#H-400 11/4/81

Memorandum 81-74

Subject: Study H-400 - Marketable Title (Comments on Tentative Recommendations)

The Commission distributed for comment in July 1981 tentative recommendations relating to ancient mortgages and deeds of trust, dormant mineral rights, and unexercised options. The Commission distributed for comment in September 1981 tentative recommendations relating to rights of entry and possibilities of reverter and to unperformed real property sales contracts. These tentative recommendations are consolidated into a single draft and attached to this memorandum.

The aim of the tentative recommendations is to improve marketability of title by providing for expiration of old property interests by operation of law. This is accomplished by a number of techniques, such as imposing statutes of limitation on enforcement of the interests, providing maximum periods of duration on certain interests, and by making nonuse of the interests a factor. Different techniques are applied to different interests depending on their character.

General Reaction

The reaction to the tentative recommendations was mixed. Specific comments addressed to specific interests are discussed below. Of the more general or unspecified comments, Roger Arnebergh (Exhibit 2) thought the tentative recommendations were well considered and would not only clarify the law but cover areas that have previously been only partially covered by statute and case law. The California Department of Transportation (Exhibit 3) sees no great effect on their practice since the tentative recommendations except from expiration interests held by the state. Caltrans did feel, however, that the tentative recommendations would help in the preparation of suits to clear the record of nonsubstantial claims of record. "Any change in the law which simplifies title search and the need for service on people with no real interest in the property, will benefit all condemning agencies." The State Board of Equalization (Exhibit 4) did not see any problems that would be created for the Board by the tentative recommendations. Stephen M. Blitz (Exhibit 5) approved the proposals to make title to California property more marketable; "I certainly commend the Commission for these efforts and my only overall suggestion would be that the three tentative recommendations

do not go far enough." The Southern California Edison Company (Exhibit 6) supports these proposals since they would tend to make real property more marketable. In the process of certifying property as bondable, opinions must be given that there are no material defects in title; the proposals would aid the Company in rendering such opinions.

On the other hand, one of the Commission's consultants, Garrett H. Elmore, believes that the Commission should be hesitant to press for legislation affecting property and property rights without an intense study of court decisions on due process and without considering new provisions not found in Model and Uniform Acts that might result in fairer legislation. See Exhibit 1. Mr. Elmore's conclusions may be stated:

1. The draft is unduly broad in scope and in favoring surface owners.

2. The draft goes too far in attempting to legislate "retroactively."

3. The draft includes some loose and imprecise provisions for a statute of this type affecting property rights and requiring action by the public and non-lawyers to comply with it.

4. The draft and background studies do not take sufficiently into account recent decisions in other jurisdictions that strike down or restrict statutes on the ground of denial of due process (lack of notice or opportunity to be heard) or that by judicial interpretation restrict the operation of the statute.

Mr. Elmore offers specific examples illustrating these points in his letter.

Ancient Mortgages and Deeds of Trust

The major effect of the Commission's recommendations on mortgages and deeds of trust is that the lien of the mortgage or deed of trust expires automatically after the passage of time: 10 years after the underlying obligation is mature (if the maturity date can be ascertained from the record) or 60 years after the lien is recorded (if the maturity date cannot be ascertained from the record). Waiver or extensions must be recorded to be effective. Thus there will always be a definite period that is determinable from the record after which it can be said with confidence that the lien has expired and no quiet title action is necessary to clear title.

Professor Roger Bernhardt (Exhibit 7) approves the 60-year expiration period, since it should eliminate most questions concerning 40-year mortgages. He raises the question of ongoing lines of credit, dragnet clauses, and negative amortization features that might extend the viability of a mortgage past the 60-year period. The staff believes the statute is generally adequate to handle this situation. As Professor Bernhardt notes, the 60-year period will probably take care of most such problems. Where it does not, and it appears that an extension of credit may occur too close to the expiration of the 60-year period, the parties can simply enter into a new security agreement for the new extension of credit or can waive or extend the 60-year period as a condition of granting further credit (Section 882.020(b) expressly authorizes this).

Professor Bernhardt also raises the question of possible efforts to avoid the effect of the statute by inserting as boiler-plate in every mortgage instrument a clause waiving the 60-year period indefinitely. The statute takes care of this problem by permitting waiver or extension "only by an instrument that is effective to waive or extend any other applicable statute of limitation beyond the prescribed times." Section 882.020(b). Such an instrument would be effective to waive or extend another applicable statute of limitation only for a period of four years at a time. Code of Civil Procedure § 360.5. The Comment to Section 882.020(b) makes reference to Code of Civil Procedure Section 360.5, but the staff believes the Comment should point out the interrelation between the two provisions more explicitly, which we will revise the Comment to do.

Dormant Mineral Rights

The dormant mineral rights tentative recommendation accomplishes two major objectives--it makes all mineral rights (not just oil and gas rights) subject to loss by abandonment and it provides for expiration of mineral rights by operation of law if the rights have been dormant for a period of one year and a period of 20 years has elapsed since the rights were created or a notice of intent to preserve the rights was recorded.

The reaction to this tentative recommendation was generally unfavorable. Although a number of general comments agreed with the policy of this tentative recommendation (see discussion under "General Reaction" above), comments addressed specifically to the mineral rights proposals were negative. See comments of Homestake Mining Company (Exhibit 8),

Western Oil & Gas Association (Exhibit 10), Union Oil Company (Exhibit 11), Shell Oil Company (Exhibit 12), Tenneco Oil (Exhibit 13), Kings County Development Company (Exhibit 14), Newhall Land and Farming Company (Exhibit 15). Their opposition can be summed up as follows:

(1) The proposals are discriminatory against mineral rights holders in favor of surface owners. There is no greater public policy favoring surface development than there is favoring subsurface development, and in fact in the case of oil and gas public energy policy favors subsurface development.

(2) Forcing loss of mineral rights in favor of surface owners without notice or compensation is confiscatory and possibly unconstitutional.

(3) There appear in practice to be few title problems created by dormant mineral rights and those few can be handled usually by negotiation or in rare cases by simple quiet title proceedings.

(4) The dormancy--rerecording scheme proposed will add problems and uncertainty to the law that far outweigh any existing problems with dormant mineral rights.

(5) For large mineral rights holders the burden of rerecording will be substantial. For small mineral rights holders who may either be ignorant of the need to rerecord or may not have the resources for a 20-year reminder system, valid interests will be lost; this will be a windfall to the surface owner at the expense of the mineral rights holder.

(6) The proposals can have the effect of impairing development of subsurface rights in cases where the subsurface rights are held in a single block and due to incomplete rerecording the statute causes patchwork reversion to the owners of subdivided surface lots thereby fractionalizing the subsurface rights.

(7) There are other alternatives to working out conflicts between surface and subsurface owners besides outright loss of mineral rights. These other alternatives should be explored.

In addition to these general concerns with the dormant mineral rights proposals, the commentators also raised questions concerning specific provisions. The specific questions are treated briefly below:

§ 883.010. Definitions. The tentative recomendation defines "mineral rights" broadly, but it is not clear whether included in the

definition are mining rights, reservations of minerals in federal patents, and geothermal rights. See Exhibits 8 (Homestake Mining Company), 9 (JoAnne M. Bernhard), and 10 (Western Oil & Gas Association). In addition there is the secondary question whether these interests can or should be included with mineral rights generally. Western Oil & Gas Association also notes a number of problems with the definition of "dormancy," including the possibility of oil and gas production from neighboring land through pooling or unitization arrangements, the possibility of extraction from one but not all strata, and the possibility of separate property tax assessment of the mineral rights. A related problem is the possibility of a mineral right that does not in any way impair surface rights, such as one that can be developed through slant drilling.

§ 883.020. Abandonment of dormant mineral rights. Western Oil & Gas Association criticizes extension of the abandonment doctrine from incorporeal interests (such as oil and gas) to corporeal interests (such as hard minerals) as raising a serious constitutional question. Homestake Mining Company believes that courts would act with great restraint in finding an abandonment of mineral rights and that the statute is ambiguous, making it impossible to predict how it will be interpreted or applied.

§ 883.030. Expiration of dormant mineral rights. In addition to technical problems with the phrasing of the rerecording provisions, there was serious concern with the one-year dormancy provision. Western Oil & Gas Association believes that the one-year period is too short and that at least five years of dormancy is necessary. The Commission's consultant, Professor Blawie, too, believes that at least five years is necessary to recognize economic realities of development, financing, and the marketplace. Former Commissioner Professor Williams, an oil and gas expert, also feels one year is too short to accommodate temporary cessation of production. On the other hand, Mr. Stephen Blitz (Exhibit 5) states that any period of dormancy recognized will defeat our objective of certainty of title and that the rights of mineral holders are amply protected by the ability to rerecord every 20 years.

§ 883.040. Effect of expiration. When mineral rights expire they revert to the surface owner under the tentative recommendation. Western Oil & Gas Association raises the question whether persons claiming under the mineral right owner also lose their rights or whether the reversion to the surface owner is subject to existing leases, encumbrances, etc.

In view of these questions that have been raised concerning both the policy and the detail of the tentative recommendation as it relates to dormant mineral rights, the staff believes we need to devote more work to this aspect of the marketable title study. In particular we need to do more research on the magnitude of the problem and we need to refine and consider alternative approaches to solution of the problem. The staff recommends that the Commission's recommendation to the Legislature omit mineral rights but that the proposed legislation reserve space for inclusion in the future of a chapter on dormant mineral rights.

Unexercised Options

The unexercised option provision cuts the cloud on title of an unexercised option down from one year to six months. We received only one letter addressed specifically to the unexercised option provision. Robert L. Baker (Exhibit 16) approves the tentative recommendation because the one-year period is an unduly long impairment of marketability; six months is adequate time for the option holder to act upon the option.

Rights of Entry and Possibilities of Reverter

The tentative recommendation is to abolish possibilities of reverter and to treat them as powers of termination together with rights of entry. The duration of a power of termination would be limited to 30 years, with the right of the holder of a power to preserve the power indefinitely for 30 years at a time by recording a notice of intent to preserve the power. In addition the case-law doctrine refusing to enforce powers of termination in the event of changed circumstances would be recognized. The tentative recommendation makes clear that the statute of limitation for enforcing a power of termination after breach of condition is five years.

Professor Coskran (Exhibit 17) finds the recommendations excellent. He also raises a question about the operation of the five-year limitation period. Under the draft a power of termination must be exercised within five years after breach of condition by notice of exercise or by civil action. Suppose the holder of the power waits until the five years is about to expire and then gives notice of exercise; if the fee owner refuses to turn over possession the holder of the power would then have another five years to bring an action, making a total effective 10-year statute of limitation. The staff will add language to the effect that any notice must be given and any action must be commenced within five years after breach.

Professor Joel C. Dobris (Exhibit 18) approves the concept of a maximum duration for rights of entry and possibilities of reverter, but does not think possibilities of reverter should be abolished. He finds persuasive the fact that this common law estate is centuries old and that it has been abolished in only one jurisdiction--Kentucky. Professor Dobris also is concerned that determinable life estates or determinable terms for years might be affected by the Commission's recommendation. The staff believes it is clear from the statute as drawn that only fee-simple estates are affected, but we have no problem with adding language to the Comment to Section 885.020 to reinforce this point.

Section 885.040 codifies the doctrine of changed circumstances--a power of termination is not enforceable if the restriction "is of no actual or substantial benefit to the holder of the power, whether by reason of changed conditions or circumstances or for any other reason." The "no actual and substantial benefit" standard is drawn from a comparable New York statute. Professor Roger Bernhardt has written to the staff that this standard troubles him. "I suspect that many powers of termination would not survive such a requirement even after immediate creation. I would prefer to see a standard referring to the original purpose or intent of the grantor." The staff agrees with Professor Bernhardt that the language of the statute should be refined to adhere more closely to the case-law statements of the doctrine. The staff would revise Section 885.040(b) to read:

> (b) As used in this section, a power of termination is obsolete, whether by reason of changed conditions or circumstances or for any other reason, if:
>
> (1) In the case of a restriction intended for the benefit of appurtenant property, the restriction to which the fee simple estate is subject is of no actual and substantial benefit to the holder of the power.
>
> (2) In the case of a restriction intended other than for the benefit of appurtenant property, enforcement of the power would not effectuate the purpose of the restriction to which the fee simple estate is subject.

Unperformed Real Property Sales Contracts

Real property sales contracts are of two general types--the "deposit receipt" type that is truly an agreement of sale and contemplates a deed upon payment of the sale price, and the "installment land contract" type that is really a form of security. When either of these types is recorded potential title-clouding situations arise, particularly where there is

subsequent nonperformance of the contract. The tentative recommendation attacks this problem by requiring the defaulting buyer to execute a release of the property and by providing that the cloud of the recorded contract expires by operation of law upon the passage of five years after the date called for in the contract for conveyance of title.

The comments on this tentative recommendation were mixed. Stephen M. Kipperman (Exhibit 19) believes that there is no urgent need to tinker with the law in the area and that a seller who wishes to avoid having title clouded can take a release or quit-claim deed at the time of the transaction for later recording in the event of default. William J. McDonough (Exhibit 20), a title insurance attorney, believes that the tentative recommendation is worthwhile and will work well. Gordon L. Graham (Exhibit 21), a CEB attorney, believes that the recommendation would inadvertently and substantially change the law on seller's remedies to the detriment of the buyer--"I do not believe the seller should be given a remedy, on the buyer's default, permitting the seller's title to be cleared by operation of law." (his specific concerns are discussed below). Michael W. Ring (Exhibit 22) believes the tentative recommendation is satisfactory as far as it goes, but that it should go even farther in giving the seller remedies against the defaulting buyer (his specific suggestion is discussed below).

One difficulty in this area is we do not know the extent of the problem we are dealing with, and this uncertainty is expressed in the tentative recommendation. However, Ronald P. Denitz of Tishman West Management Corporation has informed the Commission that they invariably record even very short term contracts of sale. And Mr. McDonough (Exhibit 20) states, "With respect to the question whether there is a significant number of Real Property Sales Contracts of record, I can only state that with more than 24 years experience in the Title Insurance Industry, it is my opinion that, particularly in the last 10 years, there have been a significant number of such contracts recorded in the State of California, many of which remain unperformed and create clouds on title to real property." The staff plans to incorporate this information in the explanatory portion of the recommendation.

§ 886.010. Definitions. The definitional section makes clear that a "recorded real property sales contract" includes the entire terms of a contract evidenced by a recorded memorandum or short form. Mr. McDonough

(Exhibit 20) offers a technical amendment that the "recorded contract" also includes the entire terms of a contract recorded in its entirety. Although the staff believes this proposition is self-evident, we have no objection to making the amendment if it will help clarify the statute.

§ 886.020. Release of unperformed real property sales contract. Section 886.020 requires a defaulting buyer under a recorded sale contract to execute a release to the seller for purposes of clearing title. Mr. Graham (Exhibit 21) points out that when a buyer defaults the seller is entitled to recision only upon making restitution to the buyer for any amounts paid in excess of the seller's damages, and that by requiring the buyer to execute a release, Section 886.020 ignores the buyer's right to restitution. Section 886.020 is not intended to affect the substantive rights between the parties to a contract but only to provide a mechanism for clearing record title. However, the buyer's cloud on the seller's title does put the buyer in a strategically stronger position to negotiate restitution. The staff believes this point should be recognized in the statute, and the defaulting buyer should only be required to give a release if the buyer does not seek restitution of money paid under the contract.

Harold P. Machen (Exhibit 23) is concerned that a release requirement will be construed as mandatory in order to clear title and will further cloud title if a release cannot be obtained from the defaulting buyer. The staff would add to Section 886.020 a sentence to the effect that, "Nothing in this section makes a release or a demand therefor a condition precedent to an action to clear title to the real property."

§ 886.030. Expiration of record of real property sales contract. Section 886.030 provides for the automatic expiration of record of a real property sales contract five years after the date provided in the contract for transfer of title. The object is to enable clear title by operation of law simply by the passage of time, without the need for a court proceeding. If the buyer has defaulted, the record will then show title only in the seller; if the buyer has performed and title has been transferred, the record will then show title only in the buyer.

Professor Bernhardt (Exhibit 24) suggests that the expiration date should be five years after the date provided in the contract for the transfer of title or five years after "a date which a court may calculate to be that which the parties intended." The problem with this suggestion is that it lacks the certainty of a fixed rule and appears to require a

court determination, which we are trying to avoid in this statute. Professor Bernhardt is also concerned about the possibility that an extension of the five-year period will be executed contemporaneously with the contract of sale. Although a practice of a contemporaneous waiver plainly could arise under the statute, this does not disturb the staff; our objective is to provide title-clearing mechanisms to take care of the common case, not to hinder the parties from structuring their bargain in whatever ways seem appropriate to them.

Mr. Graham (Exhibit 21) raises the question of a land sale contract that the buyer has fully performed but for which the seller has failed to deliver the fulfillment deed, a "probably not uncommon situation." Here the buyer would lose record title to the property by operation of law five years after the last payment was made. The statute does protect the interest of a buyer in possession of the property, and does preserve the rights of the buyer against the seller. But Mr. Graham points out that this does not help in the case of a buyer of unoccupied raw land where inquiry notice does not exist, especially if the seller resells to a bona fide purchaser; the buyer's only recourse would be an action against the seller for damages. "Your recommendation in § 886.030 would require the buyer at his peril to obtain and record a fulfillment deed within five years after the date for completion of the contract or bring suit to quiet title within that period."

Mr. Graham has a point. In the case where there has been a real property sale contract that has been satisfied but no deed has been recorded, and the buyer or persons claiming under the buyer are not in possession, and the seller resells the property after five years, the buyer would lose the property under the statute and be relegated to a damage remedy. However, such a case may be extremely rare; the benefit of clearing titles generally after five years may far outweigh any detriment to the buyer in this unusual situation.

It should be noted, however, that Mr. Graham believes that the problem of the buyer's failure to obtain a fulfillment deed on completion of payments under a land sale contract may be more common than the problem of records clouded by land sale contracts on which the buyer has defaulted. The staff has spoken with Mr. Graham about this; Mr. Graham's belief is based not on experience with land sale contracts but by analogy to the common situation with mortgages and deeds of trust where the borrower fails to obtain a release or reconveyance from the lender upon satisfaction of the obligation.

Power of sale. Mr. Ring (Exhibit 22) suggests that the problems faced by the seller whose title is clouded when the buyer under an installment land contract defaults could be better cured by a statute recognizing private power of sale in the seller. Mr. Ring's argument is that an installment land contract is essentially a security device and the parties should have the same rights as if a mortgage or deed of trust had been selected as the form of security device.

Although some land sale contracts do include a clause permitting private sale by the seller in the event of the buyer's default, it is not clear whether the law recognizes this. See Graham, The Installment Land Contract in California: Is It Really a Mortgage?, 4 CEB Property Law Reporter 117 (1981). The courts still treat these "disguised" security devices as contracts for many purposes. If we were to provide by statute that the power of sale is an available remedy, we probably would also want to make certain that other rules applicable to security devices apply (such as the buyer's equity of redemption), and that the contract remedies are no longer available. We would also want to consider whether use of a land sale contract as a security device should be encouraged by making the private power of sale available; Mr. Graham believes it should not be encouraged and that the mortgage or deed of trust is a perfectly adequate security device.

The staff takes no position on this matter. However, we believe that if the Commission is interested in extending the power of sale to installment land contracts, we should do this by a separate recommendation and should consider all aspects of the problem carefully before jumping into this complex area. We note that "procedures under private power of sale in a trust deed or mortgage . . . and related matters" are specifically included within the Commission's authority to study creditors' remedies.

Miscellaneous Provisions

The tentative recommendations contain a number of general provisions that apply to the various property interests. Western Oil and Gas Association (Exhibit 10) made several points with respect to these provisions.

§ 880.020. Declaration of policy and purposes. Western Oil and Gas Association points out that the policy declaration places undue emphasis on clearing title to surface interests, whereas clearing title

to subsurface rights may be an equally important policy. The staff believes this point is well taken and would add to the first public policy declaration of Section 880.020(a)(1) that real property should be made freely alienable and marketable to the extent practicable "in order to enable and encourage full use and development of the real property, including both surface and subsurface rights."

Western Oil & Gas Association also questions the statement in subdivision (a)(2) that interests in real property created at remote times often constitute unreasonable restraints on alienation. They are correct that it is not the mere passage of time that causes the problem; the problem is caused by the fact that with the passage of time it becomes increasingly likely that interests may be no longer valid yet continue to cloud record title and that valid interests may be obsolete due to changed conditions. The staff would add language to the effect that interests created at remote times often constitute unreasonable restraints on alienation "because the interests are no longer valid or have been abandoned or have otherwise become obsolete."

§ 880.240. Interests excepted from title. Subdivision (a) of Section 880.240 saves from expiration under the provisions of the statute the interest of a person "using or occupying" real property. Western Oil & Gas Association notes that the terms are undefined and wonders whether the absence of definition will cause doubt as to the covered interests. The "use or occupancy" language derives from earlier drafts of the statute that covered such interest as easements. Now that the Commission is dealing with particular interests on an individual basis, the staff believes the more common test of "possession" should be substituted for "use or occupancy."

Subdivision (c) saves from expiration under the provisions of the statute any interest of the state or a local public entity. Western Oil & Gas Association asks why the state or a local agency should be excluded if the object of the legislation is to make title more marketable. The exclusion of public entities, like the "use or occupancy" provision, derives from a time when the draft statute was much broader. The staff believes we can refine this provision but only on an interest by interest basis; the Commission should note, however, that such refinement may arouse opposition from the public entities, which heretofore have been mildly favorable. The staff sees no problem in making public entities

subject to the provisions on unexercised options, powers of termination, and unperformed real property sales contracts. The staff also sees no problem in making public entities subject to the provisions on ancient mortgages or deeds of trust; however, we will require some time to investigate the various statutes providing for improvement bonds and other public instruments that create long-term liens to make sure that they do not run afoul of the 60-year expiration period provided in the Commission's tentative recommendation. With respect to dormant mineral rights, the staff would likewise require additional time to investigate the various statutes relating to public lands and mineral reservations. To be safe, the staff would continue the exclusion for public entities with respect to ancient mortgages and deeds of trust and dormant mineral rights until we are in a position to make a recommendation with respect to these interests.

§ 880.310. Notice of intent to preserve interest. If a notice of intent to preserve an interest is recorded, this does not preclude a finding by a court that the interest has subsequently been abandoned. Nonetheless, Western Oil & Gas Association points out that recordation of notice of intent to preserve should at least create a presumption affecting the burden of proof that the interest has not been abandoned. The staff believes this is a good point and would add the suggested language to Section 880.310.

One policy question the Commission should consider in connection with the notice of intent to preserve is whether a notice recorded by one part owner is sufficient to preserve as to other part owners. The current draft of Section 880.310 permits a person to preserve only that person's interest, on the theory that when an interest is apparently obsolete, only the interests of those persons motivated to preserve their interests should be preserved. This is particularly important where, for example, a reserved mineral right has passed by intestate succession and is dispersed among numerous unknown or unlocatable owners. However, where there are many part owners motivated to preserve the interest, this rule could impose a serious burden. In this situation, the staff recommends that one person be authorized to preserve for all; each person for whom the interest is being preserved should be listed in the notice and there should be an index entry for each.

§ 880.320. Who may record notice. A notice of intent to preserve an interest in property may be recorded by the owner of the interest or by another person on the owner's behalf in a few limited situations.

Western Oil & Gas Association suggests that anyone otherwise authorized to act on behalf of an owner should also be allowed to record the notice on behalf of the owner. This makes sense to the staff; there is adequate protection against abuse in the requirement that the notice be signed and verified by or on behalf of the owner. Western Oil & Gas Association offers language that we would incorporate.

§ 880.330. Contents of notice. A notice of intent to preserve must describe the interest being preserved. Western Oil & Gas Association points out that this requirement could cause problems where because of the varied nature of the interests the description is inaccurate or incomplete. The intent of the draft statute is not that there be a legal description of the interest so long as the description includes a reference to the recorded instrument that creates the interest. The staff would revise Section 880.330(b)(2) to make clear that only a description of the "character" of the interest is necessary. Cf. Code Civ. Proc. § 751.23 (notice of claim under Destroyed Land Records Relief Law requires description of character of interest).

§ 880.350. Recording and indexing notice. One difficulty with notices of intent to preserve interests is that California has no tract indexing system for real property parcels, with the result that a person looking to see what interests burden a particular parcel cannot do so easily. California has a general grantor-grantee indexing system; notices of intent to preserve must be catalogued within the system in such a way that a person looking to see whether a notice has been timely filed can do so with a reasonable search.

The technique adopted by the draft statute is that when the holder of an interest records a notice of intent to preserve the interest, an index entry is made for the person as a "grantor." Thus anyone seeking to determine the status of the interest would run the grantor index from the date of creation of the interest until either a transfer was recorded or the notice of intent to preserve appeared. If a transfer was recorded, the searcher would then run the grantor index for the transferee from the date the transfer was recorded, etc.

