart constructive notice to a subsequent purchaser or encumbrancer. It would be difficult to believe that a court, in the light of such evidence, would hold that there was an intent to abandon manifested.

As between these two suggested procedures for manifesting an intent not to abandon mineral rights in land, it would appear that the latter is more feasible. It does not involve as much time, effort or cost and it avoids the uncertainty of trying to assess unknown minerals which may or may not be exploited.

A third possible alternative as a solution to this problem might be the filing of an affidavit similar to those filed on mining claims. In essence, these affidavits hold ones interest in minerals by stating that certain work has been performed or expenditures have been made on the interest, thus evidencing ones efforts to negate an intention to abandon. It would appear that such affidavits could be filed on mineral interests reciting therein that it is the intention of the owner to retain his interest in said land thus, in effect, negating a contrary finding of abandonment; it would appear on the record title and impart constructive notice to any subsequent purchaser or encumbrancer. From the standpoint of time, effort and cost, this alternative is perhaps the most attractive.

SUMMARY

Gerhard v. Stephens seems to be the first California case actually holding that an incorporeal interest in oil and gas of fee simple duration can be abandoned. The California Supreme Court adopts by this decision a policy in favor of clearing titles and promoting development by holding that rights to mineral interests or the exclusive right to drill in the land is an interest which can, under certain circumstances, be lost because of a finding of abandonment.

The effect of such a classification of a reversed mineral interest or a conveyed mineral interest as incorporeal and therefore subject to abandonment raises such questions for the oil and gas industry in California as: What is the present status of large mineral holdings much of which has never had any activity conducted thereon? What is now required in the way of oil and gas lease title examinations prior to drilling? If mineral interests in land are now vulnerable to abandonment, what kind of action can be taken to overcome such a finding?

It would seem that the oil and gas industry having legitimate business or economic interests in mineral estates in California lands incurred no real injury from the uncertainty of proving the rather amorphous element of intent to abandon as set forth by the court in *Gerhard*. The court employs the standard of "subjective business judgment" as viewed in the light of "economic exigencies" and "external realities" to give definitional boundaries to the allusive element of intent.

By adopting such a standard, it would appear that in a case in which a party is trying to wrest a mineral interest from an oil and gas company by utilizing the doctrine of abandonment, it will be extremely difficult to introduce evidence sufficient to show an intention to abandon. The very nature and purpose of an oil and gas company requires that it very often hold mineral interests in land for long periods of time without conducting any activities. To find that simply because there has been no activities conducted on mineral interests for thirty (30) or forty (40) years there is an intention to abandon could be contrary to the actual intention of an oil company to retain such lands for speculation or future activity. An oil and gas company in its subjective business judgment may decide in the light of present circumstances—economic exigencies and external realities—that the time is not yet suitable for commencing activities. To attempt to negate this intention and successfully prove an intention of abandonment would be an onerous task indeed, and for this reason it would seem the *Gerhard* decision results in no real injury to such legitimate interests in these mineral rights.

For those companies which are not prone to rely on such an interpretation of the court's *dicta* as it regards the element of intent, there are several possible alternatives which, if found to be practicable, could possibly be utilized to prevent a finding of an intention to abandon mineral interests.

The first alternative is to apply for a separate valuation of one's mineral interest in land as provided in the California Revenue and Tax Code and which was suggested by the court. This may not be satisfactory however since there is a great deal of difficulty in trying to put a valuation on minerals which have not yet been exploited. Any attempted assessment could run the gamut of possible valuation from a zero value to many dollars per acre consequently providing no overt act to manifest intent or resulting in a prohibitive tax cost.

The second alternative is to rerecord mineral interests and state as a reason for such rerecording in the letter of intent which generally accompanies such a filing that it is the intention of such act to negate any intention to abandon such mineral interest. This information would appear on the record in the chain of title and any subsequent purchaser would have constructive knowledge of such interest in the land. This method would cost less and involve less time and probably less money than the first alternative.

The third alternative is to file an affidavit similar to those filed on mining claims stating it is the intention of the mineral interest owner to retain his mineral interest. As with the second alternative this imparts constructive notice to subsequent purchasers and serves the function of identifying the party who has interest in the land and resolving the issue of whether or not this interest has been extinguished. This alternative would probably be the most favorable when considered in light of time involved, cost incurred and effort that would have to be expended.

CONCLUSION

Certainly the policy in favor of clearing titles and promoting development is advanced as a result of this case by preventing claims under old mineral estates that were in fact aban-

done at an earlier time from being raised. The adoption of the abandonment doctrine reduces the risks faced by a driller when he decides to proceed with the exploitation of a mineral estate which an examination of the oil and gas lease title evidences to belong to some unknown entity who cannot be located.

However, the uncertainty generated from this decision as regards to proving the rather nebulous element of intent to abandon, leaves such entities as oil and gas companies in a limbo in two respects. First, where a company decides it will accept the risk of drilling on a mineral estate where the mineral interest owner cannot be located and has presumably abandoned his interest, it is provided with no predictable cutoff date after which he may drill in safety; whether there has been an abandonment is a question of fact which will have to be decided from the circumstances. Second, where the oil and gas company is the mineral interest owner against whom abandonment is being charged, it may be that the company will lose its interest contrary to its desires because of not knowing what precautions to take in order to negate an intention to abandon.

As has been submitted, the element of uncertainty which results from the court's adoption of the abandonment doctrine in incorporeal mineral interest situations may not leave the outcome of such a suit to rest on as much conjecture as one might think, however, it is true that it does not provide a predictable standard to rely on such as is found in the aforementioned statutes adopted by some states. Perhaps for this reason, and the resulting fear of the vulnerability of mineral interest, the time is appropriate for legislation on this matter. In this respect, therefore, it may behoove the California oil and gas industry to exert whatever influence it may possess in an effort to have a statutory standard legislated which would set out clearly and unequivocally what requirements the owner of an incorporeal mineral interest owner must satisfy in order to escape vulnerability to their interests due to the *Gerhard* doctrine of abandonment.