Professors Roger Bernhardt (Exhibit 24) and Jesse Dukeminier (Exhibit 25) both suggest that a better technique would be to require the notice of intent to preserve to be recorded under the name of the current fee owner as grantor and the interest holder as grantee. This would enable a title searcher to go back through the indexes for only the statutory

rerecording period to see whether a notice of intent to preserve had been recorded against any of the fee owners during that period.

The problem with this scheme, and the reason we did not adopt it initially, is that, as Professor Dukeminier suggests, it imposes an additional burden on the interest holder to trace the current record owner of the fee. As a practical matter it would require the interest holder to obtain a title report in every case. It is tough enough on the holder of a valid interest in property that the new statute requires the holder to go to the expense and trouble of periodic rerecording just to keep the interest from expiring, without adding to the burden the expense of a title report and possible loss of the interest if a mistake is made as to the current fee owner. Moreover, if there are multiple owners of the fee, the current status of each ownership must be traced. While such a requirement might not be too onerous as applied to holders of powers of termination, it must be remembered that the statutory provisions are general in nature and we foresee the possibility of applying them ultimately to other more numerous and more substantial property interests, such as mineral rights and easements. Thus we have chosen an indexing scheme that, while not ideal, has practical and economic considerations in its favor.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

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September 2, 1981

California Law Revision Commission
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Re: Marketable Title -Studies H-401 - H-407 (July August, 1981)

Dear sirs:

This letter perhaps should be called "Minority Report." Nevertheless, the writer views of the current draft sections (Civ. Code §§ 880.020-888.010) are sufficiently strong to justify this letter to the Commission and staff, with copy to co-consultant Professor Paul Basye.

It should be made clear this writer has no expertise in this field. My time for review and study has been limited. In private practice I did have some experience with removing clouds, establishing title after 8 co-owners had not kept it up to date, suing to enforce a condition subsequent (in equity) re liquor imposed by a developer almost uniformly some 40 years before, and so on.

When I was asked to do what I could (on a nominal basis) on the Marketable Record Title project, my background of this type of legislation was nil. Initially, it seemed that some good might be done, particularly in the area of (true) ancient clouds, such as mortages or deeds of trust that someone had neglected to satisfy of record and mineral rights that had been reserved years before and had not been separately assessed or followed up by exploration or develment. My letter in March-April, 1981, objected to the "full" approach reflected by the then excellent draft of Mr. Sterling, to point up policy issues.

The conclusions of the writer as to the current (July- August) Draft) may be stated:

1. The draft is unduly broad in scope and in favoring surface owners.
2. The draft goes too far in attempting to legislate "retroactively."
3. The draft includes some loose and imprecise provisions for a statute of this type affecting property rights and requiring action by the public and non-lawyers to comply with it.

4. The draft and background studies do not take sufficiently into account recent decisions in other jurisdictions that strike down or restrict statutes on the ground of denial of due process (lack of notice or opportunity to be heard) or that by judicial interpretation restrict the operation of the statute.

Later, some examples will be cited for each category.

It is believed the Commission should be hesitant to press for legislation affecting property and property rights without a fairly intense study of court decisions on procedural or other "due process" and without considering new provisions (not found in the Model and Uniform Acts) that might result in fairer legislation. Examples: Exceptions for being in litigation; "late" recording

Though delay might not lead to further enlightenment, the existence of legal and practical problems, in the writer's opinion, makes it desirable to start with narrowly drawn legislation. If that is passed and is accepted by the title companies and courts (or if no unfavorable rulings occur), then expanded legislation can be offered.

In any event, the writer respectfully suggests, whatever legislation is sponsored should 1- have a deferred operative date of at least one year, 2-not be retroactive, unless the grace period is extremely liberal (and specific), e. g., a specified date 5 years after operative date.

Examples (not intended as a complete list):

Point 1. Unduly broad- favors surface owners: The current draft is not limited to the purposes stated in Sec. 880.020 ("remote times" at which defect or interest was created (subd. (a)- or simplifying title transaction by reliance on record title (subd. (b)) in that it provides 1- for a new rule that a trust deed cannot be enforced if the debt or obligation secured becomes outlawed (Sec. 882.010), which may occur as early as four years in the case of a demand obligation, 2-for a minor change in a 1965 code section relating to recorded options, that has nothi to do with recording notice of Intent to Preserve and proceeds on a "lack of notice" rather than "termination of interest" basis. (Sec. 884.020), 3-for new interest in land known as "power of termination" (without amending or repealing other sections of the Civil Code referring to right of re-entry and possibility of reverter (Sec. 885.010, 885.020), 4- for a five year "absolut statute of limitations on any form of court action for relief after "breach," (referring in terms to "restriction" to which the fee simple estate is subject (Sec. 885.050, 885.060), changing the law of "reasonable time"), 5-for introducing a new conce

under "Easements" that distinguishes on the basis of the owner's use within a five year period and the owner's non use thereafter for a continuous period of five years (citing existing law as to loss of a prescriptive, rather than record, easement), Sec. 886.020 (b), 6, for a new category of "land sale contract" that disregards the present California statute on the subject and includes agreements of sale such as deposit receipts (that are essentially different) with expiration date based on "date for conveyance of title" or if none on date provided in contract for satisfaction of conditions in contract (Sec. 887.030, compare 60 years for deed of trust where maturity date does not appear- Sec. 882.020), 7, for a category of "restrictions" and for an "absolute period of five years after breach in which to commence an action to enforce a restriction (Sec. 888.030) and for a statutory statement of case law and principles that cause a court to decline enforcement (Sec. 888.020). See also "slander of Title" (Sec. 880-360)

Whether or not the provisions in the above that do more than establish a "marketable title" recording procedure in the conventional sense are desirable, their inclusion in one act, without conforming changes in related code sections, and separate consideration, at best seems justified only on the ground that separate bills or amendments cannot be prepared, within the time alloted.

Point 2. Retroactive application. The current draft has varying provisions as to the "grace" period- many shorter than five years (Compare General Provisions- Sec. 880.070- with individual "transitional" sections).

I wish to call the attention of the Commission and the staff to the great practical problem faced by owners of encumbrances and interests who would comply with the law. It may be assumed that the new law will not be known to property owners and encumbrancers generally. It is further to be assumed that the time period (complex at best in the draft) will not be easily understood; that searches will have to be made to trace down the "beginning date"; and that someone (presumably attorneys, title people, real estate brokers or entrepreneurs) will undertake to help the owner make out the description required for a Notice Of Intent To Preserve to make certain it is technically correct. There likely are millions of easements, restrictions, mineral rights, land contracts and mortgages deeds of trust and other liens that come within the proposals. What will be the cost to the public?

Point 3. Imprecise provisions in draft. For example, time provisions throughout are complicated. On the other hand, when old public improvement liens proved a problem, presumption of payment conclusive as to third persons, when clear provisions to cover it date were enacted. See, e. g., Civ. Code, Sec. 2911. Again, is "mortgage, deed of trust or other security interest" intended to apply to trust indentures securing long term bonds, equipment trusts, resolutions imposing assessments by public bodies or managing bodies

of condominium associations (for latter, see Civ. Code §1356, authorizing recording of a lien of not more than two years' duration with basic authority for assessment found in recorded declaration of restrictions)? When use of property for mineral right purposes comes in question, the problem of pooling or unitization for exploration or production seems involved, i. e., the very property may not up to then have been "used." The overlapping between the several chapters results in uncertainty, i. e. , does the specific control? Under the proposed treatment, minerals in place become a profit au prendre (contrary to present California law it appears)? Is the right to explore and take not also an "easement"? Were exceptions to be made for "easements" of public utilities companies? In some chapters, a procedure exists for filing a notice of Intent and in others not? Again, some obligations may be extended by akcnowledgement of debt. This does not appear to in a land contract.

4. Judicial decisions. Reference is made , by example, to

Wilson v. Bishop (1980) 412 N. E. 2d 522 (Ill)

Contos v. Herbst (1979) 278 N. W. 2d 732 (Minn.)

Wheelock v. Heatch (1978) 272 N. W. 2d 768 (Neb.)

Chicago and Northwestern Transportation Co. v. Pedersen

(1977)259 N. W. 2d 311 (Wis.)

Cf. Short v. Texaco (indiana)

Other cases sustain legislation of this general type but it is the writer's impression that the courts are looking with increasing scrutiny upon the provisionsand setting of each Act.

Respectfully submitted,

Garrett H. Elmore

CC: Paul Basye, Esq.

Exhibit 2

Roger Arnebergh
ATTORNEY - CONSULTANT
88 SADDLEBOW ROAD
CANOGA PARK, CALIF. 91307
(213) 887-6200

August 10, 1981

California Law Revision Commission
4000 Middlefield Road, Room D - 2
Palo Alto, California 94306

Dear John: Attention: John H. DeMoully, Executive Secretary

Thanks for sending me drafts of proposed changes in Civil Procedure and Property Law.

I have read the tentative recommendations relating to:

Unexercised Options
Ancient Mortgages and Deeds of Trust
Dormant Mineral Rights
Dismissal for Lack of Prosecution

In my opinion, these tentative recommendations are very well considered and should not only clarify the law but cover areas that heretofore have been only partially covered by statute and case law.

Sincerely yours,

RA:ea

Roger Arnebergh

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY EDMUND G. BROWN JR., Governor

DEPARTMENT OF TRANSPORTATION
LEGAL DIVISION
1120 N STREET, SACRAMENTO 95814
P.O. BOX 1438, SACRAMENTO 95807
(916) 445-5241

August 19, 1981

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear John:

In re: Tentative Recommendations in Civil Procedure and Real Property Law

We have reviewed the five tentative recommendations.

Since all the recommendations exclude the state from their impact, there would not be a great effect on our practice. It would, however, help in the preparation of suits to clear the record of nonsubstantial claims of record.

We would appreciate it if you could let us know if there is any change in regard to the state exceptions in the recommendations.

Very truly yours,

Charles E. Spencer, Jr.

CHARLES E. SPENCER, Jr.
Attorney

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY EDMUND G. BROWN JR., Governor

DEPARTMENT OF TRANSPORTATION
LEGAL DIVISION
1120 N STREET, SACRAMENTO 95814
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October 6, 1981

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear John:

In re: Tentative Recommendation Relating to Rights of Entry and Possibilities of Reverter

We have reviewed the tentative recommendations relating to Rights of Entry and Possibilities of Reverter and the Unperformed Real Property Sales Contracts.

Since these two recommendations repeat the earlier recommendation to exclude the state from its operation, the department will not be significantly affected. Any change in the law which simplifies title search and the need for service on people with no real interest in the property, will benefit all condemning agencies.

Please advise us if there is any change affecting state interests.

Very truly yours,

Charles E. Spencer, Jr.

CHARLES E. SPENCER, Jr.
Attorney

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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Controller, Sacramento

DOUGLAS D. BELL
Executive Secretary

September 16, 1981

John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Proposed Changes in Civil Procedure and Property Law, Press Release, July 15, 1981

Dear Mr. DeMoully:

The staff's review did not disclose any problems which would be created for the Board if the proposals were adopted.

Thank you for the opportunity of reviewing the five tentative recommendations of the Commission.

Very truly yours,

Margaret H. Howard

Margaret H. Howard
Tax Counsel

MHH:ljt

cc: Mr. J. J. Delaney

Exhibit 5

GIBSON, DUNN & CRUTCHER
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WRITER'S DIRECT DIAL NUMBER
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OUR FILE NUMBER

September 8, 1981

John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Tentative Recommendations: H-401, 402 and 403

Dear Mr. DeMoully:

I appreciate your sending to me a copy of the above three tentative proposed recommendations of the California Law Revision Commission concerning three proposals to make title to California property more marketable. I certainly commend the Commission for these efforts and my only overall suggestion would be that the three tentative recommendations do not go far enough.

While these three tentative recommendations would help clear the record of options no longer in effect, dormant mineral rights and mortgages and deeds of trust that no longer secure any enforceable debt, there are numerous other matters of record that purport to effect title long after any legitimate purpose therefor has long since expired. In particular, there are numerous covenants, conditions and restrictions that have been recorded against California property that may have been useful while the property in question, and surrounding property, was being developed, but which no longer have any relevance years after the property and its surroundings have been fully developed. While interested parties should have an opportunity to preserve their rights in these matters, if they desire to do so, by

recording a suitable document evidencing their desire to do so, it is highly likely that a large percentage of these matters of record are of no further interest to anyone. Thus, I would suggest that the Commission also consider a marketable title act which will render void and ineffective any covenant, condition or restriction that has been recorded more than "x" years previously unless prior to that time a party having an interest in such covenant, condition or restriction records a document stating its intention to keep such covenant, condition or restriction in effect.

As for the pending tentative recommendations, I have one comment as to recommendation H-402. It seems to me that the objective of promoting certainty of title from the record, without the need for reference to off-record matters, would be defeated by providing that only "dormant" mineral rights will expire after 20 years. Holders of active mineral interests could be amply protected by permitting them to record a notice of intent to preserve such interest. The small inconvenience this would cause to holders of active mineral interests would, in my opinion, be more than outweighed by the exclusion of any need to determine whether or not a 20-year old mineral interest of record is or is not "dormant".

Thank you for the opportunity to comment on these tentative recommendations, and I would appreciate your keeping me advised of any additional recommendations proposed to be made by the Commission in this or related areas.

Sincerely yours,

Stephen M. Blitz

SMB:jzm

Exhibit 6

Southern California Edison Company

P.O. BOX 800
2244 WALNUT GROVE AVENUE
ROSEMEAD, CALIFORNIA 91770

MARVIN D. HOMER
ASSISTANT COUNSEL

LAW DEPARTMENT

TELEPHONE
(213) 572-1914

August 5, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Tentative Recommendation relating to ancient Mortgages and Deeds of Trust.
Tentative Recommendation relating to Dormant Mineral Rights.

Dear Sirs:

Southern California Edison Company supports your tentative recommendations concerning the above two subjects since they would tend to make real property more marketable. In the process of certifying property as bondable additions to the Trustees of the Edison Trust Indenture, opinions must be given that there are no material defects in the title to the property. Your tentative recommendations would be of aid to the Edison Company in rendering such opinions.

Sincerely,

Marvin D. Homer

Marvin D. Homer
Attorney at Law

MDH:jm

Southern California Edison Company

P.O. BOX 800
2244 WALNUT GROVE AVENUE
ROSEMEAD, CALIFORNIA 91770

MARVIN D. HOMER
ASSISTANT COUNSEL

LAW DEPARTMENT

TELEPHONE
(213) 572-1914

September 16, 1981

File No.
7007-2

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attention: Nathaniel Sterling
Assistant Executive Secretary

Dear Mr. Sterling:

Southern California Edison Company supports your Study H-405 - Marketable Title (Reverter Act), as it would eliminate obsolete possibilities of reverter, more technically called powers of termination, since it would eliminate title defects and would more readily permit us to certify to the Trustees of our bond indenture that no material defects exist in properties which we acquire. Such properties would be more readily available as security for bonds to be issued by the Edison Company.

On the other hand, the Edison Company would not support your Study H-406 - Marketable Title (abandoned Easements), recommendation unless it contained language which your staff recommends, namely, "The staff suggests the Commission consider making an exception for public utility easements -- the burden of rerecording for thousands of parcels would be tremendous...."

Sincerely,

Marvin D. Homer

Marvin D. Homer
Attorney at Law

MDH:jm

cc: P. Walsh
T. P. Gilfoy

Exhibit 7

August 6, 1981

California Law Revision Commission
4000 Middlefield Road
Palo Alto, California

Re: Study H-401, 402, 403

Dear Sirs/Madams:

With regard to your recommendations concerning Ancient Mortgages, I am glad that you have revised the time period from thirty to sixty years. This should certainly eliminate most questions concerning forty year mortgages, and probably those involving ongoing lines of credit, dragnet clauses and negative amortization features (although perhaps you might care to address these considerations specially). I am concerned whether, under Section 882.020(b), a waiver could be executed contemptuously with the original mortgage instrument and/or could be written to cover an indefinite period of time? I fear that without some restriction contemporaneous indefinite waivers would become standard boiler plate.

I have no special comments to make concerning your recommendations dealing with dormant mineral rights and unexercised options.

Yours truly,

Roger Bernhardt
Professor of Law

RB/rd

Exhibit 8

HOMESTAKE MINING COMPANY
650 CALIFORNIA STREET · 9TH FLOOR
SAN FRANCISCO, CALIFORNIA 94108

CABLE: HOMESTAKE
TELEPHONE (415) 981-8150

September 11, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Gentlemen:

I have received and reviewed a copy of the Tentative Recommendation relating to Dormant Mineral Rights dated July 15, 1981 ("Tentative Recommendation").

There is no doubt that dormant mineral rights can cause problems of marketability of title. Such problems, if deemed serious enough, could or even should be the subject of curative legislation.

In my view, however, the Tentative Recommendation does very little to alleviate the evils you have identified because it fails to address the problems directly and unambiguously. It raises so many questions concerning its intent and applicability that a starting point for comment is difficult to find.

Viewed in the light of experience with mining titles and terms of art, the proposed statute contains many gaps and ambiguities. These collectively exacerbate the problem the Commission seeks to eliminate by adding to the existing title confusion the necessity to guess or litigate the statute's applicability. For example, does the statute apply to a mining claim? Is a mining claim real property? If so, is there a supremacy problem? If not, is the resulting discrimination a wise policy? Would the statute apply to an interest in minerals severed from the executive right?

Certainly it is reasonable to expect that courts would act with great restraint in finding mineral interests abandoned since property rights are at stake. In this light, the level of ambiguity in the proposed statute is unacceptable, making it nearly impossible to predict how the proposed statute would be interpreted or applied.

There is no doubt in my mind that the Recommendation must be extensively clarified and sharpened before it goes to the Legislature, or else the problems of mineral title are better left alone.

If the Law Revision Commission intends to proceed with the Tentative Recommendation in this form, I would be willing to meet with the Commission staff and communicate to them the gaps and multiple ambiguities that give rise to my apprehensions.

Very truly yours,

Dennis B. Goldstein
Assistant Counsel

DBG:bh

cc: Ray B. Hunter, Secretary
California Mining Association
P. O. Box 3
Jackson, California 95642

Exhibit 9

JO ANNE M. BERNHARD
ATTORNEY AT LAW
827½ "J" STREET
SACRAMENTO, CALIFORNIA 95814
TEL. (916) 442-4906

September 30, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Tentative Recommendation relating to Dormant Mineral Rights

Gentlemen:

I am writing in regard to your Tentative Recommendation relating to Dormant Mineral Rights, and I am so pleased that something is being pursued in this area.

My comment is really in the form of an inquiry, and that is, I am wondering if it goes far enough or covers the following problem, which frequently shows up in preliminary title reports. The language is usually as follows:

"CONDITIONS AND RESERVATIONS in patent from the United States of America to John Doe, dated (date), recorded (date), in Book ( ) of Patents, Page ( ), Sacramento County Records, as follows:

First: That the grant hereby made is restricted in its exterior limits to the boundaries of the said land as hereinbefore described and to any veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, and valuable deposit which may hereafter be discovered within said limits and which are not claimed or known to exist at the datc hereof.

Second: That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from those presents.

Third: That the premises hereby conveyed shall be held subject to entry by the properietor of any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, cooper, or other valuable deposits, for the

purposes of extraction and removing the ore from vein, lodes or deposit should the same or any part thereof, be found to penetrate, intersect, pass through or dip into the mining ground or premises hereby granted.

Fourth: That the premises hereby conveyed shall be held subject to any vested and accured water rights for mining, agricultrual manufacturing or other purposes, and right to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Fifth: That in the absence of necessary legislation by Congress the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to the complete development thereof."

In this case, the title companies have alerted a buyer about a condition (which is already excepted by the standard printed language of the California Land Title Association policy) that the buyer believes will be something that can be removed as easily as bringing a quiet title or adverse possession action.

However, information on this matter seems to be limited and varies with each title office contacted. Some say to file quiet title, or adverse possession, or both; and, others say it doesn't matter, as the reservations and conditions remain in the Federal Government forever--taking an Act of Congress to get rid of them.

As I said, I am not sure your recommendation deals with this area--or that it even should. But, I know that the problem has occurred from time to time, and the lack of knowledge and information relative to many title companies has created problems as to how to deal with it.

I would like to talk to you in greater detail about this, so I would appreciate your office letting me know the name of the person whom I should contact in the Commission regarding same.

Kindest regards.

Sincerely,

Jo Anne M. Bernhard

JO ANNE M. BERNHARD

JMB/jbw

Exhibit 10

HANNA AND MORTON
LAWYERS
523 WEST SIXTH STREET
SUITE 1126
LOS ANGELES, CALIFORNIA 90014
(213) 628-7131

October 9, 1981

California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Attention: Nat Sterling

Re: Tentative Recommendation Relating to Dormant Mineral Rights

Gentlemen:

Pursuant to a telephone conversation with Mr. Nat Sterling on September 9, 1981, at which time we were given until October 15, 1981 to file our comments, we enclose herewith comments on the subject proposal on behalf of the Western Oil and Gas Association.

We have a number of concerns with the proposal, some of which might be lessened by the amendments that are indicated by appropriate strikeovers and underlinings showing language deleted and language added on the enclosed copy of the proposal. We also have a number of concerns which cannot be satisfied by amendment and, accordingly, place the advisability of the proposal in serious question and would, no doubt, lead to strong opposition if the proposal were introduced before the Legislature. This letter will discuss both types of concerns.

The changes we recommend in the language of the proposal are as follows:

1. The declaration of policy and purposes seems to be too narrow. It seems to concentrate on the freeing up of surface titles from right of entry by a mineral owner in order to encourage free marketability of surface rights. We think that an equally valid public purpose is the freeing up of confused mineral titles so as to encourage mineral

development. A society running short of energy and raw materials can ill afford to ignore this purpose. At page 2, lines 19-21 and at page 3, lines 28-30, we have suggested language showing that this too is a purpose behind the proposal.

2. The proposal exempts any mineral interest of the state or a local public entity from termination. If the purpose of the statute is to clarify titles and to make real property more freely transferrable, then why should a State or local government interest be excluded? It seems unfair, for instance, to terminate the mineral estate of a elderly widow while not terminating the mineral estate of a local sanitation district under the same circumstances. At page 4, lines 42-44 and page 5, lines 14-16, we have eliminated the exception for state or local public entity mineral rights.

3. The law should not apply to interests belonging to persons whose rights do not include the right to use the surface of the property for purposes of mineral development. This situation often occurs. In fact, most urban area oil and gas fields are now being developed under documents which only give the operator a right of entry <u>below</u> 500 feet from the surface. These properties must be then developed by directional drilling from drillsites located elsewhere which are generally owned in fee by the operator. The surface use of such parcels (other than the drillsite) is not in any way impaired. Such interests should be excluded from the operation of the proposal. At page 4, lines 46-50, we have suggested language which would accomplish this.

4. It is unclear whether the notice of intent to preserve interest constitutes evidence or

creates a presumption negating an intent to abandon. We think that it should at least raise a presumption, affecting the burden of proof that there is no abandonment. At page 6, lines 5-15, we have suggested language to this effect.

5. The list of those who may record notice is limited. Notices may only be recorded by the person who claims the interest or another person acting on the claimant's behalf if the claimant is under a disability or unable to assert a claim on his own behalf or if the claimant is one of a class whose identity cannot be established. We suggest that in addition to the foregoing, anyone otherwise authorized to act on behalf of a claimant should be allowed to file a notice. At page 6, lines 48-50 and page 7, lines 4-6, we have added language to that effect.

6. The proposal as it stands appears to provide that mineral rights are dormant unless there is both production of minerals and development or other operations that affect the minerals. We think that either production or operations should prevent dormancy. At page 11, line 49, we have added appropriate language to accomplish this result.

7. The proposal appears to overlook the fact that hydrocarbons and hard minerals are often produced from surface locations and by operations on remote parcels of land. For instance, various parcels are often unitized or pooled and operations conducted on only one parcel. Also, oil is often produced by means of directional drilling from drillsites located at some distance from the surface of the land overlying the producing interval. The statute, as proposed, is unclear whether the production or exploration must be on the surface of the land in question. At page 12,

lines 3-5, we have added language making it clear that the production or operations which prevent a mineral right from being dormant may be conducted either on the surface of the property itself or at a remote location.

8. Sometimes mineral rights, when severed from the surface, are assessed separately by the local assessor and taxes are paid on the mineral rights alone. If that is done, it seems to us that the mineral rights should not be treated as dormant. At page 12, lines 5-7, we have added language to that effect.

9. The proposal provides that dormancy for a period of one year may result in termination assuming other conditions are met. That is a very short period of dormancy. We would think that five years would be the minimum. Perhaps it should be even longer. At page 13, line 24 and in the "Comment" at page 14, we have modified the language to provide for a five-year rather than a one-year dormancy period.

10. It is unclear whether successive notices of intent to preserve interests may be filed or whether an owner is limited to one such notice. The latter would be unfair. Mineral rights which today are not susceptible of development because of adverse economics and because of the current state of technology will undoubtedly, at some time in the future, be susceptible of development as economics and technology change. It would, therefore, be unfair to limit a mineral interest holder to one 20-year period. Instead, such an owner should be able to record and re-record successive notices of intent. At page 13, lines 32 through 50 and in the "Comment" at page 14, we have suggested language changes and additions which so provide.

11. It is unclear whether a subsequent transfer of a previously severed mineral interest starts a new 20-year period running. At page 13, line 26, language is added providing that it does start a new period.

12. A problem with the proposal as it now stands is that if 20 years have expired since the instrument creating the interest was recorded and if either no notice of intent has been recorded or if more than 20 years has passed since the notice was recorded but the mineral rights have not yet expired, no new notice of intent may be filed. It seems to us that it should be possible to record a notice of intent at any time prior to the termination of the mineral interest. We have suggested langage so providing at page 13, line 50 through page 14, line 3.

13. The proposal does not say what happens to the rights of a person who has carved an interest out of an underlying interest by way of a mortgage, lien, oil and gas lease or otherwise. Does the owner of such a carved out interest lose his interest when the owner of the underlying mineral right fails to record a notice of intent and the underlying mineral right passes by operation of law to the surface owner? That would seem to be unequitable and perhaps unconstitutional. We have suggested language at page 15, lines 18-26, to the effect that the mineral estate passing under any such transfer by operation of law from the mineral owner to the surface owner would be subject to any rights held by persons who had carved interests out of the underlying mineral interest.

In addition to the foregoing, there are a number of problems we have which we do not feel lend themselves to solution by adding or deleting language. We believe the concerns are basic and cast doubt upon the wisdom of the proposal. These concerns are as follows:

14. The proposal may be a trap for the unwary and uninformed. Most companies engaged in the extractive industries such as mining companies and oil and gas companies will develop procedures for carefully inventorying mineral interests and filing notices of intent if this proposal is adopted into law. It is also probably true that businesses will emerge offering this service to those who do not have sufficient in-house capability. On the other hand, mineral interests in the hands of unsophicated private parties, may be lost and passed by way of windfall to surface owners at no cost. Thus, the widow or other heirs of an elderly farmer who sold his farm and reserved a mineral estate may find that they have lost their minerals to the surface owner who originally bought the land without the minerals and presumably paid a price that was less than it would have been if the minerals had not been reserved.

15. The law purports to apply the rule of abandonment in Gerhard v. Stephens (1968) 68 Cal.2d 864, which involved oil and gas rights, to mineral rights in other substances. That, it seems to us, raises a serious constitutional question. Concluding that an incorporeal hereditament such as that involved in Gerhard v. Stephens is subject to abandonment is one thing but concluding that a corporeal interest, such as a fee ownership in hard minerals, is subject to abandonment is an entirely different matter. On the other hand, the proposal does not accomplish its purpose and, indeed, appears arbitrary and uneven in application (perhaps unconstitutionally so) if it is not applied to hard minerals as well as fugacious minerals.

16. The proposal may actually result in a fractionalizing of interests in real property. For instance, assume a mineral reservation

covering many acres. Assume further that subsequently the surface is subdivided among many tenants. If the mineral rights revert to the individual surface owners, they would thereby be seriously fractionalized, making development of a mineral right (a form of real property) much more difficult.

17. We are not convinced that the proposal will necessarily clarify title. It may, instead, confuse title in some situations. Suppose one owns an oil and gas lease taken from the owner of the mineral estate and no development or production has taken place. Assume that the mineral estate subsequently is transferred by operation of law to the surface owner. Assume further that the oil and gas lease is still in effect and development then commences. How does the owner of the lease know that the underlying fee has been transferred? To whom does he make payments when he subsequently develops the property? Furthermore, how does a prospective purchaser of a mineral estate know whether to deal with the owner of the mineral fee or the owner of the surface if the recordation provisions of the statute have not been met? The answer will turn on whether there have been any producing or operating activities relative to the minerals during a given period of time. But how does the purchaser know whether that has occurred? As already pointed out, some activities may have occurred within the time frame and yet may have left no trace. Furthermore, any activities that were carried out might have been carried out at remote locations. Will not litigation be necessary? Who has the burden of proof? It seems to us that there may be many occasions when the determination of who owns the mineral estate will be not capable of prompt ascertainment and, if so, the policy of the act will have been defeated.

18. There are instances where mineral development and operations will relate to the minerals underlying a given strata but not another strata or will relate to one type of mineral and not another. For instance, one owner might own the minerals in the first 5,000 feet and another owner might own all mineral rights below 5,000 feet. Does development aimed at the first 5,000 feet prevent dormancy below 5,000 feet? Even if ownership is not divided by strata, the question still remains to which minerals a given piece of exploration relates. In reconstructing what took place at an earlier time, might it be unworkably difficult to determine what operations related to which minerals?

19. What is or is not a mineral interest is not clear. For instance, are geothermal resources covered by this proposal? Should they be?

20. Section 880.240(a) refers to persons "using" or "occupying" real property. These terms are not defined. Absent complete and precise definitions, will there not be considerable doubt as to which interests are covered by the proposed legislation?

21. The statement is made in § 880.020 (see page 1, lines 40 through 47 of the attached bill) that interests in real property created at remote times often constitute unreasonable restraints on alienation. Is this a correct statement? It is hard for us to visualize an otherwise legal interest carved out of real property as constituting an unreasonable restraint on alienation.

22. Interests in minerals vary in nature according to the document which carves them out of the fee. Suppose a mineral interest is inaccurately or incompletely described in

the notice of intent to preserve interest or some other recorded document evidencing the interest. Does inaccuracy or lack of completeness in the description invalidate the notice? If so, how much inaccuracy or lack of completeness is required to invalidate the notice?

23. Is the problem which the proposal would seek to cure really serious enough to warrant adoption of the proposal which will itself obviously create new problems not the least of which will be the cost of administering the law, complying with the law and litigating the various questions which the law will inevitably spawn?

24. Considering the fact that valuable mineral rights might be cut off, we believe that before any final action is taken on this proposal, the Commission should consider an alternative approach. A number of states have adopted statutory schemes which provide for the bringing of court action for the appointment of a receiver or trustee who, with court approval, may lease the interest of an absent or unknown mineral owner. Any moneys earned for the account of the absent mineral interest owner may be placed in an appropriate trust fund to be claimed at such time as he can be located. Examples of such statutes are as follows:

Nebraska, Neb. Rev. Stat. §§ 57-210 through 212.01

Oklahoma, Okla. Stat. Ann. title 52, § 521, et seq.

Texas, Tex. Rev. Civ. Stat. Ann. Art. 2320b

Kansas, Kan. Stat. § 55-219, et seq.

Mississippi, Miss. Code Ann. § 11-17-33

This concept could conceivably be broadened to cover settlement of conflicting rights to the surface between a surface owner and an absent mineral owner.

25. The law as proposed is of questionable constitutionality. A similar law exists in Michigan. In Van Slooten v. Larson (1980) 299 N.W.2d 704, it was held constitutional in the state courts. A petition for certiorari has been filed but not yet acted upon by the United States Supreme Court. A somewhat similar Wisconsin statute was invalidated by the Wisconsin Supreme Court in Chicago & Northwestern Transportation Co. v. Pedderson (1977) 259 N.W.2d 316. An Indiana statute was upheld by the Indiana Supreme Court in Short v. Texaco Inc. (1980) 406 N.E.2d 625. However, on March 23, 1981 the United States Supreme Court granted a hearing. 68 L.Ed.2d 192 (1981). Three more state high courts (Nebraska, Illinois and Minnesota) struck down their respective dormant mineral rights statutes which were somewhat similar to the current proposal. The Nebraska statute was held unconstitutional in Wheelock v. Heath (1978) 272 N.W.2d 768 and in Monahan Cattle Company v. Goodwin (1978) 272 N.W.2d 774. The Illinois statute was struck down in Wilson v. Bishop (1980) 412 N.E.2d 522. The Minnesota statute was struck down in Contos v. Herbst (1979) 278 N.W.2d 723.

We appreciate the opportunity to comment and hope the foregoing will be of help to you in your deliberations.

Yours very truly,

EDWARD S. RENWICK

ESR:bw
Encl.

An act to add Title 5 (commencing with Section 880.020) to Part 2 of Division 2 of the Civil Code, relating to mineral rights.

The people of the State of California do enact as follows:

SECTION 1. Title 5 (commencing with Section 880.020) is added to Part 2 of Division 2 of the Civil Code, to read:

Civil Code §§ 880,020-883.050 (added) 10354

SECTION 1. Title 5 (commencing with Section 880.020) is added to Part 2 of Division 2 of the Civil Code, to read:

TITLE 5. MARKETABLE RECORD TITLE

CHAPTER 1. GENERAL PROVISIONS

Article 1. Construction

§ 880.020. Declaration of policy and purposes

880.020. (a) The Legislature declares as public policy that:

(1) Real property is a basic resource of the people of the state and should be made freely alienable and marketable to the extent practicable.

(2) Interests in real property and defects in titles created at remote times, whether or not of record, often constitute unreasonable restraints on alienation and marketability of real property.

(3) Such interests and defects produce litigation to clear and quiet titles, cause delays in real property title transactions, and hinder marketability of real property.

(4) Real property title transactions should be possible with economy and expediency. The status and security of recorded real property titles should be determinable to the extent practicable from an examination of recent records only.

(b) It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of public policy and to encourage mineral development by enabling persons to rely on record title to the extent provided in this title, subject only to the limitations expressly provided in this title and notwithstanding any provision or implication to the contrary in any other statute or in the common law. This title shall be liberally construed to effect the legislative purpose.

Comment. Subdivision (a) of Section 880.020 is drawn from North Carolina marketable title legislation, N.C. Gen. Stat. § 47B-1 (19__). The declaration of public policy is intended to demonstrate the significance of the state interest served by this title and the importance of the retroactive application of the law to the effectuation of that interest. See In re Marriage of Bouquet, 16 Cal.3d 583, 592, 546 P.2d 1371, ____, 128 Cal. Rptr. 427, _____ (1976) (upholding changes in the community property laws as retroactively applied).

A statute may require recordation of previously executed instruments if a reasonable time is allowed for recordation. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 10.4 at 415-16 (1974). The burden on holders of old interests of recording a notice of intent to preserve is outweighed by

the public good of more secure land transactions. See, e.g., Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 880, 825 (1957)(upholding Minnesota marketable title legislation):

> A number of marketable title acts have been passed by various states. Such limiting statutes are considered vital to all who are engaged in or concerned with the conveyance of real property. They proceed upon the theory that the economic advantages of being able to pass uncluttered title to land far outweigh any value which the outdated restrictions may have for the person in whose favor they operate. These statutes reflect the appraisal of state legislatures of the 'actual economic significance of these interests weighed against the inconvenience and expense caused by their continued existence for unlimited periods without regard to altered circumstances.' . . . They must be construed in the light of the public good in terms of more secure land transactions which outweighs the burden and risk imposed upon owners of old outstanding rights to record their interests.

Subdivision (b) is drawn in part from Section 9 of the Model Marketable Title Act. If the application of a particular statute or common law rule conflicts with the provisions of this title, this title governs. Subdivision (b) also makes clear that the encouragement of mineral development is also an objective of the Legislature.

12343

§ 880.030. Effect on other law

880.030. Nothing in this title shall be construed to:

(a) Extend the period for bringing an action or doing any other required act under a statute of limitation.

(b) Affect the operation of any statute governing the effect of recording or failure to record, except as specifically provided in this title.

Comment. Subdivision (a) of Section 880.030 is drawn from Section 7 of the Model Marketable Title Act and Section 3-308 of the Uniform Simplification of Land Transfers Act (1977). Subdivision (b) is drawn from Section 7 of the Model Act.

12756

Article 2. Application of Title

§ 880.240. Interests excepted from title

880.240. The following interests are not subject to expiration pursuant to this title:

(a) The interest of a person using or occupying real property and the interest of a person under whom a person using or occupying real property claims, to the extent the use or occupancy would have been revealed by reasonable inspection or inquiry.

(b) An interest of the United States or pursuant to federal law in real property that is not subjected by federal law to the recording requirements of the state and that has not terminated under federal law.

(c) An interest of a person whose rights do not include a right of access over or upon the surface of such parcel for purposes of mineral development.

(c) The interest of a person whose rights do not include a right of access over or upon the surface of such parcel for purposes of mineral development.

Comment. Subdivision (a) of Section 880.240 is drawn from Section 3-306(2) of the Uniform Simplification of Land Transfers Act (1977). Subdivision (a) makes clear that if a person in possession claims under another person, whether by lease, license, or otherwise, the interest of the other person does not expire.

Subdivision (b) is drawn from Section 6 of the Model Marketable Title Act and Section 3-306(4) of the Uniform Act. The Comment to the Model Act states, "The exception as to claims of the United States would probably exist whether stated in the statute or not."

Subdivision (c) is drawn from Section 6 of the Model Act.

16974

Article 3. Preservation of Interests

§ 880.310. Notice of intent to preserve interest

880.310. (a) An interest in real property may be preserved from expiration pursuant to this title by recordation of a notice of intent to preserve the interest within the period prescribed by statute. The running of the period prescribed by statute is not suspended by the disability or lack of knowledge of any person or tolled for any other reason.

(b) Recordation of a notice of intent to preserve an interest in real property after the period prescribed by statute does not preserve an interest that has previously expired pursuant to this title.

(c) Recordation of a notice of intent to preserve an interest in real property does not preclude a court from determining that an interest has been abandoned or is otherwise unenforceable, whether before or after the notice of intent to

preserve the interest is recorded, and does not validate or make enforceable a claim or interest that is otherwise invalid or unenforceable, nevertheless, recordation of a notice of intent to preserve an interest in real property shall raise the presumption, affecting the burden of proof, that the person who claims the interest has not abandoned and has no intent to abandon the interest.

Comment. Subdivision (a) of Section 880.310 is drawn from the first two sentences of Section 4(a) of the Model Marketable Title Act and Section 3-305 of the Uniform Simplification of Land Transfers Act (1977).

Subdivision (b) is comparable to Section 2(d) of the Model Act and Section 3-303(3) of the Uniform Act.

Subdivision (c) is drawn from Section 3-309 of the Uniform Act, with the addition of language to make clear that a notice of intent to preserve does not affect the validity of any interest in real property under law apart from this title.

28766

§ 880.320. Who may record notice

880.320. A notice of intent to preserve an interest in real property may be recorded by any of the following persons:

(a) A person who claims the interest.

(b) Another person acting on behalf of a claimant if the claimant is under a disability, unable to assert a claim on his or her own behalf, or one of a class whose identity cannot be established or is uncertain at the time of recording the notice of intent to preserve the interest or another person otherwise authorized to act on behalf of a claimant.

Comment. Section 880.320 is drawn from the third sentence of Section 4(a) of the Model Marketable Title Act and Section 3-305 of the Uniform Simplification of Land Transfers Act (1977) except language has been added to make clear that any person authorized to act on behalf of the claimant may do so.

10003

§ 880.330. Contents of notice

880.330. Subject to all statutory requirements for recorded documents:

(a) A notice of intent to preserve an interest in real property shall be in writing and signed and verified by or on behalf of the claimant.

(b) The notice shall contain all of the following information:

(1) The name and mailing address of the claimant.

(2) A description of the interest claimed. The description shall include a reference by record location to the recorded document that creates or evidences the interest.

(3) A legal description of the real property in which the interest is claimed. The description may be the same as that contained in the recorded document that creates or evidences the interest.

Comment. Section 880.330 is drawn from portions of Sections 4(a) and (5) of the Model Marketable Title Act and from Sections 2-302(b) and 2-308(b) of the Uniform Simplification of Land Transfers Act (1977). Under subdivision (b), if the interest is a restriction that affects the use or enjoyment of more than one parcel of real property that was created by a recorded document containing a general description of all of the parcels,

the legal description required may be the same as the general description. The introductory portion of Section 890.330 makes clear that all other statutory requirements must be complied with. See, e.g., Section 1170 (recorded document must be duly acknowledged or proved and certified).

30151

§ 880.340. Form of notice

880.340. Subject to all statutory requirements for recorded documents, a notice of intent to preserve an interest in real property shall be in substantially the following form:

RECORDING INFORMATION

Recording requested by:
After recording return to:

FOR USE BY COUNTY RECORDER

Indexing instructions. This notice must be indexed as follows:
Grantor and grantee index--claimant is grantor.

NOTICE OF INTENT TO PRESERVE INTEREST

This notice is intended to preserve an interest in real property from extinguishment pursuant to Title 5 (commencing with Section 890.010) of Part 2 of Division 2 of the Civil Code (Marketable Record Title).

Claimant — Name:
Mailing address:

Interest — Description (e.g., mineral rights):
Record location of document creating or evidencing interest:

Real Property — Legal description (may be same as in recorded document creating or evidencing interest).

I assert under penalty of perjury that this notice is not recorded for the purpose of slandering title to real property and I am informed and believe that the information contained in this notice is true.

Signed:_____ Date:_____

_____
(claimant)

_____
(person acting on behalf of claimant)

State of _____,

County of _____, ss

On this _____ day of _____, in the year ____, before me (here insert name and quality of officer), personally appeared _____, known to me (or proved to me on the oath of _____) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the instrument.

Signed: _____ Official Seal:

Office: _____

Comment. Section 880.340 incorporates the requirements of Section 880.330 (contents of notice). The introductory portion of Section 880.340 makes clear that all other statutory requirements must be complied with. See, e.g., Gov't Code § 27361.6 (printed forms).

09747

§ 880.350. Recording and indexing notice

880.350. (a) A notice of intent to preserve an interest in real property shall be recorded in the county in which the real property is situated.

(b) The county recorder shall index a notice of intent to preserve an interest in real property in the index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the claimant under the notice shall be deemed to be the grantor.

Comment. Section 880.350 is drawn from a portion of Section 5 of the Model Marketable Title Act. The manner of recording the notice is prescribed in Government Code Section 27322 and the fee for recording is prescribed in Government Code Section 27361 et seq.

09733

Section 880.360. Slander of title by recording notice

880.360 A person shall not record a notice of intent to preserve an interest in real property for the purpose of slandering title to the real property. If the court in an action or proceeding to establish or quiet title determines that a person recorded a notice of intent to preserve an interest for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding,

including a reasonable attorney's fee, and the damages caused by the recording.

Comment. Section 880.360 is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation, and makes clear that recordation of a notice of intent to preserve an interest under this title is not privileged. Section 890.360 does not affect the elements of the cause of action for slander of title and codifies the measure of recovery for slander of title, with the addition of reasonable attorney's fees. See 4 B. Witkin, Summary of California Law Torts § 328 (8th ed. 1974).

07426

§ 880.370. Grace period for recording notice

880.370. If the period prescribed by statute during which a notice of intent to preserve an interest in real property must be recorded expires before, on, or within five years after the operative of the statute, the period is extended until five years after the operative date of the statute.

Comment. Section 880.370 is drawn from Section 10 of the Model Marketable Title Act and Section 7-701(d) of the Uniform Simplification of Land Transfers Act (1977)(two years).

12823

[CHAPTER 2. ANCIENT MORTGAGES AND DEEDS OF TRUST]

CHAPTER 3. DORMANT MINERAL RIGHTS

§ 883.010. Definitions

883.010. As used in this chapter:

(a) Mineral rights are "dormant" if (1) there is no production of the minerals or ~~and~~ no exploration, drilling,

mining, development, or other operations that affect the minerals either on the surface of the land or land unitized or pooled with said land or at remote locations and (2) no separate property tax assessment of said mineral rights is being made.

(b) "Mineral rights" means any interest created by grant or reservations, whether in the form of a fee, leasehold, easement, profit a prendre, rents, royalties, or other possessory or nonpossessory interest in fugacious or nonfugacious minerals, whether organic or inorganic, and includes express or implied appurtenant surface rights.

Comments. Section 883.010 defines mineral rights broadly to include a fee interest as well as an incorporeal hereditament and to include oil and gas as well as in-place minerals such as ores, metals, and coal. Cf. In re Waltz, 197 Cal. 263, 240 P. 19 (1925) (characterizing mineral rights). Section 883.010 also makes clear that for the purposes of this chapter, surface rights appurtenant to a mineral interest are included within the meaning of "mineral rights." Cf. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935) (grant of minerals includes implied right of entry to extract them).

15341

§ 883.020. Abandonment of dormant mineral rights

883.020. Notwithstanding any other provision of this chapter, dormant mineral rights are subject to abandonment.

Comment. Section 883.020 codifies the rule of Gerhard v. Stephens, 68 Cal.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968), that mineral rights in oil and gas are subject to abandonment and extends the rule to mineral rights in other substances. Section 883.020 applies regardless of the characterization of the mineral rights as a fee, an incorporeal hereditament, or any other legal

classification. See Section 883.010 ("mineral rights" defined).

Mineral rights are subject to abandonment, notwithstanding the provisions of this chapter for expiration of dormant mineral rights after a prescribed period of time. See Section 883.030 (expiration of dormant mineral rights). Although recording a notice of intent to preserve the rights may be evidence of an intent not to abandon, there nonetheless may be abandonment before expiration of the prescribed period. See Section 880.310(c) (notice of intent to preserve interest).

13618

§ 883.030. Expiration of dormant mineral rights

883.030. (a) Dormant mineral rights expire at the latest of the following times:

(1) After the mineral rights are dormant for a period of five ~~one~~ years.

(2) Twenty years after the date the latest instrument creating, reserving, transferring, or otherwise evidencing the mineral rights is recorded.

(3) Twenty years after the date the latest ~~a~~ notice of intent to preserve the mineral rights is recorded or rerecorded. A notice of intent to preserve the mineral rights is not effective unless it is recorded within 20 years after the date the instrument creating, reserving, transferring, or otherwise evidencing the mineral rights is recorded or, if a prior notice or notices of intent to preserve the mineral rights have been ~~is~~ recorded, within 20 years after the date the prior notice or notices of intent to preserve the mineral rights were ~~is~~ recorded or if those periods have passed and the

mineral rights have not expired, at any time prior to their expiration.

(b) This section applies notwithstanding any provision to the contrary in the instrument creating, reserving, transferring, or otherwise evidencing the mineral rights or in another recorded document unless the instrument or other recorded document provides an earlier expiration date.

Comment. Section 883.030 provides for expiration of dormant mineral rights after 20 years from the date of the most recently recorded notice of intent to preserve an interest in real property, the date of any instrument describing the right, or such later time as the mineral rights have been dormant for a five-year ~~one-year~~ period, notwithstanding a longer or an indefinite period provided in the instrument creating the mineral rights. The expiration period is consistent with the 20-year period prescribed by statute for termination of a right of entry or occupation of surface lands under an oil or gas lease. See Sections 772.010-772.060. Section 883.030 does not affect mineral rights in active production or that have been in active production within one year. See Section 883.010 ("dormant" mineral rights defined).

The expiration period can be extended for up to 20 years at a time by recordation of a notice of intent to preserve the mineral rights or recordation of a new notice of intent to preserve interest. See Section 880.310 (notice of intent to preserve interest). Recordation of a notice of intent to preserve the mineral rights does not necessarily preclude abandonment of the mineral rights. See Section 883.020 (abandonment of dormant mineral rights) and the Comment thereto.

Mineral rights do not expire under Section 883.030 unless there is both nonuse for a period of at least five ~~one~~ years and failure to record a notice of intent to preserve within 20 years.

13617

§ 883.040. Effect of expiration

883.040. Expiration of dormant mineral rights pursuant to this chapter makes the mineral rights unenforceable and is equivalent for all purposes to a termination of the mineral rights of record and a conveyance of the mineral rights to the fee owner of the surface interest, and execution and recording of a termination and conveyance is not necessary to terminate and convey or evidence the termination and conveyance of the mineral rights. Any such conveyance of a mineral right upon termination conveys that right to the fee owner of the surface subject to any existing oil and gas lease, mineral lease, royalty, encumbrance or other interest, right or estate in said mineral right.

Comment. Section 883.040 provides for the clearing of record title to real property by operation of law after mineral rights have expired under Section 883.030 (expiration of dormant mineral rights). Title can be cleared by judicial decree prior to the time prescribed in Section 883.030 in case of an abandonment of mineral rights. See Section 883.020 (abandonment of mineral rights).

30944

§ 883.050. Transitional provision

883.050. Subject to Section 880.370 (grace period for recording notice), this chapter applies on the operative date to all mineral rights, whether executed or recorded before, on, or after the operative date.

Comment. Section 883.050 makes clear the legislative intent to apply this chapter immediately to existing mineral interests. Section 880.370 provides a five-year grace period for recording a notice of intent to preserve a mineral interest that expires by operation of this chapter before, on, or within five years after the operative date of this chapter. See Section 880.370 (grace period for recording notice) and the Comment thereto.

16969

Uncodified Section (added)

SEC. 2. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the Legislature finds and declares that there are savings as well as costs in this act which, in the aggregate, do not result in additional net costs.

Comment. Section 3 recognizes that any costs of recording and indexing notices of intent to preserve an interest are offset by the fees for recording and indexing pursuant to Government Code Section 27361 et seq.

Union Oil and Gas Division: Western Region

Union Oil Company of California
Union Oil Center, Box 7600, Los Angeles, Calif. 90051

Herbert S. Harry
Manager of Lands

October 14, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Gentlemen:

Proposed Dormant Mineral Rights Legislation

Union Oil Company of California has reviewed the tentative recommendation relating to dormant mineral rights that you recently distributed. It is our opinion that the public interest of the state would be best served if the proposed recommendation were not made.

Union Oil Company is an energy producer which has decades of experience in land title matters in California. We find the proposed legislation has many unworkable features. However, we have not prepared remedial language for your Commission because we feel two threshold problems exist with the proposal that cannot be corrected.

Of foremost concern to Union is that the legislation forces a change of property ownership from the mineral owner to the surface owner. The lack of consideration and lack of adequate due process elevates this statutory transfer to the level of confiscation. We do not feel the recommendation, if codified, can survive judicial scrutiny.

Of equally fundamental importance for your Commission to consider is the underlying need for the legislation. Union Oil Company is constantly obtaining mineral interests and has found as a general rule there is no serious impedement to our establishing clear title. In those rare instances where mineral ownership is obscure (i.e. in non-probated estates) the proposed legislation is of no help as it makes no remedial contribution.

Union Oil Company would appreciate your reconsidering the motivation behind any new laws that would confuse and unstabilize the current ownership system in this state and respectively request the tentative recommendation not be finalized.

Very truly yours,

Herbert S. Harry
Manager of Lands

Exhibit 12

Shell Oil Company

P.O. Box 4848
511 N. Brookhurst Street
Anaheim, California 92803

October 15, 1981

California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, CA 94306

DORMANT MINERAL RIGHTS LEGISLATION

Gentlemen:

We have given careful consideration to your Commission's Tentative Recommendation relating to Dormant Mineral Rights and have concluded that the problems, complications and inequities that would be created by the proposed legislation would be substantially more troublesome than those it purports to address. Accordingly, we urge you to abandon this proposal.

Yours very truly,

B. G. Warren, Manager
West Coast Legal Office

Exhibit 13

Tenneco Oil
Exploration and Production
A Tenneco Company

Pacific Coast Division

4700 Stockdale Highway
P.O. Box 9909
Bakersfield, California 93389
(805) 395-5200

October 16, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

ATTN: Mr. Nat Sterling
RE: Tentative Recommendation Relating to Dormant Mineral Rights

Gentlemen:

Tenneco Oil Company is unequivocally opposed to the legislative proposals in the above-captioned matter. It is our position that this proposal cannot be amended into a good law. We raise the following objections to the legislative proposals:

1. The affirmative requirement of a duty to record a Notice of Intent to Preserve is an unnecessary and costly regulatory burden. The clear directive of the voters is that legislatures should avoid regulations that are unnecessary, burdensome, and costly.

2. Tenneco's experience in other states indicates that, by comparison, California does not have an excessive number of fractionalized mineral interests. This proposed legislation will create more problems that it will resolve.

3. Tenneco Oil Company personnel have many years of experience in the exploration and development of California oil and gas. We have found that in the few instances in which we have had to deal with fractionalized dormant mineral interests, the current legal remedies have been sufficient to resolve the problem with a minimum of lost time and costs.

We would appreciate your keeping us appraised of any developments or modifications of this proposed legislation. We hope that you will seriously consider our position that the proposed legislation should not be introduced in the California Legislature.

Very truly yours,

TENNECO OIL COMPANY

Robt. T. Bogan
Division General Manager

RTB/BNM:pwj
26B14
cc-Jack Crose

Exhibit 14

BRIGHT AND BROWN
ATTORNEYS AT LAW

JAMES S. BRIGHT
GREGORY C. BROWN
JOHN J. HARRIS

611 WEST SIXTH STREET
SUITE 2400
LOS ANGELES, CALIFORNIA 90017
(213) 489-3444

October 16, 1981

California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: California Law Revision Commission's Proposal Re Dormant Mineral Rights

Gentlemen:

This letter is written on behalf of Kings County Development Company, a company which owns both fee interests and severed mineral interests primarily in Kings County, California. The purpose of this letter is to register strong opposition to both the concept and form of your proposed dormant mineral rights legislation. This proposal, which has only recently come to the Company's attention, is inequitable, unnecessary and will likely lead to far more uncertainty relating to mineral title than under current law. Kings County Development Company will take all actions which it feels necessary and appropriate to oppose the enactment of any legislation based on the concepts set forth in your proposal.

Kings County Development Company has retained severed mineral interests in a considerable amount of acreage which, while not developed for many years for economic reasons, was and is nevertheless a valuable and carefully watched and maintained asset of the company. The company feels that it would be extremely inequitable to automatically shift the ownership of valuable resources to others unless an owner undertakes continual, technical, affirmative steps to provide otherwise. Such a system would provide considerable windfalls to surface owners in the event of clerical errors, adminstrative mistakes or ignorance of the law in the case of unsophisticated mineral owners. Likewise, it favors large mineral owners over small, less sophisticated owners in that the larger landowner can afford and justify the time and expense required in maintaining the necessary records.

Furthermore, Kings County Development Company seriously doubts that a system as proposed by your Commission would result in any simplification of mineral title issues. In fact, just the opposite would probably result. The system proposed by your Commission would result in serious disruption of long-established and well-defined rules of title to mineral lands. Any system providing for an automatic change of ownership in certain instances without express deeds would result in tremendous confusion in establishing legal ownership. In addition, any actual transfer of title under your proposal would be based upon various factual determinations relating to the establishment of "dormancy" which will undoubtedly merely lead to a new set of lengthy and costly disputes between surface owners seeking a windfall and mineral owners attempting to hold onto their property.

Kings County Development Company also doubts that the proposed system would result in encouraging alienation of land and development of the state's resources. Legislation discouraging the holding of severed mineral interests would, in many instances, have the effect of discouraging mineral and oil and gas development. Certainly that is not a desireable public policy in this state. A single owner holding a block of severed mineral interests where there are multiple surface owners facilitates the leasing and development of relatively larger blocks of minerals and land, thus encouraging development of the minerals. Your proposal disfavors such mineral holdings.

Finally, there are numerous technical problems and ambiguities with the proposed legislation itself which we have not addressed in view of our total opposition to the entire concept behind your proposal. Likewise, we have not directly addressed the doubtful constitutionality of your proposal, which issue can be raised at a later time should that become necessary.

Kings County Development Company strongly urges you to reject the tentative recommendation relating to dormant mineral

rights and urges you not to forward any such proposed legislation to the California Legislature. Thank you for your consideration.

Very truly yours,

GREGORY C. BROWN

GCB/cs
cc: Dr. Douglas Donath, President
Kings County Development Company

Exhibit 15

THE NEWHALL LAND AND FARMING COMPANY

Post Office Box 55000
Valencia, California 91355
(805) 255-4000

WRITER'S DIRECT DIAL NUMBER

(805) 255-4053

October 19, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Gentlemen:

With regard to the proposed Dormant Mineral Rights legislation, The Newhall Land and Farming Company has quickly reviewed the recommendation and it is our opinion, albeit brief, that the people of California would best be served if this proposal were rejected.

As a major landholder in California and as a company involved in the energy production system, we have a great deal of experience in land title matters. As a result of this experience, we believe the proposal has a preponderance of unworkable, legally destabilizing, and possibly unconstitutional features.

A major concern is that the proposal forces a change of property ownership from the mineral owner to the surface owner. The steps involved, in our opinion, represent a form of confiscation lacking in due process and legally questionable.

In addition, in our experience of obtaining mineral rights we have found very few serious problems in establishing title, and none that have been insurmountable.

I apologize for the brevity of our remarks but we were only recently made aware of this proposal, in addition to which, after a quick review, we found little about the proposal that warrants suggested changes, i.e., you cannot amend a bad bill.

Thank you for your consideration of our position at this late date. We hope this proposal will be found unworthy of legislation debate.

Sincerely,

Michael B. Neal
Director of Public Affairs

MBN:lfn

Exhibit 16

LAW OFFICES OF
ROBERT L. BAKER

HUDSON PROFESSIONAL BUILDING
111 SOUTH HUDSON AVE SUITE A
PASADENA, CALIFORNIA 91101

TELEPHONE
(213) 795-1488
(213) 681-1488

July 29, 1981

California Law
Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Tentative Recommendation Relating to Unexercised Options

Gentlemen:

The undersigned as a real estate practitioner, recommends the tentative recommendation for the following reasons:

1. Civil Code Section 1213.5 allows a one year cloud on title. In the opinion of the undersigned, that is excessive inasmuch as a quiet title action generally cannot be brought to trial for a period of four to five years in Los Angeles County. Therefore, it is necessary, under the present statute, to wait at least one year where an option exists without an expiration date.

2. A six month period is more than sufficient to allow an option holder time to act upon the option.

3. The one year period prevents marketability of real property inasmuch as it poses a cloud on the title for a lengthy period of time even when an option is not exercised. A shorter period of time would allow title insurers to act more promptly which would enhance the marketability of real property.

We would appreciate hearing what action is taken upon the recommendations.

Very truly yours,

Robert L. Baker

Robert L. Baker

RLB:nm

LOYOLA LAW SCHOOL

October 12, 1981

Mr. John H. DeMoully
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: Tentative Recommendation Relating to Right of Entry and Possibilities of Reverter

Dear John:

My compliments to the chef! The report and recommendations are excellent.

I am particularly pleased that you chose a notice of continuing interest procedure rather than an arbitrary automatic cut off at the end of thirty years. I think most of the states that have gone for the specific maximum duration lack the extensive development of the equitable doctrine of changed circumstances.

I am concerned that Section 885.050 does not appear to completely clarify the statute of limitations problem.

It seems there are two separate acts of the power of termination holder typically involved. First, the notice of exercise and demand for conveyance and possession. Second, assuming that the fee simple subject to condition subsequent holder does not comply, commencing the action to clear title and recover possession. The two acts may be combined by commencing the action and letting the action itself serve as the notice and demand. Reference page three of the Introduction.

Section 885.050 provides that the power of termination shall be exercised within five years after breach (a), and that the power is to be exercised by notice or by civil action (d). The power must be exercised of record (b), which I assume would be by way of lis pendens in the case of exercise by civil action.

Suppose a restriction is allegedly breached and after four years the power of termination holder records his notice of exercise.

The fee simple subject to condition subsequent holder denies the breach and refuses to convey or vacate. How long does the power of termination holder have to bring his action to clear title and recover possession? One year, so that it is within five years from the alleged breach? Five years from the notice of exercise allegedly terminating the fee simple subject to condition subsequent?

Since the proposed statute requires either the notice or the action to be of record within five years, it seems the power of termination holder has complied with the statute and need do nothing further within the "five years after breach". If this is true, the power of termination could be a cloud on title for potentially ten years after breach. Since in most cases the fee simple subject to condition subsequent holder will not voluntarily comply with the notice itself, the effect of the statute is not truly a five year statute of limitations on the power of termination.

Best regards,

William G. Coskran
Professor of Law

WGC:mcm

UNIVERSITY OF CALIFORNIA, DAVIS

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SCHOOL OF LAW DAVIS, CALIFORNIA 95616

October 27, 1981

California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Ladies and Gentlemen:

I teach real property at the above law school. I am writing to comment on your tentative recommendation relating to rights of entry and possibilities of reverter. The Commission and its consultant are to be complimented on the work in the recommendation.

I am, however, against the abolition of the fee simple determinable and the possibility of reverter in the State of California. The fee simple determinable and the possibility of reverter have existed in property law for hundreds of years. The fact that California has "only recently...given them legal recognition" is not to the point. See page four of your recommendation.

It is most instructive that only one other jurisdiction--Kentucky--has abolished the fee simple determinable. Abolishing a set of common law estates in land which has existed for centuries is too drastic.

I believe the way to deal with the negative aspects of the fee simple determinable and the possibility of reverter is to use the statute of limitations discussed in the balance of the Law Revision Commission's report.

Also, let me ask a question, if I may. What will happen to the determinable life estate and the determinable term for years if the legislation is passed? For example, what is to happen to a limitation "to my husband for life or until he remarries" (a determinable life estate)? At a minimum, the proposed legislation to abolish the fee simple determinable should make it clear that determinable life estates and determinable terms for years should be allowed to continue.

I thank you for your attention to this matter.

Sincerely,

Joel C. Dobris
Professor of Law

JCD:esg

Exhibit 19

STEVEN M. KIPPERMAN
LAW CORPORATION
120 GREEN STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94111
(415) 397-8600

October 1, 1981

California Law Revision Commission
4000 Middlefied Road, Room D-2
Palo Alto, California 94306

Re: Tentative Recommendation Relating to Unperformed Real Property Sales Contracts

Dear Sir or Madam:

I think the above-referenced tentative recommedation is ill-advised and should not under any circumstances be recommended or enacted. It is probably true that no matter what the statutory scheme is or the common law scheme, whether the one now in force in California or the one proposed by you, by contract the parties will be able to achieve the result they desire. Simply, however, to "tinker" with the present scheme because the Law Revision Commission believes, without very substantial support it would seem, that the State has been deluged with unintentionally clouded titles appears to me to be an ill-founded basis on which to legislate new expectations of parties. Since it is unquestionably true that really only the longer term installment sales contracts are at issue, I think it is bad social policy to start legislating without any apparent need. I would assume that the lenders or title companies would themselves approach the legislature if this were a problem that the institutions could not cope with. Since sellers can take a release or quit-claim deed at the time of the transaction for recording in the event of default, I see no reason to shift the burden to the buyers to know the law any more than the sellers should know it now. I oppose your recommendation.

Very truly yours,

STEVEN M. KIPPERMAN

SMK/lbs

WILLIAM J. McDONOUGH
Attorney at Law
11473 Dona Dolores Pl.
Studio City, CA 91604

213-656-9486

October 6, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Attention: Nathan Sterling

Dear Nat:

I reviewed the 91481 tentative recommendation relating to Unperformed Real Property Sales Contracts. In general, I believe the proposal is very worthwhile and will work well as set forth in the recommendation.

I would suggest your considering a minor revision of Section 886.010.(b). As I read it you have provided for the inclusion of a memorandum or short form in a manner which may be construed to exclude from the definition of a "Recorded Real Property Sales Contract", one that has been recorded in its entirety. I would suggest Section (b) be redrafted as follows:

(b) "Recorded Real Property Sales Contract" includes the entire terms of a Real Property Sales Contract <u>whether recorded in its entirety</u> or evidenced by a recorded memorandum or short form of the contract.

With respect to the question whether there is a significant number of Real Property Sales Contracts of record, I can only state that with more than 24 years experience in the Title Insurance Industry, it is my opinion that, particularly in the last 10 years, there have been a significant number of such contracts recorded in the State of California, many of which remain unperformed and create clouds on title to real property.

Warmest regards,

Bill

William J. McDonough

WJM:ps

cc: Roger Bernhardt, Golden Gate University School of Law, 536 Mission St., San Francisco, Ca. 94105

Alan Wayte, Real Property Section California State Bar Chairman, Adams, Duque & Hazeltine, 523 W. 6th St., Los Angeles, Ca. 90014

CALIFORNIA CONTINUING EDUCATION OF THE BAR
2300 Shattuck Avenue, Berkeley, CA 94704
(415) 642-3973; Direct Phone: (415) 642-6648

October 22, 1981

California Law Revision Commission
Room D-2, 4000 Middlefield Road
Palo Alto, California 94306

Gentlemen:

I have the following comments to offer on your tentative recommendation relating to unperformed real property sales contracts.

In determining whether a problem exists with recorded unperformed real property sales contracts, it is necessary to distinguish between marketing contracts, such as "deposit receipts", and contracts used as security devices, commonly called land contracts, land sales contracts, or installment land contracts. Notwithstanding your citations to Simes & Taylor and to Basye, I would seriously question whether very many sales contracts of the marketing contract type are recorded. The few instances where such contracts are recorded would involve large transactions in which the parties would anticipate the need to record a release from the buyer if the contract is rescinded. If any problem exists with respect to recorded, but unperformed, sales contracts, it is probably limited to the security device (the installment land contract) and my remaining comments pertain solely to the contract used as a security device.

Your recommendation seems to assume that the real problem with the recorded, but unperformed, land contract is the seller's need to bring a quiet title action to clear his title. I believe a much more common problem is the failure of the buyer to clear his title to the property by obtaining and recording a fulfillment deed on completion of the payments due under the contract.

The unperformed land contract, creating a cloud on the seller's title, does so only because the buyer has defaulted on making the installment payments. I do not agree with you that "a means should be provided to enable clearing of an unperformed land sale contract from record title by operation of law." At present, the seller's remedies, on the buyer's default, are to bring a quiet title action (and make restitution) or to seek specific performance of the contract by the buyer (usually resulting in judicial sale of the property). See Graham, "The Installment Land Contract in California: Is It Really a Mortgage?" 4 CEB Real Property Law Reporter 117 (1981).

The seller's action taken on the buyer's default (i.e., quiet title or specific performance) is analogous to the action of the beneficiary under a deed of trust or a mortgagee who must bring a judicial foreclosure action (or conduct a trustee's sale) to foreclose the trustor's or mortgagor's equity of redemption. Your recommendation that the seller's title be cleared by operation of law after five years would permit the seller to obtain clear title following the buyer's default without either judicial intervention or a sale of the property (as is required under a mortgage or deed of trust).

Your proposed §886.020 would require a buyer who is in breach under a recorded land contract to execute a release to the seller without any requirement that the seller make restitution to the buyer. Present California law requires that the seller, as a condition of quieting his title, make restitution to the buyer to the extent the amount paid by the buyer exceeds the seller's damages. See Graham, 4 CEB Real Property Law Reporter at 121.

Your comment to §886.020 states that the requirement of a release from the buyer is analogous to the requirement in CC §2941 of a reconveyance of a deed of trust or release of a mortgage upon satisfaction. That is not true. The release or reconveyance is given on satisfaction of the mortgage debt, not on its breach. The release or reconveyance is analogous to the fulfillment deed that the buyer receives on completion of the installments due under the contract. A release of the contract by the buyer (on its breach) is instead analogous to a deed given by the trustor or mortgagor in lieu of foreclosure. There is, of course, no statute that requires a lieu deed be executed by the trustor or mortgagor on default; instead, the lender must proceed with a judicial foreclosure or trustee's sale if the borrower insists. See California Mortgage and Deed of Trust Practice §6.29 (Cal CEB 1979) for a discussion of lieu deeds.

A more serious problem is created by your proposed §886.030. Under this section, the seller would receive clear title five years after the date for completion of the contract. In the, probably not uncommon situation, where the buyer has made all payments under the contract but the seller inadvertently failed to deliver the fulfillment deed to the buyer for recordation, the buyer would, by operation of law, lose all interest of record in the property even though he had completed all payments under the contract. In the case of a purchase of unoccupied raw land where inquiry notice might not exist, the buyer could even lose the property if the seller sold to a bona fide purchaser. The buyer's only recourse would be an action against the seller for damages. Your recommendation in §886.030 would require the buyer at his peril to obtain and record a fulfillment deed within five years after the date for completion of the contract or bring suit to quiet title within that period.

Your recommendation would, I think inadvertently, substantially change California law on the subject of the seller's remedies for the buyer's default under a land contract. I do not believe the seller should be given a remedy, on the buyer's default, permitting the seller's title to be cleared by operation of law. The real problem may be the buyer's failure to obtain clear title by obtaining a fulfillment deed on completion of the contract. The buyer's problem is analogous to the trustor's or mortgagor's problem if a reconveyance or release is not recorded on satisfaction of the mortgage debt.

I shall be pleased to discuss this with you further if you so desire.

Yours very truly,

Gordon L. Graham
CEB Supervising Attorney
Real Property Law

GLG:hw

Exhibit 22

SHEPPARD, MULLIN, RICHTER & HAMPTON

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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MARTIN J. EVANS
FRANK A. URIBIE

*PROFESSIONAL CORPORATION

October 23, 1981

19079

The California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Unperformed Real Property Sales Contracts

Gentlemen:

I have read the Commission's Tentative Recommendation relating to Unperformed Real Property Sales Contracts dated September 14, 1981.

I have no difficulties with the substance of the recommendation as far as it goes, and while I am sure that various drafting changes might be suggested, I find nothing unacceptable in the proposed language. However, by limiting the impact of the recommendation to contracts lying dormant for more than five years after they were supposed to have been performed, I believe the Commission has missed the greatest part of the point.

It might be expected that the seller of a parcel of property under an installment land sale contract would wish to be able to resell that property in less than five years after the contract has been abandoned by the buyer. The fact that the installment land sale contract form of documentation was selected by the parties should not place the seller in a more onerous position in this regard than if a promissory note and deed of trust had been used. The economic relationships between the trustor and the beneficiary under a deed of trust are in fact identical to the relationships of

vendor and vendee under a land sale contract, and the same rights and remedies should be afforded in each situation.

Recorded installment land sale contracts often contain language purporting to grant the vendor the private right of sale under Civil Code §§ 2924 et seq. There is some speculation that the private power of sale remedy may nonetheless be unavailable to the vendor because the statutory authorization for private sale specifically refers only to mortages and deeds of trust. In addition, the right of private sale is available only if specifically provided for in the instrument creating the lien. While printed form documents will normally contain the necessary language, inartfully prepared "custom" documents sometimes do not.

The existence of these hazards for the unwary seem unjustified. If they were abolished, the private sale procedure could be used as a relatively expeditious and efficient means of clearing title in situations involving a recorded "agreement for sale" as well as the more common problem of a recorded installment land sale contract.

For these reasons, I suggest that serious consideration be given to expanding the proposed legislation to encompass a specific acknowledgement of the existence of the private sale remedy in the event of the breach by a buyer under a contract to purchase real property (installment or otherwise), as well as to eliminate the requirement that the instrument specifically authorize the private power of sale.

Very truly yours,

Michael W. Ring

for SHEPPARD, MULLIN, RICHTER & HAMPTON

MWR:bn

Exhibit 23

Harold P. Machen
Attorney at Law
4433 Florin Road, Suite 880
Sacramento, California 95823
(916) 422-7111

OUR FILE NO.

October 28, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

RE: Press release of September 15, 1981
Real estate property sales contract release

Gentlemen:

I have read the tenative recommendation which would require a defaulting buyer to execute a release of a real property sales contract that has been recorded.

I do not feel that this law should be recommended because it might create problems if the defaulting buyer refuses to execute the release or if the defaulting buyer cannot be found.

In 1980 Section 409.55 was added to the Code of Civil Procedure and under the provisions there, it is necessary for a bilateral agreement of withdrawal of a Lis Pendens. I ran into some difficulty because of that section a few months ago based on the following fact situation.

I was handling a probate of an estate in which the real property belonging to the estate was ordered sold by a Confirmation of Sale Order.

After the escrow was opened, the preliminary report indicated that the county of sacramento had filed an action against the tenant of the real property for violating a zoning ordenance in that the tenant had been operating an automobile repair shop in a residential neighborhood. The County of Sacramento had filed a Les Pendens against the property when they filed the suit and had recovered an injunction against any future activity of this type.

Prior to my discovering the Lis Pendens, I had file an unlawful detainer procedure and had the tenant evicted by the County Marshall.

One additional fact is that the lawsuit had also been filed against the decedent as an individual and he was named as a party defendant.

Fortunately for me the title company agreed that if the County of Sacramento dismissed the lawsuit against the decedent the sale could clear escrow.

My concern is that usually a defendant will not cooperate with the attorney for the plaintiff where a Lis Pendens has been filed. In looking at the proposed tenative recommendation I can see that the same difficulty might occur in a given fact situation. If the buyer has defaulted and removed himself from the property he has no further interest or concern as to what happens to the property. Sometimes time is of the essence and if time is of the essence in order to close a real estate sales transaction I can foresee that problems might arise.

I hope that if you still intend to recommend this that you will be aware of future detriment in selling real property in a probate matter.

Very truly yours,

Harold P. Machen

Harold P. Machen
HPM:ldf

Exhibit 24

September 28, 1981

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Palo Alto, California

Re: Study H-405
(Unperformed Land Sale Contracts)

Dear Nat:

I have the following thoughts regarding your proposed legislation for terminating the record effect of unperformed land contracts:

1. Section 887.020. I suggest you provide either for some sanction against a buyer who refuses to execute a release or create a procedure whereby the seller can have the contract expunged from the records, or both.

2. Section 887.030(a)(1). The 5-year period should run either from the date which is "provided" in the contract or, instead from a date which a court may calculate to be that which the parties intended.

3. Section 887.030(b). This provision should state that an extension occurs only by a subsequent instrument and not by one recorded contemporaneously with the original contract.

Yours truly,

Roger Bernhardt
Professor of Law

RB/rd

P.S. With regard to your response of September 16 concerning my suggestion for differently indexing notices of Intent to Preserve Powers of Termination, I hope you realize that your notion that a person is searching the grantor index anyway is based upon the assumption that a search has already been made of the previous 20-years (or earlier) so as to have found that interest in the first place. If your purpose is

to restrict the scope of the title searches, then you have put this document in the wrong index because your rule will require every title searcher to run in the grantee index all the way back to find out whether a power was ever created and then run in the grantor index back up into the present to see if it has been extended. Revising the indexing would permit the searcher merely to check (in the grantor index under the name of the present estate holder) for the past 20 years.

Exhibit 25

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO SANTA BARBARA · SANTA CRUZ

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

October 7, 1981

Mr. John DeMoully
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

In reading over your tentative recommendation relating to Rights of Entry and Possibilities of Reverter, I have come across a provision in § 880.350 which I do not understand. It provides that, "The index entry shall be for the grantor, and for the purpose of this index, the claimant under the notice shall be deemed to be the grantor." Should not the index entry be the other way: the record owner should be the grantor and the claimant be the grantee? In drafting the Kentucky statute we considered this problem and came to a result opposite to that which § 880.350 provides. We provided that the record owner is the grantor and the claimant is the grantee. I enclose a xerox copy of Ky. Rev. Stat. § 381.221.

Take this hypothetical:

1985 O conveys to A, retaining a power of termination.

1986 O dies. Power descends to B, O's heir.

1999 B dies. Power descends to C, B's heir.

2005 C files notice of intent to preserve.

Under § 880.350 C's notice will be filed under B's name in the grantor index. But why would a title searcher look under C's name in the index? He would look under C's name only if he had searched outside the records into extrinsic facts relating to A's death; whether A died testate or intestate; if intestate who was A's heir; if A's heir is B where does he live; if dead who are B's heirs; and so on. This might be a tremendous search job. But C's recordation gives constructive notice and the title searcher has the duty to find it.

This extrinsic search could be avoided if the claimant's notice is filed under the record owner's name as grantee. I

notice that your form does not provide for a statement as to the name of the record owner. It seems to me this is important information. Are you trying to avoid making the claimant search the records for a "record owner"? Or do you assume there may be two or more "record owners"? I am puzzled by this section.

Sincerely,

Jesse Dukeminier
Professor of Law

JD:ij
enc

instrument creating such fee simple subject to a right of entry. If such contingency occurs within said thirty (30) years the right of entry, which may be created in a person other than the person creating the interest or his heirs, shall become exercisable notwithstanding the rule against perpetuities. This section shall not apply to rights of entry created prior to July 1, 1960. (Enact. Acts 1960, ch. 167, § 5, effective June 16, 1960.)

381.220. Restraints on alienation — Duration of — Exceptions. [Repealed.]

Compiler's Note. This section (2360: amend. Acts 1956, ch. 175) was repealed by Acts 1960, ch. 167, § 8.

381.221. Termination and preservation of forfeiture restrictions created before July 1, 1960.—(1) Every possibility of reverter and right of entry created prior to July 1, 1960, shall cease to be valid or enforceable at the expiration of thirty (30) years after the effective date of the instrument creating it, unless before July 1, 1965, a declaration of intention to preserve it is filed for record with the county clerk of the county in which the real property is located.

(2) The declaration shall be entitled "Declaration of Intention to Preserve Restrictions on the Use of Land," and shall set forth:

(a) The name of the record owner or owners of the fee in the land against whom the possibility of reverter or right of entry is intended to be preserved;

(b) The names and addresses of the persons intending to preserve the possibility of reverter or right of entry;

(c) A description of the land;

(d) The terms of the restriction;

(e) A reference to the instrument creating the possibility of reverter or right of entry and to the place where such instrument is recorded. The declaration shall be signed by each person named therein as intending to preserve the possibility of reverter or right of entry and shall be acknowledged or proved in the manner required to entitle a conveyance of real property to be recorded. The county clerk shall record the declaration in the record of deeds and shall index it in the general index of deeds in the same manner as if the record owner or owners of the land were the grantor or grantors and the persons intending to preserve the possibility of reverter or right of entry were the grantees in a deed of conveyance. For indexing and recording the clerk shall receive the same fees as are allowed for indexing and recording deeds. (Enact. Acts 1960, ch. 167, § 6, effective June 16, 1960.)

NOTES TO DECISIONS

ANALYSIS

1. Right of entry.
2. Filing declaration of intention.

1. Right of Entry.

Kentucky perpetuities act of 1960 is the equivalent of a statute of limitation, and this section applies to a right of entry impliedly retained to enforce a restraint on alienation. Atkinson v. Kish (1967), 420 S. W. (2d) 104.

2. Filing Declaration of Intention.

The bringing of an action by holders school board claiming that under terms of the deed the school board had forfeited title by discontinuance of use of the parcel for a school obviated the necessity of filing a declaration under this section of intent to preserve the reversionary right under the deed. Withers v. Pulaski County Board of Education (1967), 415 S. W. (2d) 604.

The nonuse of a clubhouse for approximately five years must be deemed a period of substantial duration, and the informal, indefinite intent of the club

H-400

STAFF DRAFT

RECOMMENDATION

relating to

MARKETABLE RECORD TITLE TO REAL PROPERTY

November 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306
(415) 494-1335

STAFF DRAFT

LETTER OF TRANSMITTAL

November 20, 1981

To: THE HONORABLE EDMUND G. BROWN, JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by 1975 Cal. Stats. res. ch. 15 to study whether the law relating to possibilities of reverter and powers of termination should be revised and by 1967 Cal. Stats. res. ch. 30 to study whether a Marketable Title Act should be enacted in California. The Commission has concluded that a Marketable Title Act should not be enacted in California but that a series of statutes should be enacted designed to achieve greater marketability of title by removing the cloud on title created by obsolete interests of record. The Commission herewith submits its recommendations relating to ancient mortgages and deeds of trust, dormant mineral rights, unexercised options, rights of entry and possibilities of reverter, and unperformed real property sales contracts. The Commission plans in the future to submit additional recommendations dealing with other interests that impair marketability of title.

The Commission wishes to express its gratitude to its consultants and other persons who assisted in the formulation of these recommendations. Its consultants on this study are Professors Paul E. Basye, James L. Blawie, Jesse Dukeminier, Susan French, Russell D. Niles, and Mr. Garrett H. Elmore. The Commission also wishes to thank Mr. Ronald P. Denitz for his contribution to the recommendations.

Respectfully submitted,

Beatrice P. Lawson
Chairperson

RECOMMENDATION

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STAFF DRAFT

RECOMMENDATION

relating to

Marketable Record Title to Real Property

Introduction

Under the recording laws, a bona fide purchaser of real property takes the property subject to all interests of record and free of unrecorded interests (except interests that would appear from inspection of the property and reasonable inquiry). This necessitates a search of the records by a purchaser to ascertain whether there are adverse interests of record and whether title to the property is marketable. The longer the period of search required, the more difficult and time-consuming the search and the greater the likelihood that obsolete interests of record will appear that will require time and money to clear from the record.

Because of this problem all jurisdictions, including California, have enacted legislation of some sort to mitigate the title-clouding effect of obsolete interests under the recording acts. Such legislation ranges from simple recognition of affidavits to statutes of limitation and maximum periods of duration for selected interests.[1] In addition to the broad range of legislation, there are exhaustive Model Acts[2] as well as Uniform Acts[3] dealing with this problem.

The most far-reaching efforts to cure marketability problems are found in the Marketable Title Acts, which have been adopted in at least 19 jurisdictions in the United States.[4] The Marketable Title Acts operate to limit the search of the records required and to invalidate ancient interests. They do this by providing that a purchaser need only search back through a chain of title for a limited period of time, say

1. See P. Basye, Clearing Land Titles (2d ed. 1970).

2. L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation (1960).

3. See, e.g., Uniform Simplification of Land Transfers Act (1977).

4. P. Basye, Clearing Land Titles §§ 179-193 (2d ed. 1970; suppl. 1981).

30 or 40 years. All interests recorded before that time are automatically extinguished unless they have been rerecorded. The assumption of the Marketable Title Acts is that most old interests are obsolete, and if they are not obsolete it is a minimal burden on the interest holder to rerecord every 30 or 40 years.

Although Marketable Title Acts have been well-received in those jurisdictions that have adopted them, they are not free of problems.[5] The California Law Revision Commission has reviewed the advantages and disadvantages of a Marketable Title Act for California and has concluded that adoption of such an act would be undesirable. Of critical importance in the Commission's view is the possibility that under such an act a person who is unaware of the rerecording requirement may lose a valid and substantial property interest simply by the passage of time. The Marketable Title Acts are overly broad and can affect property interests that should not be affected, such as the fee or long-term less than fee interests.

A preferable approach to problems created by obsolete interests of record is a series of provisions more narrowly drawn than a Marketable Title Act and designed to cure specific types of problems with specific types of interests. This recommendation addresses some of the common title-clouding interests in California. The Commission does not consider its work in this area complete, however, and plans additional recommendations addressing other common and less common interests that impair marketability of title.

Ancient Mortgages and Deeds of Trust

Real property is ordinarily burdened of record by a deed of trust (or in rare instances, a mortgage). This is the case even though the underlying obligation secured by the mortgage or deed of trust may have been fully satisfied or may be unenforceable due to the running of the applicable statute of limitation. The impairment of marketability of title to real property caused by ancient mortgages and deeds of trust of record has been and continues to be troublesome.[1]

5. See, e.g., Barnett, Marketable Title Acts--Panacea or Pandemonium, 53 Cornell L. Rev. 45 (1967).

1. See discussion in P. Basye, Clearing Land Titles §§ 71-76 (2d ed. 1970).

Existing California law attacks the problem of the recorded ancient mortgage or deed of trust on real property in a number of ways. When the underlying obligation is satisfied, the mortgagee must record a certificate of discharge and the trustee must record a reconveyance, under threat of civil and criminal penalties.[2] The general statute of limitation on the underlying obligation is a relatively short four years, and any waiver of the statute must occur within the limitation period and is good for only an additional four years.[3] Any lien that secures the underlying obligation is extinguished by lapse of the limitation period.[4]

Despite existing California law, there is no assurance that real property burdened by a recorded mortgage or deed of trust will be either marketable or insurable, even though the underlying obligation may be satisfied and enforcement barred by the statute of limitation.[5] At best, a judicial action to quiet title or remove a cloud on title will be necessary; at worst, the encumbrance will burden the property indefinitely.[6]

The "one form of action" rule provides that the only judicial action to enforce the underlying obligation secured by a mortgage or deed of trust is foreclosure.[7] Therefore, when the statute of limitation on the underlying obligation has run, foreclosure is precluded; any lien is also extinguished.[8] However, in legal theory a trustee under a deed of trust owns title to the property (rather than a lien) and the trustee's exercise of the power of sale under the deed of trust is not a judicial

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2. See, e.g., Civil Code §§ 2941 (civil penalty), 2941.5 (criminal liability).

3. Code Civ. Proc. §§ 337 (4-year statute of limitation), 360.5 (waiver of statute of limitation).

4. Civil Code § 2911.

5. See, e.g., 2 A. Bowman, Ogden's Revised California Real Property Law § 17.46 (1975) (discharge by bar of statute of limitation).

6. This results from the rule that the power of sale under a deed of trust "never outlaws." See, e.g., 3 B. Witkin, Summary of California Law, Security Transactions in Real Property §§ 84-85 (8th ed. 1973).

7. Code Civ. Proc. § 726.

8. Civil Code § 2911.

action to foreclose; consequently the running of the statute of limitation on the underlying obligation, which has the effect of barring enforcement of a mortgage, does not bar exercise of the power of sale under a deed of trust. The deed of trust permanently impairs marketability of title.

Even a mortgage which appears to be barred by the running of the statute of limitation on the underlying obligation may constitute an indefinite cloud on title. The running of the statute of limitation may have been tolled.[9] The running of the statute of limitation may have been stopped and started anew by a partial payment.[10] The statute of limitation may have been waived.[11] None of these factors is ordinarily reflected in the record. And where it is clear that the statute of limitation has in fact run on the underlying obligation, the mortgagor may nonetheless be unable to obtain clear title because of the mortgagor's equitable duty to satisfy the mortgage.[12]

The Law Revision Commission recommends that provisions be added to California law to enable a person to rely on the record in determining marketability of real property burdened by an ancient mortgage or deed of trust of record. The rule that a power of sale under a deed of trust never outlaws, despite the running of the statute of limitation on the underlying obligation, should be reversed;[13] this is a legal technicality that serves only to cloud titles and make real property less marketable.[14]

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9. See, e.g., Code Civ. Proc. §§ 351-358.

10. See Code Civ. Proc. § 360.

11. See Code Civ. Proc. § 360.5.

12. See, e.g., Puckhaber v. Henry, 152 Cal. 419, 93 Pac. 114 (1907). The equitable duty applies only to the original mortgagor and not to a subsequent purchaser, who may clear title of the ancient mortgage. See, e.g., Fontana Land Co. v. McLaughlin, 199 Cal. 625, 250 Pac. 669 (1926).

13. Many states have done this by statute. See P. Basye, Clearing Land Titles § 73 (2d ed. 1970).

14. In California, legal scholars have noted that the only significant difference left in the legal treatment of mortgages and deeds of trust is the early holding that the power of sale in a deed of trust never outlaws while the same power in a mortgage is subject to the statute of limitation. It has been predicted that the California courts will ultimately eliminate this distinction as unreasonable and unnecessary. See R. Bernhardt, California Mortgage and Deed of Trust Practice § 3.3 (Cal. CEB 1979).

The rule that a mortgagor may not clear title without "doing equity," despite the running of the statute of limitation on the underlying obligation, should also be reversed;[15] this rule defeats the basic purpose of statutes of limitation.[16]

While the recommended reforms will help reduce the uncertainty caused by an ancient mortgage or deed of trust, judicial action to clear title will still be necessary. Consequently, the Law Revision Commission further recommends that a fixed and absolute period be provided by statute for the duration of record of a mortgage or deed of trust;[17] this will permit a person to rely on the record in determining marketability unaffected by partial payments, waivers, or tolling. The statutory period should be 10 years following the maturity date of the underlying obligation if the date can be ascertained from the record or, if not, 60 years following the date the mortgage or deed of trust was recorded.[18] Any waiver or extension of the statutory period should be effective only if recorded. A provision of this type will enable automatic clearing of ancient mortgages and deeds of trust from the record after lapse of the statutory period without the necessity of judicial action to quiet title or remove a cloud. The burden imposed on mortgagees or trustees to record notice of waiver or extension will be small compared with the benefit of increased marketability of land titles.

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15. Statutes in a number of states have reversed the rule that in order to clear title a mortgagor must do equity by paying a debt barred by the statute of limitation. See P. Basye, Clearing Land Titles § 75 (2d ed. 1970).

16. Giving quiet and repose to titles and the maintenance of property in a merchantable condition are integral parts of the social end of prompt assertion of claims sought to be achieved by statutes of limitation. See discussion in P. Basye, Clearing Land Titles § 76 (2d ed. 1970).

17. Many states have enacted statutes of this type. See P. Basye, Clearing Land Titles § 76 (2d ed. 1970).

18. The 10-year period is comparable to that provided in the Model Mortgage Limitation Act (Simes & Taylor 1960) and in the Uniform Simplification of Land Transfers Act (1977) § 3-408. The 60-year period is intended to be sufficiently long to include most home mortgages, particularly variable mortgages that provide for extension of the length of the loan. The recommended legislation includes a two-year grace period for actions to foreclose mortgages and deeds of trust that would otherwise be terminated by the lapse of the statutory periods at or shortly after enactment of the legislation.

Dormant Mineral Rights

It is a common occurrence in California conveyancing that a grantor of real property reserves mineral rights from the grant, even though there may be no reasonably foreseeable possibility that the rights will ever be exploited.[1] The pattern of large-scale reservation of mineral rights on a speculative basis leaves many titles unnecessarily clouded and substantially impairs the marketability of otherwise useful real property.[2]

This situation can persist indefinitely, since severed mineral rights can take the form of a fee interest.[3] Even a grant of minerals following a typical reservation of mineral rights that by its terms is limited in duration may violate the Rule Against Perpetuities, so that what appears to be a limited mineral right is in fact a perpetual mineral right.[4]

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1. See, e.g., Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 853 (1970); Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1231-1232 ("Although there appear to be no statistics on the extent of the severance, it is a matter of common knowledge that mineral rights have been severed from large amounts of surface acreage in mineral-producing states.")

2. See, e.g., L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 241 (1960) ("Such interests are widely acquired on a speculative basis and present an intolerable situation after they have proved to be worthless.").

3. Grants or reservations of mineral rights can take innumerable forms including but not limited to a mineral interest, leasehold, easement, profit a prendre, rents, and royalties. California law distinguishes between fixed-location minerals such as ore, metal, and coal which are owned by the surface owner and which can be severed from the surface and conveyed in fee, and fugacious minerals such as oil and gas which are not owned by the surface owner and cannot be conveyed as a fee estate but only as a profit a prendre, a type of incorporeal hereditament. See, e.g., In re Waltz, 197 Cal. 263, 240 P. 19 (1925); Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935). A profit a prendre may be unlimited in duration by its terms, but is subject to abandonment. See, e.g., Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237 (1935); Gerhard v. Stephens, 68 Cal.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968).

4. See, e.g., Victory Oil Co. v. Hancock Oil Co., 125 Cal. App.2d 222, 270 P.2d 604 (1954) (executory interest following reservation of mineral rights that "shall continue for a period of twenty (20) years, and so long thereafter as oil, gas, or other minerals may or shall be produced therefrom in paying quantities" violates Rule Against Perpetuities). But see Rousselot v. Spanier, 60 Cal. App.3d 238, 181 Cal. Rptr. 438 (1976).

The impairment of marketability caused by dormant mineral rights affects both surface and subsurface interests. A conveyance of subsurface mineral rights includes the right of access over the surface and restricts the use of the surface. The surface ownership "may be burdened in part, and, in very rare cases perhaps, in its totality, by the reasonable exercise of the rights of the owner of the oil and mineral estate."[5] Old mineral rights created in the 19th century can adversely affect the development of the surface in the 20th century despite changed conditions that have made development of the surface of greater importance to society as a whole than the undeveloped mineral rights and that have made the value of the undeveloped mineral rights insignificant in comparison with the value of the surface.[6]

Dormant mineral rights also impede development of the subsurface minerals. The existence of a dormant mineral interest discourages drilling and other mineral exploration efforts by increasing the risks associated with such operations: the owners of the interests are often difficult to identify and locate, and mineral exploiters face the possibility of severe penalties if they drill without obtaining the consent of all the mineral-rights owners, for example, by a requirement of accounting to nonconsenting owners (who run no risk) for a share of production.[7]

For these reasons also many oil and gas leases make express the requirement that the holder of the mineral rights proceed diligently or the lease terminates.[8] The lease ties up the lessor's property for a long period and failure to develop its production involves the danger of depletion of the oil by wells on adjoining lands.[9]

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5. Wall v. Shell Oil Co., 209 Cal. App.2d 504, 513, 25 Cal. Rptr. 908, 913 (1962).

6. See discussion in Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 147-148 (1969).

7. See discussion in Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1231-1233 (1969).

8. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 12.42 (1974).

9. See discussion in 3 B. Witkin, Summary of California Law Real Property § 557 (8th ed. 1973).

The impediment of dormant mineral rights on both surface and subsurface interests can make the real property practically unmarketable. When it becomes necessary or economically desirable to put together a full and unencumbered fee title, identifying and locating the owners of the retained mineral interest may be an impossible task. Negotiating for its purchase is often difficult, since the value of the mineral interest as an impairment of the fee title may exceed its intrinsic value as a source of possible future income from mineral exploitation. Where the mineral interests are owned in fee, quiet title actions are generally ineffective to clear title, since normal surface use is not hostile to several mineral rights and therefore does not constitute adverse possession.[10]

The California Supreme Court has held in Gerhard v. Stephens[11] that since mineral interests in oil and gas are a profit a prendre, a type of incorporeal hereditament,[12] the mineral interests are subject to abandonment based on nonuse and intent to abandon:[13]

> Commentators have noted that "The abandonment concept, when applied, frequently serves the very useful purpose of clearing title to land of mineral interest 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 such owners."
>
> As stated in Dabney-Johnston, "the use of different terms of description may give rise to different legal incidents . . . ." By describing rights identical to those granted to the corporations as incorporeal hereditaments our court foreordained the conclusion we now reach. Moreover, a ruling that incorporeal hereditaments of the type involved may be abandoned tends to promote the marketability of title by facilitating the clearing of titles. To that extent it better fulfills the demands of a modern economic order. Further, it reduces the possibility of the resurrection of the ghosts of abandoned claims by which title searchers and forgotten owners collect the windfalls of accidental profit.

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10. See Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 853-854 (1970).

11. 68 Cal.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968) (citations and footnotes omitted).

12. See note 3 supra.

13. 68 Cal.2d at 887-889, 69 Cal. Rptr. at ___-___, 442 P.2d at ___-___.

Gerhard v. Stephens does not offer a completely satisfactory solution to the problem of dormant mineral rights. It requires a judicial proceeding to determine whether particular mineral rights have been abandoned and requires proof of intent to abandon. In Gerhard, for example, the court held that 47 years of nonuser, coupled with such a number of cotenancy interests that a court appointed receiver would be needed for development, was not sufficient to show abandonment as to all mineral interests.[14] It appears that abandonment will be a useful basis for clearing title only infrequently.[15] Moreover, the possibility that there has been an off-record abandonment may have the effect of clouding otherwise good record titles to mineral rights.[16]

Gerhard v. Stephens by its terms applies only to those mineral rights in fugacious minerals which are incorporeal hereditaments and therefore subject to abandonment.[17] Presumably mineral rights in nonfugacious minerals, which may take the form of a severed fee, are not subject to abandonment. Where a grant or reservation of mineral rights includes both fugacious and nonfugacious minerals, the grant apparently would be subject to abandonment only in part.[18]

An extensive body of legal literature demonstrates the need for an effective means of clearing land titles of dormant mineral rights.[19]

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14. 68 Cal.2d at 893-895, 442 P.2d at 716-717, 69 Cal. Rptr. at 635-636.

15. See, e.g., discussion in Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 856 (1970).

16. See, e.g., discussion in Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 150 (1969).

17. See, e.g., discussion in Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227 (1969).

18. See, e.g., discussions in Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 854-856 (1970); Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1233-1235 (1969); Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 150 (1969).

19. See, e.g., P. Basye, Clearing Land Titles § 38 (2d ed. 1970); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 239-247 (1960); Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835 (1970); Comment, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227 (1969); Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136 (1969). For a more extensive bibliography, see 1 H. Williams & C. Meyers, Oil and Gas Law § 216.7 n.1 (1980).

Subjecting dormant mineral rights to termination is in the public interest and legislative intervention in the continuing conflict between mineral and surface interests is necessary. About a dozen states have now enacted statutes to enable termination of dormant mineral rights[20] and most of the nearly two dozen states that now have marketable title acts apply the acts to mineral rights.[21]

The statutes of other jurisdictions that have confronted the problem of dormant mineral interests offer two basic models. One model is based on nonuse: a mineral right is extinguished if there have been no operations for mineral production within a recent period of time, for example, within 10 or 20 years.[22] The major attraction of this model is that it enables extinguishment of dormant rights solely on the basis of nonuse; proof of intent to abandon is unnecessary. The major drawbacks of this model are that it requires resort to facts outside the record and that it requires a judicial proceeding to determine the fact of nonuse.[23] This model 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.[24]

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20. For discussions of the statutes, see, e.g., P. Basye, Clearing Land Titles § 38 (2d ed. 1970); 1 H. Williams and C. Meyers, Oil & Gas Law § 216.7 (1980); Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 142-144 (1969).

21. See discussion in P. Basye, Clearing Land Titles §§ 171-193 (2d ed. 1970; Supp. 1979). The Uniform Simplification of Land Transfers Act (1977) follows the Model Marketable Title Act in making no exception for mineral interests (although providing an optional provision excepting mineral interests--Section 3-306(5)). The Uniform Act notes that whether or not the exception should be made is the "most controversial issue" with respect to marketable title legislation.

22. See, e.g., La. Civ. Code arts. 789, 3546 (19__); Tenn. Code 64-704 (19__).

23. Even a marginal effort by the mineral owner will keep the interest alive. See discussion in Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 142-144 (1969).

24. See discussion in Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 860 (1970).

The other major statutory model is based on passage of time--a mineral right is extinguished a certain period of time after it is recorded, for example 20 years, unless during that period a notice of intent to preserve the interest is recorded.[25] 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 mineral owner to preserve the mineral rights on a purely speculative basis and to hold out for nuisance money indefinitely,[26] and that it creates the possibility that actively producing mineral rights will be lost through an inadvertent failure to record a notice of intent to preserve the mineral rights.

In addition to the two basic models, there are numerous variants and combinations of the two.[27] California has enacted a statute to enable termination of surface entry rights under a 20-year old oil and gas lease in certain counties where this will not adversely affect the operations of the oil and gas lessee.[28]

Of the various available alternatives, the Law Revision Commission recommends as most sound in practice and theory a statute that provides for termination of mineral rights after the passage of 20 years if the holder of the mineral rights fails to record within that time a notice of intent to preserve the mineral rights. To protect the interests of a person who through inadvertence fails to record, the statute should make clear that only mineral rights that have been dormant for at least one year may be terminated. This will assure that active mineral interests are protected, but will not place an undue burden on marketability or the ability of a title insurer to determine dormancy easily and accurately. In addition, there should be a five-year grace period for owners of

25. See, e.g., Ind. Code Ann. § 56-1104 (19__); Minn. Stat. Ann. 541.023 (19__). The rights of a person in possession would not be affected.

26. See discussion in Willemsen, Improving California's Quiet Title Laws, 21 Hastings L.J. 835, 860 (1970).

27. See, e.g., Mich. Stat. Ann. 26.1163(1)-(4) (19__).

28. 1971 Cal. Stats. ch. 1586, § 1, p. 3200, now codified as Code Civ. Proc. §§ 772.010-772.060.

mineral rights to record a notice of intent to preserve rights that would be immediately or within a short period affected by enactment of the statute. The combination of these protections will help ensure the constitutionality of the statute.[29]

Because titles in California have been clouded over the years on a mass basis by reservation of mineral rights, such a statute will enable the clearing of title records on a mass basis. Similar statutes have been criticized on the ground that the major holders of mineral interests will be unlikely to let their interests lapse by failure to record, thereby rendering a rerecording statute ineffective.[30] The Commission believes that a person who desires to preserve a valid mineral interest and who takes active steps to preserve the interest by recording should be permitted to do so. This should not preclude abandonment of dormant mineral rights, however, and the statute should should also make clear that all mineral rights, not just oil and gas rights, are subject to abandonment.

Unexercised Options

Civil Code Section 1213.5 provides that an unexercised option to purchase real property that has been recorded remains a cloud on the title to the property for one year after the option expires according to its terms or by operation of law.[1] An unexercised option that provides no expiration date according to its terms expires by operation of law within a reasonable time after it is executed.[2]

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29. Compare Von Slooten v. Larson, 299 N.W.2d 704 (Mich. 1980) (statute constitutional) and Short v. Texaco Inc., 406 N.E.2d 625 (Ind. 1980) (hearing granted 68 L. Ed.2d 192 (1981) (statute constitutional) with Chicago & Northwestern Transportation Co. v. Pedderson, 259 N.W.2d 316 (Wisc. 1977) (statute unconstitutional), Wheelock v. Heath, 272 N.W.2d 768 (Nev. 1978) (statute unconstitutional), Wilson v. Bishop, 412 N.E.2d 522 (Ill. 1980) (statute unconstitutional), and Contos v. Herbst, 278 N.W.2d 723 (Minn. 1979) (statute unconstitutional). Cf. Donlan v. Weaver, 118 Cal. App.3d 675, ___ Cal. Rptr. ___ (1981).

30. See, e.g, discussion in Comment, The Oil and Gas Profit A Prendre: What Effect on California Land?, 2 Loy. U.L. Rev. 136, 143 (1969).

1. See discussion in Review of Selected 1965 Code Legislation 53-54 (Cal. Cont. Ed. Bar 1965).

2. See 1 B. Witkin, Summary of California Law, Contracts § 129 (8th ed. 1973).

The one-year cloud on title after expiration of an unexercised option unduly impairs the marketability of real property. The property owner may seek to minimize the effect of the cloud on title in a number of ways, none of which is satisfactory. Title may be cleared by obtaining a quitclaim deed from the option holder; however, this is not always possible. A quiet title action is available within the one-year period; but such an action is time-consuming and costly. An effort to shorten or eliminate the one-year cloud by the terms of the option itself is problematical.[3]

The apparent function of the one-year cloud after expiration of an option is to allow the option holder sufficient time to record an exercise or extension of the option that occurs at the end of the term of the option.[4] For this purpose one year is excessive; six months should be sufficient.[5] Civil Code Section 1213.5 should be revised to provide that the cloud on title of an unexercised option to purchase real property lasts for six months after the option expires according to its terms.

If the option does not by its terms provide an expiration date, the option should expire for purposes of notice to third parties six months after it is recorded.[6] This will avoid the need for a court determination of the date of expiration and will enable the option holder to be aware of the exact time when notice of exercise or extension of the option must be recorded. The provision will enhance the marketability of property if notice of exercise or extension is not recorded within the statutory period by removing the cloud on title simply by the passage of time without need for resort to judicial proceedings.

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3. See discussion in Moore & Sturhahn, Options, California Real Estate Sales Transactions § 7.42 (Cal. Cont. Ed. Bar 1967).

4. Civil Code Section 1213.5 is drawn from the Model Act Concerning Option Contracts as Notice, L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 197 (1960). Simes and Taylor in their discussion of the Model Act do not justify the one-year cloud.

5. New York has adopted an even shorter period. See N.Y., Real Prop. L. § 294 (McKinney's _____) (30 days).

6. The Uniform Simplification of Land Transfers Act (1977) has adopted this rule. Section 3-206. See also Conn. G.S.A. § 47-33a (19__) (18 months); Ala. Code 1975 § 35-4-76 (19__) (2 years).

Rights of Entry and Possibilities of Reverter

Introduction

California recognizes three types of future interest in a grantor of property--the reversion following a grant of an estate less than fee and the possibility of reverter and the right of entry for condition broken following a grant of a fee estate.

The grantor has a reversion following the grant of an estate less than fee that commences in possession upon the termination of the estate granted.[1] Thus, for example, the grant of a life estate or a term of years creates a reversion in the grantor upon the termination of the estate or term.[2]

If an estate is granted in fee but the duration of the estate is subject to a special limitation, a fee simple determinable is created; the grantor retains a possibility of reverter. When the event that limits the duration of the estate occurs, the estate terminates and there is a reversion to the grantor. The reversionary interest is called a possibility of reverter because the event upon which the limitation depends may never occur.[3] No particular words are required to create this estate, but it is necessary that the language show that the grantor intended that the fee estate automatically expires on the occurrence of the event.[4]

If an estate is granted in fee subject to a condition subsequent, the grantor is said to retain a right of entry upon breach of the condition. Exercise of the right of entry terminates the fee simple, hence the right of entry is sometimes classified as a power of termination rather than a reversionary interest.[5] It is distinguished from the possibility of reverter by the fact that it is not a limitation upon the

1. Civil Code § 768.

2. 3 B. Witkin, Summary of California Law Real Property § 242, at ___ (8th ed. 1973).

3. Alamo School Dist. v. Jones, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

4. McDougall v. Palo Alto Unified School Dist., 212 Cal. App.2d 422, 28 Cal. Rptr. 37 (1963).

5. Parry v. Berkeley Hall School Foundation, 10 Cal.2d 422, 74 P.2d 738 (1937).

estate granted--not a measure of its duration--but a condition upon the occurrence of which the granted estate could be cut off by entry of the grantor.[6]

Whether particular language in a grant creates a possibility of reverter or a right of entry is a fine point. A classic example is that a conveyance in fee simple "until St. Paul's falls" or "as long as St. Paul's stands" creates a fee simple determinable with possibility of reverter, whereas a conveyance in fee simple "upon condition that, if St. Paul's falls, the estate shall terminate" creates a fee simple on condition subsequent with right of entry for condition broken.[7] In doubtful cases the preferred construction, consistent with the general disfavor of forfeitures, is for a fee simple on condition subsequent (which requires an act by the grantor to terminate) rather than a fee simple determinable (which ends on the happening of the event without any act by the grantor).[8] The possibility of reverter is recognized only where there is no ambiguity and no doubt as to the intent of the creating instrument.[9]

Comparison of Right of Entry with Possibility of Reverter

The right of entry and the possibility of reverter are closely related reversionary interests distinguished primarily by technicalities in the wording of the creating instrument. The two interests are so similar in effect that there is no substantial difference between the two for most purposes.[10] In fact it was not certain until the end of the nineteenth century that American law included the possibility of reverter, and California recognized this interest only in the twentieth century.[11]

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6. Alamo School Dist. v. Jones, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

7. Id.

8. Civil Code § 1442; 3 B. Witkin, Summary of California Law Real Property § 189, at ___ (8th ed. 1973).

9. 2 H. Miller & M. Starr, Current Law of California Real Estate §§ 15:6, 15:18 (rev. 1977).

10. Dunham, Possibilities of Reverter and Powers of Termination--Fraternal or Identical Twins?, 20 U. Chi. L. Rev. 215 (1953).

11. Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962 (1935); Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849 (1937). See discussion in Ferrier, Determinable Fees and Fees Upon Conditions in California, 24 Calif. L. Rev. 512 (1936).

The critical difference between the right of entry and the possibility of reverter is that a right of entry requires an act of the holder of the right in order to terminate the preceding fee estate, whereas a possibility of reverter terminates the preceding fee estate automatically. The practical implications of this distinction between the effect of a right of entry and a possibility of reverter are not clear, however.

Although technically a right of entry permits the holder of the right to take possession, the holder must exercise the right by giving notice and making demand.[12] Upon exercise of the right of entry the fee owner must reconvey the property by grant deed, acknowledged for recording.[13] If the fee owner does not reconvey or give up possession, exercise must be made effective by action for possession or to quiet title;[14] actual entry on the land is unnecessary.[15] The basic five-year statute of limitation apparently applies to the action.[16] However, it has been stated that the statute of limitation does not apply and the person entitled to enforcement has a "reasonable time" within which to exercise the right of entry.[17]

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12. Civil Code § 791 (reentry may be made after right has accrued, upon three days' notice); see also Civil Code § 793 (action for possession may be maintained after right to reenter has accrued without notice).

13. Civil Code § 1109.

14. Lincoln v. Narom, 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970); 4 H. Miller & M. Starr, Current Law of California Real Estate § 25.22 (rev. 1977).

15. Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935 (1915); Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 294 (1962); 2 A. Bowman, Ogden's Revised California Real Property Law § 23.18 (1975).

16. Code Civ. Proc. §§ 319-320; 2 A. Bowman, Ogden's Revised California Real Property Law § 23.32 (1975).

17. Lincoln v. Narom Development Co., 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970); 3 B. Witkin, Summary of California Law Real Property § 188, at ___ (8th ed. 1973); 2 H. Miller & M. Starr, Current Law of California Real Estate § 15:5 (rev. 1977). This rule appears to be based upon a waiver theory. See, e.g., City of Santa Monica v. Jones, 104 Cal. App.2d 463, 232 P.2d 55 (1951); Goodman v. Southern Pacific Co., 143 Cal. App.2d 424, 299 P.2d 321 (1956).

Likewise, although a possibility of reverter is said to take effect automatically, as a practical matter a judicial proceeding is necessary to make it effective.[18] The basic five-year statute also apparently applies to an action to enforce a possibility of reverter.[19] At least, it seems likely that, absent litigation by the holder of the reverter, the person in possession of the property will take title after five years by adverse possession.[20] However, there are no California cases on this point. In one case the holders of a possibility of reverter were allowed to establish their title 19 years after the reversion, without discussion of the statute of limitation.[21]

Abolition of Possibility of Reverter

The possibility of reverter is an unnecessary estate in property law. It serves the same functions as the right of entry and there is no practical difference of any substance between the two. Whether an instrument creates a possibility of reverter or a right of entry is determined by technicalities in the language creating the interest, and there is a strong constructional preference for a right of entry. The possibility of reverter is disfavored in the law because of its automatic forfeiture features and only recently has been given legal recognition. Application of statutes of limitation to it is uncertain, and it cannot be ascertained from the record whether a forfeiture may have occurred in the remote past. The interest has been severely criticized and its abolition advocated.[22] "The inevitable conclusion is that the law is

18. See discussion in MacEllven, Private Restrictions and Controls, in California Land Security and Development § 24.13 (Cal. Cont. Ed. Bar 1960).

19. Cf. 2 A. Bowman, Ogden's Revised California Real Property Law § 23.25 (1975) (no distinction made); Highland Realty Co. v. City of San Rafael, 46 Cal.2d 669, 298 P.2d 15 (1956) (statutory reverter).

20. Dunham, Possibility of Reverter and Powers of Termination--Fraternal or Identical Twins?, 20 U. Chi. L. Rev. 215, 229 (1953).

21. McDougall v. Palo Alto Unified School Dist., 212 Cal. App.2d 422, 28 Cal. Rptr. 37 (1963).

22. 2 H. Miller & M. Starr, Current Law of California Real Estate § 15:5 (rev. 1977); Ferrier, Determinable Fees and Fees Upon Conditions Subsequent in California, 24 Calif. L. Rev. 512 (1936).

needlessly complicated, and that the concept more consistent with modern practice should alone survive, namely, the power of termination or right of entry."[23]

The Law Revision Commission recommends that the fee simple determinable with possibility of reverter should be abolished by statute in California.[24] At least one other jurisdiction--Kentucky--has done this.[25] An existing fee simple determinable with possibility of reverter should be deemed to be, and should be enforceable as, a fee simple subject to condition subsequent with power of termination.[26] This will not make a substantial change in practice, but it will make the record more reliable and simplify the law of property and future interests.

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23. Blawie, A Study of the Present Law of Property and Conveyancing in California with Critical Analysis and Suggestions for Change 21 (unpublished study prepared for California Law Revision Commission 1979).

24. Cf. Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Calif. L. Rev. 1, 6 (1932) ("Legislation is desirable to remove the existing uncertainty as to determinable fees and possibilities of reverter.").

25. Ky. Acts 1960, ch. 167, § 4, effective June 16, 1960 (Ky. Rev. Stats. § 381.218 (Baldwin 1969)):

> The estate known at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished. Words which at common law would create a fee simple determinable shall be construed to create a fee simple subject to a right of entry for condition broken. In any case where a person would have a possibility of reverter at common law, he shall have a right of entry.

See Dukeminier, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 2, 71-75 (1960). See also N.Y. Real Prop. Actions and Proceedings Law § 1953 (McKinney ____) (possibility of reverter enforceable only by civil action).

26. A right of entry arising from the breach of a condition is more accurately described as, and is often called, a power of termination. Parry v. Berkeley Hall School Foundation, 10 Cal.2d 422, 74 P.2d 738 (1937); Santa Monica v. Jones, 104 Cal. App.2d 463, 232 P.2d 55 (1951); 3 B. Witkin, Summary of California Law Real Property § 244, at ___ (8th ed. 1973); 2 H. Miller & M. Starr, Current Law of California Real Estate § 15:18 (rev. 1977).

Enforcement of Powers of Termination

The doctrine that the law abhors a forfeiture is commonly applied by California courts to the divesting of ownership by rights of entry and possibilities of reverter.[27] This attitude has been manifested in three ways: (1) The courts have construed reversionary language to create a covenant or as mere surplusage;[28] "no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction."[29] (2) The courts have construed the scope of the condition or limitation narrowly, thus reaching the conclusion that no breach has occurred.[30] (3) The courts have found that, although there is a condition and it has been broken, the grantor is barred from enforcing a forfeiture because of waiver or estoppel,[31] changed circumstances,[32] or other equitable defenses.[33]

The legal restraints on enforcement of rights of entry and possibilities of reverter in California are so pronounced that several commentators have suggested that forfeitures be statutorily precluded altogether.[34]

27. See generally discussion in Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 298-301 (1962).

28. See, e.g., discussion and cases cited in 3 B. Witkin, Summary of California Law Real Property § 187, at ___ (8th ed. 1973).

29. Hawley v. Dafitz, 148 Cal. 393, 394, 83 P. 248, 249 (1905).

30. Civil Code § 1442 ("A condition involving a forfeiture must be strictly interpreted against the person for whose benefit it is created."). See, e.g., discussion and cases cited in 4 H. Miller & M. Starr, Current Law of California Real Estate § 25:23-25 (rev. 1977).

31. See discussion of "Statute of Limitation," below.

32. See discussion of "Obsolete Powers of Termination," below.

33. See, e.g., discussion and cases cited in 2 A. Bowman, Ogden's Revised California Real Property Law §§ 23.29-23.34 (1975).

34. Ferrier, Determinable Fees and Fees Upon Conditions Subsequent in California, 24 Calif. L. Rev. 512, 518 (1936) ("The detriment from their retention would seem definitely to outweigh the gain."). This author would make an exception for grants without consideration for public or charitable purposes and for grants in the nature of oil and gas leases. See also Note, 42 Calif. L. Rev. 194 (1954) (conditional restrictions for land use should be discontinued in favor of covenants).

A right of entry or possibility of reverter would be treated as a restrictive covenant rather than as a power of termination and would be enforceable not by forfeiture but by injunction or damages.[35]

Where the purpose of the power of termination is to enforce a land use restriction such as uniform subdivision lot limitations, treatment as a restrictive covenant is appropriate.[36] However, powers of termination also enforce other types of land use restrictions (typically limitations on use for public or charitable purposes) and non-land use restrictions (such as family or estate planning purposes). For these functions, a conditional gift may be precisely what is intended and what is necessary to effectuate the purposes of the grant; injunctive or damage relief would be inappropriate. It is possible that these functions could also be achieved to a certain extent by use of a trust device. However, the availability of powers of termination provides desirable flexibility in the law. The Law Revision Commission recommends that the power of termination continue to be recognized as an enforceable interest in real property, subject to current strict rules of construction and interpretation.[37]

Duration of Powers of Termination

Rights of entry and possibilities of reverter seriously impair marketability of property. They restrain alienability and sometimes the economic use of property as well, and because their violation involves a forfeiture of the property they may be particularly burdensome.[38]

35. Cf. N.Y., Real Prop. Actions and Proc. Law § 1953 (McKinney ___) (similar scheme).

36. This is the conclusion of Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293 (1962).

37. The law should also make clear that a power of termination is not enforceable by possession but only by notice or civil action. This is consistent with Civil Code Sections 791 (notice) and 793 (action for possession). See also Jordan v. Talbot, 55 Cal.2d. 579, 361 P.2d 20, 12 Cal. Rptr. 488 (1961) (right of entry in lease).

38. See, e.g., discussion in Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Calif. L. Rev. 1 (1932); Ferrier, Determinable Fees and Fees Upon Conditions Subsequent in California, 24 Calif. L. Rev. 512, 518 (1936) ("Conditions subsequent imposed upon ownership in fee render titles both technically and practically unmarketable and make it difficult to borrow money on mortgage security.").

These problems are aggravated by the fact that there is no limitation on the duration of rights of entry and possibilities of reverter as there is on other future interests in property. Because reversionary interests are considered to be "vested," the Rule Against Perpetuities does not apply.[39] This feature, combined with the fact that these interests appear to be devisable and descendable,[40] can result in dispersion of rights of entry and possibilities of reverter among unknown or unavailable owners. A person seeking to assemble a marketable title to the property may find that the interests have considerable nuisance value or that it is impossible to obtain quitclaim deeds from all owners of the interests.[41]

The cases holding that the Rule Against Perpetuities does not apply to possibilities of reverter and rights of entry have been severely criticized.[42] Legal scholars generally concur that in order to relieve the marketability problems created by rights of entry and possibilities of reverter, legislation limiting their duration is necessary.[43] A number of jurisdictions have enacted such legislation, ranging from application of the Rule Against Perpetuities, to rerecording requirements, to maximum time limits for enforcement.[44]

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39. Strong v. Shatto, 45 Cal. App. 29, 187 P. 159 (1919); 3 B. Witkin, Summary of California Law Real Property § 306, at ___ (8th ed. 1973); Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 306 (1962).

40. Civil Code § 699 (future interests pass by succession, will, and transfer); Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047 (1917); Victoria Hospital Assn. v. All Persons, 169 Cal. 455, 147 P. 124 (1915). See also discussion in Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Calif. L. Rev. 1 (1932).

41. See discussion in Williams, Restrictions on Use of Land: Conditions Subsequent and Determinable Fees, 27 Tex. L. Rev. 158 (1958); Webster, The Quest for Clear Land Titles--Whither Possibilities of Reverter and Rights of Entry?, 42 N.C.L. Rev. 807 (1964); Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings, L.J. 293, 307 (1962).

42. See discussion in Alamo School Dist. v. Jones, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

43. See discussion in Basye, Clearing Land Titles § 143 (2d ed. 1970); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 201 (1960).

44. Id.

Although application of the Rule Against Perpetuities to possibilities of reverter and rights of entry has been suggested for California,[45] this is not an ideal means of limiting their duration.[46] The Rule is indiscriminate in its application to all interests, whether for land use, public, family, estate planning, or other purposes.[47] The Rule is complex and intricate, and is not easily applied in many situations.[48] Because it makes reference to a "life in being," it is not satisfactory for title examination and insurance purposes based on the record.[49] Moreover, since most rights of entry and possibilities of reverter make no reference to a life in being, the operative limitation in the Rule is 21 years, which may be an unduly short limitation period.[50] And the Rule is harsh in effect, voiding rather than limiting the duration of offending interests.[51]

Most of the modern reverter acts speak in terms of fixed periods of duration for possibilities of reverter and rights of entry.[52] Typical

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45. Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Calif. L. Rev. 1 (1932).

46. See discussion in L. Simes § C. Taylor, The Improvement of Conveyancing by Legislation 203-204 (1960).

47. An important exception to the Rule is for "eleemosynary" purposes. Civil Code § 715.

48. See, e.g., Lucas v. Hamm, 56 Cal.2d 583, 592, 364 P.2d 685, ___, 15 Cal. Rptr. 821, ___ (1961) ("Of the California law on perpetuities and restraints it has been said that few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman; that members of the bar, probate courts, and title insurance companies make errors in these matters; that the code provisions adopted in 1872 created a situation worse than if the matter had been left to the common law . . . .").

49. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 2.43 (1974).

50. The California Rule also provides an alternate vesting period of 60 years. Civil Code § 715.6.

51. Civil Code § 715.2.

52. See discussion in P. Basye, Clearing Land Titles § 143 (2d ed. 1970) and L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 205-213 (1960).

statutes limit the duration of possibilities of reverter and rights of entry to 30 years.[53] These statutes are based on the same policy as the Rule Against Perpetuities--the public has an interest in free marketability and use of property and in limiting the restricting influence of the "dead hand" to no more than one generation in the future.[54]

The policy in favor of free alienability of property must be weighed against the policy of enabling long-term control of land use, whether for public, charitable, environmental, residential, estate planning, or other purposes.[55] In balancing these policies the Law Revision Commission has concluded that it is desirable to statutorily limit the duration of possibilities of reverter and rights of entry (which should be treated together as powers of termination) but also to permit extension of the period of duration.

The power of termination should expire after a period of 30 years unless within that time the holder of the power extends the period by recording a notice of intent to preserve the power; an extension should be good for 30 years at a time.[56] There should be a five-year grace period for holders of powers of termination to record a notice of intent to preserve powers that would be immediately or within a short period affected by enactment of the statute.

This scheme will ensure that only those powers of termination will burden property for an extended period that a person has an active interest in preserving. It will also keep record ownership of the power current and help in ascertaining current holders of the power. The

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53. See, e.g., Model Act Limiting the Duration of Rights of Entry and Possibilities of Reverter (1960).

54. See, e.g., discussion in Webster, The Quest for Clear Land Titles--Whither Possibilities of Reverter and Rights of Entry?, 42 N.C.L. Rev. 807 (1964).

55. Cf. Civil Code §§ 815-816 (conservation easements). The proposed limitation on the duration of powers of termination would not affect conservation easements that take the form of powers of termination and are perpetual in duration pursuant to Civil Code Section 815.2.

56. Other jurisdictions have similar schemes with differing time periods. See, e.g., New York, Massachusetts, and Iowa. N.Y., McKinney's Real Prop. Actions and Proc. Law § ____ (McKinney ____); Mass. G.L.A. c. 184 §§ 23, 26-30 (___); Ia. C.A. § 614.24-614.25 (___). This is also the pattern of Section 3-409 of the Uniform Simplification of Land Transfers Act (1977).

scheme has the additional virtue of minimizing potential problems of constitutionality inherent in applying an absolute limitation on powers without the option of extension.[57]

Obsolete Powers of Termination

If the restriction that a right of entry or possibility of reverter is designed to enforce becomes obsolete, the reversionary interest operates as a clog on title. So long as the restriction is reasonable, marketability of the property is not seriously impaired; but when the restriction becomes unreasonable, it is objectionable and marketability is hampered.

California case law has applied the doctrine of changed circumstances to obsolete rights of entry[58] and presumably would do likewise were a case involving a possibility of reverter to arise.[59] For example, the courts will refuse to enforce a right of entry by forfeiture of title where, through change in character of the neighborhood, the purpose of the condition is no longer attainable.[60] The doctrine of changed circumstances precludes enforcement of outmoded restrictions in order to prevent title from being encumbered perpetually.[61]

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57. Compare Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975) (rerecording statute constitutional) with Board of Education of Central School Dist. No. 1 v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965) (rerecording statute unconstitutional). See also Biltmore Village v. Royal, 71 So.2d 727 (Fla. 1954) (absolute limitation unconstitutional); Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955) (absolute limitation constitutional); Hiddleston v. Nebraska Jewish Education Society, 186 Neb. 786, 186 N.W.2d 904 (1971) (absolute limitation constitutional); Housing and Redevelopment Authority of South St. Paul v. United Stockyards Corp., 244 N.W.2d 275 (Minn. 1976) (absolute limitation constitutional); Cline v. Johnson County Board of Education, 584 S.W.2d 507 (Ky. 1977) (combination scheme constitutional).

58. See, e.g., Townsend v. Allen, 114 Cal. App.2d 291, 250 P.2d 292 (1952); Wedum-Aldahl Co. v. Miller, 18 Cal. App.2d 745, 64 P.2d 762 (1937); Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932).

59. See discussion in Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 307-309 (1962).

60. See, e.g., Forman v. Hancock, 3 Cal. App.2d 291, 39 P.2d 249 (1934); see discussion in 2 A. Bowman, Ogden's Revised California Real Property Law § 23.33 (1975).

61. See discussion in 4 H. Miller & M. Starr, Current Law of California Real Estate § 25:25 (rev. 1977).

This rule is sound, and legal scholars have recommended that it be statutorily recognized.[62] The Law Revision Commission recommends that application of the rule of changed conditions to rights of entry be codified and extended by statute to possibilities of reverter, the two interests being treated together as powers of termination.[63] Although this will not permit clearing the record of obsolete powers by operation of law, it will make clear that obsolete powers of all types may be terminated by judicial action.[64] Thus the fee owner will be able to extinguish a power of termination when enforcement is no longer of such substantial benefit to the holder to warrant the continued impairment of practical and valuable uses of the property and the consequential injury to its utilization and marketability.[65]

Statute of Limitation

Existing law governing the limitation period applicable to exercise of a right of entry or a possibility of reverter is not clear.[66] The law governing the power of termination, which will replace the right of entry and the possibility of reverter, should be made clear. The ordinary five-year statute of limitation applicable to other actions concerning title to or possession of real property is appropriate for powers of termination.[67] In order that the cloud of a recorded power of termination not continue for an undue length of time, exercise of the power of

62. See, e.g., Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Calif. L. Rev. 1, 8-9 (1932).

63. New York has such a provision. See N.Y., Real Prop. Actions and Proc. Law § 1951 (McKinney ___). See also, Ariz. Rev. Stat. § 33-436 (___); Mich. Stat. Ann. § 26.46 (___); Minn. Stat. Ann. § 500.20(1) (___); Wis. Stat. § 230.46 (___) (nominal conditions or conditions of no substantial or actual benefit may not be enforced).

64. See discussion in L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 206-208 (1960).

65. Webster, The Quest for Clear Land Titles--Whither Possibilities of Reverter and Rights of Entry?, 42 N.C.L. Rev. 807, 838-839 (1964).

66. See "Comparison of Right of Entry with Possibility of Reverter," above.

67. Code Civ. Proc. §§ 319-320.

termination within the statutory period should be recorded or the power expires of record.[68] Clarification of the statutory limitation period would not affect the general principles that the holder of the power of termination can waive the power or be estopped from exercising the power by failure to timely pursue the remedy.[69]

Unperformed Real Property Sales Contracts

Contracts for sale of real property are of two general types.[1] An agreement for sale (sometimes known as an "earnest money," or "deposit receipt" contract) is ordinarily to be performed within a relatively short period and results in a transfer of title.[2] An installment land contract[3] is ordinarily to be performed over a longer period and is a type of security device as well as an agreement of sale.[4]

Either type of real property sale contract may be recorded,[5] and recordation has the effect of clouding title. If a buyer defaults, the buyer more often than not fails to execute a release or reconveyance to

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68. The statutory period for expiration of record would not be extended by tolling or for any other reason than a recorded extension. Apparently, existing practice is to ignore the possibility of tolling. See 2 A. Bowman, Ogden's Revised California Real Property Law § 23.25 (1975).

69. See, e.g., Santa Monica v. Jones, 104 Cal. App.2d 463, 232 P.2d 55 (1951) (waiver); Wedum-Aldahl Co. v. Miller, 18 Cal. App.2d 745, 64 P.2d 762 (1937) (waiver or estoppel); Hanna v. Rodeo-Vallejo Ferry Co., 89 Cal. App. 462, 265 P. 287 (1928) (waiver or estoppel).

1. See, e.g., discussion in Bernhardt, Liability for Breach, in California Real Estate Sales Transactions §§ 11.45-11.46 (Cal. Cont. Ed. Bar 1967); Hetland, Land Contracts, in California Real Estate Secured Transactions § 3.59 (Cal. Cont. Ed. Bar 1970).

2. See, e.g., discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 11.4 (1974).

3. See also Civil Code § 2985 (real property sales contracts).

4. See, e.g., discussion in 3 B. Witkin, Summary of California Law Security Transactions in Real Property § 21 (8th ed. 1973). The installment land contract acquired considerable popularity during the early 1970's when it was perceived as circumventing the consequences of a due-on clause in a deed of trust. It was also widely employed in the early 1960's and before then as an inexpensive and expedient financing vehicle. R. Bernhardt, California Mortgage and Deed of Trust Practice § 1.7 (Cal. Cont. Ed. Bar 1979).

5. Gov't Code §§ 27280, 27288.

clear the title. The unreleased contract for sale of the real property continues to impair title and renders the property unmarketable and uninsurable until it is eliminated by a release from the buyer or by quiet title proceedings.[6]

The magnitude of this problem is not clear. It is said that real property sale contracts are commonly recorded.[7] However, it has also been suggested that because real property sale contracts ordinarily are not acknowledged, they will not be recorded and thus not cloud title.[8]

If the seller under a real property sales contract wishes to record, acknowledgment by the buyer is unnecessary.[9] If the buyer wishes to record, a number of means to obtain recordation are available.[10] It is ordinarily in the best interest of the buyer under an installment land contract to record.[11] It is less important to record an agreement of sale because it is of relatively short duration.[12]

In any event, it appears that there are many unreleased real property sale contracts in the records that impair marketability of property.[13] Title is not cleared automatically by operation of the statute of limitation by the passage of four years after the date for performance of the contract.[14] The statute of limitation does not run against a buyer in

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6. 1 A. Bowman, Ogden's Revised California Real Property Law § 11.27 (1974).

7. L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 152 (1960).

8. See J. Hetland, Secured Real Estate Transactions § 2.5 (Cal. Cont. Ed. Bar 1974).

9. Gov't Code § 27288.

10. See, e.g., Bernhardt, Liability for Breach, in California Real Estate Sales Transactions § 11.72 (Cal. Cont. Ed. Bar 1967); Hetland, Land Contracts, in California Land Security and Development § 2.17 (Cal. Cont. Ed. Bar 1960).

11. 1 (Pt. 1) H. Miller & M. Starr, Current Law of California Real Estate § 2:39 (rev. 1975).

12. This is particularly true where marketable title and title insurance are conditions of the contract.

13. P. Basye, Clearing Land Titles § 132 (2d ed. 1970).

14. The statute of limitation for enforcement of a land sale contract is four years. Code Civ. Proc. § 337(1). See also Stafford v. Ballinger, 199 Cal. App.2d 289, 18 Cal. Rptr. 568 (1962); Bernhardt, Liability for Breach, in California Real Estate Sales Transactions § 11.38 (Cal. Cont. Ed. Bar 1967).

possession[15] and there may be other events that do not appear of record but that toll the operation of the statute.[16]

Property that is subject to a contract of sale is unmarketable because the current status of the contract can be determined only by reference to facts outside the record. A means should be provided to enable clearing of an unperformed land sale contract from record title by operation of law, without need for quiet title proceedings or a release from the buyer.[17] An ideal statute for this purpose should first eliminate any extensions of time for performance by facts outside the record, and then should declare the seller's title marketable after expiration of a stated period of time.[18]

The Law Revision Commission recommends that the cloud on title of an unperformed real property sale contract be eliminated by passage of five years after the time for performance of the contract unless waived or extended of record.[19] The five-year period allows for the running of the statute of limitation plus an additional year for possible extenuating circumstances and is consistent with the general five-year statutes of limitation for real property actions.[20] This recommendation would not affect the ability of the seller to clear title before the passage of five years by a quiet title action or by obtaining a release from the buyer.

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15. See, e.g., Kidd v. Kidd, 61 Cal.2d 479, 393 P.2d 403, 39 Cal. Rptr. 203 (1964).

16. See L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 153 (1960) and P. Basye, Clearing Land Titles § 132 (2d ed. 1970).

17. A requirement should also be added to the law that the buyer must execute a release upon breach of the contract.

18. Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960).

19. The recommended legislation would only eliminate the cloud on title as it affects third parties; it would not alter the rights and obligations of the buyer and seller as between each other.

20. Code Civ. Proc. §§ 318-320. Cf. Uniform Simplification of Land Transfers Act (1977) § 3-206 (6 months).

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Title 5 (commencing with Section 880.020) to Part 2 of Division 2 of, and to repeal Section 1213.5 of, the Civil Code, relating to, real property.

The people of the State of California do enact as follows:

401/752

Civil Code §§ 880.020-886.040 (added)

SECTION 1. Title 5 (commencing with Section 880.020) is added to Part 2 of Division 2 of the Civil Code, to read:

TITLE 5. MARKETABLE RECORD TITLE

CHAPTER 1. GENERAL PROVISIONS

Article 1. Construction

§ 880.020. Declaration of policy and purposes

880.020. (a) The Legislature declares as public policy that:

(1) Real property is a basic resource of the people of the state and should be made freely alienable and marketable to the extent practicable.

(2) Interests in real property and defects in titles created at remote times, whether or not of record, often constitute unreasonable restraints on alienation and marketability of real property.

(3) Such interests and defects produce litigation to clear and quiet titles, cause delays in real property title transactions, and hinder marketability of real property.

(4) Real property title transactions should be possible with economy and expediency. The status and security of recorded real property titles should be determinable to the extent practicable from an examination of recent records only.

(b) It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of public policy by enabling persons to rely on record title to the extent provided in this title, subject only to the limitations expressly provided in this title and notwithstanding any provision or implication

to the contrary in any other statute or in the common law. This title shall be liberally construed to effect the legislative purpose.

Comment. Subdivision (a) of Section 880.020 is drawn from North Carolina marketable title legislation, N.C. Gen. Stat. § 47B-1 (19__). The declaration of public policy is intended to demonstrate the significance of the state interest served by this title and the importance of the retroactive application of the law to the effectuation of that interest. See In re Marriage of Bouquet, 16 Cal.3d 583, 592, 546 P.2d 1371, ____, 128 Cal. Rptr. 427, ____ (1976) (upholding changes in the community property laws as retroactively applied).

A statute may require recordation of previously executed instruments if a reasonable time is allowed for recordation. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 10.4, at 415-16 (1974). The burden on holders of old interests of recording a notice of intent to preserve is outweighed by the public good of more secure land transactions. See, e.g., Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 800, 825 (1957) (upholding Minnesota marketable title legislation):

> A number of marketable title acts have been passed by various states. Such limiting statutes are considered vital to all who are engaged in or concerned with the conveyance of real property. They proceed upon the theory that the economic advantages of being able to pass uncluttered title to land far outweigh any value which the outdated restrictions may have for the person in whose favor they operate. These statutes reflect the appraisal of state legislatures of the 'actual economic significance of these interests weighed against the inconvenience and expense caused by their continued existence for unlimited periods without regard to altered circumstances.' . . . They must be construed in the light of the public good in terms of more secure land transactions which outweighs the burden and risk imposed upon owners of old outstanding rights to record their interests.

Subdivision (b) is drawn from Section 9 of the Model Marketable Title Act. If the application of a particular statute or common law rule conflicts with the provisions of this title, this title governs.

404/083

§ 880.030. Effect on other law

880.030. Nothing in this title shall be construed to:

(a) Limit application of the principles of waiver and estoppel, laches, and other equitable principles.

(b) Affect the operation of any statute governing the effect of recording or failure to record, except as specifically provided in this title.

Comment. Subdivision (a) of Section 880.030 is new; notwithstanding the maximum record duration or period of enforceability of interests in property pursuant to this title, the owner of an interest may waive or

be estopped from asserting the interest within the prescribed time, or other equitable defenses may apply. Subdivision (b) is drawn from Section 7 of the Model Marketable Title Act.

404/087

Article 2. Application of Title

§ 880.240. Interests excepted from title

880.240. The following interests are not subject to expiration or expiration of record pursuant to this title:

(a) The interest of a person using or occupying real property and the interest of a person under whom a person using or occupying real property claims, to the extent the use or occupancy would have been revealed by reasonable inspection or inquiry.

(b) An interest of the United States or pursuant to federal law in real property that is not subjected by federal law to the recording requirements of the state and that has not terminated under federal law.

(c) An interest of the state or a local public entity in real property.

(d) A conservation easement pursuant to Chapter 4 (commencing with Section 815) of Title 2.

Comment. Subdivision (a) of Section 880.240 is drawn from Section 3-306(2) of the Uniform Simplification of Land Transfers Act (1977). Subdivision (a) makes clear that if a person in possession claims under another person, whether by lease, license, or otherwise, the interest of the other person does not expire.

Subdivision (b) is drawn from Section 6 of the Model Marketable Title Act and Section 3-306(4) of the Uniform Act. The Comment to the Model Act states, "The exception as to claims of the United States would probably exist whether stated in the statute or not."

Subdivision (c) is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation.

Subdivision (d) recognizes that a conservation easement may be created that is perpetual in duration. Section 815.2.

404/124

§ 880.250. Relation of title to statutes of limitation

880.250. (a) The times prescribed in this title for expiration or expiration of record of an interest in real property or for enforcement, for bringing an action, or for doing any other required act are absolute and apply notwithstanding any disability or lack of knowledge of any

person or any provisions for tolling a statute of limitation and notwithstanding any longer time applicable pursuant to any statute of limitation.

(b) Nothing in this title extends the period for enforcement, for bringing an action, or for doing any other required act, or revives an interest in real property that has expired and is unenforceable, pursuant to any applicable statute of limitation.

Comment. Subdivision (a) of Section 880.250 makes clear that there can be no off-record waivers, extensions, or tolling of the expiration time for, or enforceability of, an interest in real property pursuant to this title. While off-record waivers, extensions, or tolling (including partial payments in the case of a mortgage or deed of trust) may be effective for purposes of general statutes of limitation, they cannot extend the duration or enforceability of an interest past the times prescribed in this title. Whether a recorded waiver, extension, or tolling is effective depends upon the statute governing the particular interest. Compare Section 882.020 (waiver or extension of time for enforcement of mortgage or deed of trust) with Section 885.030 (no waiver or extension of time for expiration of power of termination).

Subdivision (b) is drawn from Section 7 of the Model Marketable Title Act and Section 3-308 of the Uniform Simplification of Land Transfers Act (1977).

405/390

§ 880.260. Effect of action and lis pendens

880.260. An interest in real property does not expire or expire of record pursuant to this title at the times prescribed in this title if within the times an action is commenced to enforce, establish, clear title to, or otherwise affect the interest and a notice of the pendency of the action is recorded as provided by law.

Comment. Section 880.260 makes clear that there is no expiration of an interest in real property by operation of law pursuant to this title if a lis pendens is recorded before expiration. This is a specific application of the general provisions governing the effect of a lis pendens. See Code Civ. Proc. § 409.

404/096

Article 3. Preservation of Interests

§ 880.310. Notice of intent to preserve interest

880.310. (a) If the time within which an interest in real property expires pursuant to this title depends upon recordation of a notice of intent to preserve the interest, a person may preserve the person's interest from expiration by recording a notice of intent to preserve the

interest before the interest expires pursuant to this title. Recordation of a notice of intent to preserve an interest in real property after the interest has expired pursuant to this title does not preserve the interest.

(b) Recordation of a notice of intent to preserve an interest in real property does not preclude a court from determining that an interest has been abandoned or is otherwise unenforceable pursuant to other law, whether before or after the notice of intent to preserve the interest is recorded, and does not validate or make enforceable a claim or interest that is otherwise invalid or unenforceable.

Comment. Subdivision (a) of Section 880.310 is drawn from Sections 2(d) and 4(a) of the Model Marketable Title Act and Sections 3-303(3) and 3-305 of the Uniform Simplification of Land Transfers Act (1977). Subdivision (a) imposes no limit on the number of times a notice of intent to preserve may be recorded; so long as the interest has not expired at the time of recordation, preservation of an interest in perpetuity is possible. If a person owns a part interest in real property, the notice of intent preserves only the part interest owned by the person for whom the notice is recorded. If a person owns an interest in real property that is one of several related interests in real property, the notice of intent preserves only the interest owned by the person for whom the notice is recorded and not the related interests of other persons.

Subdivision (b) is drawn from Section 3-309 of the Uniform Act, with the addition of language to make clear that a notice of intent to preserve does not affect the validity of any interest in real property under law apart from this title.

404/101

§ 880.320. Who may record notice

880.320. A notice of intent to preserve an interest in real property may be recorded by any of the following persons:

(a) A person who claims the interest.

(b) Another person acting on behalf of a claimant if the claimant is under a disability, unable to assert a claim on his or her own behalf, or one of a class whose identity cannot be established or is uncertain at the time of recording the notice of intent to preserve the interest.

Comment. Section 880.320 is drawn from the third sentence of Section 4(a) of the Model Marketable Title Act and Section 3-305 of the Uniform Simplification of Land Transfers Act (1977).

§ 880.330. Contents of notice

880.330. Subject to all statutory requirements for recorded documents:

(a) A notice of intent to preserve an interest in real property shall be in writing and signed and verified by or on behalf of the claimant.

(b) The notice shall contain all of the following information:

(1) The name and mailing address of the claimant.

(2) A description of the interest claimed. The description shall include a reference by record location to the recorded document that creates or evidences the interest.

(3) A legal description of the real property in which the interest is claimed. The description may be the same as that contained in the recorded document that creates or evidences the interest.

Comment. Section 880.330 is drawn from portions of Sections 4(a) and (5) of the Model Marketable Title Act and from Sections 2-302(b) and 2-308(b) of the Uniform Simplification of Land Transfers Act (1977). Under subdivision (b), if the interest is a restriction that affects the use or enjoyment of more than one parcel of real property that was created by a recorded document containing a general description of all of the parcels, the legal description required may be the same as the general description. The introductory portion of Section 890.330 makes clear that all other statutory requirements must be complied with. See, e.g., Section 1170 (recorded document must be duly acknowledged or proved and certified).

404/105

§ 880.340. Form of notice

880.340. Subject to all statutory requirements for recorded documents, a notice of intent to preserve an interest in real property shall be in substantially the following form:

RECORDING INFORMATION

Recording requested by:
After recording return to:

FOR USE OF COUNTY RECORDER

Indexing instructions. This notice must be indexed as follows: Grantor and grantee index--claimant is grantor.

NOTICE OF INTENT TO PRESERVE INTEREST

This notice is intended to preserve an interest in real property from extinguishment pursuant to Title 5 (commencing with Section 890.010) of Part 2 of Division 2 of the Civil Code (Marketable Record Title).

Claimant — Name:
Mailing address:

Interest — Description (e.g., mineral rights, power of termination):
Record location of document creating or evidencing interest:

Real Property — Legal description (may be same as in recorded document creating or evidencing interest):

I assert under penalty of perjury that this notice is not recorded for the purpose of slandering title to real property and I am informed and believe that the information contained in this notice is true.

Signed:_____ Date:_____

_____
(claimant)

_____
(person acting on behalf of claimant)

State of _____,

County of _____, ss.

On this _____ day of _____, in the year _____, before me (here insert name and quality of officer), personally appeared _____, known to me (or proved to me on the oath of _____) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the instrument.

Signed: _____ Official Seal:

Office: _____

Comment. Section 880.340 incorporates the requirements of Section 880.330 (contents of notice). The introductory portion of Section 880.340 makes clear that all other statutory requirements must be complied with. See, e.g., Gov't Code § 27361.6 (printed forms).

404/131

§ 880.350. Recording and indexing notice

880.350. (a) A notice of intent to preserve an interest in real property shall be recorded in the county in which the real property is situated.

(b) The county recorder shall index a notice of intent to preserve an interest in real property in the index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the claimant under the notice shall be deemed to be the grantor.

Comment. Section 880.350 is drawn from a portion of Section 5 of the Model Marketable Title Act. The manner of recording the notice is prescribed in Government Code Section 27322 and the fee for recording is prescribed in Government Code Section 27361 et seq.

404/145

§ 880.360. Slander of title by recording notice

880.360. A person shall not record a notice of intent to preserve an interest in real property for the purpose of slandering title to the real property. If the court in an action or proceeding to establish or quiet title determines that a person recorded a notice of intent to preserve an interest for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording.

Comment. Section 880.360 is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation, and makes clear that recordation of a notice of intent to preserve an interest under this title is not privileged. Section 890.360 does not affect the elements of the cause of action for slander of title and codifies the measure of recovery for slander of title, with the addition of reasonable attorney's fees. See 4 B. Witkin, Summary of California Law Torts § 328 (8th ed. 1974).

§ 880.370. Grace period for recording notice

880.370. If the period prescribed by statute during which a notice of intent to preserve an interest in real property must be recorded expires before, on, or within five years after the operative of the statute, the period is extended until five years after the operative date of the statute.

Comment. Section 880.370 is drawn from Section 10 of the Model Marketable Title Act and Section 7-701(d) of the Uniform Simplification of Land Transfers Act (1977) (two years).

67700

CHAPTER 2. ANCIENT MORTGAGES AND DEEDS OF TRUST

§ 882.010. Statute of limitation outlaws mortgage or deed of trust

882.010. If the period prescribed by statute for commencement of an action on a debt or other obligation secured by a mortgage, deed of trust, or other instrument that creates a security interest in real property has expired, the lien of the mortgage, deed of trust, or other security interest also expires and is not enforceable by foreclosure, power of sale, or any other means commenced thereafter.

Comment. Section 882.010 codifies the rule that the running of the statute of limitation on a debt outlaws foreclosure or exercise of a power of sale under a mortgage and reverses the rule that the running of the statute of limitation on a debt outlaws foreclosure but does not outlaw exercise of a power of sale under a deed of trust. See, e.g., Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919 (1913) (mortgage); Flack v. Boland, 11 Cal.2d 103, 77 P.2d 1090 (1938) (deed of trust). The basic statute of limitation on a debt secured by a mortgage or deed of trust is four years, but this period can be extended by partial payment or waiver or by ordinary tolling principles. See Code Civ. Proc. §§ 337 (four-year statute of limitation); 360 (partial payment turns back statute); 360.5 (waiver of statute of limitation); 351-358 (tolling of statute). For an absolute limit on enforceability of a mortgage or deed of trust, see Section 882.020 (expiration of record of mortgage or deed of trust).

28762

§ 882.020. Expiration of record of mortgage or deed of trust

882.020. (a) Unless the lien of a mortgage, deed of trust, or other instrument that creates a security interest of record in real property to secure a debt or other obligation has earlier expired pursuant

to Section 882.010, the lien expires and is not enforceable by foreclosure, power of sale, or any other means commenced after the following times:

(1) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is ascertainable from the record, 10 years after that date.

(2) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is not ascertainable from the record, or if there is no final maturity date or last date fixed for payment of the debt or performance of the obligation, 60 years after the date the instrument that created the security interest was recorded.

(b) The times prescribed in this section may be waived or extended only by an instrument that is effective to waive or extend any other applicable statute of limitation beyond the prescribed times and that is recorded before expiration of the prescribed times. Upon recordation of a waiver or extension beyond the times prescribed in this section, the prescribed times shall be computed as if the waiver or extension were the original instrument that created the security interest.

Comment. Section 882.020 prescribes a maximum time for enforcement of a mortgage or deed of trust. It operates to bar enforcement of a mortgage or deed of trust after the time prescribed even though the general statutes of limitation may not have run due to tolling, partial payment, or waiver. See Comment to Section 882.010 (statute of limitation outlaws mortgage or deed of trust). The section does not extend the time provided by the general statutes of limitation that apply to enforcement of a mortgage or deed of trust. Cf. Code Civ. Proc. § 337 (four-year limitation period). The cloud on title of a mortgage or deed of trust that is barred by the general statutes of limitation before the time prescribed in this section may be removed by judicial action, or may be removed by operation of law after passage of the time prescribed in this section. See Section 882.030 (effect of expiration).

Subdivision (a) adopts a 10-year maximum enforcement period after maturity of the obligation secured by the mortgage or deed of trust. This period is drawn from the comparable 10-year period of the Model Mortgage Limitation Act § 4(a) and the Uniform Simplification of Land Transfers Act (1977) § 3-408(a). Subdivision (a) adopts a 60-year maximum enforcement period after recordation of the security instrument in cases where the maturity date of the obligation cannot be ascertained from the record, whether because the obligation provided no maturity date, because the maturity date is variable depending on facts not in the record, or because the obligation specifies no maturity date. The effect of subdivision (a) is to prescribe a maximum life for a mortgage or deed of trust based exclusively on the record for marketability of title purposes.

Subdivision (b) provides for waiver or extension of the time for enforcement of a mortgage or deed of trust under subdivision (a). The waiver or extension must operate to waive or extend the general statutes

of limitation and must be recorded to be effective. This accomplishes the purpose of enabling a determination of enforceability based on the record alone. See also Section 360.5 (four-year waiver period).

28760

§ 882.030. Effect of expiration

882.030. Expiration of the lien of a mortgage, deed of trust, or other security interest pursuant to this chapter is equivalent for all purposes to a certificate of satisfaction, reconveyance, release, or other discharge of the security interest, and execution and recording of a certificate of satisfaction, reconveyance, release, or other discharge is not necessary to terminate or evidence the termination of the security interest. Nothing in this section precludes execution and recording at any time of a certificate of satisfaction, reconveyance, release, or other discharge.

Comment. Section 882.030 is drawn from the Model Mortgage Limitation Act § 4 and from the Uniform Simplification of Land Transfers Act (1977) § 3-408(b). Under this section, running of the enforcement periods prescribed in Sections 882.010 (statute of limitation outlaws mortgage or deed of trust) and 882.020 (expiration of record of mortgage or deed of trust) has the effect of complete discharge of the mortgage or deed of trust; this reverses the rule that a mortgage or deed of trust barred by the statute of limitations may be equitably enforced. See, e.g., Puckhaber v. Henry, 152 Cal. 419, 93 Pac. 114 (1907).

28759

§ 882.040. Transitional provisions

882.040. (a) Except as otherwise provided in this section, this chapter applies on the operative date to all mortgages, deeds of trust, and other instruments that create a security interest in real property to secure a debt or other obligation, whether executed or recorded before, on, or after the operative date.

(b) This chapter shall not cause the lien of a mortgage, deed of trust, or other security interest in real property to expire or become unenforceable before the passage of two years after the operative date of this chapter.

Comment. Section 882.040 provides a two-year grace period to enable enforcement of security interests that would be outlawed by the enactment of this chapter and a shorter grace period for enforcement of interests that would be outlawed within two years after enactment of this chapter. The two-year grace period does not operate as an extension of the statute of limitation itself or of the time within which an effective waiver or extension of the statute of limitation must be made pursuant to Code of Civil Procedure Sections 337 (statute of limitation) and 360.5 (waiver of statute of limitation).

12823

CHAPTER 3. DORMANT MINERAL RIGHT

§ 883.010. Definitions

883.010. As used in this chapter:

(a) A mineral right is "dormant" if there is no production of the minerals and no exploration, drilling, mining, development, or other operations that affect the minerals.

(b) "Mineral right" means any interest created by grant or reservation, whether in the form of a fee or any lesser interest, whether in the form of a corporeal or incorporeal interest, whether in the form of a mineral, royalty, or a leasehold interest, whether in fugacious or nonfugacious minerals, whether organic or inorganic, and includes express or implied appurtenant surface rights.

Comment. Section 883.010 defines mineral rights broadly to include a fee interest as well as any lesser interest and to include oil and gas as well as in-place minerals such as ores, metals, and coal. Cf. In re Waltz, 197 Cal. 263, 240 P. 19 (1925) (characterizing mineral rights). Section 883.010 also makes clear that for the purposes of this chapter, surface rights appurtenant to a mineral interest are included within the meaning of "mineral rights." Cf. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935) (grant of minerals includes implied right of entry to extract them).

15341

§ 883.020. Abandonment of dormant mineral rights

883.020. Notwithstanding any other provision of this chapter, a dormant mineral right is subject to abandonment.

Comment. Section 883.020 codifies the rule of Gerhard v. Stephens, 68 Cal.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968), that mineral rights in oil and gas are subject to abandonment and extends the rule to mineral rights in other substances. Section 883.020 applies regardless of the characterization of the mineral rights. See Section 883.010 ("mineral rights" defined).

Mineral rights are subject to abandonment, notwithstanding the provisions of this chapter for expiration of dormant mineral rights after a prescribed period of time. See Section 883.030 (expiration of dormant mineral rights). Although recording a notice of intent to preserve the rights may be evidence of an intent not to abandon, there nonetheless may be abandonment before expiration of the prescribed period. See Section 880.310(c) (notice of intent to preserve interest).

13618

§ 883.030. Expiration of dormant mineral right

883.030. (a) A dormant mineral right of record expires if the mineral right is dormant for a period of one year at or after the later of the following times:

(1) Twenty years after the date the instrument creating, reserving, transferring, or otherwise evidencing the mineral right is recorded.

(2) Twenty years after the date a notice of intent to preserve the mineral right is recorded. A notice of intent to preserve the mineral right is not effective unless it is recorded within 20 years after the date the instrument creating, reserving, transferring, or otherwise evidencing the mineral right is recorded or, if a prior notice of intent to preserve the mineral right is recorded, within 20 years after the date the prior notice of intent to preserve the mineral right is recorded.

(b) This section applies notwithstanding any provision to the contrary in the instrument creating, reserving, transferring, or otherwise evidencing the mineral right or in another recorded document unless the instrument or other recorded document provides an earlier expiration date.

Comment. Section 883.030 provides for expiration of a dormant mineral right after 20 years or such later time as the mineral rights have been dormant for a one-year period, notwithstanding a longer or an indefinite period provided in the instrument creating the mineral right. The expiration period is consistent with the 20-year period prescribed by statute for termination of a right of entry or occupation of surface lands under an oil or gas lease. See Code Civ. Proc. §§ 772.010-772.060. Section 883.030 does not affect a mineral right in active production or that has been in active production within one year. See Section 883.010 ("dormant" mineral right defined).

The expiration period can be extended for up to 20 years at a time by recordation of a notice of intent to preserve the mineral right. See Section 880.310 (notice of intent to preserve interest). Recordation of a notice of intent to preserve the mineral right does not necessarily preclude abandonment of the mineral right. See Section 883.020 (abandonment of dormant mineral right) and the Comment thereto.

A mineral right does not expire under Section 883.030 unless there is both nonuse for a period of at one year and failure to record a notice of intent to preserve within 20 years.

13617

§ 883.040. Effect of expiration

883.040. Expiration of a dormant mineral right of record pursuant to this chapter makes the mineral right unenforceable and is equivalent for all purposes to a termination of the mineral right of record and a conveyance of the mineral right to the surface owner, and execution and recording of a termination and conveyance is not necessary to terminate and convey or evidence the termination and conveyance of the mineral right.

Comment. Section 883.040 provides for the clearing of record title to real property by operation of law after a mineral right has expired under Section 883.030 (expiration of dormant mineral right). Title can be cleared by judicial decree prior to the time prescribed in Section 883.030 in case of an abandonment of a mineral right. See Section 883.020 (abandonment of mineral right).

30944

§ 883.050. Transitional provision

883.050. Subject to Section 880.370 (grace period for recording notice), this chapter applies on the operative date to all mineral rights, whether executed or recorded before, on, or after the operative date.

Comment. Section 883.050 makes clear the legislative intent to apply this chapter immediately to existing mineral interests. Section 880.370 provides a five-year grace period for recording a notice of intent to preserve a mineral interest that expires by operation of this chapter before, on, or within five years after the operative date of this chapter. See Section 880.370 (grace period for recording notice) and the Comment thereto.

CHAPTER 4. UNEXERCISED OPTIONS

§ 884.010. Expiration of record

884.010. If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within the following times:

(a) Six months after the option expires according to its terms.

(b) If the option provides no expiration date, six months after the date the instrument that creates the option is recorded.

Comment. Subdivision (a) of Section 884.010 reduces the period of former Section 1213.5 for expiration of record of an option from one year to six months after expiration by its terms.

Under subdivision (b) an option with no prescribed term expires of record six months after its recordation rather than one year after its expiration by operation of law as provided under former Section 1213.5. This modifies the rule that if an option provides no expiration date it may be exercised within a reasonable time after it is executed. See, e.g., 1 B. Witkin, Summary of California Law, Contract § 129 (8th ed. 1973). Subdivision (b) does not prescribe the time within which such an option must be exercised; it only limits the effect of the option on third persons. See Section 884.020 (effect of expiration).

Nothing in Section 884.010 affects the application of the Rule Against Perpetuities to an option, whether the option expires within a fixed or indefinite period in accordance with its terms or whether it expires by operation of law within a reasonable time after it is executed. See, e.g., 3 B. Witkin, Summary of California Law, Real Property § 304 (8th ed. 1973).

Nothing in Section 884.010 affects an option to purchase included in the terms of the lease of a lessee in possession. See Section 880.240(a) (interests excepted from title).

2788

§ 884.020. Effect of expiration

884.020. Upon the expiration of record of an option to purchase real property, the recorded instrument that creates or gives constructive notice of the option ceases to be notice to any person or to put any person on inquiry with respect to the exercise or existence of the option or of any contract, conveyance, or other writing that may have been executed pursuant to the option.

Comment. Section 884.020 continues the substance of a portion of former Section 1213.5. An option that has expired of record does not affect third persons but may still affect the parties to the option. See Section 884.010 (expiration of record) and Comment thereto.

2789

§ 884.030. Transitional provisions

884.030. (a) Except as otherwise provided in this section, this chapter applies on the operative date to all recorded instruments that create or give constructive notice of options to purchase real property, whether executed or recorded before, on, or after the operative date.

(b) This chapter shall not cause an option that expires according to its terms within one year before, on, or within one after the operative date of this chapter to expire of record until one year after the operative date.

(c) This chapter shall not cause an option that provides no expiration date to expire of record until one year after the operative date of this chapter.

(d) Nothing in this chapter affects a recorded instrument that has ceased to be notice to any person or put any person on inquiry with respect to the exercise or existence of an option pursuant to former Section 1213.5 before the operative date of this chapter.

Comment. Subdivision (a) of Section 884.030 continues the effect of former Section 1213.5 to govern all options now in existence or hereafter created. Subdivision (b) is intended to protect fixed term option holders who may have relied on the one-year expiration period formerly provided in Section 1213.5. Subdivision (c) is intended to protect indefinite term option holders before the operative date of this statute from expiration until an adequate time after the operative date, during which time an exercise or extension of the option may be recorded. Subdivision (d) makes clear that this chapter does not revive options that have expired pursuant to prior law.

404/152

CHAPTER 5. POWERS OF TERMINATION

§ 885.010. "Power of termination" defined

885.010. (a) As used in this chapter, "power of termination" means the power to terminate a fee simple estate in real property to enforce a restriction in the form of a condition subsequent to which the fee

simple estate is subject, whether the power is characterized in the instrument that creates or evidences it as a power of termination, right of entry or reentry, right of possession or repossession, reserved power of revocation, or otherwise, and includes a possibility of reverter that is deemed to be and is enforceable as a power of termination pursuant to Section 885.020. A power of termination is an interest in the real property.

(b) For the purpose of applying this chapter to other statutes relating to powers of termination, the terms "right of reentry," "right of repossession for breach of condition subsequent," and comparable terms used in the other statutes mean "power of termination" as defined in this section.

Comment. Section 885.010 redefines the right of entry as a power of termination, the more descriptive and technically accurate of the two terms. See, e.g., Parry v. Berkeley Hall School Foundation, 10 Cal.2d 422, 74 P.2d 55 (1951). Places in the code where old terminology is used include Section 791 and 793 ("right of re-entry") and 1046 ("right of reëntry, or of repossession for breach of condition subsequent").

Despite redefinition, the power of termination is an interest in property and is subject to provisions governing property interests. See, e.g., Section 699 (future interests pass by succession, will, and transfer). A power of termination is transferable whether it would be classified at common law as a right of entry or possibility of reverter. See Section 1046. This resolves uncertainty in the case law. See, e.g., Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047 (1917) and Victoria Hospital Assn. v. All Persons, 169 Cal. 455, 147 P. 124 (1915).

404/154

§ 885.020. Fee simple determinable and possibility of reverter abolished

885.020. Fees simple determinable and possibilities of reverter are abolished. Every estate that would be at common law a fee simple determinable is deemed to be a fee simple subject to a restriction in the form of a condition subsequent. Every interest that would be at common law a possibility of reverter is deemed to be and is enforceable as a power of termination.

Comment. Section 885.020 abolishes the estate known at common law as the fee simple determinable and the interest known as the possibility of reverter. Cf. Section 763 (estates tail abolished); Ky. Rev. Stats. § 381.218 (Baldwin 1969) (fee simple determinable and possibility of reverter abolished). These interests were recognized late in California

jurisprudence and added little to California land law. See Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962 (1935) (recognizing fee simple determinable and possibility of reverter). Section 885.020 applies to existing estates and interests as well as to those created after its enactment. See Section 885.070 (transitional provisions).

404/155

§ 885.030. Expiration of power of termination

885.030. (a) A power of termination of record expires at the later of the following times:

(1) Thirty years after the date the instrument reserving, transferring, or otherwise evidencing the power of termination is recorded.

(2) Thirty years after the date a notice of intent to preserve the power of termination is recorded. A notice of intent to preserve the power of termination is not effective unless it is recorded within 30 years after the date the instrument reserving, transferring, or otherwise evidencing the power of termination is recorded or, if a prior notice of intent to preserve the power of termination is recorded, within 30 years after the date the prior notice of intent to preserve the power of termination is recorded.

(b) This section applies notwithstanding any provision to the contrary in the instrument reserving, transferring, or otherwise evidencing the power of termination or in another recorded document unless the instrument or other recorded document provides an earlier expiration date.

Comment. Section 885.030 provides for expiration of a power of termination after 30 years, notwithstanding a longer or indefinite period provided in the instrument reserving the power. The expiration period supplements the Rule Against Perpetuities, which has been held inapplicable to powers of termination. See Strong v. Shatto, 45 Cal. App. 29, 187 P. 159 (1919). The expiration period runs from the date of recording rather than the date of creation of the power of termination because the primary purpose of Section 885.030 is to clear record title. The expiration period can be extended for up to 30 years at a time by recordation of a notice of intent to preserve the power of termination. See Section 880.310 (notice of intent to preserve interest). Recordation of a notice of intent to preserve the power of termination does not enable enforcement of a power that has expired because it has become obsolete due to changed conditions or otherwise. See Sections 880.310 (notice of intent to preserve interest) and 885.040 (obsolete power of termination) and the Comments thereto. For the effect of expiration of a power of termination pursuant to this section, see Section 885.060 (effect of expiration). This section does not affect conservation easements pursuant to Sections 815-816. See Section 880.240 (interests excepted from title) and the Comment thereto.

§ 885.040. Obsolete power of termination

885.040. (a) If a power of termination becomes obsolete, the power expires.

(b) As used in this section, a power of termination is obsolete if the restriction to which the fee simple estate is subject is of no actual and substantial benefit to the holder of the power, whether by reason of changed conditions or circumstances or for any other reason.

Comment. Section 885.040 is drawn from New York law. See N.Y., Real Prop. Actions and Proc. Law § 1951 (McKinney ___). It codifies the rule that reversionary interests will not be enforced if the restriction does not benefit the holder of the interests. See, e.g., Young v. Cramer, 38 Cal. App.2d 64, 100 P.2d 523 (1940) (holder of interest not an owner of appurtenant property). It also codifies existing case law relating to obsolete rights of entry. See, e.g., Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932) (changed circumstances).

A power of termination may expire pursuant to this section if it becomes obsolete notwithstanding the fact that the 30-year statutory duration of the power has not elapsed and notwithstanding the fact that a notice of intent to preserve the power may have been filed. See Section 885.030 (expiration of power of termination). For the effect of expiration of a power of termination pursuant to this section, see Section 885.060 (effect of expiration).

404/157

§ 885.050. Exercise of power

885.050. (a) A power of termination shall be exercised only by notice or by civil action and, if the power of termination is of record, the exercise shall be of record.

(b) A power of termination shall be exercised within five years after breach of the restriction to which the fee simple estate is subject.

Comment. Subdivision (a) of Section 885.050 makes clear that even if a power of termination is phrased in terms of a right of entry, the power may be exercised only by notice or by civil action. This is consistent with Sections 791 (notice) and 793 (action for possession). See also Jordan v. Talbot, 55 Cal.2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961) (right of entry in lease).

Subdivision (b) makes clear that the statutory limitation period applicable to a power of termination is five years. Cf. Code Civ. Proc. §§ 319-320 (five years). Former law was not clear. Compare, e.g., 3 B. Witkin, Summary of California Law Real Property § 188, at ___ (8th ed. 1973) (enforcement within a "reasonable time") and Lincoln v. Narom Development Co., 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970) (statute of limitation not applicable) with 2 A. Bowman, Ogden's Revised California Real Property Law § 23.32 (1975) (five years pursuant to Code of Civil Procedure Section 320).

Subdivision (b) prescribes the limitation period for exercise of a power of termination to enforce breach of a restriction, but it does not otherwise affect the existence or continued vitality of the power of termination as to other breaches. Section 885.050 does not preclude earlier termination of a power of termination through waiver or estoppel. See Section 880.030(a) (application of waiver and estoppel). See, e.g., Santa Monica v. Jones, 104 Cal. App.2d 463, 232 P.2d 55 (1951) (waiver); Wedum-Aldahl Co. v. Miller, 18 Cal. App.2d 745, 64 P.2d 762 (1937) (waiver or estoppel); Hanna v. Rodeo-Vallejo Ferry Co., 89 Cal. App. 462, 265 P. 287 (1928) (waiver or estoppel).

404/159

§ 885.060. Effect of expiration

885.060. (a) Expiration of a power of termination pursuant to this chapter makes the power unenforceable and is equivalent for all purposes to a termination of the power of record and a quitclaim of the power to the owner of the fee simple estate, and execution and recording of a termination and quitclaim is not necessary to terminate or evidence the termination of the power.

(b) Expiration of a power of termination pursuant to this chapter terminates the restriction to which the fee simple estate is subject and makes the restriction unenforceable by any other means, including but not limited to injunction and damages.

Comment. Section 885.060 provides for the clearing of record title to real property by operation of law after a power of termination has expired under Section 885.030 (expiration of power of termination). Title can be cleared by judicial decree prior to the time prescribed in Section 885.030 in case of an obsolete power of termination. See Section 885.040 (obsolete power of termination); Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931).

404/160

§ 885.070. Transitional provisions

885.070. (a) Subject to Section 880.370 (grace period for recording notice) and except as otherwise provided in this section, this chapter applies on the operative date to all powers of termination, whether executed or recorded before, on, or after the operative date.

(b) If breach of the restriction to which the fee simple estate is subject occurred before the operative date of this chapter and the power of termination is not exercised before the operative date of this chapter, the power of termination shall be exercised, or in the case of a power

of termination of record, exercised of record, within the earlier of the following times:

(1) The time that would be applicable pursuant to the law in effect immediately prior to the operative date of this chapter.

(2) Five years after the operative date of this chapter.

Comment. Subdivision (a) of Section 885.070 makes clear the legislative intent to apply this chapter immediately to existing powers of termination. Section 880.370 provides a five-year grace period for recording a notice of intent to preserve a power of termination that expires by operation of this chapter before, on, or within five years after the operative date of this chapter.

Subdivision (b) provides a five-year grace period to enable enforcement of powers of termination that would be barred upon enactment of this chapter by the absolute limitation period for enforcement provided by Section 885.050 (time for exercise of power) and a shorter grace period for enforcement of powers of termination that would be barred within five years after enactment of this chapter.

21994

CHAPTER 6. UNPERFORMED REAL PROPERTY SALES CONTRACTS

§ 886.010. Definitions

886.010. As used in this chapter:

(a) "Real property sales contract" means an agreement wherein one party agrees to convey title to real property to another party upon the satisfaction of specified conditions set forth in the contract, whether designated in the agreement a "real property sales contract," "land sale contract," "deposit receipt," "agreement for sale," "agreement to convey," "installment land contract," or otherwise.

(b) "Recorded real property sales contract" includes the entire terms of a real property sales contract that is evidenced by a recorded memorandum or short form of the contract.

Comment. Section 886.010 is drawn from Sections 2985 and 2985.51 and Business and Professions Code Section 10029 (real property sales contracts). This chapter applies to real property sales contracts of all types, including both agreements for sale and installment land contracts; whether conveyance of title is to be made within one year from the date of formation of the contract is immaterial. This chapter also applies to agreements to convey that are dependent on performance of conditions other than payment of money.

§ 886.020. Release of unperformed real property sales contract

886.020. If the party to whom title to real property is to be conveyed pursuant to a recorded real property sales contract fails to satisfy the specified conditions set forth in the contract and does not seek performance of the contract, the party shall, upon demand therefor, execute a release of the contract, duly acknowledged for record, to the party who agreed to convey title. Willful violation of this section by the party to whom title is to be conveyed makes the party liable for damages the party who agreed to convey title sustains by reason of the violation, including but not limited to court costs and reasonable attorney's fees in an action to clear title to the real property.

Comment. Section 886.020 is new. It is analogous to the provision requiring reconveyance upon termination of a mortgage or deed of trust. Section 2941. See also Section 1109 (reconveyance of estate on condition that is defeated by nonperformance). Section 886.020 is intended to enhance marketability of title clouded by an unperformed real property sales contract without the need to quiet title or await the lapse of the five-year period provided in Section 886.030 (expiration of record of unperformed real property sales contract).

21990

§ 886.030. Expiration of record of real property sales contract

886.030. (a) Except as otherwise provided in this section, a recorded real property sales contract expires of record at the later of the following times:

(1) Five years after the date for conveyance of title provided in the contract or, if no date for conveyance of title is provided in the contract, five years after the last date provided in the contract for satisfaction of the specified conditions set forth in the contract.

(2) If there is a recorded extension of the contract within the time prescribed in paragraph (1), five years after the date for conveyance of title provided in the extension or, if no date for conveyance of title is provided in the extension, five years after the last date provided in the extension for satisfaction of the specified conditions set forth in the contract.

(b) The times prescribed in this section may be waived or extended only by an instrument that is recorded before expiration of the prescribed times.

Comment. Section 886.030 prescribes the maximum duration of a real property sales contract of record for purposes of marketability. The maximum duration does not affect the rights and obligations of the parties to the contract but only the effect of the recorded notice of the contract on third parties. See Section 886.040 (effect of expiration). Section 886.030 operates to clear record title of the contract after the time prescribed even though the general statute of limitation to enforce the contract may not have run due to tolling, possession by the purchaser, or for some other cause. The section does not extend the time provided by the general statute of limitation that applies to enforcement of a real property sales contract. See Code Civ. Proc. § 337(1) (four-year limitation period). The cloud on title of an unperformed real property sales contract, whether or not barred by the general statute of limitation, may be removed by judicial action or may be removed by operation of law after passage of the time prescribed in this section. See Section 886.040 (effect of expiration).

Subdivision (a) adopts the five-year period of the Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960). The effect of subdivision (a) is to prescribe a maximum life for a real property sales contract based exclusively on the record for marketability of title purposes.

Subdivision (b) provides that a waiver or extension of the expiration date of a real property sales contract must be recorded to be effective. This accomplishes the purpose of enabling a determination of marketability based on the record alone.

17019

§ 886.040. Effect of expiration

886.040. Upon the expiration of record of a recorded real property sales contract pursuant to this chapter, the contract has no effect, and does not constitute an encumbrance or cloud, on the title to the real property as against a person other than a party to the contract.

Comment. Section 886.040 is drawn from the Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960). A real property sales contract that has expired of record does not affect third persons but may still affect the parties to the contract. See Section 886.030 (expiration of record of real property sales contract) and Comment thereto. In addition, expiration of record does not affect the interest of a person using or occupying the real property. Section 880.240 (interests excepted from title).

31056

§ 886.050. Transitional provision

886.050. (a) Except as otherwise provided in this section, this chapter applies on the operative date to all recorded real property sales contracts, whether recorded before, on, or after the operative date.

(b) This chapter shall not cause a recorded real property sales contract to expire of record before the passage of two years after the operative date of this chapter.

Comment. Section 886.050 makes clear the legislative intent to apply this chapter immediately to existing real property sales contracts. It provides a two-year grace period to enable enforcement of contracts that would expire upon enactment of this chapter and a shorter grace period for enforcement of contracts that would expire within two years after enactment of this chapter. The two-year grace period does not operate as an extension of the statute of limitation itself. See Code Civ. Proc. § 337(1) (statute of limitation). Notwithstanding the grace period for expiration, a person required to execute a release of the contract pursuant to Section 886.020 (release of unperformed land sale contract) has an immediate duty to do so upon request therefor upon the operative date of this chapter.

2790

Civil Code § 1213.5 (repealed)

SEC. 2. Section 1213.5 of the Civil Code is repealed.

~~1213.5. When a recorded instrument has created, or shall hereafter create, an option to purchase real property, which, according to its terms, or by operation of law, has expired, and one year has elapsed since such time of expiration, and no conveyance, contract or other instrument has been recorded showing that such option has been exercised or extended, then the written instrument whereby such option was created shall cease to be notice to any person or put any person on inquiry, with respect to the exercise or existence of such option or of any contract, conveyance or other writing which may have been executed pursuant thereto.~~

Comment. Former Section 1213.5 is superseded by Sections 884.010-884.030 (unexercised options).

16969

Uncodified Section (added)

SEC. 3. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the Legislature finds and declares that there are savings as well as costs in this act which, in the aggregate, do not result in additional net costs.

Comment. Section 3 recognizes that any costs of recording and indexing notices of intent to preserve an interest are offset by the fees for recording and indexing pursuant to Government Code Section 27361 et seq.